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Distributive Justice and Rural America

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ANN M. EISENBERG*

Abstract: Today's discourse on struggling rural communities insists they are "dying" or "forgotten." Many point to globalization and automation as the culprits that made livelihoods in agriculture, natural resource extraction, and manufacturing obsolete, fueling social problems such as the opioid crisis. This narrative fails to offer a path forward; the status quo is no one's fault, and this "natural" rural death inspires mourning rather than resuscitation. This Article offers a more illuminating account of the rural story, told through the lens of distributive justice principles. The Article argues that rural communities have not just "died." They were sacrificed. Specifically, distributive justice theories question the morality of public measures that disadvantage discrete groups in the name of aggregate welfare. A critique of legal frameworks shaping rural livelihoods for the past several decades shows that policymakers consistently decided to trade rural welfare for some perceived societal benefit, violating distributive justice norms. In agriculture, policies favoring consolidated agribusiness hollowed out once-multidimensional farm communities. In the extractive sector, lackluster oversight enabled the environmental and economic devastation of fossil fuel communities. In manufacturing, trade adjustment programs' inadequate mitigation of international competition facilitated whole towns' dismantlement. Decisionmakers pointed to "the greater good" as their rationale. But benefits for rural communities that would offset these burdens and render their sacrifice "just" prove elusive. This alternate narrative reveals the rural story as not morally neutral, but one infused with value judgments that determined winners and losers, raising questions of what a fairer allocation of benefits and burdens should be.

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INTRODUCTION

What happened to rural America and what should be done about it? These questions have shaped the public and scholarly discourse on rural communities since the 2016 presidential election and its run-up. Many now realize that *something* is wrong outside large population centers in the United States—something that has rendered certain communities in rural America “forgotten,” “left behind,” “dying,” “abandoned,” or at least, “resentful.”¹ Yet there is little consensus about the optimal remedy for this nebulous wrong—for those who think action is warranted at all.²

A fundamental problem with this discourse is its oversimplification of “rural America.” Commentators often focus, whether implicitly or explicitly, on the mystical land of “Trump country,” where everyone is white, angry, and a blind supporter of the president.³ This focus disserves rural communities in several ways. First, it erases substantial rural populations of color despite the

¹ See generally KATHERINE J. CRAMER, *THE POLITICS OF RESENTMENT: RURAL CONSCIOUSNESS IN WISCONSIN AND THE RISE OF SCOTT WALKER* (2016) (detailing rural working-class resentment towards politicians who do not reflect their social values); ROBERT WUTHNOW, *THE LEFT BEHIND: DECLINE AND RAGE IN RURAL AMERICA* (2018) (discussing rural Americans’ anger and distrust toward the federal government); Steven Conn, *Is Rural America the New Inner City?*, HUFFPOST (Mar. 12, 2017), https://www.huffingtonpost.com/entry/rural-american-the-new-inner-city_us_58c5961ce4b0a797c1d39e24 [<https://perma.cc/9DQP-6ADC>] (comparing rural America’s decline to that of America’s inner cities and asserting that “America’s countryside is dying”); Juana Summers, *The ‘Forgotten Tribe’ in West Virginia; Why America’s White Working Class Feels Left Behind*, CNN POLITICS (Sept. 20, 2016), <http://www.cnn.com/2016/09/20/politics/election-2016-white-working-class-donald-trump-kaiser-family-foundation/index.html> [<https://perma.cc/KJ29-FNS9>] (describing disaffected West Virginians who feel “forgotten” and “left behind”).

² See generally LOKA ASHWOOD, *FOR-PROFIT DEMOCRACY: WHY THE GOVERNMENT IS LOSING THE TRUST OF RURAL AMERICA* (2018) (blaming the democratic structure’s enmeshment with corporate profit for exploitation of rural populations); J.D. VANCE, *HILLBILLY ELEGY: A MEMOIR OF A FAMILY AND CULTURE IN CRISIS* (2016) (arguing that white, working-class Appalachians’ struggles stem from cultural problems that cannot easily be solved through policy); David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78 (2017) (discussing impediments to mobility as drivers of rural marginalization).

³ See Nathan A. Rosenberg & Bryce Wilson Stucki, *The Butz Stops Here: Why the Food Movement Needs to Rethink Agricultural History*, 13 J. FOOD L. & POL’Y 12, 12 (2017). The authors note,

After Donald Trump’s surprise victory over Hillary Clinton, commentators and journalists turned their attention to rural America, where Trump won three times as many votes as his opponent, in order to understand what had just happened. They wrote about forgotten places: small towns populated by opioid addicts, dying Rust Belt cities with abandoned factories at their centers, and mountain hamlets populated by xenophobes and racists. These writers described a conservatism so total and inexplicable it seemed part of the landscape. Yet the history of rural America reveals a different story.

Id. (footnotes omitted). See generally Larissa MacFarquhar, *In the Heart of Trump Country*, NEW YORKER (Oct. 10, 2016), <https://www.newyorker.com/magazine/2016/10/10/in-the-heart-of-trump-country> [<https://perma.cc/PF9G-LA5J>].

fact that they bear the brunt of concentrated rural poverty. Second, the narrative acknowledges rural socioeconomic decline while in the same breath implying rural culpability for electing a highly polarizing president. This not only denies the existence of substantial populations of liberal or non-voting rural residents, but also provides an excuse for declining to address rural challenges.⁴

The increased attention toward the rural may still seem beneficial for some distressed rural communities, stereotypes notwithstanding. When commentators ask, “What happened?,” they mean, “What factors contributed to the widespread rural socioeconomic decline that has fueled feelings of despair and alienation among certain rural residents?”⁵ The most common response to this question focuses on rural economic marginalization stemming from globalization and automation.⁶ Traditional livelihoods in agriculture, extractive industries, and manufacturing once sustained rural life throughout the country.⁷ Globalization and automation undermined a substantial portion of these jobs over the past several decades, including steep declines in the twenty-first century.⁸ This loss of a way of life has contributed to modern rural problems for-

⁴ See Mark H. Harvey & Rosalind P. Harris, *Racial Inequalities and Poverty in Rural America*, in RURAL POVERTY IN THE UNITED STATES 141, 141–42 (Ann R. Tickamyer et al. eds., 2017) (explaining that rates of poverty among racial minorities living in rural America are two and sometimes three times higher than for rural whites); Mara Casey Tieken, *There’s a Big Part of Rural America That Everyone’s Ignoring*, WASH. POST (Mar. 24, 2017), https://www.washingtonpost.com/opinions/theres-a-big-part-of-rural-america-that-everyones-ignoring/2017/03/24/d06d24d0-1010-11e7-ab07-07d9f521f6b5_story.html?noredirect=on&utm_term=.1ca147eae02f [<https://perma.cc/EV34-HBEG>] (detailing how the popular narrative on rural America often leaves out the 10.3 million people of a racial minority who live in rural America). These rural populations generally voted for Hillary Clinton in the 2016 presidential election. Tieken, *supra*.

⁵ See Ann M. Eisenberg, *Rural Blight*, 13 HARV. L. & POL’Y REV. 187, 208–10 (2018).

⁶ See, e.g., Linda Lobao, *Continuity and Change in Place Stratification: Spatial Inequality and Middle-Range Territorial Units*, 69 RURAL SOC. 1, 21–25 (2004) (observing that rural areas are harder hit by global competition); Christopher D. Merrett & Cynthia Struthers, *Globalization and the Future of Rural Communities in the American Midwest*, 12 TRANSNAT’L L. & CONTEMP. PROBS. 33, 63 (2002); Robert E. Litan, *Meeting the Automation Challenge to the Middle Class and the American Project*, BROOKINGS (June 21, 2018), <https://www.brookings.edu/research/meeting-the-automation-challenge-to-the-middle-class-and-the-american-project/> [<https://perma.cc/9VX8-TJJE>] (observing that automation’s cost savings tend not to benefit rural areas and smaller cities).

⁷ Thomas G. Johnson, *The Rural Economy in a New Century*, in BEYOND AGRICULTURE: NEW POLICIES FOR RURAL AMERICA 7, 7 (Cent. for the Study of Rural Am. ed., 2000), <https://files.eric.ed.gov/fulltext/ED455981.pdf> [<https://perma.cc/EA32-NDC2>].

⁸ Daron Acemoglu et al., *Import Competition and the Great US Employment Sag of the 2000s*, 34 J. LAB. ECON. S141, S141–43 (2015); Michelle W. Anderson, *The Western, Rural Rustbelt: Learning from Local Fiscal Crisis in Oregon*, 50 WILLAMETTE L. REV. 465, 512–13 (2014) (observing that globalization and automation had a greater displacement effect on rural manufacturing jobs than urban ones); Dirk Johnson, *Population Decline in Rural America: A Product of Advances in Technology*, N.Y. TIMES (Sept. 11, 1990), <https://www.nytimes.com/1990/09/11/us/population-decline-in-rural-america-a-product-of-advances-in-technology.html> [<https://perma.cc/QL4B-DBPX>]; Jennifer Ludden, *Coal Jobs Have Gone up Under Trump, but Not Because of His Policies*, NPR (Feb. 23, 2018), <https://www.npr.org/2018/02/23/586236738/coal-jobs-have-gone-up-under-trump-but-not-because-of>

merly thought of as only “inner-city” problems: a drug crisis, high unemployment, mass population migration, steep drops in the tax base funding local governments, and a decaying socioeconomic and physical infrastructure.⁹ One might think that increased focus on these challenges would help to remedy them.

Yet, this part of the narrative, too, is incomplete. Globalization and automation are framed almost as forces of nature. They are rarely portrayed as the consequence of deliberate policy choices; inaction in response to their fallout is similarly assumed to be somehow natural.¹⁰ The associated socioeconomic challenges, then, are no one’s fault. With no one responsible, there is no moral imperative for any entity to act. The “what should we do about it” question remains unanswered. Indeed, few meaningful policy options have emerged to address these troubling trends. Further, this issue’s momentousness does not readily suggest a course of remedial action. Rural poverty, the opioid crisis, and towns that are literally crumbling can seem like challenges almost too widespread and daunting to take on.¹¹ Altogether, the dominant narrative suggests that livelihoods, local governments, and infrastructure across rural America are dying a natural death, inspiring mourning rather than efforts at resuscitation.¹²

In order to inform a more meaningful and productive dialogue, this Article challenges the dominant narrative and offers an alternate account of the rural story.¹³ This alternate narrative centers on three main arguments. The first

his-policies [<https://perma.cc/2HS3-BZU2>] (discussing automation and competition for natural gas as the main drivers of loss of coal jobs); David Autor et al., *When Work Disappears: Manufacturing Decline and the Falling Marriage-Market Value of Young Men* (Nat’l Bureau of Econ. Research, Working Paper No. 23173, 2018), <https://www.nber.org/papers/w23173.pdf> [<https://perma.cc/32T5-Q4HS>].

⁹ See Anderson, *supra* note 8, at 468 nn.12–13; Eisenberg, *supra* note 5, at 194–99; Alana Semuels, *The Graying of Rural America*, THE ATLANTIC (June 2, 2016), <https://www.theatlantic.com/business/archive/2016/06/the-graying-of-rural-america/485159/> [<https://perma.cc/8GX6-Y79F>].

¹⁰ Cf. Eduardo Porter, *The Hard Truths of Trying to ‘Save’ the Rural Economy*, N.Y. TIMES (Dec. 14, 2018), <https://www.nytimes.com/interactive/2018/12/14/opinion/rural-america-trump-decline.html> [<https://perma.cc/C86P-CJXC>] (characterizing phenomena affecting rural communities as “decline,” “growth,” and “agglomeration” rather than as consequences of policy decisions or lack thereof).

¹¹ See Eisenberg, *supra* note 5, at 188; CTRS. FOR DISEASE CONTROL & PREVENTION, 2017 DRUG OVERDOSE DEATH RATES (2019), <https://www.cdc.gov/drugoverdose/data/statedeaths/drug-overdose-death-2017.html> [<https://perma.cc/22E8-KE3K>] [hereinafter OVERDOSE DEATH RATES] (describing the disproportionately harsh effects of the opioid crisis on rural communities).

¹² See Porter, *supra* note 10 (commenting that “nobody—not experts or policymakers or people in these communities—seems to know quite how to pick rural America up”).

¹³ Cf. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1989). Delgado writes,

Stories, parables, chronicles, and narratives are powerful means for destroying mind-set—the bundle of presuppositions, received wisdoms, and shared understandings

is that today's rural socioeconomic challenges and failures in public services did not simply result from the passive, benign evolution of economic forces. Instead, these challenges, whether new or longstanding, result at least in part from the law's contribution to or failure to address different forms of distributive injustice, defined as the inequitable distribution of society's burdens and benefits.¹⁴

Some of that injustice is more self-evident, yet it remains absent from the "Trump country" discourse. Persistent inequitable allocations of resources to Native American reservations in South Dakota and rural schools in South Carolina, for instance, are clear examples of publicly driven racial discrimination and distributive injustice that intersect with rurality.¹⁵ It is, in fact, not difficult to establish that rural residents throughout the United States suffer from inequitable allocations of various critical resources. Some of these resource allocations, such as severe shortages of doctors and lawyers, public decisionmakers have overlooked, while others, such as inequitable education and infrastructure spending, they have created.¹⁶ At a minimum, these disparities suggest that

against a background of which legal and political discourse takes place. These matters are rarely focused on. They are like eyeglasses we have worn a long time. . . . Ideology—the received wisdom—makes current social arrangements seem fair and natural.

Id. (footnotes omitted).

¹⁴ See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971) (articulating a theory of how societies should pursue morally just distributions of resources).

¹⁵ Patrice H. Kunesh, *A Call for an Assessment of the Welfare of Indian Children in South Dakota*, 52 S.D. L. REV. 247, 284–86 (2007); Kimberly Johnson, *Verdict Looms for Education in 'Corridor of Shame': Race, Poverty and Geography Converge in the Longest Trial in South Carolina's History*, ALJAZEERA AM. (Aug. 11, 2014), <http://projects.aljazeera.com/2014/south-carolina-schools/> [<https://perma.cc/G3P8-MCPU>].

¹⁶ See Lisa R. Pruitt, *Spatial Inequality as Constitutional Infirmity: Equal Protection, Child Poverty and Place*, 71 MONT. L. REV. 1, 2 (2010) (detailing how residents of rural counties in Montana are least-served by local government); Anna Williams Shavers, *Rethinking the Equity vs. Adequacy Debate: Implications for Rural School Finance Reform Litigation*, 82 NEB. L. REV. 133, 140 (2003) (discussing inequitable rural access to education opportunities); Thomas F. Martin II, Note, *The Stark Inaccessibility of Medical Care in Rural Indiana: Judicial and Legislative Solutions*, 11 IND. HEALTH L. REV. 831, 832–33 (2014). See generally Craig Anthony (Tony) Arnold, *Ignoring the Rural Underclass: The Biases of Federal Housing Policy*, 2 STAN. L. & POL'Y REV. 191 (1990) (explaining that while thirty percent of poor individuals live in rural areas, rural residents receive only about twenty percent of federal, state, and local anti-poverty measures and live with higher rates of substandard housing); Keith Bauer, *Distributive Justice and Rural Healthcare: A Case for E-Health*, 17 INT'L J. APPLIED PHIL. 241 (2003) (stating that twenty percent of the U.S. population lives in rural areas but only nine percent of physicians practice there); Linda L. Chezem, *Public Health Law & Equal Access to Justice in Rural America*, 59 S.D. L. REV. 529 (2014) (discussing the public health disparities in rural communities); Allen S. Hammond, *The FCC's Third Report on Broadband Deployment: Inequitable, Untimely and Unreasonable*, 24 HASTINGS COMM. & ENT. L.J. 539, 548 (2002) (discussing the inequitable distribution of broadband services to rural and inner-city communities); Katherine Porter, *Going Broke the Hard Way: The Economics of Rural Failure*, 2005 WIS. L. REV. 969 (offering an empirical analysis that suggests that rural families face more economic hardship than their urban

today's discourse on rural communities requires a more robust exploration of how distributional decisions shape rural conditions and whether those decisions are "just," an exploration that this Article offers.¹⁷

The Article's second argument focuses more directly on the rural socioeconomic decline that has garnered attention of late, and on a subtler version of distributive injustice that is also absent from the current discourse. This argument is that unacknowledged utilitarianism—a form of distributive injustice in which the majority makes discrete populations worse off in the name of helping "everyone"—has also contributed to today's rural challenges.¹⁸ This argument does not dispute globalization and automation's role in rural decline. Rather, it critiques the legal frameworks that have shaped rural livelihoods in the agriculture, resource extraction, and manufacturing sectors for the past several decades. This critique shows that, time and again, public decisionmakers traded rural welfare for some perceived collective benefit. Through their efforts to make society's pie of benefits larger, public decisionmakers reduced the size of the rural slice, raising the question of whether this redistribution was "just."

Legal and policy developments in these three sectors reveal this pattern of undermining rural people and places for at least nominal societal benefit. In the farming sector, President Nixon's Secretary of Agriculture, Earl Butz, championed a novel vision of agriculture as "a highly profitable commodity for a handful of . . . producers and processors."¹⁹ After this vision became more mainstream, the displacement of family farms and the rise of legal regimes friendly to polluting agribusiness continued to undercut small operations that had more symbiotic relationships with communities and neighbors.²⁰ Even

counterparts); Lisa R. Pruitt et al., *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL'Y REV. 15 (2018) [hereinafter Pruitt et al., *Legal Deserts*] (discussing the lack of legal resources in rural areas).

¹⁷ Cf. Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489, 1498 (2018) (arguing that "important welfare-enhancing regulations" are likely to be derailed in the future if policymakers continue "[i]gnoring the pleas of communities that disproportionately suffer serious harms").

¹⁸ See Alice Kaswan, *Distributive Justice and the Environment*, 81 N.C. L. REV. 1031, 1061–62 (2003) (defining utilitarianism as the principle that distributive decisions should lead to "the greatest good for the greatest number"); Revesz, *supra* note 17, at 1491 (discussing widespread acceptance of the idea that legal rules should focus on "increasing the size of the pie (maximizing net benefits), and not the size of each slice (distribution)," while explaining that such a view does not necessarily mean distributional concerns are unimportant).

¹⁹ Bekah Mandell, *Feasts of Oz: Class, Food, and the Rise of Global Capitalism*, 20 S. CAL. INT'ERDISC. L.J. 93, 101 (2010); see Rosenberg & Stucki, *supra* note 3, at 17–18 (observing that Butz is often inaccurately credited with implementing consolidation-friendly programs—such as ending production control for corn and urging farmers to "get big or get out"—when in fact earlier directors of the USDA started them).

²⁰ JOEL DYER, HARVEST OF RAGE: WHY OKLAHOMA CITY IS ONLY THE BEGINNING 13, 17, 70, 112–14 (1997); Rosenberg & Stucki, *supra* note 3, at 19.

since the displacement of small farmers reached “crisis” level in the 1980s, state and federal policymakers have consistently favored consolidation and industrialization. These trends reduced the number of farms, the number of farm jobs, and local residents’ ability to influence land use decisions— weakening farm communities and devolving them into mere staging grounds for often hazardous industrial activity.²¹ Yet, these measures have been justified by “the greater good.” Small farms are “inefficient,” while industrialized agriculture can purportedly “feed the world.”²²

In the extractive sector, for much of the twentieth century, the environmental and socioeconomic devastation associated with coal mining was addressed with only anemic reforms in measures such as the lackluster Surface Mining Control and Reclamation Act.²³ As damaging as an extractive economy was, it provided a form of sustenance. But after using rural communities for cheap, reliable energy, public actors failed to respond to the foreseeable decline of extractive jobs even as they encouraged a transition towards more efficient and cleaner energy production. This left communities with little to show for their decades-long contribution to the nation’s energy grid.²⁴

In manufacturing, plant closures fell harder on rural communities because of their more limited economies.²⁵ Measures to mitigate mass layoffs came reluctantly in response to demands by betrayed laborers. Yet, these measures, such as the Trade Act of 1974 and the Worker Adjustment Retraining and Noti-

²¹ See Jonathan W. Coppess, *High Cotton and the Low Road: An Unraveling Farm Bill Coalition and Its Implications*, 23 *DRAKE J. AGRIC. L.* 353, 370 (2018) (discussing how farm consolidation has increased since the farm crisis of the 1980s); Neil D. Hamilton, *Harvesting the Law: Personal Reflections on Thirty Years of Change in Agricultural Legislation*, 46 *CREIGHTON L. REV.* 563, 567 (2013) [hereinafter Hamilton, *Harvesting the Law*] (describing the “Big Ag” period characterizing the 1980s to the present, with some present-day evolution toward food localism, as with Community-Supported Agriculture programs); Neil D. Hamilton, *Myth Making in the Heartland—Did Agriculture Elect the New President?*, 13 *J. FOOD L. & POL’Y* 5, 10 (2017) [hereinafter Hamilton, *Myth Making*] (“[S]tructural shifts—in land tenure, farm consolidation and livestock production—are often facilitated by public programs such as farm income support, crop insurance, the RFS, and farm lending practices.”); Mandell, *supra* note 19, at 101–02 (“[Secretary Butz’s focus] on the mechanization, industrialization, and commoditization of agriculture required larger investments in capital than traditional farming. The increasing need to invest heavily in equipment, fertilizers, pesticides, and herbicides in order to stay competitive meant that only farmers with access to capital could remain competitive under the new system.”); Merrett & Struthers, *supra* note 6, at 36.

²² See Neil D. Hamilton, *Moving Toward Food Democracy: Better Food, New Farmers, and the Myth of Feeding the World*, 16 *DRAKE J. AGRIC. L.* 117, 121 (2011).

²³ Patrick McGinley, *Collateral Damage: Turning a Blind Eye to Environmental and Social Injustice in the Coalfields*, 19 *J. ENVTL. & SUSTAINABILITY L.* 304, 330, 422 (2013).

²⁴ Ann Eisenberg, *Just Transitions*, 92 *S. CAL. L. REV.* 273, 300–08 (2019); Revesz, *supra* note 17, at 1543–55.

²⁵ Anderson, *supra* note 8, at 465–68; see Revesz, *supra* note 17, at 1498 (“Our regulatory system has grappled for almost a half century with the question of how to deal with regulations that displace workers in communities where there are few other employment options.”).

fication Act of 1988, failed to adequately mitigate losses imposed on workers and communities.²⁶ Meanwhile, the subsequent proliferation of rural blight—with emptying communities hampered by widespread property vacancy and abandonment—has largely gone unaddressed.²⁷ Like in the agricultural and extractive sectors, the reduction of trade restrictions, with minimal mitigation measures for affected individuals and communities, were justified by collective benefits: a higher Gross Domestic Product (GDP) and greater consumer access to cheaper goods.²⁸

Developments in each of these sectors—from small farms to industrialized ones, from the use of fossil fuels to their decline, and from manufacturing jobs to outsourcing—have been justified by aggregate benefits: respectively, cheap energy then clean energy, cheap and abundant food, and cheap goods and a higher GDP.²⁹ The rural America in decline did not just “die.” By bearing disproportionate economic losses alongside substantial environmental burdens—rationalized in the name of collective welfare—these communities were sacrificed.³⁰

It might be argued that concentrating losses and burdens on certain populations is an inevitable part of a functioning society.³¹ The problem is that legal theorists and philosophers widely consider utilitarian rationales for suffering to be ethically repugnant.³² According to distributive justice theorists, measures that impose burdens on discrete groups in the name of aggregate welfare should be treated with strong skepticism.³³ Although benefits that offset the burdens—such as rural residents’ joint enjoyment of cheap or clean energy, cheap food,

²⁶ Fran Ansley, *Standing Rusty and Rolling Empty: Law, Poverty, and America’s Eroding Industrial Base*, 81 GEO. L.J. 1757, 1868 (1993).

²⁷ See generally Eisenberg, *supra* note 5 (discussing proliferation of rural property vacancy, dilapidation, and lack of attention to the issue from scholarship, public commentary, and policymakers).

²⁸ See discussion *infra* Part III.B.

²⁹ See *infra* notes 207–320.

³⁰ See Porter, *supra* note 10 (describing rural economic decline of past quarter century as “relentless” and reflective of an “intensifying ruralization of distress”).

³¹ Cf. Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVTL. L. 1, 4, 7 (2003) (observing that society must be able to “revise and update rules” in the public welfare); Kaswan, *supra* note 18, at 1062 (arguing that distributive justice does not require “strict equality”); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1167 (1967) (recognizing the constitutional distinction between valid exercise of police power for which a person bears losses by being “regulated,” versus compensable injuries for loss of property in the public name).

³² See RAWLS, *supra* note 14, at 14 (utilitarianism is “inconsistent with the idea of reciprocity implicit in the notion of a well-ordered society”); Kaswan, *supra* note 18, at 1062; Michelman, *supra* note 31, at 1166 (discussing wide recognition of the injustice inherent in the expectation that “one man should [. . . be compelled to die] for the people”) (alteration in original).

³³ Michelman, *supra* note 31, at 1174; see Joseph L. Sax, *Do Communities Have Rights? The National Parks as a Laboratory of New Ideas*, 45 U. PITT. L. REV. 499, 510–11 (1984) (discussing ethical tensions surrounding local subordination to national interests).

and cheap goods—might render rural sacrifices just, it is not clear that the most affected rural communities have had any losses offset.³⁴ What is the demise of an entire town worth, after all?³⁵

The discussion's third argument follows once distributive injustice and majoritarian utilitarianism are established as contributors to rural challenges. Because rural inequity is a collective problem, the onus falls on society as a whole to address today's rural marginalization.³⁶ To avoid past mistakes—recreating arbitrary or cruel choices about winners and losers, or embracing the trap of utilitarian thinking—the clearest solution to addressing rural challenges is a more robust approach to societal inequity in general. This includes ensuring access to decent work and decent environments for all. These measures are captured in part in federal policy proposals such as the Green New Deal, a potential “massive program of investments in clean-energy jobs and infrastructure, meant to transform not just the energy sector, but the entire economy.”³⁷ Such legislation, designed “to make [the economy] fairer and more just,” would chip away at persistent rural poverty, make the loss of traditional livelihoods somewhat less devastating, and potentially help offset localized environmental hazards.³⁸ These protections are urgent needs for urban communities treated inequitably, as well.³⁹

³⁴ See generally Michelman, *supra* note 31 (discussing the prospect that adequately providing offsetting benefits to “losers” in allocative decisions might “induce losers to quit their objections to the change”).

³⁵ Cf. Anderson, *supra* note 8, at 499–500 (contemplating innate and practical values to facilitating a rural way of life); Alana Semuels, *Ghost Towns of the 21st Century*, THE ATLANTIC (Oct. 20, 2015), <https://www.theatlantic.com/business/archive/2015/10/ghost-towns-of-the-21st-century/411343/> [<https://perma.cc/92HN-V5N7>] (discussing the proliferation of rural ghost towns as a result of deindustrialization).

³⁶ This Article presumes that the idea of collective responsibility “makes sense as a form of moral responsibility.” *Collective Responsibility*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/collective-responsibility/> [<https://perma.cc/X85C-2T3C>]. Defenders of this idea argue “that we blame groups all the time in practice and . . . in a way that is difficult to analyze with the precepts of methodological individualism”; that “within our practices of moral responsibility . . . groups have the ability of moral address and exhibit moral competence”; and that linguistic analyses, existentialist traditions, and social theory suggest that it is possible to ascribe group blame. *Id.*

³⁷ David Roberts, *The Green New Deal, Explained*, VOX (Jan. 7, 2019), <https://www.vox.com/energy-and-environment/2018/12/21/18144138/green-new-deal-alexandria-ocasio-cortez> [<https://perma.cc/F2JX-BMJ3>]; see Brigham Daniels et al., *Just Environmentalism*, 37 YALE L. & POL'Y REV. 1, 9 (2018) (discussing a need to account for more varied forms of distributive injustice in environmental decision making than those traditionally considered).

³⁸ See Lisa Archer, Opinion, *Green New Deal Must Transform Our Food System to Save Our Climate*, FOOD TANK (Feb. 2019), <https://foodtank.com/news/2019/02/opinion-green-new-deal-must-transform-our-food-system-to-save-our-climate/> [<https://perma.cc/D2CB-9XRN>] (arguing that the Green New Deal would help address rural poverty by promoting organic, sustainable farming over industrialized agriculture); Roberts, *supra* note 37.

³⁹ See generally Debra Lyn Bassett, *Ruralism*, 88 IOWA L. REV. 273 (2003) (discussing different types of challenges facing urban and rural communities).

The discussion finishes with brief consideration of better-tailored approaches to rural marginalization.⁴⁰ The first step is for policymakers to recognize that rural communities warrant equitable treatment and are not merely means to collective ends. Policymakers should coordinate more with rural residents themselves to better understand their needs.⁴¹ Efforts to address rural poverty should be re-energized. For communities in decline, local governments have important, under-discussed potential for rural reform. They are well positioned to serve as vehicles for more robust community economic development—or at least for better-managed decline.⁴² Yet, one is hard-pressed to avoid the conclusion that the remedy to distributive injustice is distributive justice; the desire for a resource-free solution is unrealistic. Policy choices and neglectful inaction have contributed to disproportionately low rates of resources per capita directed to rural residents, undercut traditional livelihoods, and undermined public services. Policymakers must thus ensure a more equitable allocation of society's benefits and burdens to rural communities in need.

Skeptics of this narrative and these solutions will raise several questions. First, is it possible to generalize about rural challenges despite rural variability in residents' race, class, and region?⁴³ Second, in light of rural voters' disproportionate power in bodies such as the U.S. Senate and the electoral college, can they experience inequity, and do they even want help?⁴⁴ Third, even if

⁴⁰ For a more in-depth discussion, see Ann M. Eisenberg, *Economic Regulation and Rural America* (working draft on file with author).

⁴¹ See Lisa R. Pruitt, *Rural Rhetoric*, 39 CONN. L. REV. 159, 159–60 (2006) (discussing courts' urban-centric decision making that tends to view rurality through a lens of nostalgia for an idyllic, stereotyped past); Jean Hardy, *How Rural America Is Saving Itself*, CITYLAB (Dec. 20, 2018), <https://www.citylab.com/perspective/2018/12/rural-america-us-economic-future-new-york-times-wrong/578740/> [<https://perma.cc/D66L-BKTZ>] (“The insistence that no one out there knows how to solve problems of the rural economy is a false and misleading one. There are decades of research that have identified paths forward that rural communities are already following and flourishing on.”).

⁴² See Anderson, *supra* note 8, at 501; cf. Noah Smith, Opinion, *How to Save the Troubled American Heartland*, BLOOMBERG (Aug. 3, 2018), <https://www.bloomberg.com/view/articles/2018-08-03/how-to-save-the-troubled-american-heartland> [<https://perma.cc/ZYV6-YXDV>] (arguing that not every rural place can be revitalized, but a strategic allocation of local government resources can help those places poised to recover). See generally Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. REV. 466 (2014) (discussing rural residents' difficulties accessing basic services); Hardy, *supra* note 41 (arguing that state legislatures have underfunded rural localities in the first part of the 21st century, resulting in a less talented work-force in those communities, crumbling local infrastructure, and insufficient funding for local school systems).

⁴³ Cf. Pruitt & Showman, *supra* note 42, at 475 (discussing the adage that “if you’ve seen one rural place, you’ve seen one rural place”).

⁴⁴ See Emily Badger, *As American as Apple Pie? The Rural Vote's Disproportionate Slice of Power*, N.Y. TIMES (Nov. 20, 2016), <https://www.nytimes.com/2016/11/21/upshot/as-american-as-apple-pie-the-rural-votes-disproportionate-slice-of-power.html> [<https://perma.cc/Z7GC-B6DX>] (detailing how “rural America, even as it laments its economic weakness, retains vastly disproportionate electoral strength”).

most rural residents want more government intervention, would such interventions not be prohibitively costly? Finally, is the burden on society to rectify this problem, or should rural residents just move to more livable environs?

These concerns are addressed throughout this Article. Of course, it is difficult to characterize all of “rural America”—a geographic label encompassing seventy-five percent of the nation’s land and between fifteen to twenty percent of its people.⁴⁵ But this Article insists that it is worth looking for common themes in the rural experience and to redirect this conversation. The fact remains that most people, including academics and journalists, live in cities and remain uninitiated to rural challenges. These challenges are central to understanding today’s politics, disputes like those seen at Standing Rock, and the daily quality of life for those of us who enjoy cheap energy, food, and goods.⁴⁶ It is hoped that the subsequent analysis will capture diverse rural experiences—encompassing not just the mythic “Trump country,” but also those who lost cotton mill jobs in African-American communities in the South, coal jobs in Native-American communities in the West, and farmland in diverse places, while also bearing burdens of widespread blight and the hazards of unsustainable agribusiness and natural resource extraction.⁴⁷

This Article’s alternate narrative at least partially answers the two questions above—what happened to rural America and what should be done about it?—in more illuminating terms than the dominant discourse’s resignation to rural America’s natural death. This narrative illustrates that although rural marginalization is complex, its contours are finite and comprehensible, and there is

⁴⁵ See Kenneth M. Johnson, *Where Is Rural America and Who Lives There?*, in RURAL POVERTY IN THE UNITED STATES, *supra* note 4, at 3, 3 (explaining that “rural America is a simple term describing a remarkably diverse collection of people and places”). Over fifty million Americans live in areas defined as rural. *Id.*

⁴⁶ Cf. Daniel T. Lichter & David L. Brown, *The New Rural-Urban Interface: Lessons for Higher Education*, 29 CHOICES 1, 1 (2014) (asserting that the question of how rural America can reverse its decline “seems hardly a priority for most Americans living in big cities and suburbs; they often know little or nothing about day-to-day life in small towns or in the countryside”).

⁴⁷ See generally DYER, *supra* note 20 (discussing widespread displacement of farmers and hazards of industrialized agriculture); Judy Bainbridge, *How Black Workers Changed the Textile Industry in South Carolina*, GREENVILLE NEWS (Oct. 29, 2018), <https://www.greenvilleonline.com/story/news/2018/10/29/how-black-workers-changed-textile-industry-south-carolina/1798644002/> [<https://perma.cc/Q7EM-HLUK>] (discussing black workers’ significant contribution to South Carolina’s textile industry in the 1970s, and the mass layoffs that followed in the 1980s due to increased automation and cheap labor abroad); Joe Rigert, Letter to the Editor, *Native Americans and Coal: The Risks of Dependency*, N.Y. TIMES (Apr. 10, 2017), <https://www.nytimes.com/2017/04/10/opinion/native-americans-and-coal-the-risks-of-dependency.html> [<https://perma.cc/SP5Z-C3ZH>] (pointing out the risk Native-American tribes run in depending on coal industry); Claire E. Jamieson, Change in the Textile Mill Villages of South Carolina’s Upstate During the Modern South Era 3 (May 2010) (unpublished M.A. thesis, University of Tennessee), https://trace.tennessee.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1298&context=utk_gradthes [<https://perma.cc/2UGP-V952>] (detailing how a loss of mill jobs has “transformed” southern textile towns).

a normative case for addressing it through law. It reveals that the rural story is not morally neutral but infused with value judgments that determine winners and losers. It also shows that our concepts of potential solutions—or lack thereof—are shaped by value judgments, rather than by forces of nature. At the very least, this narrative insists that we must all grapple with these difficult questions rather than leaving them to the purview of technocrats, political agitators, or struggling small-town governments. To not do so risks further injustice and deepening the urban-rural polarization that threatens the fabric of national democracy.⁴⁸

The Article proceeds in four parts. Part I provides background on the communities this Article contemplates, differentiating between a rural America burdened with chronic poverty and a rural America burdened with socioeconomic decline.⁴⁹ Part II discusses various theories of distributive justice and their under-explored relevance to the rural condition.⁵⁰ Part III.A argues that disparities in resource allocations between urban and rural communities are an instance of distributive injustice, with those disparities falling harder on chronically impoverished communities.⁵¹ Part III.B critiques legal frameworks that have shaped key rural livelihoods for the past several decades and argues that policymakers' majoritarian-utilitarian treatment of rural livelihoods also effectuated distributive injustice, with these developments affecting communities in decline more poignantly.⁵² Part IV offers preliminary contemplation of solutions.⁵³

I. UNDERSTANDING TODAY'S RURAL LANDSCAPE

This Part provides a broad overview of modern rural America and the problems its residents face. Section A differentiates among four categories of

⁴⁸ Cf. Lee Drutman, *We Need Political Parties. But Their Rabid Partisanship Could Destroy American Democracy.*, VOX (Sept. 5, 2017), <https://www.vox.com/the-big-idea/2017/9/5/16227700/hyperpartisanship-identity-american-democracy-problems-solutions-doom-loop> [https://perma.cc/8RUJ-P4CM] (discussing an American political partisanship increasingly characterized in terms of the “urban/rural partisan divide” and “separate tribal epistemologies”). Rural or white working-class “economic anxiety” is sometimes framed as a driver of politics that is mutually exclusive with racism or xenophobia as political drivers. By acknowledging rural inequity, this Article is not intended to suggest that racism and xenophobia are not also urgent problems in today’s political landscape. This discussion also does not attempt to discern or explain rural Trump voters’ motivations, although such connections may surface. Cf. Tyler T. Reny et al., *Vote Switching in the 2016 Election: How Racial and Immigration Attitudes, Not Economics, Explain Shifts in White Voting*, 83 PUB. OPINION Q. 91, 91 (2019) (seeking to explain whether “immigration and racial attitudes or economic dislocation and marginality” were greater causes of the white working class’s “vote switching” in the 2016 election).

⁴⁹ See *infra* notes 54–134 and accompanying text.

⁵⁰ See *infra* notes 135–179 and accompanying text.

⁵¹ See *infra* notes 186–202 and accompanying text.

⁵² See *infra* notes 203–320 and accompanying text.

⁵³ See *infra* notes 321–332 and accompanying text.

economic trends that capture the bulk of what today's rural communities are experiencing.⁵⁴ Section B discusses chronic rural poverty specifically.⁵⁵ Section C provides an overview of the transformation of the rural economy over the past century.⁵⁶ Finally, Section D establishes rurality as an intersectional concept that interacts with other bases of marginalization, such as race, gender, age, national origin, and class.⁵⁷

A. Differentiating the Four Rural Americas

To understand rural communities in the United States, it is important to understand basic characteristics of urban-rural relations that typically occupy scholars outside the legal field. Urban and rural communities are interdependent; some even challenge the idea that they should be considered distinguishable types of places.⁵⁸ Yet, rural communities tend to be the locus for certain productive activities. Farming, natural resource extraction, energy production, forestry, and outdoor recreation necessarily take place predominantly in rural communities.⁵⁹ Urban communities depend upon these rural activities. At the same time, rural communities depend on urban communities for other benefits, such as recreation-seeking tourists and peripheral economic effects from large urban labor markets through regional diffusion of wealth, information, and work opportunities.⁶⁰ Global trends suggest these relationships may be fundamentally evolving as urbanization intensifies around the world.⁶¹ But rural populations persist and likely will into the future.⁶²

A common question is how “rural” should be defined. Most agree that a spectrum best characterizes differing types of populations and landscapes, with extreme urbanity on the one end and extreme rurality on the other.⁶³ Formal

⁵⁴ See *infra* notes 58–71 and accompanying text.

⁵⁵ See *infra* notes 72–80 and accompanying text.

⁵⁶ See *infra* notes 81–121 and accompanying text.

⁵⁷ See *infra* notes 122–134 and accompanying text.

⁵⁸ Daniel T. Lichter & James P. Ziliak, *The Rural-Urban Interface: New Patterns of Spatial Interdependence and Inequality in America*, 672 ANNALS AM. ACAD. POL. & SOC. SCI. 6, 9 (2017).

⁵⁹ *Id.* at 8.

⁶⁰ *Id.* at 8, 17–18.

⁶¹ See generally GLOBAL URBANIZATION (Eugenie L. Birch & Susan M. Wachter eds., 2011).

⁶² Cf. Christopher Ingraham, *Americans Say There's Not Much Appeal to Big-City Living. Why Do So Many of Us Live There?*, WASH. POST (Dec. 18, 2018), [https://www.washingtonpost.com/business/2018/12/18/americans-say-theres-not-much-appeal-big-city-living-why-do-so-many-us-live-ther/](https://www.washingtonpost.com/business/2018/12/18/americans-say-theres-not-much-appeal-big-city-living-why-do-so-many-us-live-ther/?hpid=hp-top-table-main%3Aamericans-say-theres-not-much-appeal-big-city-living-why-do-so-many-us-live-ther%3Ahomepage%2Ft%3Aamericans-say-theres-not-much-appeal-big-city-living-why-do-so-many-us-live-ther&hpid=hp-top-table-main%3Aamericans-say-theres-not-much-appeal-big-city-living-why-do-so-many-us-live-ther%3Ahomepage%2Ft%3Aamericans-say-theres-not-much-appeal-big-city-living-why-do-so-many-us-live-ther) [<https://perma.cc/Q6GD-A6HE>] (discussing a poll showing that a plurality of Americans would prefer to live in a rural area over a city, small city, or suburb); Sarah Smarsh, *Opinion, Something Special Is Happening in Rural America*, N.Y. TIMES (Sept. 17, 2019), <https://www.nytimes.com/2019/09/17/opinion/rural-america.html> [<https://perma.cc/F2XE-B86R>] (describing a “brain gain” currently taking place in rural America).

⁶³ Eisenberg, *supra* note 5, at 200.

definitions characterize rurality by population scarcity, low population volumes, and distance from substantial population centers. For example, the commonly used U.S. Census Bureau definition defines “rural” as anything other than (1) an Urbanized Area of 50,000 or more people, or (2) Urban Clusters of between 2,500 and 50,000 people.⁶⁴ But formal legal definitions, of which there are many, are not necessarily the best metrics by which to understand rural America today. This Article takes a somewhat broader view; an isolated town of 2,501 people is likely to face similar challenges as one that has a population of 2,499.⁶⁵

Still, rural communities’ diversity—in topography, population, history, and industrial activity—makes generalizations difficult. Rural America includes not only some of the world’s best farmland (in the Great Plains and the Corn Belt, for instance), high-producing dairy regions (such as in Upstate New York, Wisconsin, and New England), but also:

sprawling exurban areas on the outer edges of the nation’s largest metropolitan areas; the vast arid range and desert lands in the Southwest; the deep, mountainous forests of the Pacific Northwest; the flat and humid coastal plain of the Southeast; the hardscrabble towns and hollows of the Appalachians; the rocky shorelines and working forests of New England, where rural villages look much as they did a hundred years ago; and the glaciers and fjords of Alaska.⁶⁶

This diversity notwithstanding, common trends across these landscapes and populations can be identified. Researchers at the Carsey Institute have formulated a useful typology of rural places that helps narrow and define the subjects of this Article. This typology describes four rural Americas, each shaped by a handful of key differing factors that reflect how economic activity does or does not sustain them. The four rural Americas include: (1) amenity-rich rural America; (2) chronically poor rural America; (3) declining resource-dependent rural America; and (4) amenity/decline rural America, which is an “in-between” category.⁶⁷

⁶⁴ *Urban and Rural*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural.html> [<https://perma.cc/8V3C-2ASB>].

⁶⁵ *Cf.* Lichter & Ziliak, *supra* note 58, at 10 (noting that “[f]ew scholars . . . embrace [the Census Bureau’s] narrow definition . . . , instead preferring to use the Census Bureau’s official definition of nonmetropolitan interchangeably with rural”).

⁶⁶ Johnson, *supra* note 45, at 3–4.

⁶⁷ LAWRENCE C. HAMILTON ET AL., CARSEY INST., UNIV. OF N.H., PLACE MATTERS: CHALLENGES AND OPPORTUNITIES IN FOUR RURAL AMERICAS 26–28 (2008).

This Article is least concerned with the first and last categories. Although amenity-rich rural places do have challenges, such as gentrification, inequality, and access to quality jobs, their concerns more closely resemble those seen in urban places. Being rural is not as much of a concern for relatively affluent places like Aspen and Vail, Colorado, for instance.⁶⁸ Category four, with its decline and amenities frequently cancelling each other out, is also not the central focus of this Article, although it shares some commonalities with categories two and three.

This Article centers on the two most extreme forms of today's rural distress: chronically poor communities and communities in decline. Although today's dominant discourse focuses more on communities in decline, part of this Article's argument is that the discussion should also include chronically poor communities. For purposes of the subsequent discussion, each category corresponds more closely with one type of distributive injustice that this Article seeks to articulate.

According to the Carsey Institute's report, chronically poor rural America shares some similarities with declining rural America.⁶⁹ Both communities are concerned about crime, drugs, and employment opportunities. Two main differences are that chronically poor rural America has lost less population and is constituted of more non-white populations, particularly African Americans.⁷⁰ This category describes substantial parts of the rural South including central Appalachia, many Native-American reservations, and other pockets of concentrated poverty across Western states.

The declining communities referenced by category three are predominantly white, comprised mostly of at least second-generation residents who grew up in the area and remained there long-term. The decline is largely driven by young adults leaving. In addition to population loss, job opportunities and drug manufacturing and sales are prominent regional problems.⁷¹ These declining communities are the places that this Article has in mind when it turns to the utilitarian sacrifice of rural communities for the greater good, although resource disparities also affect these localities. This category describes parts of Appalachia, the deindustrializing Midwest, and timber communities in the Pacific Northwest.

⁶⁸ See Nicholas Riccardi, *Aspen Split Between Wealthy Visitors and the Working Poor That Serve Them*, ASSOCIATED PRESS (Jan. 12, 2015), <https://skift.com/2015/01/12/aspen-split-between-wealthy-visitors-and-the-working-poor-that-serve-them/> [https://perma.cc/5LC2-7C8F].

⁶⁹ HAMILTON ET AL., *supra* note 67, at 27.

⁷⁰ *Id.* Chronically poor rural America also has lower educational attainment, lower household incomes, fewer elderly residents, and a higher reliance on food stamps. *Id.*

⁷¹ *Id.* at 26.

B. Background on Chronic Rural Poverty

Chronic rural poverty, the issue that most directly affects category two communities, has a long and difficult history. Although it is usually measured as an economic phenomenon by departments such as the U.S. Census Bureau, poverty may be defined as “a multidimensional concept that involves insufficient income relative to need and limited access to resources such as education, health care, and social and political power.”⁷²

The persistence of rural poverty is one feature that may set it apart from urban poverty. Rural poverty emerged as a national policy issue in the 1930s, when the Great Depression drew attention to dire living conditions for certain populations outside cities.⁷³ In 1968, a report from the President’s National Advisory Commission on Rural Poverty stated, “Rural poverty is so widespread, and so acute, as to be a national disgrace[.]”⁷⁴ The Johnson administration’s War on Poverty began in 1964 and created a legislative framework largely still in effect today. The War on Poverty made notable dents in rural challenges.⁷⁵

In spite of these improvements, rural poverty has proven more difficult to eradicate than urban poverty.⁷⁶ Since 1959, poverty rates in rural America have outpaced their urban counterparts.⁷⁷ And recent trends highlight growing cause for concern. As of 2009–2013, roughly one-quarter of U.S. counties were considered high poverty counties, a seventy percent increase from 1999 (when sixteen percent of counties were high poverty). These high-poverty counties were disproportionately rural. Over this period, approximately one-third of rural counties were considered high-poverty, compared to one-sixth of metro counties.⁷⁸

Thus, concentrated, chronic rural poverty remains a substantial problem today. Chronic rural poverty is exacerbated by rural socioeconomic decline. Yet, the dominant discourse described above focuses almost entirely on communities in decline.

⁷² Bruce Weber & Kathleen Miller, *Poverty in Rural America Then and Now*, in RURAL POVERTY, *supra* note 4, at 28, 38.

⁷³ *Id.* at 35.

⁷⁴ *Id.* at 31.

⁷⁵ *See id.* at 39–41 (discussing War on Poverty and stating that rural poverty declined during the 1960s under the Johnson administration); *see also* Donald E. Voth, *A Brief History and Assessment of Federal Rural Development Programs and Policies*, 25 U. MEM. L. REV. 1265, 1272–75 (1995).

⁷⁶ Weber & Miller, *supra* note 72, at 33.

⁷⁷ *Id.* at 40.

⁷⁸ *Id.* at 51. These 828 counties were “concentrated primarily in Appalachia, the southern Black Belt and Mississippi Delta, along the Mexican border, and on Native American tribal reservations.” *Id.* at 50.

Communities in decline are susceptible to the spread of poverty.⁷⁹ But the inattention to longstanding chronic poverty is a critical problem: communities in decline tend to be majority white, while rural communities of color have been disproportionately burdened by chronic poverty since well before the onset of modern rural decline. As of 2013, rural African Americans had the highest incidence of poverty at 37.3%; rural Native Americans had the second highest rate at 34.4%; and rural Hispanics had the third highest rate at 28.2%. Rural whites, by contrast, experienced a poverty rate of 15.9%, which is similar to rates of urban poverty.⁸⁰ Although communities in decline certainly warrant attention—and are vulnerable to poverty—a discussion of rural decline should also include a discussion of persistent rural poverty.

C. Background on Rural Economic Transformation

Despite concerns about rural poverty in the 1960s, rural communities were collectively more prosperous in the mid- and late-twentieth century than they are now.⁸¹ The changing rural landscape stems in large part from changes in rural economic activity.

Rural livelihoods have ebbed and flowed in and out of various sectors over the past hundred years, as the nation shifted away from a majority agrarian society to an industrialized one.⁸² The overall effect, though, has been a relatively abrupt transition.⁸³ A century ago, approximately sixty percent of U.S. residents lived in rural areas, and forty percent worked on farms.⁸⁴ Today, approximately fifteen to twenty percent of U.S. residents live in rural areas, but a mere one to two percent work on farms.⁸⁵

The past several decades themselves have also seen dramatic transformations. And contrary to common wisdom, rural livelihoods have never been synonymous with agriculture in the modern era. As of 1970, in high-density rural areas, agriculture, forestry, fishing, manufacturing, and mining accounted for approximately thirty-eight percent of employment altogether, while in low-

⁷⁹ *Id.* at 32 (explaining that most rural poverty is in the Southeast, but deindustrialization since the 1980s has led to the spread of poverty in the Midwest and Northeast, as did the Great Recession).

⁸⁰ Harvey & Harris, *supra* note 4, at 146.

⁸¹ See Porter, *supra* note 10 (explaining that “[r]ural communities once captured a greater share of the nation’s prosperity” and detailing the sustained job creation in rural America during the 1990s).

⁸² Carolyn Dimitri et al., *The 20th Century Transformation of U.S. Agriculture and Farm Policy*, U.S. DEP’T AGRIC. ERS BULL., June 2005, at 2–5, <https://naldc.nal.usda.gov/download/22832/PDF> [<https://perma.cc/DC2L-JF7Y>].

⁸³ Cf. STEVEN STOLL, *RAMP HOLLOW: THE ORDEAL OF APPALACHIA* 28–30 (2017) (observing that until only very recently in human history, the vast majority of people were subsistence agrarians).

⁸⁴ Weber & Miller, *supra* note 72, at 34, 36.

⁸⁵ *Id.* at 36.

density rural areas, these sectors accounted for thirty-six percent of employment.⁸⁶

The already substantial proportions of those employment numbers do not paint the full picture of the significance of these traditional rural livelihoods to communities dependent upon them. These livelihoods often centered on large-scale productive activity with a substantial land use or environmental footprint. These industries have been distinct from other significant employers, like the service or retail sectors, in the magnitude of their presence and their relationships with local governments. Industries such as coal and timber may account for millions of dollars in tax revenue through measures such as severance taxes, which are then distributed to rural municipalities, counties, and reservations.⁸⁷ Thus, although these industries employed just over one-third of residents,⁸⁸ their role in a regional way of life often loomed even larger than the already-large proportion suggests.

By 2007, these industries had declined dramatically.⁸⁹ Over this period, agriculture, forestry, fishing, manufacturing, and mining went from accounting for

⁸⁶ COUNCIL OF ECON. ADVISERS, STRENGTHENING THE RURAL ECONOMY—THE CURRENT STATE OF RURAL AMERICA (2010) [hereinafter CURRENT STATE OF RURAL AMERICA], <https://obamawhitehouse.archives.gov/administration/eop/cea/factsheets-reports/strengthening-the-rural-economy/the-current-state-of-rural-america> [<https://perma.cc/P623-6JXH>]. The exact breakdown of rural livelihoods is as follows: agriculture, forestry, and fishing accounted for thirteen percent of jobs in high-density rural areas and twenty-three percent of jobs in low-density rural areas; manufacturing accounted for twenty-three percent of jobs in high-density rural areas and ten percent of jobs in low-density rural areas; and mining accounted for two percent of jobs in high-density rural areas and three percent of jobs in low-density rural areas. Other major sectors included government, the service sector, wholesale and retail trade, finance, insurance, real estate, and “other.” *Id.*

⁸⁷ See RORY MCILMOIL & EVAN HANSEN, DOWNSTREAM STRATEGIES, THE DECLINE OF CENTRAL APPALACHIAN COAL AND THE NEED FOR ECONOMIC DIVERSIFICATION 1 (Jan. 19, 2010), http://www.downstreamstrategies.com/documents/reports_publication/DownstreamStrategies-DivideOfCentralAppalachianCoal-FINAL-1-19-10.pdf [<https://perma.cc/55PX-6JTJ>] (discussing the coal industry’s role in filling the tax coffers of local governments in Appalachia); see also Anderson, *supra* note 8, at 481 (discussing the relationship between federal timber funds paid in lieu of taxes and regional reliance on the industry in the northwest); Alan Ramo & Deborah Behles, *Transitioning a Community Away from Fossil-Fuel Generation to a Green Economy: An Approach Using State Utility Commission Authority*, 15 MINN. J.L. SCI. & TECH. 505, 515 (2014) (discussing the tax revenue Hopi and Navajo tribes derived from their coal mines); Julie Turkewitz, *Tribes That Live Off Coal Hold Tight to Trump’s Promises*, N.Y. TIMES (Apr. 1, 2017), <https://www.nytimes.com/2017/04/01/us/trump-coal-promises.html> [<https://perma.cc/ZJ8M-LHLS>] (explaining how half of the Crow Tribe’s non-federal budget comes from royalties and taxes on coal extracted from a mine located on the reservation; the mine also supports 170 jobs).

⁸⁸ See *supra* note 86 and accompanying text.

⁸⁹ CURRENT STATE OF RURAL AMERICA, *supra* note 86. The exact breakdown of these sectors is as follows: agriculture, forestry, and fishing accounted for six percent of jobs in high-density areas and twelve percent in low-density areas; manufacturing accounted for thirteen percent of jobs in high-density rural areas and seven percent in low-density rural areas; and mining accounted for one percent in high-density rural areas and three percent in low-density rural areas. *Id.*

more than one-third of rural employment to less than one-fifth.⁹⁰ The localized effects have been more dramatic for many communities, however. In rural Southeast Alaska, forestry was once the region's economic driver, providing a peak of 3,400 jobs in 1990; this figure dropped to just 214 in 2009.⁹¹ As of 2011, seventy-five percent of residents believed that the loss of forestry jobs was negatively affecting their communities.⁹² In North Carolina, manufacturing jobs dropped from 761,000 in 2000 to 429,000 in 2010, a drop of forty-four percent that disproportionately affected rural communities.⁹³ Former timber communities of the Pacific Northwest are still in crisis following reductions in timbering on public lands.⁹⁴ Meanwhile, coal communities in central Appalachia struggle with a fully collapsed regional economy.⁹⁵ Iowa has lost thirty percent of its farms since 1977.⁹⁶ The story may differ depending upon the region in question, but common themes are change and loss of a way of life.

These data show that the makeup of rural livelihoods has shifted substantially in modern U.S. history. Yet, it does not appear that these sectors have been replaced by new ones. Over the course of the same time period, economic growth has disproportionately benefited large urban centers.⁹⁷ With the eco-

⁹⁰ See *id.* (detailing how traditional rural livelihoods once made up roughly thirty-six to thirty-eight percent of rural employment; that number has decreased to roughly twenty percent). Since some of these livelihoods—such as forestry and mining—are rural by nature, changes in those livelihoods had less of an effect on urban communities. The numbers may look similar for manufacturing in urban places: in 1970, twenty-five percent of the workforce as a whole worked in manufacturing, compared to 8.5% today. Sara Bauerle Danzman & Jeff D. Colgan, *Robots Aren't Killing the American Dream. Neither Is Trade. This Is the Problem.*, WASH. POST (Mar. 10, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/10/robots-arent-killing-the-american-dream-neither-is-trade-this-is-the-real-problem/> [<https://perma.cc/5JV4-UZ6M>]. These losses in manufacturing, however, have had a more substantial impact on rural communities. See Anderson, *supra* note 8, at 467–68.

⁹¹ THOMAS G. SAFFORD ET AL., CARSEY INST., UNIV. OF N.H., JOBS, NATURAL RESOURCES, AND COMMUNITY RESILIENCE: A SURVEY OF SOUTHEAST ALASKANS ABOUT SOCIAL AND ENVIRONMENTAL CHANGE 14 (2011).

⁹² *Id.* at 5.

⁹³ David L. Carlton & Peter A. Coclanis, *The Roots of Southern Deindustrialization*, 61 CHALLENGE 418, 418 (2018).

⁹⁴ Anderson, *supra* note 8, at 471 (describing the “crisis” in Oregon timber industry).

⁹⁵ See CALVIN A. KENT, NAT'L ASS'N OF CTYS., THE CRUEL COAL FACTS: THE IMPACT ON WEST VIRGINIA COUNTIES FROM THE COLLAPSE OF THE COAL ECONOMY 1 (2016), http://www.cbermu.org/wp-content/uploads/2017/08/2016-09-Cruel_Coal.pdf [<https://perma.cc/4X7C-LN6G>] (stating that the “38 percent decline in West Virginia coal production plus the 71 percent fall in coal prices since 2008 have led to a collapse of the State's coal economy”).

⁹⁶ Matthew Patane, *How We Got Here: Iowa Farms Grow in Size, but There Are Fewer of Them*, CEDAR RAPIDS GAZETTE (June 17, 2019), <https://www.thegazette.com/IowaIdeas/stories/agriculture/how-we-got-here-iowa-farms-grow-in-size-but-there-are-fewer-of-them-family-farms-consolidation-iowa-state-research-20180623> [<https://perma.cc/6ZNP-4XK6>].

⁹⁷ See ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., RURAL EMPLOYMENT AND UNEMPLOYMENT (2019), <https://www.ers.usda.gov/topics/rural-economy-population/employment-education/rural-employment-and-unemployment/> [<https://perma.cc/92RE-X6FS>] [hereinafter RURAL EMPLOY-

economic recession of 2008, rural communities as a whole fell below zero population growth for the first time in the country's history.⁹⁸ This relatively novel concentration of economic losses on rural places suggests that a distributive justice inquiry is warranted.

The ripple effects of this economic decline have been severe. Mass migration to cities due to the changing economic landscape has affected both the physical and the social rural landscape.⁹⁹ Shrunken populations have a ripple effect on communities' already-precarious economic health.¹⁰⁰ As populations shrink, local governments receive less tax revenue, and are in turn less able to provide basic services, such as police protection.¹⁰¹ Homes and businesses stand empty, and as they fall into disrepair, they impose a new burden on cash-strapped local governments.¹⁰² Rural hospitals and libraries have closed throughout the country, leaving remaining residents under-served.¹⁰³ As the built and infrastructural environment decays, new potential residents and investors are drawn to more livable places.¹⁰⁴ Young people continue to move

MENT AND UNEMPLOYMENT] (explaining that while urban communities have recovered from the Great Recession, rural employment rates remain low compared to pre-recession levels); Carlton & Coclanis, *supra* note 93, at 419 (asserting that a loss of rural jobs "has disproportionately hit the small-town and rural South, particularly its heavily white populations, and has opened up enormous disparities between these areas and the larger cities of the region"); Evert Meijers & Dick van der Wouw, *Struggles and Strategies of Rural Regions in the Age of the 'Urban Triumph,'* 66 J. RURAL STUD. 21, 21–22 (2019).

⁹⁸ JOHN CROMARTIE, ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., RURAL AREAS SHOW OVERALL POPULATION DECLINE AND SHIFTING REGIONAL PATTERNS OF POPULATION CHANGE (Sept. 5, 2017), <https://www.ers.usda.gov/amber-waves/2017/september/rural-areas-show-overall-population-decline-and-shifting-regional-patterns-of-population-change/> [https://perma.cc/7TNK-VPJF]; THOMAS HERTZ ET AL., ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., RURAL EMPLOYMENT IN RECESSION AND RECOVERY (Oct. 6, 2014), <https://www.ers.usda.gov/amber-waves/2014/october/rural-employment-in-recession-and-recovery/> [https://perma.cc/426U-RXHN].

⁹⁹ See Eisenberg, *supra* note 5, at 187–88.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 197.

¹⁰² *Id.* at 193.

¹⁰³ Sheldon Weisgrau, *Issues in Rural Health: Access, Hospitals, and Reform*, 17 HEALTH CARE FINANCING REV. 1, 1–7 (1995); see Jon Marcus & Matt Krupnick, *The Rural Higher-Education Crisis*, THE ATLANTIC (Sept. 27, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-rural-higher-education-crisis/541188/> [https://perma.cc/XHW4-ZJTS] (explaining that rural areas must "contend with drug and mental-health issues, poverty, and a lack of high-speed access to the internet"); see also Darrell M. West & Jack Karsten, *Rural and Urban America Divided by Broadband Access*, BROOKINGS BLOG (July 18, 2016), <https://www.brookings.edu/blog/techtank/2016/07/18/rural-and-urban-america-divided-by-broadband-access/> [https://perma.cc/22MM-ZQXM] (detailing how rural areas have slower broadband than urban areas).

¹⁰⁴ See Eisenberg, *supra* note 5, at 187–88.

away because of a lack of opportunity.¹⁰⁵ Meanwhile, disproportionate rural “deaths of despair” by opioids or suicide persist.¹⁰⁶

Yet, the nature of the industries that left these communities did not allow for a clean break. Traditional rural livelihoods meant that longstanding industrial activities left legacies beyond lost jobs and socioeconomic despair. The quality of water and air in mining communities remains precarious, for example; many of the mountaintops of the Appalachian mountain range have been permanently felled to retrieve coal.¹⁰⁷ Power plants like the Navajo Generating Station have “fouled the air and scarred the land that the tribe holds sacred.”¹⁰⁸ Mill towns struggle to remediate the manufacturing centers-turned-brownfields.¹⁰⁹ And the pollutants emitted by large agribusiness operations that displaced residents and transformed communities often go unchecked.¹¹⁰

The past several decades are also significant because of two transitional moments that hint at alternative historical paths not traveled. First, during the 1970s, the already-declining rural population seemed to have balanced out. In a period known as the “rural renaissance,” rural areas in fact grew at a faster rate than cities.¹¹¹ Yet, certain legal and economic developments, among them the aforementioned globalization and automation trends, seem to have steered rural America downward starting just after that era. More recently, the 2008 Great Recession proved another decisive event. Widespread housing and busi-

¹⁰⁵ See Semuels, *supra* note 9.

¹⁰⁶ See OVERDOSE DEATH RATES, *supra* note 11 (explaining that the opioid crisis is having particularly harsh effects on rural areas); RURAL EMPLOYMENT AND UNEMPLOYMENT, *supra* note 97; Brian Thiede et al., *The Divide Between Rural and Urban America, in 6 Charts*, U.S. NEWS & WORLD REP. (Mar. 20, 2017), <https://www.usnews.com/news/national-news/articles/2017-03-20/6-charts-that-illustrate-the-divide-between-rural-and-urban-america> [<https://perma.cc/339V-RFBG>] (stating that rural areas experience high poverty rates, fewer new jobs, and higher rates of disabilities); Press Release, Ctrs. for Disease Control & Prevention, Suicide Rates for Rural Counties Consistently Higher Than Urban Counties from 2001–2015 (Oct. 5, 2017), <https://www.cdc.gov/media/releases/2017/p1005-rural-suicide-rates.html> [<https://perma.cc/9QQT-XT2U>].

¹⁰⁷ McGinley, *supra* note 23, at 373.

¹⁰⁸ James Rainey, *Lighting the West, Dividing a Tribe*, NBC NEWS (Dec. 18, 2017), <https://www.nbcnews.com/specials/navajo-coal> [<https://perma.cc/DSW6-V8PT>].

¹⁰⁹ U.S. ENVTL. PROT. AGENCY, REVITALIZING AMERICA’S MILLS: A REPORT ON BROWNFIELDS MILL PROJECTS 2, 24 (2015), https://www.epa.gov/sites/production/files/2015-09/documents/mill_report_110306.pdf [<https://perma.cc/K3AV-AE83>].

¹¹⁰ See, e.g., Margaret Carrel et al., *Pigs in Space: Determining the Environmental Justice Landscape of Swine Concentrated Animal Feeding Operations (CAFOs) in Iowa*, 13 INT’L J. ENVTL. RES. & PUB. HEALTH 849 (2016) (detailing harmful level of pollution produced by the swine industry).

¹¹¹ See J. Paul Newell, *Rural Healthcare: The Challenges of a Changing Environment*, 47 MERCER L. REV. 979, 981 (1996) (“The 1970s were labeled a ‘rural renaissance,’ with the rate of rural population growth outpacing urban growth for the first time in the twentieth century. However, this trend was reversed in the 1980s, primarily because of the depressed rural economy.”).

ness foreclosures and abandonments seemed to smother a spark that was otherwise fueling a path toward revitalization.¹¹²

This Article is therefore not concerned solely with poverty—an already pressing problem—but also with what appears to be the large-scale, systematic unraveling of many rural local governments and related social and economic systems throughout the country. Rural decline is not necessarily a tragedy per se. Viewed through one lens, it makes sense for people to move to cities with more job opportunities; it also makes sense for obsolete or hazardous industries to be phased out.¹¹³ But approximately sixty million people still live in rural places; one-fifth of these sixty million are more vulnerable, non-white populations.¹¹⁴ As more young people leave rural America, and the ever-aging rural population's property values continue to drop, many rural localities will continue to decline.¹¹⁵ Even if it would be too daunting or irrational to try to reverse these trends, the *management* of this decline—or the current lack thereof—raises important ethical questions.

One response to these trends is that rural residents should simply relocate to the places that enjoy a higher proportion of resources and greater economic opportunity.¹¹⁶ Yet, this solution to rural marginalization fails for several rea-

¹¹² Annie Lowrey, *The Great Recession Is Still with Us*, THE ATLANTIC (Dec. 1, 2017), <https://www.theatlantic.com/business/archive/2017/12/great-recession-still-with-us/547268/> [<https://perma.cc/LD4U-4ZLM>]; Gillian B. White, *Rural America's Silent Housing Crisis*, THE ATLANTIC (Jan. 28, 2015), <https://www.theatlantic.com/business/archive/2015/01/rural-americas-silent-housing-crisis/384885/> [<https://perma.cc/2GVN-9B74>].

¹¹³ See Dipak Kumar, *Rural America Is Losing Young People—Consequences and Solutions*, WHARTON SCH. U. PENN. PUB. POL'Y INITIATIVE (Mar. 23, 2018), <https://publicpolicy.wharton.upenn.edu/live/news/2393-rural-america-is-losing-young-people-> [<https://perma.cc/A9YA-BGAU>] (arguing that “economic migration supports free market allocation of labor, capital, and taxes” and that the ability of rural Americans to move to more urban areas has benefitted the economy and contributed to growth).

¹¹⁴ Press Release, U.S. Census Bureau, *New Census Data Show Differences Between Urban and Rural Populations* (Dec. 8, 2016), <https://www.census.gov/newsroom/press-releases/2016/cb16-210.html> [<https://perma.cc/X8XW-FS5W>]; see Tieken, *supra* note 4 (providing data that among rural residents who are minorities, about forty percent are Black, thirty-five percent nonwhite Hispanic, and twenty-five percent Native-American, Asian, Pacific Islander, or multiracial).

¹¹⁵ Press Release, U.S. Census Bureau, *supra* note 114.

¹¹⁶ Cf. Arnold, *supra* note 16, at 191 (explaining that the inequitable funding for rural welfare programs stems from assumptions that rural residents eventually migrate to cities and that to help this declining, politically insignificant population would be futile anyway); Nick Gillespie, *If Rural Americans Are Being 'Left Behind,' Why Don't They Just Move?*, REASON (Jan. 9, 2018), <https://reason.com/blog/2018/01/09/if-rural-americans-are-being-left-behind> [<https://perma.cc/XF42-T9HT>]; Henry Grabar, *In Defense of the Small City*, SLATE (Feb. 1, 2018), <https://slate.com/business/2018/02/small-cities-and-rural-areas-deserve-revitalization.html> [<https://perma.cc/J4AQ-RECZ>]; Heather Long, *America's Forgotten Towns: Can They Be Saved or Should People Just Leave?*, WASH. POST (Jan. 2, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/01/02/americas-forgotten-towns-can-they-be-saved-or-should-people-just-leave/?noredirect=on&utm_term=.03f59776dca9 [<https://perma.cc/7U4K-KJD6>]. See generally ELIZABETH CATTE, *WHAT YOU ARE GETTING WRONG ABOUT APPA-*

sons. First, the de facto policy in most areas to address rural decline has been just this approach: residents in dying or long-struggling communities have been left to their own devices with the hope that they will relocate to more livable locales. Many have indeed moved, but many have not. Those who remain may be unable to move because of a lack of resources or other impediments to mobility.¹¹⁷ They may also decline to move because they do not want to. The high rates of rural suicides, opioid overdose deaths, and other “deaths of despair” should prompt commentators to more deeply examine the impediments to rural mobility.

This line of thinking also raises the question of whether it is ethically objectionable to mandate mobility, or whether the onus is on public entities to provide basic services to existing communities. It is not necessarily clear that life would be better in a large urban center, where housing costs, long commutes, and a loss of community may bring a qualitatively different form of suffering upon relocation.¹¹⁸ The “just move” argument also presumes that there will always be a perfect match of opportunities available to those who would seek them, only potentially in a different place. This presumption seems faulty, especially as we move into a future that will increasingly displace workers through automation.¹¹⁹

Finally, as this analysis illustrates, the “just move” argument also ignores the structural forces that have shaped the modern rural status quo. It is not the case that well-informed individuals en masse decided to locate themselves in an unfortunate locale and can simply undo the decision. Rural communities have often been crafted over the course of decades in order to create a workforce to provide public necessities. The presumption of perfect individual autonomy seems questionable; many people were born where they are, and after multiple generations became reliant on a local mono-economy that was formed on the basis of public subsidies and other policy drivers.¹²⁰ In other words, to-

LACHIA (2018) (describing the author’s personal experience of having many people ask her why more Appalachians do not simply leave Appalachia, in light of difficult living conditions).

¹¹⁷ See Schleicher, *supra* note 2, at 78 (discussing reasons why poor Americans find it difficult to relocate to areas with more employment opportunities, and labeling Americans in the twenty-first century as “homebodies”).

¹¹⁸ Cf. Patrick Sisson, *The Housing Crisis Isn’t Just About Affordability—It’s About Economic Mobility, Too*, CURBED (Apr. 24, 2018), <https://www.curbed.com/2018/4/24/17275068/jobs-mobility-high-rent-housing-costs> [<https://perma.cc/9SP7-B4GH>] (discussing the prohibitively high cost of housing in California and land-use restrictions that discourage migration from rural areas to urban areas).

¹¹⁹ See Leigh C. Anderson, *Automation Is Coming for More Jobs Than You May Realize*, SALON (Nov. 29, 2017), <https://www.salon.com/2017/11/29/automation-is-coming-for-more-jobs-than-you-may-realize/> [<https://perma.cc/XNS8-DSWE>].

¹²⁰ Eisenberg, *supra* note 24, at 302–04 (discussing the public role in creating communities dependent upon fossil fuels); Rosenberg & Stucki, *supra* note 3, at 13–14 (discussing the role of the

day's rural marginalization was not created by each individual's faulty choices, but by society as a whole. As such, the allocation of resources that shapes rural inequity is worthy of everyone's attention.¹²¹

D. "Rural" as an Intersectional Concept

Some may still be skeptical as to whether rurality is a meaningful lens for understanding these forms of inequity. First, other factors, such as race, have a causal relationship with poverty and exposure to environmental hazards; indeed, white rural residents may well be among the populations exploiting rural residents of color.¹²² Second, urban communities also face challenges like those described above, which may suggest that the rural plight is not unique, but a part of broader societal trends in inequality.

This Article readily acknowledges that rurality is not always the most important factor. Both enslaved people and plantation owners were once "rural," and it was not their rurality that shaped their power relations. Yet, rurality warrants attention for several reasons.¹²³ One reason is the nature of rurality itself.¹²⁴ Rural residents, by definition, live outside large population centers. This fact alone carries a host of realities. Land is a more dominant part of life, and as such, land uses may have more direct and potent relationships with people's lives, livelihoods, and welfare.¹²⁵ The scarcer population renders local governments weaker and people enjoy fewer protections by way of land use

New Deal and Farm Bill in shaping the development of agricultural communities); Hardy, *supra* note 41 (noting that economic policies affect how economic growth is distributed and that the twenty-first century has seen "systematic defunding" of rural communities).

¹²¹ Cf. Lichter & Brown, *supra* note 46, at 1 (arguing that all Americans should be concerned about the plight of rural America, not least because of rural America's important role in providing foodstuffs, natural resources, and recreational opportunities for the rest of the country).

¹²² See, e.g., Rosenberg & Stucki, *supra* note 3, at 15–17 (discussing the role of white farmers and the U.S. Department of Agriculture in driving black farmers off their land throughout the twentieth century, contributing to a ninety percent drop in black farmers between 1920 and 1970—from 925,000 to fewer than 10,000).

¹²³ Cf. Lichter & Brown, *supra* note 46, at 1 (explaining that "rural and urban are 'complementary parts' of a nation's settlement system, and 'familiarity with only one of them limits understanding of the whole'" (quoting Peter Schaeffer et al., *Urban and Rural: Opportunities No More!*, 28 *ECON. DEV. Q.* 1, 3–4 (2014))).

¹²⁴ See Debra Lyn Bassett, *The Politics of the Rural Vote*, 35 *ARIZ. ST. L.J.* 743, 746 (2003) (discussing how "rural dwellers are tied together by virtue of living in rural areas, and common issues exist for those residing in the most isolated—the most rural—of rural areas, including unifying themes of isolation, poverty, and lack of access to goods and services").

¹²⁵ Cf. SAFFORD ET AL., *supra* note 91, at 7 (observing that because "rural communities are closely tied to nature," research needs to investigate rural residents' views of environmental problems and related attitudes about development opportunities); Eisenberg, *supra* note 5, at 204.

planning and zoning ordinances.¹²⁶ The lack of development makes economic opportunities scarcer, driving more people to engage in hazardous or undesirable economic activity to survive.¹²⁷ The distance from population centers brings with it invisibility, a veil between rural residents and a mainstream population that may be either ignorant or indifferent to abuses that take place outside of cities.¹²⁸

But some trends permeate rural communities nationwide, in addition to consistent qualitative themes concerning land, scarcity, invisibility, and law's more limited reach into daily life.¹²⁹ The vast majority of persistent poverty counties are located in rural areas.¹³⁰ Rural communities as a whole have also lost population and have seen residents' sources of income change in recent decades.¹³¹ Studies that control for various factors, including place, have demonstrated as much, in addition to observations of large-scale trends.¹³² As with other characteristics, place interacts with factors such as race, class, and gender to shape a person or community's experiences.¹³³ Critically, "rural" is not synonymous with "white," just as "urban" is not synonymous with "black."¹³⁴ Ultimately, the premise in this Article is that place matters in addition to the other factors that are considered relevant to marginalization.

¹²⁶ See Michelle Wilde Anderson, *Sprawl's Shepard: The Rural County*, 100 CALIF. L. REV. 365, 369–70 (2012).

¹²⁷ See generally Benjamin E. Apple, *Mapping Fracking: An Analysis of Law, Power, and Regional Distribution in the United States*, 38 HARV. ENVTL. L. REV. 217 (2014) (discussing rural municipalities' vulnerability to coercive, uncontrolled development scenarios due to scarcity of opportunities); Ann M. Eisenberg, *Beyond Science and Hysteria: Reality and Perceptions of Environmental Justice Concerns Surrounding Marcellus and Utica Shale Gas Development*, 77 U. PITT. L. REV. 183 (2015).

¹²⁸ Pruitt & Showman, *supra* note 42, at 482.

¹²⁹ See, e.g., Lichter & Brown, *supra* note 46, at 1 (identifying general depopulation, chronic out-migration of young people, and rapid aging as common themes across rural America).

¹³⁰ Weber & Miller, *supra* note 72, at 40–42.

¹³¹ CROMARTIE, *supra* note 98.

¹³² E.g., Mark P. Doescher & J. Elizabeth Jackson, Trends in Cervical and Breast Cancer Screening Practices Among Women in Rural and Urban Areas in the United States 11 (2008) (working paper, Rural Health Research Center, University of Washington), http://depts.washington.edu/uwrhrc/uploads/RHRC_FR121_Doescher.pdf [<https://perma.cc/93UY-5E84>].

¹³³ See Arnold, *supra* note 16, at 191 (observing that rural residents generally experience a "much higher incidence of substandard housing," while "[s]ome minority groups, such as rural blacks and migrant farmworkers, experience a grossly disproportionate degree of substandard housing"); Bassett, *supra* note 39, at 328 (explaining that discrimination against protected groups, such as women and minorities, is heightened in rural America).

¹³⁴ Cf. Eisenberg, *supra* note 5, at 193 (discussing this stereotype and observing that many African Americans live in rural America).

II. DISTRIBUTIVE JUSTICE AND THE RURAL CONDITION

This Part turns to theories of distributive justice and argues that they have under-examined relevance to the rural condition.¹³⁵ Section A provides a broad overview of distributive justice theories and establishes this inquiry as a Rawlsian one focused on the unfairness of placing burdens on discrete groups for the benefit of all.¹³⁶ Section B discusses the specific burdens of economic loss and environmental hazards, additional theoretical frameworks that emphasize unfairness specific to those burdens, and the unique relevance of these particular factors to today's conditions and the question of whether rural communities have experienced injustice.¹³⁷

A. Theories of Distributive Justice

An exploration of distributive justice and its application to the rural condition today seems critical for several reasons. First, the persistence of rural poverty raises questions as to the distributional decisions that either shape that poverty or fail to address it. Second, the functional role of rural communities in American life and the widespread "ruralization" of economic distress raise questions about whether rural communities have disproportionately shouldered society's burdens and losses and, if so, whether that distribution is "just." Third, scholars' and policymakers' flummoxed response to today's rural challenges—including socioeconomic decline, local government struggles, and infrastructural decay—suggests that a theoretically-grounded discussion of what is fair or unfair about urban and rural dynamics can help inform approaches to these problems.

Literature on the various theories of distributive justice is vast and diverse; one can begin with Aristotle and spend a lifetime on the subsequent 2,400 years of writings.¹³⁸ This Section does not debate or defend the legitimacy of a particular subset of those ideas. Instead, it accepts certain premises as givens and forms a framework by which to assess potential injustices that have shaped rural America.

Prominent concepts purporting to establish how resources should be allocated include Rawlsianism, Kaldor-Hicks efficiency, Pareto efficiency, and equalitarianism.¹³⁹ Questions central to each of these theories include: (1) How should social, economic, and other benefits and burdens be distributed

¹³⁵ See *infra* notes 136–179 and accompanying text.

¹³⁶ See *infra* notes 138–149 and accompanying text.

¹³⁷ See *infra* notes 150–179 and accompanying text.

¹³⁸ See generally ARISTOTLE, ARISTOTLE'S POLITICS (Carnes Lord trans., U. of Chi. Press 2nd ed. 2013) (discussing the pursuit of virtue within political communities).

¹³⁹ Steve P. Calandrillo, *Responsible Regulation: A Sensible Cost-Benefit, Risk Versus Risk Approach to Federal Health and Safety Regulation*, 81 B.U. L. REV. 957, 982 (2001).

throughout a population? (2) Is it acceptable for a minority group's welfare to be reduced in the name of the aggregate welfare? (3) If the answer to the latter question is "yes," what are the conditions warranting such a tradeoff? (4) If a group is sacrificed in the name of aggregate welfare, should there be offsetting benefits or compensation? And finally, (5) what institutional design will achieve the fairest distributions?

Equalitarianism is the only concept that demands full equality in distributions and related socioeconomic status.¹⁴⁰ A synthesis of the other three schools of thought reveals, first, the principle that policy developments are best if no one is made worse off. But, given that virtually all transitions or distributional decisions make someone worse off, that loss can be justified either if the losers are compensated or if the decision enhances the welfare of the most vulnerable members of society.

This Article's inquiry is essentially a Rawlsian one, informed by the idea that unfairness is inherent in "the arbitrary imposition of selective burdens on the few for the benefit of the many."¹⁴¹ Rawls's famous "original position" and "veil of ignorance" concepts address the questions above.¹⁴² He argues that we should design a society as if we did not know what life and characteristics we would be born into.¹⁴³ These principles are based on the premise that we tend to advocate the sacrifice of a particular population in the name of the aggregate welfare if we do not belong to that population. But if we were part of the group made less well off, we would design society's allocation of benefits and burdens to ensure that the sacrificed minority were as well off as possible.¹⁴⁴ In other words, according to Rawls, a certain level of minority sacrifice may be acceptable, but there should be adequately offsetting benefits to the most vulnerable members of society.

The Rawlsian framework has unique applicability to the rural context. Namely, much of traditional rural life centers on productive activities that increase aggregate welfare.¹⁴⁵ This relationship does not inherently necessitate neglect or sacrifice; farmers and miners, for instance, could theoretically be the

¹⁴⁰ *Id.* at 983–84.

¹⁴¹ See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 394 (2000) (discussing Professor Frank Michelman's classic law review article—*Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*—on when a government taking can be "just" within the Rawlsian theory of distributive justice (citing 80 HARV. L. REV. 1165 (1967))).

¹⁴² See RAWLS, *supra* note 14, at 136–42 (discussing the concept of the "veil of ignorance").

¹⁴³ *See id.*

¹⁴⁴ *See id.* at 183–92.

¹⁴⁵ *See* Lichter & Ziliak, *supra* note 58, at 8.

highest-paid workers in a society.¹⁴⁶ Yet, in the United States, the reality of many rural livelihoods has been hard work, hazardous conditions, long hours, uncertain rewards, and limited reciprocal benefits.¹⁴⁷ Distributive justice questions arise at the most fundamental level of urban-rural relations. These relations have raised even more urgent distributive justice questions as traditional rural livelihoods have been phased out, with that decline itself rationalized in the name of collective progress.

In applying the broad theoretical questions posed above, distributive justice inquiries may ask two more specific questions: (1) What are the actual distributions of benefits and burdens among groups, and are they justified? (2) Are the procedures or political processes that determined those allocations fair?¹⁴⁸ This Article focuses more on the former question to make the case that chronic rural poverty is linked to distributive injustice, and the latter question to make the case that rural communities in decline have experienced distributive injustice. But, as will be shown in Part III, the treatment of rural communities seems likely to fail any of these tests.¹⁴⁹ Rural populations of color are among the most vulnerable communities in the country, yet modern distributional decisions consistently fail to improve their quality of life. The alienation expressed by rural communities in decline, in addition to the regional decay they are experiencing, suggests that losses associated with rural decline—which Part III will show cannot be blithely dismissed as a market-based phenomenon—remain uncompensated.

B. The Burdens of Economic Loss and Environmental Hazards

To further illuminate the circumstances affecting communities in decline, the analysis below narrows its focus to emphasize two specific forms of burden: economic losses and environmental hazards. The discussion draws on the concept of the “just transition” to characterize inordinate economic losses that have been imposed on rural communities in decline.¹⁵⁰ The idea of just transi-

¹⁴⁶ See, e.g., Eric Bellman, *With Cash Handouts, India Takes Step Toward Universal Basic Income*, WALL ST. J. (Feb. 1, 2019), <https://www.wsj.com/articles/with-cash-handouts-india-takes-step-toward-universal-basic-income-11549020444> [<https://perma.cc/2CNM-E54Q>] (discussing government measures in India that are moving the country toward providing universal basic income for small farmers).

¹⁴⁷ See Shannon Elizabeth Bell & Richard York, *Community Economic Identity: The Coal Industry and Ideology Construction in West Virginia*, 75 RURAL SOC. 111, 112 (2010); David L. Hard & John R. Myers, *Fatal Work-Related Injuries in the Agriculture Production Sector Among Youth in the United States, 1992–2002*, 11 J. AGROMEDICINE 57, 58 (2006); Pruitt, *supra* note 41, at 169–70.

¹⁴⁸ Kaswan, *supra* note 18, at 1047, 1062.

¹⁴⁹ See *infra* notes 180–320 and accompanying text.

¹⁵⁰ See Daniels et al., *supra* note 37, at 6–7 (discussing “economic externalities that society’s pursuit of environmental protection imposes on the poor and vulnerable” and arguing that “without

tions has grown increasingly popular in the face of efforts to decarbonize the economy. The term first emerged in union advocacy in the mid-twentieth century when curtailments on hazardous industrial activity began to displace workers in those industries.¹⁵¹ The idea was that workers alone should not bear their economic loss if society is to benefit from policies that result in them losing their livelihoods. Rather, the loss should be distributed equitably among everyone.

Although the concept of a just transition has not been widely recognized as a principle of distributive justice, the concentration of economic losses on rural communities signals its theoretical relevance. Many today are discussing just transitions in a forward-looking sense, asking what measures can be taken to ensure a fair distribution of losses in the transition to clean energy. For instance, as scientists and economists have acknowledged that effective reductions in carbon emissions will displace workers in the fossil fuel sector, commentators have recognized the need for measures to ensure that the economic losses associated with this transition are not unfairly concentrated on fossil fuel workers and communities.¹⁵²

Yet, few have applied this lens to the past, asking which workers and communities have already borne disproportionate losses in the name of the greater good. Demands for just transitions equate to demands for the equitable distribution of economic losses.¹⁵³ These demands suggest that it is worthwhile to ask whether past transitions could be deemed unjust, and what consequences flow from “unjust transitions.”

The concept of a just transition raises questions that relate directly to a society’s design and the distributive theories discussed above. Legal and economic transitions are necessary for society to evolve.¹⁵⁴ Legislatures must, it is presumed, be able to regulate without necessarily creating offsetting benefits for anyone who stands to lose in some way as a result of the regulation.¹⁵⁵ This concern is a central focus of discussions on the causes of these losses: most are comfortable compensating or mitigating losses to communities if those losses

full and careful consideration of how environmental protection affects the poor and the vulnerable,” justice for rural America will be unattainable).

¹⁵¹ LES LEOPOLD, *THE MAN WHO HATED WORK AND LOVED LABOR* 468 (2007).

¹⁵² Robert Pollin & Brian Callaci, *A Just Transition for U.S. Fossil Fuel Industry Workers*, AM. PROSPECT (July 6, 2016), <http://prospect.org/article/just-transition-us-fossil-fuel-industry-workers> [<https://perma.cc/6F8H-DWGT>].

¹⁵³ See David J. Doorey, *A Law of Just Transitions? Putting Labour Law to Work on Climate Change*, 12 OSGOODE LEGAL STUD. RES. PAPER SERIES, no. 35, 2016, at 1, 2, 9; Eisenberg, *supra* note 24, at 278.

¹⁵⁴ Doremus, *supra* note 31, at 3.

¹⁵⁵ See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (explaining that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law”).

are clearly a result of public action.¹⁵⁶ This acceptance arises most notably in the takings context where compensation is constitutionally required.¹⁵⁷ Employment losses may also evoke such sympathy if public causation is clear. But mitigating losses associated with “economic transitions” strike commentators as less worthy of attention—even though differentiating legal and economic transitions in our society seems virtually impossible.¹⁵⁸ In short, laissez-faire ideologies in the United States suggest that we should err on the side of having workers bear their own losses, and only in rare cases and under certain conditions have society as a whole attempt to shoulder those losses collectively.¹⁵⁹

This stance raises the question of what is to be made of rural America. Declining rural communities are a living (or dying) example of the logical extreme of asking communities and workers to shoulder concentrated burdens of economic losses. Although the trade adjustment programs discussed below appear to have attempted to offset some rural losses, rural conditions today suggest such measures were mere drops in the bucket. To deny that this experiment has been a failure is to deny the existence of literal widespread death and despair outside the country’s major urban centers, as well as the political and cultural alienation that has percolated in rural places for decades.¹⁶⁰

The theoretical concerns outlined here, such as the repugnancy of minority sacrifice in the name of aggregate welfare, suggest that just transitions are a principle of distributive justice worth deeper contemplation. As with other models of distributive justice, just transitions have a substantive and a procedural component. A transition is substantively “unjust” if workers in a particular sector alone bear the costs of societal evolution beyond a hazardous or obsolete industry.¹⁶¹ The procedural path toward a just transition involves more meaningful avenues for input by affected groups in order for them to have a chance to ensure better outcomes for themselves.¹⁶²

¹⁵⁶ Cf. Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 513–14 (1986) (arguing that the way to approach transitional policy is determining whether there was uncertainty of future government policy when investments were made).

¹⁵⁷ Cf. Michelman, *supra* note 31, at 1165 (noting the role of the takings clause in determining when the government can implement transitions while concentrating costs on discrete individuals or groups).

¹⁵⁸ See Kaplow, *supra* note 156, at 534 (“[T]here is little to distinguish losses arising from government and market risk.”).

¹⁵⁹ See Revesz, *supra* note 17, at 1500 (explaining that the idea that legal rules can or should not redistribute wealth or income “has become a tenet of law and economics orthodoxy”).

¹⁶⁰ See generally DYER, *supra* note 20 (theorizing connections among abrupt rural economic losses and rise in rural antigovernment sentiment).

¹⁶¹ Fergus Green, *Transition Policy for Climate Change Mitigation: Who, What, Why and How* 3 (Crawford Sch. of Pub. Policy, Australian Nat’l Univ., Working Paper No. 1805, 2018).

¹⁶² See Doorey, *supra* note 153, at 43.

In an era of rapid, ongoing transitions and increasing inequality, the concept's relevance will continue to be implicated. Yet, more pragmatically, an embrace of the just transition concept may enhance political stability and reduce polarization more than current neoliberal policies. Ample literature connects rural economic marginalization with widespread anti-government sentiment.¹⁶³ It is worth contemplating whether the failure to ensure just transitions over the past several decades has contributed to this alienation. The past failure to ensure just transitions also raises the question of what risks, both ethical and practical, may be run in the future by allowing economic losses to be concentrated on other discrete populations.¹⁶⁴

The subsequent discussion also focuses on the specific burden of environmental hazards in declining rural communities. Environmental justice theory focuses in part on fairness in society's distributions of environmental hazards or benefits. This framework, too, illuminates modern rural conditions. Primarily, it is the environmental context where utilitarian thinking about rural places seems the most tempting. Because rural places have fewer people and more space, it seems almost natural that land uses such as shale gas extraction, nuclear waste storage, and wind farm installations are destined to be borne by rural communities, when we would be loath to allow them in cities, or when doing so would be impracticable.¹⁶⁵ Rural environmental injustice has also received little academic and public attention. Because of widespread rural environmental hazards that have been pursued in the name of the greater good, it seems worth exploring relationships between rural communities and society's environmental benefits and burdens.

Rural environmental injustice has tended to be at the periphery of environmental justice conversations.¹⁶⁶ This oversight stems in part from a focus

¹⁶³ See CRAMER, *supra* note 1, at 9 (detailing white, rural working-class resentment towards politicians who do not reflect their social values and who are perceived as not promoting the interests of rural communities); Doorey, *supra* note 153, at 21 (noting that decent employment is central to political stability). See generally ARLIE HOCHSCHILD, *STRANGERS IN THEIR OWN LAND* (2016) (examining social factors that contributed to the rise of the right-wing Tea Party in a rural town).

¹⁶⁴ Cf. Revesz, *supra* note 17, at 1498 (noting the ability of groups to impede welfare-enhancing legal reforms when those groups stand to bear disproportionate burdens, and suggesting such distributional issues played a role in 2016 presidential election).

¹⁶⁵ See Shelley Welton & Joel Eisen, *Clean Energy Justice: Charting an Emerging Agenda*, 43 HARV. ENVTL. L. REV. 308, 361 (2019) (explaining how the "urban/rural divide" is more pronounced in the context of siting clean energy production sources because renewable facilities are more difficult than conventional ones to site in population centers); Sarah Zhang, *The White House Revives a Controversial Plan for Nuclear Waste*, THE ATLANTIC (Mar. 21, 2017), <https://www.theatlantic.com/science/archive/2017/03/yucca-mountain-trump/519972/> [<https://perma.cc/N6JU-3T8H>] (discussing the long-planned nuclear storage facility at Yucca Mountain, a location chosen in part due to its remoteness).

¹⁶⁶ See David N. Pellow, *Environmental Justice and Rural Studies: A Critical Conversation and Invitation to Collaboration*, 47 J. RURAL STUD. 381, 381 (2016) (observing that although "the rural

on race and class in rural environmental justice scenarios.¹⁶⁷ Meanwhile, “the spatial relationships and tensions between urban and rural communities” have not been sufficiently studied or emphasized.¹⁶⁸ The limited legal literature on rural environmental injustice in the United States has tended to focus either on farmworkers or on natural resource extraction and energy production.¹⁶⁹ A recent discourse among rural sociologists takes a broader view, characterizing the urban majority’s treatment of the rural as its “dumping ground.”¹⁷⁰

One reason for the limited attention to rural environmental injustice may be the tacit belief that rural environmental injustice is somehow more “natural” than environmental injustice elsewhere; in most minds, siting hazardous land uses in rural places probably makes sense.¹⁷¹ Rural places have more space and

dimensions of environmental justice studies have long been present,” they have generally been “only in the background, rarely foregrounded, centered, or taken seriously as a social, ecological, cultural, economic, and political category that shapes [environmental justice] struggles everyday”).

¹⁶⁷ Cf. Loka Ashwood & Kate MacTavish, *Tyranny of the Majority and Rural Environmental Injustice*, 47 J. RURAL STUD. 271, 271 (2016) (arguing that rural issues should be brought to the forefront of environmental justice scholarship, “alongside race and class, to better address inequality in the ecohuman community”); Lisa R. Pruitt & Linda T. Sobczynski, *Protecting People, Protecting Places: What Environmental Litigation Conceals and Reveals About Rurality*, 47 J. RURAL STUD. 326, 326–27 (2016) (observing that environmental litigation in rural areas is often framed within the context of race rather than rurality, and contending that classist attitudes toward rural whites helped explain their exclusion from environmental advocacy concerning a hog farm).

¹⁶⁸ Pellow, *supra* note 166, at 382.

¹⁶⁹ See, e.g., Ralph Santiago Abascal, *California Rural Legal Assistance and Environmental Justice*, 14 CHICANA/O LATINA/O L. REV. 44, 44–47 (1994); Jeanne Marie Zokovitch Paben, *Green Power & Environmental Justice—Does Green Discriminate?*, 46 TEX. TECH L. REV. 1067, 1076–77 (2014) (observing that “a lot of people tend to think of environmental justice communities as being only in urban areas; however, there has been growing attention paid to environmental justice impacts from raw materials development thrust upon rural communities”); Raina Wagner, *Adapting Environmental Justice: In the Age of Climate Change, Environmental Justice Demands a Combined Adaptation-Mitigation Response*, 2 ARIZ. J. ENVTL. L. & POL’Y 153, 162 (2011) (noting the rural nature of building wind farms on Native-American reservations); Anietie Maureene-Ann Akpan, Note, *Tierra y Vida: How Environmental Injustice Has Adversely Impacted the Public Health of Rural Brown Populations in South Texas*, 43 TEX. ENVTL. L.J. 321, 322 (2013); Sierra M. Jefferies, Note, *Environmental Justice and the Skull Valley Goshute Indians’ Proposal to Store Nuclear Waste*, 27 J. LAND RESOURCES & ENVTL. L. 409, 409 (2007).

¹⁷⁰ See Ashwood & MacTavish, *supra* note 167, at 274.

¹⁷¹ See Vicki Been, *What’s Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1002 (1993) (“Because local protest can be costly, time-consuming, and politically damaging, siting decision makers often take the path of least resistance—choosing sites in neighborhoods that are least likely to protest effectively. Not surprisingly, many of the neighborhoods selected are populated disproportionately by the poor and by people of color.”) (footnotes omitted); see also Ashwood & MacTavish, *supra* note 167, at 271 (“[P]ervasive logic commands state-industrial complexes across developing and developed nations: rural sites have ample resources and fewer people, an ideal pairing for taking and dumping.”).

fewer people. The hazards have to go somewhere. And rural communities have often neither regulated nor resisted hazardous land uses in their environs.¹⁷²

But if utilitarian reasoning—that minority sacrifice is justified by a concomitant increase in aggregate welfare—is generally considered ethically repugnant, why do so many embrace this form of reasoning when it concerns the utilization of rural land and people?¹⁷³

The first reason is likely a belief that rural land uses reflect community preferences.¹⁷⁴ But it is not clear that rural communities have always acquiesced to environmental hazards, despite what coal miners featured in the media might lead the public to believe. Many rural communities have vocally protested hazardous industrial activities or even attempted to outlaw them—as has been the case with natural resource extraction, hazardous waste storage, and agribusiness throughout the country—only to have those activities imposed nonetheless.¹⁷⁵

Indeed, the scarcity of land use regulations in rural communities does not necessarily reflect a lack of concern for how land is used. It can also reflect a

¹⁷² See Ashwood & MacTavish, *supra* note 167, at 274; cf. Craig Anthony Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U. L. REV. 1, 103 (1998) (laying out five examples of communities that have added land use regulations in an effort to better insulate and protect against hazardous uses and environmental injustices); Kaswan, *supra* note 18, at 1038–40 (discussing and challenging the “community preferences model” of environmental justice that proposes the disproportionate siting of undesirable land uses in rural areas is not unjust if the siting project satisfies the locality’s preferences).

¹⁷³ See Kaswan, *supra* note 18, at 1062–67 (acknowledging that Rawls and other scholars deem a utilitarian approach “to be inconsistent with the idea of reciprocity implicit in the notion of a well-ordered society” and that “[e]quality is . . . a guiding principle in determining whether the distribution of [locally undesirable land uses] is just”); see also OFFICE OF CIVILIAN RADIOACTIVE WASTE MGMT., U.S. DEP’T OF ENERGY, YUCCA MOUNTAIN SCIENCE AND ENGINEERING REPORT 1–16 (first rev. 2002), <https://www.energy.gov/sites/prod/files/edg/media/SER.PDF> [perma.cc/MX6Z-TAJN] (illustrating that low population density was one reason behind the proposed siting of Yucca mountain nuclear waste storage site); Paben, *supra* note 169, at 1095 (discussing the argument for placing polluting biomass plants away from urban centers because “you can pollute more and you are not competing with the polluting rights of other industries”). See generally Michael B. Gerrard, *Fear and Loathing in the Siting of Hazardous and Radioactive Waste Facilities: A Comprehensive Approach to a Misperceived Crisis*, 68 TUL. L. REV. 1047 (1994) (discussing considerations for hazardous and radioactive waste disposal sites in urban and rural settings).

¹⁷⁴ See Kaswan, *supra* note 18, at 1077–78.

¹⁷⁵ See, e.g., Emily A. Kolbe, Note, “Won’t You Be My Neighbor?” *Living with Concentrated Animal Feeding Operations*, 99 IOWA L. REV. 415, 441–42 (2013) (describing negative impacts of concentrated animal feeding operations (CAFOs) and Iowans’ growing opposition to them); Ryan Teel, Note, *Not in My Neighborhood: The Fight Against Large-Scale Animal Feeding Operations in Rural Iowa, Preemptive Tactics, and the Doctrine of Anticipatory Nuisance*, 55 DRAKE L. REV. 497, 519–523 (2007) (observing the difficulty that localities have in expelling CAFOs from the community once they are established there). See generally CHAD MONTRIE, *TO SAVE THE LAND AND THE PEOPLE: A HISTORY OF OPPOSITION TO SURFACE COAL MINING IN APPALACHIA* (2003) (chronicling fairly widespread opposition to surface mining in the Appalachia region during the twentieth century despite support for mining from federal, state, and local governments).

lack of capacity to adopt the local legal regimes that more populated and sophisticated communities use to protect themselves. Some would-be polluters engage in strategic searches for those places where people are the least equipped to protect themselves.¹⁷⁶ Because many rural residents are governed by sparsely populated, poorly equipped counties rather than municipalities with frameworks such as zoning ordinances, rural residents may be all the more vulnerable to these predatory practices.¹⁷⁷ These communities' smaller populations also put them at a disadvantage when it comes to garnering the public attention needed to successfully prevent undesired land uses.

Even if a utilitarian argument in favor of causing the least harm to the fewest people supports the prospect of placing environmental hazards into rural communities, the question of procedural justice still remains.¹⁷⁸ If rural communities were better equipped to participate in the political process and voice their opposition, would the substantive inequity still be imposed upon them based on this utilitarian rationale?

Finally, another question warranting contemplation is whether the recent proliferation of rural blight is an environmental justice issue. As population migration and the urbanization trends continue, remaining rural residents are increasingly saddled with the costs of empty and decaying built infrastructure. Rural population outmigration has largely resulted from measures pursued in the name of aggregate welfare, such as liberalized international trade. Leaving those residents to handle this widespread problem on their own seems like yet another burden concentrated on a discrete population despite the majority's role in creating it.

In sum, rural environmental injustice has generally been overlooked. Yet the environmental justice framework has unique applicability to the rural context in light of the collective temptation to justify locating environmental hazards in rural places, as well as traditional rural livelihoods' closer connections to land-based industrial activity. It may be tempting to dismiss rural environmental injustice as more "natural" or the lesser of two evils when compared to other forms of environmental injustice. But rationalizing rural environmental

¹⁷⁶ See Eisenberg, *supra* note 127, at 219 (describing a natural gas company's "military-style" tactics to "manipulate" communities and their decisionmakers in rural Pennsylvania).

¹⁷⁷ See Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095, 1097 (2008) (discussing the vulnerability of unincorporated rural communities).

¹⁷⁸ Cf. Roopali Phadke, *Public Deliberation and the Geographies of Wind Justice*, 22 SCI. AS CULTURE 247, 247 (2013) (observing that "[r]ural communities at the forefront of new energy development are asking why they are disproportionately being asked to carry the weight of the new carbon economy while urban residents continue their conspicuous use of energy"); Welton & Eisen, *supra* note 165, at 361 (explaining that rural communities are often asked to bear a disproportionate burden of energy siting simply because their geographic factors make them more attractive or advantageous).

injustice based on aggregate welfare raises the same distributive justice concerns as environmental injustice elsewhere. Perhaps the most fundamental question is whether this form of utilitarianism is recognized for what it is—a sacrifice of a population “for the greater good,” raising important normative questions of justice.

Combining economic losses and environmental hazards into their own distributive justice framework paints a potent picture of “what happened in rural America.” By highlighting both economic losses and environmental burdens, this framework illuminates important contours of today’s urban-rural divisions. Many rural communities spent the industrial era caught in a catch-22: local employers polluted with impunity, but they were the only source of economic activity.¹⁷⁹ When the hazardous industries left—as many have in recent decades—their disappearance did not offer relief, but only a qualitatively different struggle. Declining rural communities today have thus been left with neither the pristine rural environment of our collective imagination, nor the once-storied industrial spirit of the American small town. These losses and burdens shape the modern rural condition for many communities in decline.

III. A DISTRIBUTIVE JUSTICE CRITIQUE OF THE LAW’S TREATMENT OF RURAL LIVELIHOODS

This Part applies the framework discussed above in a critique of the law’s treatment of rural livelihoods for the past several decades.¹⁸⁰ Section A discusses actual distributions of resources to rural communities and argues that these distributions raise fairness concerns.¹⁸¹ Section B applies a distributive justice lens to legal developments in three major sectors of the rural economy.¹⁸² Subsection 1 of Section B critiques the recent evolution of legal regimes shaping the agricultural sector;¹⁸³ Subsection 2 does the same for extractive industries;¹⁸⁴ and Subsection 3 focuses on manufacturing.¹⁸⁵

A. Inequitable Allocations of Resources as Distributive Injustice

Inequitable distributions of resources to rural communities arise across a variety of resource types. These range from direct spending to infrastructure

¹⁷⁹ See Bell & York, *supra* note 147, at 112 (explaining how extractive industries continue to both exploit and maintain the support of rural communities where they operate despite harming the communities’ local environments and no longer providing the jobs they once did).

¹⁸⁰ See *infra* notes 181–320 and accompanying text.

¹⁸¹ See *infra* notes 186–202 and accompanying text.

¹⁸² See *infra* notes 203–320 and accompanying text.

¹⁸³ See *infra* notes 207–243 and accompanying text.

¹⁸⁴ See *infra* notes 244–281 and accompanying text.

¹⁸⁵ See *infra* notes 282–320 and accompanying text.

development to access to services that may be private, but are nonetheless necessary. Quantifying all of the resource distributions between urban and rural communities is, of course, difficult to do. Nonetheless, literature and data examining different sectors appear to reveal a pattern of rural communities, as a whole, being underserved by public, quasi-public, and private providers.

Limited access to broadband internet has perhaps received the most attention of late as an issue of rural communities being unfairly left behind. As of 2019, twenty-six percent of Americans living in rural areas and thirty-two percent of Americans living in Tribal lands lacked access to the Federal Communications Commission's minimum standard of broadband coverage; only 1.7% of Americans living in urban areas lacked such coverage.¹⁸⁶ Concerns of inequitable access arise with even more basic needs. Rural schools are disproportionately underfunded.¹⁸⁷ A 2018 report on energy poverty argued that rural residents' relatively higher household burden of energy costs "is not a story about high energy prices," but one illustrating "historic inequities in the deployment of energy infrastructure" disadvantaging rural households.¹⁸⁸ Compared to their urban counterparts, rural residents received less than fifty percent the rate of annual per capita federal spending from 1994 to 2001 in general.¹⁸⁹ Ample literature establishes a gaping disparity between urban and rural access to doctors and lawyers.¹⁹⁰ More money is available through private philanthropy in urban areas than in rural areas as well.¹⁹¹ State-specific studies have shown that these and other inequities persist throughout the country.¹⁹² Conditions are particularly egregious on Native-American reservations, which are mostly rural and governed closely by federal agencies; a 2003 report from

¹⁸⁶ FED. COMMC'NS COMM'N, FCC-19-44, 2019 BROADBAND DEPLOYMENT REPORT 16.

¹⁸⁷ See Anna Williams Shavers, *Rethinking the Equity vs. Adequacy Debate: Implications for Rural School Finance Reform Litigation*, 82 NEB. L. REV. 133, 142, 144 (2003) (discussing disproportionately low spending on rural schools).

¹⁸⁸ LAUREN ROSS ET AL., AM. COUNCIL FOR AN ENERGY-EFFICIENT ECON., THE HIGH COST OF ENERGY IN RURAL AMERICA: HOUSEHOLD ENERGY BURDENS AND OPPORTUNITIES FOR ENERGY EFFICIENCY 46 (2018), <https://aceee.org/sites/default/files/publications/researchreports/u1806.pdf> [perma.cc/E6D7-SDUM].

¹⁸⁹ *Federal Development Funding Lower in Rural Areas, Study Finds*, FED. RES. BANK MINNEAPOLIS (Nov. 1, 2004), <https://www.minneapolisfed.org/article/2004/federal-development-funding-lower-in-rural-areas-study-finds> [<https://perma.cc/ZEH7-KFUP>].

¹⁹⁰ See, e.g., Bassett, *supra* note 39, at 306, 323 (discussing rural Americans' reduced access to decent education and lawyers); Bauer, *supra* note 16, at 241 (discussing the uneven ratio of patients to doctors in rural America and rural residents' lack of access to rural hospitals); Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 312 (2010) (explaining inadequate funding of the justice system—including county attorneys and appointed attorneys for indigents—in rural Arizona).

¹⁹¹ See Bauer, *supra* note 16, at 241.

¹⁹² See generally Pruitt & Colgan, *supra* note 190 (discussing inequities in access to the justice system for Arizonans living in rural counties).

the U.S. Commission on Civil Rights found significant disparities between funding for tribal needs versus funding for other groups.¹⁹³

Some would argue that it is only natural that access to these resources would be more limited in rural areas. Measures to diffuse virtually any form of service or development are more expensive per capita outside cities due to the need to travel longer distances and serve more dispersed populations. For public services, reaching rural communities will strain public coffers, whereas for private services, providers stand to gain more limited profits.

Although it is true that a less dense population separated by more distance may be more costly and difficult to serve, the mere idea that rural life is inefficient stymies efforts to even attempt to serve rural communities adequately.¹⁹⁴

These trends raise fundamental questions about the obligation of local, state, and federal governments to protect those who reside within their boundaries, as well as whether these resource allocations can be deemed “unjust.”¹⁹⁵ In the public sector, it seems difficult to justify not striving harder to meet basic rural needs. Although few would argue that it would be unjust for a private service provider like a doctor to decline to locate in a rural area, policymakers’ failure to enact programs to promote equitable access to necessary private services seems just as concerning as disproportionately low public expenditures.

¹⁹³ See U.S. COMM’N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 116 (2003), <https://www.usccr.gov/pubs/na0703/na0204.pdf> [perma.cc/C9G8-4KQP] (recommending that all federal agencies administering Native-American programs identify unmet needs and address immediate requirements for increased funding, including infrastructure development and support for tribal courts); Patrice H. Kunesh, *A Call for an Assessment of the Welfare of Indian Children in South Dakota*, 52 S.D. L. REV. 247, 248 (2007) (discussing poverty conditions on South Dakota reservations and state and federal policymakers’ failure to support necessary services).

¹⁹⁴ Bassett, *supra* note 39, at 283 n.26 (citing JANET M. FITCHEN, ENDANGERED SPACES, ENDURING PLACES: CHANGE, IDENTITY, AND SURVIVAL IN RURAL AMERICA 157–58 (1991)). Fitchen writes:

The “cost-effectiveness” model and “efficiency” emphasis in human service delivery has had an increasingly negative impact on distribution of services for low-income residents in rural areas. It is simply more costly to serve small, dispersed populations of poor people than large, concentrated ones, not only in terms of the obvious higher cost of transportation but also in that when the service is actually taken out to the more remote areas of the county, there are fewer people there to be served. Because of the higher per-person cost and the smaller number of persons to be served, decisions are made at federal, state, and local levels that “we simply cannot afford to serve those rural areas.”

FITCHEN, *supra*.

¹⁹⁵ See, e.g., Anderson, *supra* note 8, at 485 (describing a 911 operator unable to assist a woman she heard being murdered over the phone because budgetary cuts had left the local police department without officers to dispatch).

Defenders of the status quo will raise two additional arguments to justify the inequities present in rural Americans' everyday life. First, rural residents—the majority of whom are white and (if they vote) conservative—are unlikely to demand better access to resources through the political process; sociologist Arlie Hochschild calls poor rural whites' tendency to vote against expanded public services “the great paradox.”¹⁹⁶ Second, rural residents in fact benefit from disproportionately high resources in other contexts. Some note, for instance, that rural regions receive more than they contribute to state and federal coffers.¹⁹⁷

The first argument raises a variety of questions, but ultimately fails because it is not clear that election outcomes are the only factor that should decide the fate of a region. Perhaps most concerning, these inequitable resource allocations fall harder on chronically poor rural communities, which are disproportionately people of color who tend to vote for Democrats.¹⁹⁸ Thus, majoritarian mandates cannot be the only measure by which to decide whether communities need or deserve help. As to the second argument—that rural communities benefit disproportionately from other resources—they do, in some contexts.¹⁹⁹ But those resources are almost overwhelmingly designed to benefit poor people; rural communities benefit disproportionately, for instance, from Social Security, Medicare, Medicaid, food stamps, and unemployment benefits.²⁰⁰ In contrast, the resources that rural residents are denied—such as infrastructure, broadband, and education—tend to be capacity-building re-

¹⁹⁶ HOCHSCHILD, *supra* note 163, at 5.

¹⁹⁷ Nathan Arnosti & Amy Liu, *Why Rural America Needs Cities*, BROOKINGS (Nov. 30, 2018), <https://www.brookings.edu/research/why-rural-america-needs-cities/> [perma.cc/7YGR-XWY9].

¹⁹⁸ HAMILTON ET AL., *supra* note 67, at 4.

¹⁹⁹ See, e.g., Rich Morin et al., *A Bipartisan Nation of Beneficiaries*, PEW RES. CTR. (Dec. 18, 2012), <https://www.pewsocialtrends.org/2012/12/18/a-bipartisan-nation-of-beneficiaries/> [https://perma.cc/PS2J-8G9A] (stating that rural Americans receive a disproportionate amount of social service entitlements when compared to urban Americans).

²⁰⁰ Julia Foutz et al., *The Role of Medicaid in Rural America*, KAISER FAMILY FOUND. (Apr. 25, 2017), <https://www.kff.org/medicaid/issue-brief/the-role-of-medicaid-in-rural-america/> [https://perma.cc/UWM2-GRFL] (discussing Medicaid coverage in rural America); Tim Marema, *The Geography of Food Stamps*, DAILY YONDER (Dec. 31, 2018), <https://www.dailyyonder.com/geography-food-stamps/2018/12/31/> [https://perma.cc/N67T-K5GK] (illustrating food stamp distribution throughout the United States); Morin, *supra* note 199 (discussing Social Security and Medicare); Derek Thompson, *7 Facts About Government Benefits and Who Gets Them*, THE ATLANTIC (Dec. 18, 2012), <https://www.theatlantic.com/business/archive/2012/12/7-facts-about-government-benefits-and-who-gets-them/266428/> [https://perma.cc/6H2Z-TSEC] (illustrating that rural residents are more likely to receive entitlements generally). Some might argue that farm subsidies are an example of rural communities receiving higher rates of resources, but subsidies in large part flow to the industrialized agriculture operations which this Article criticizes. See Tamar Haspel, *Why Do Taxpayers Subsidize Rich Farmers?*, WASH. POST (Mar. 15, 2018), https://www.washingtonpost.com/lifestyle/food/why-do-taxpayers-subsidize-rich-farmers/2018/03/15/50e89906-27b6-11e8-b79d-f3d931db7f68_story.html [https://perma.cc/3LJQ-M4GV].

sources that can spur economic growth and reduce regional dependency on direct aid. One must at least ask whether better distributional decisions for dependency-reducing measures might help reduce distributions of resources geared toward alleviating crises.

Although some characteristics of rural communities may naturally make them more difficult or costly to serve, policy decisions concerning rural places are nonetheless infused with value judgments and choices as to which communities merit service and to what extent. In other words, it should not be presumed that rural communities are naturally fated to poverty and struggle.²⁰¹ Despite the importance of rural activities to society as a whole, available data on distributions of resources to rural places in the United States bear out the idea that they do not enjoy an equitable allocation of critical resources.²⁰² These inequities alone raise questions of distributive justice.

Ultimately, it remains unclear how the distributional disparities discussed here can be justified, looking back to the frameworks of justice described above. Some of the country's most vulnerable residents live in these underserved areas. It also seems unlikely that their limited access to these resources is somehow offset or compensated by decisions to direct them elsewhere.

B. Majoritarian-Utilitarian Sacrifice as Distributive Injustice

This Section provides a distributive justice critique of the law and policy frameworks shaping three key economic sectors that once helped sustain rural life: agriculture,²⁰³ natural resource extraction,²⁰⁴ and manufacturing.²⁰⁵ For each sector, the discussion highlights (1) major legal developments of the past several decades; (2) how those legal developments imposed or overlooked concentrated economic losses and environmental hazards that burdened rural people and places; and (3) how these policies that undermined rural welfare were rationalized by service to “the greater good,” yet did not result in gains for society's most vulnerable or offsetting measures for the communities affected.

²⁰¹ Cf. Joel Kotkin & Mark Schill, *Where Small Town America Is Thriving*, FORBES (Mar. 8, 2018), <https://www.forbes.com/sites/joelkotkin/2018/03/08/where-small-town-america-is-thriving/#75b8449538b8> [<https://perma.cc/9DER-F889>] (arguing that “America’s smaller communities are far more diverse—and have far greater potential—than is commonly believed”).

²⁰² See Steven M. Virgil, *Community Economic Development and Rural America: Strategies for Community-Based Collaborative Development*, 20 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 9, 16–17 (2010).

²⁰³ See *infra* notes 207–243 and accompanying text.

²⁰⁴ See *infra* notes 244–281 and accompanying text.

²⁰⁵ See *infra* notes 282–320 and accompanying text.

This Section therefore demonstrates how utilitarian thought embodied in decision-making processes effectuated a grand sacrifice of rural communities.²⁰⁶

1. Agriculture

Agricultural life in the United States has never been easy. In the 1930s, when farmers accounted for two-thirds of the rural population, high rates of farm poverty were a problem nationwide, inspiring the first federal interventions into rural poverty.²⁰⁷ By the 1960s, farmers made up approximately one-quarter of the rural population and rural poverty was an issue examined in both

²⁰⁶ In the interest of keeping this Article manageable, this discussion puts aside in-depth consideration of public lands in the American West. Nonetheless, the substantial role public lands play in rural communities cannot be ignored. The vast majority of land—most of it rural—in many western states is owned by the federal government and managed by federal agencies. The public lands regime involves a unique legal apparatus that warrants its own consideration. Yet, a synthesis of prior articles by this author and others suggests that the just transitions and environmental justice analysis is relevant to the public lands as well. First, as the public lands regime transitioned from an “open-access” model to one focused more on conservation—and therefore curtailed traditional uses such as ranching, natural resource extraction, and certain tribal rights—it is not clear that policymakers and managers did enough to make that transition “just.” See Ann M. Eisenberg, *Do Sagebrush Rebels Have a Colorable Claim? The Space Between Parochialism and Exclusion in Federal Lands Management*, 38 PUB. LAND & RESOURCES L. REV. 57, 86 (2017) (contemplating literature suggesting that western rural communities find agency management to be unclear, inconsistent, and arbitrary, with agencies recognizing property rights in some longstanding uses and not others). This was, of course, after the far more egregious forced removal of Native Americans. Daniels et al., *supra* note 37, at 27. As to environmental justice, public lands communities do not bear a disproportionate burden of environmental hazards. However, they do arguably bear a disproportionate burden of conservation priorities. Although the public lands conserve land, public lands communities still experience the more limited autonomy associated with rural non-development and the procedural limitations associated with environmental justice. See Eisenberg, *supra*, at 87 (contemplating whether rural communities affected by public lands management experience “reverse environmental justice” because “the rhetoric used to justify vast public land holdings in the West—that those lands ‘belong to all Americans’—evokes an analogous subjugation of local will to ‘the greater good’”). See generally Daniels et al., *supra* note 37 (discussing the need to more deeply consider unequal distributions of burdens in environmental protection, impacts on local economic opportunity, and environmental protection’s limitations on self-determination for groups such as Native Americans excluded from public lands). Although critics of the public lands regime often point to the solicitude afforded to companies in the extractive industry—and that criticism is well-noted—fewer have observed the effects of public lands management on individual and community livelihoods. See Stephen R. Miller, *As Bundy’s Malheur Takeover Ends, the Real Concerns of Sagebrush Country Ranchers Linger*, LAND USE PROF BLOG (Jan. 26, 2016), http://lawprofessors.typepad.com/land_use/2016/01/as-bundys-malheur-takeover-ends-the-real-concerns-of-sagebrush-country-ranchers-linger.html [<https://perma.cc/46AY-7LVR>] (“[S]pecies protection has hit this region hard. . . . [T]here are families that have been farming these federal lands for generations . . . but do not own it. There is an odd tenant-farmer reality: some of these families have been here for generations but do not own any land. This creates immense hostility, especially when new conditions are placed on those permits.”); see generally Chris Armstrong, *Sharing Conservation Burdens Fairly*, 33 CONSERVATION BIOLOGY 554 (2019).

²⁰⁷ Weber & Miller, *supra* note 72, at 43–45.

farm and non-farm contexts.²⁰⁸ Today, farmers—most of whom also earn non-farm income—make up less than five percent of the rural population and are not the main object of poverty-related concern.²⁰⁹ Farmworkers, by contrast, face high rates of poverty, difficult working conditions, and other forms of vulnerability.

Even if the traditional small farm was not the romanticized version seen on television, commentators focusing on the nexus of the evolution of the agricultural sector and community economic development tend to agree on one thing: farm consolidation from the mid-twentieth century to the present was not a positive development for farming communities as a whole.²¹⁰

The 1930s saw the creation of the foundation for modern agricultural policy. The 1933 Agricultural Adjustment Act (the first “Farm Bill”), though sometimes understood as providing aid to the poor or small farmers, in fact started the wheels turning toward dramatic farm consolidation over the next ninety years—tilting the scale in favor of large agribusiness.²¹¹ The Farm Bill

²⁰⁸ *Id.* at 45.

²⁰⁹ See Bruce Weber & Kathleen Miller, *Poverty in Rural America Then and Now*, in RURAL POVERTY IN THE UNITED STATES, *supra* note 10, at 45–46.

²¹⁰ Mary Jane Angelo, *Corn, Carbon, and Conservation: Rethinking U.S. Agricultural Policy in a Changing Global Environment*, 17 GEO. MASON L. REV. 593, 602 (2010) (explaining that “[f]rom an economic and social standpoint, non-labor intensive industrial agriculture has led to fewer farmers producing the vast majority of crops, the virtual disappearance of the traditional family farm, high-risk working and living conditions for farm laborers, increased production costs, and a decline of economic and social conditions in rural communities”); Coppess, *supra* note 21, at 370 (noting a complex set of shifts in farm consolidation as the most notable development since the last major farm economic crisis in 1980s); Hamilton, *Harvesting the Law*, *supra* note 21, at 567 (describing the “Big Ag” period stemming from the 1980s to the present, with some present-day evolution toward food localism, as with Community-Supported Agriculture programs); Hamilton, *Myth Making*, *supra* note 21, at 10 (discussing how “structural shifts—in land tenure, farm consolidation and livestock production—are often facilitated by public programs such as farm income support, crop insurance, the RFS, and farm lending practices”); Mandell, *supra* note 19, at 101 (observing that the U.S. Department of Agriculture Secretary Butz’s focus “on the mechanization, industrialization, and commoditization of agriculture required larger investments in capital than traditional farming” and that “[t]he increasing need to invest heavily in equipment, fertilizers, pesticides, and herbicides in order to stay competitive meant that only farmers with access to capital could remain competitive under the new system”); Merrett & Struthers, *supra* note 6, at 36; Rosenberg & Stucki, *supra* note 3, at 13.

²¹¹ Rosenberg & Stucki, *supra* note 3, at 14; Erin Morrow, *Agri-Environmentalism: A Farm Bill for 2007*, 38 TEX. TECH L. REV. 345, 369 (2006). Morrow notes,

The farm bill does not subsidize all farmers. Farm bill provisions provide little assistance for or entirely exclude many farmers, crops, regions, and even entire industries within agriculture. Meanwhile, corporate agriculture receives the bulk of farm bill funds, putting additional pressure on farm policy intended to preserve small family farms. The farm bill, in an arbitrary case of line-drawing, focuses on a few commodity crops.

Morrow, *supra*, at 369–70.

has been renewed every five years since its enactment in 1933.²¹² Although initially intended as a modest intervention into crop markets, the Farm Bill is entangled with nearly all aspects of rural community development. For years, critics have argued that the Farm Bill serves to “subsidize the expansion of a mega-farm that puts family farmers out of business.”²¹³ Even in early Farm Bills, “farmers, tenants, and sharecroppers were ‘shoved aside in the rush toward bigger units, more tractors, and less men per acre,’” reducing the number of farmers (both white and black) by approximately one-third by 1945.²¹⁴ By 1970, ninety percent of black farmers, who had primarily been located in the South, were forced out of their agricultural livelihoods and driven northward in the Great Migration because the U.S. Department of Agriculture facilitated farm consolidation, mechanization, and various forms of discrimination, such as withholding loans.²¹⁵

Moving forward in history, commentators often point to President Nixon’s Secretary of Agriculture, Earl Butz, as the champion of modern farm consolidation, agricultural industrialization, and the high-volume cultivation of monoculture cash crops.²¹⁶ Others point out, though, that the programs associated with Butz—such as cutting production controls for corn or weakening supply management that helped control commodity prices and support farm livelihoods—in fact predate his time in office.²¹⁷ In any case, the 1970s saw continued federal support for agricultural industrialization and consolidation, which arguably became more mainstream during that era.

²¹² JIM MONKE, CONG. RESEARCH SERV., R45210, FARM BILLS: MAJOR LEGISLATIVE ACTIONS, 1965–2018, at 1 (2018).

²¹³ Daniel Imhoff, *Overhauling the Farm Bill: The Real Beneficiaries of Subsidies*, THE ATLANTIC (Mar. 21, 2012), <https://www.theatlantic.com/health/archive/2012/03/overhauling-the-farm-bill-the-real-beneficiaries-of-subsidies/254422/> [<https://perma.cc/LF6W-UTBC>].

²¹⁴ Rosenberg & Stucki, *supra* note 3, at 15.

²¹⁵ *Id.* Rosenberg and Stucki further explain:

As the civil rights movement gathered steam, assaults on black farmers intensified. By the 1950s, “any program for small, poverty-ridden farmers in the South became entangled with the civil rights movement.” The founder of the Citizens’ Council drew up a plan to remove 200,000 African-Americans from Mississippi by 1966 through “the tractor, the mechanical cotton picker . . . and the decline of the small independent farmers.” As government-funded mechanization continued apace, “tens of thousands” of poor farmers were forced out of agriculture . . . Black farmers who held onto their land used their independence to support civil rights workers, which often made them targets for lynch mobs and local elites. Throughout the South, USDA agents withheld loans black farmers needed to operate—amid other discrimination—which continued after the Civil Rights Act. From 1959 to 1969, black farmers declined by over two thirds, almost triple the rate of white farmers.

Id. at 16 (footnotes omitted).

²¹⁶ *E.g.*, Mandell, *supra* note 19, at 101.

²¹⁷ Rosenberg & Stucki, *supra* note 3, at 18.

Most agree that the 1980s farm crisis represented a substantial turning point in the evolution of modern agriculture. But little modern discussion contemplates the role of the 1980s farm crisis in shaping today's rural conditions. This short collective memory masks one of the ongoing contributors to the urban-rural divide; institutions' manipulation of the farming sector in the 1980s left deep wounds that have not healed. First, in the 1970s, the Department of Agriculture, bankers, and university extension offices told farmers that they must either "get big or get out."²¹⁸ Because the rate of inflation was running higher than interest rates, institutional lenders, including government lenders like the Farm Home Administration (FmHA), told farmers to borrow as much as possible to invest in farmland.²¹⁹

By the 1980s, though, the bubble had burst. The Federal Reserve abruptly reversed course on its lending practices and dictated high interest rates on loans that the average small farmer simply could not repay.²²⁰ This might not have destroyed so many small farms on its own, but coupled with reduced crop subsidies and increased competition from multinational food monopolies' domination of markets, small farmers were no longer positioned to survive.²²¹

The fallout from the farm crisis was devastating and widespread. During the worst period in 1986–1987, almost one million Americans were displaced from their farms.²²² Years before and after that peak saw between 500,000 and 600,000 farm foreclosures.²²³ And many of those farmers were unable or unwilling to "just move" to find new employment. From 1981 to 1988, "more farmers died from suicide than from any other unnatural cause."²²⁴ Rates of alcoholism and domestic abuse also rose dramatically. Despite the increase in mental health issues among farmers spurred on by the farm crisis, provisions for rural mental health services decreased during the same period.²²⁵

The farm crisis—which many rural residents blamed on public institutions such as the FmHA—reshaped middle-class rural communities, whose requests for federal help went unheeded.²²⁶ In 1979, five percent of rural coun-

²¹⁸ DYER, *supra* note 20, at 15.

²¹⁹ *Id.*

²²⁰ *Id.* at 2, 15 (explaining how Federal Reserve Chairman Paul Volcker contributed to the 1980s farm crisis by raising interest rates to temper inflation, which had negative effects for farmers who had just borrowed substantial amounts to buy additional farmland).

²²¹ *Id.* at 2.

²²² *Id.* at 15. Rosenberg and Stucki point out, however, that earlier decades had seen substantial displacement of small farmers, but they came from more marginalized populations and therefore received less attention. Rosenberg & Stucki, *supra* note 3, at 19.

²²³ DYER, *supra* note 20, at 15.

²²⁴ *Id.* at 4.

²²⁵ *Id.* at 5.

²²⁶ *Id.* at 25 (discussing the Oklahoma governor's failed efforts to secure federal assistance to "investigate the actions of the farm lenders and provide additional money for rural mental health").

ties had an unemployment rate over nine percent.²²⁷ In a mere five years that rate ballooned: fifty percent of rural counties had unemployment rates exceeding nine percent.²²⁸ The decline of the rural farm town proceeded alongside the rise of the rural place as the staging site for industrialized agriculture. The number of farms in the United States dropped by two-thirds between 1935 and 2012, while the average farm size more than doubled.²²⁹ Thus, over the course of modern history, public institutions facilitated the destruction of this longstanding way of life. Some commentators have proposed that this era planted the seeds for anti-government militia movements among rural Americans.²³⁰

States have also facilitated the rise of industrialized, consolidated agriculture. Somewhat less dramatically, the proliferation of state right-to-farm laws over the past several decades has also contributed to the dominance of agribusinesses over small farms and farming communities. Right-to-farm laws limit nuisance suits involving agriculture.²³¹ Initially, the laws' stated rationale was to preserve farmland. To do so, they raised evidentiary burdens for bringing nuisance actions against farmers. Specifically, "many of the laws adopted a 'coming to the nuisance' concept whereby activities that were not a nuisance when commenced would not become a nuisance due to the changed land uses of neighbors."²³² Yet, since their inception, observers have expressed concern that right-to-farm laws "provide too much protection for agricultural pursuits and other activities at the expense of neighboring property owners."²³³ Thus, right-to-farm laws have served as a legal shield of sorts for industrial agriculture.

Although industrial agriculture may not be undesirable per se, the industry's relationship with rural communities is problematic. Small, family-run farms are often economically challenging to run, and are far from immune from ethical concerns such as poor conditions for farmworkers. Nonetheless, they are likelier to have more symbiotic relationships within communities.²³⁴ The presence of more farms run by more varied farmers provides more work opportunities, affords farmers more independence, supports families that have children in schools, and generally benefits the socioeconomic health of a

²²⁷ *Id.* at 17.

²²⁸ *Id.*

²²⁹ Roberto A. Ferdman, *The Decline of the Small American Family Farm in One Chart*, WASH. POST (Sept. 16, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/09/16/the-decline-of-the-small-american-family-farm-in-one-chart/> [<https://perma.cc/SXB3-5U7H>].

²³⁰ *E.g.*, DYER, *supra* note 20, at 1–7. This theory has been tested empirically and yielded mixed, unclear results. See JOSHUA D. FREILICH, *AMERICAN MILITIAS* 110–23 (2003).

²³¹ Terence J. Centner, *Governments and Unconstitutional Takings: When Do Right-to-Farm Laws Go Too Far?*, 33 B.C. ENVTL. AFF. L. REV. 87, 87 (2006).

²³² *Id.*

²³³ *Id.* at 88.

²³⁴ Weber & Miller, *supra* note 72, at 31.

community.²³⁵ In other words, the relationship between small farms and communities is symbiotic: each feeds the other.

Large agribusiness operations, by contrast—almost all of which are owned by white men—have a more parasitic relationship.²³⁶ They bring with them a “tide [of] adverse social, economic, and environmental impacts” that reduce the small farmer’s ability to compete. Eventually, the presence of agribusiness in a rural community has the effect of “replacing the independent farmer with disempowered sharecroppers and destroys the social fabric of towns.”²³⁷ As corporate landowners consolidate land, they also reduce the number of decisionmakers contributing to community development, suffocating local autonomy.

Many will defend the rise of industrialized agriculture as necessary to “scale” agricultural production due to the supposed inefficiency of the small farm. But this theory confuses the chicken and the egg; it assumes that small farms have died off because they cannot compete in the “market,” when in fact, publicly-provided capital, subsidies, and technological incentives have heavily tilted the scale in favor of industrialized agriculture.²³⁸

Returning to principles of distributive justice, the transformation of agriculture discussed here illustrates several points. First, this transformation looks like an “unjust transition.” Farm families throughout the twentieth century—especially farmers of color, but also the vast majority of white farmers—bore a substantial and disproportionate economic loss compared to the rest of society. Governmental policies drove them off their land and out of the countryside in the name of industrialized agriculture. Certainly, some people willingly moved to cities for a better life—and some of these trends can be attributed to “the market.” But for the most part, agricultural policy has been detrimental to rural communities as a whole. The “unjust transition” in the agricultural sector has been legal institutions’ role in redistributing the wealth and land of small farmers to large agribusinesses—justified in the name of cheaper food for all that can supposedly “feed the world.”²³⁹

²³⁵ See Meredith Redlin & Brad Redlin, *Amendment E, Rural Communities and the Family Farm*, 49 S.D. L. REV. 787, 787, 792 (2004) (rural communities’ viability and sustainability are connected to the form of agriculture that surrounds them). Communities with family farms have shown healthier local economies than those with large-scale corporate farms. *Id.*

²³⁶ Rosenberg & Stucki, *supra* note 3, at 19.

²³⁷ Randolph C. Canney, *Amendment E: A Personal Perspective on Defending Its Constitutionality*, 49 S.D. L. REV. 777, 778 (2004).

²³⁸ Rosenberg & Stucki, *supra* note 3, at 20–21; see Angelo, *supra* note 210, at 593 (quoting Michael Pollan, *Farmer in Chief*, N.Y. TIMES MAG. (Oct. 12, 2000), <https://www.nytimes.com/2008/10/12/magazine/12policy-t.html> [<https://perma.cc/DA6U-E9NM>]).

²³⁹ See Hamilton, *supra* note 22, at 134 (explaining that America never did—nor was ever asked by other nations—to “feed the world”); Morrow, *supra* note 211, at 360 (explaining how “[f]arm

The transformation of agriculture has also imposed environmental hazards on the populations that remain in declining and hollowed-out farm communities. Concentrated Animal Feeding Operations (CAFOs) have received substantial attention in this context.²⁴⁰ Most animals produced for human consumption are now raised in CAFOs. The animals live out their brief lives at high densities in indoor stalls until they are taken to other facilities for slaughter.²⁴¹ CAFO advocates insist that they are an “efficient” means of pursuing animal agriculture. But CAFO operations also pollute the air and water and expose neighboring residents to severe public health risks.²⁴²

Both the sacrifice of the rural farm to consolidated agriculture (an economic loss borne inequitably by rural communities) and the sacrifice of the rural community to ongoing agribusiness pollution (an environmental burden borne only by rural communities) have been justified in the name of collective progress and efficiency. Agribusiness’s proponents justify it in the name of modernization and “feeding the world.”²⁴³ Although more recent critiques have established the disingenuousness and failed track record of food-abundance rationales, public institutions have embraced them while also failing to address the associated challenges for rural communities. Thus, the law’s role in shaping the agricultural sector has facilitated the sacrifice of rural communities in the name of the aggregate welfare through concentrated economic losses and environmental burdens.

2. Extractive Industries

Natural resource extraction was historically another major source of economic activity for rural communities. In recent decades, this sector has contracted, contributing to a downward spiral for communities that depended on

programs increase the price of farm land while providing a disproportionate share of subsidies to large-scale farming operations, thus undermining rural economic development”).

²⁴⁰ E.g., Wendee Nicole, *CAFOs and Environmental Justice: The Case of North Carolina*, 121 ENVTL. HEALTH PERSP. A 182, A 183 (2013).

²⁴¹ JoAnn Burkholder et al., *Impacts of Waste from Concentrated Animal Feeding Operations on Water Quality*, 115 ENVTL. HEALTH PERSP. 308, 308 (2007).

²⁴² See Kaitlin Kelly-Reif & Steve Wing, *Urban-Rural Exploitation: An Underappreciated Dimension of Environmental Injustice*, 47 J. RURAL STUD. 350, 355–57 (2016) (discussing health outcomes associated with pork industry); Michelle B. Nowlin, *Sustainable Production of Swine: Putting Lipstick on a Pig?*, 37 VT. L. REV. 1079, 1096 (2013) (explaining that “economists and scientists have concluded swine CAFOs ‘contribute to economic marginalization of workers and socioeconomic decline in rural communities’” and are also “unsustainable from environmental and public health perspectives”); *Industrial Animal Agriculture: A Broken System*, PEW CHARITABLE TR. (July 2011), <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2011/07/19/industrial-animal-agriculture-a-broken-system> [<https://perma.cc/9JSR-X6HK>].

²⁴³ See Hamilton, *supra* note 22, at 134.

it.²⁴⁴ Thus, an understanding of modern rural decline and related unfairness requires an examination of rural communities' relationships with extractive industries and how the law has shaped those relationships. Although extractive industries are diverse—including industries such as forestry, fishing, natural gas and oil drilling, and gold mining—coal miners are often held out as the face of the so-called “urban-rural divide.”²⁴⁵ This Subsection focuses on coal in Appalachia.²⁴⁶ The Appalachian experience may be unique in some ways, but it illustrates a perfect storm of environmental justice and just transitions issues. The issues seen in Appalachia are also reflected in other rural communities, including coal communities elsewhere and rural communities reliant on other extractive industries.²⁴⁷

The failure of the state and federal legal apparatus to prevent or remedy Appalachian problems, and the many benefits the country has reaped from Appalachian exploitation, speak to the burdens Appalachia has borne in the name of aggregate welfare. In his book *Ramp Hollow*, historian Steven Stoll argues that the subjugation of Appalachia was neither an accident nor an unfortunate tragedy along the way to industrialization.²⁴⁸ He characterizes the nineteenth-century “scramble for Appalachia” as embedded in “the idea that historical progress required taking land away from agrarians and giving it to others.”²⁴⁹

Residents of Appalachia in the nineteenth century were mostly subsistence farmers, but many did not own the land they used for survival. Politicians living in the North and East owned the titles to large stretches of Appalachian land, and for a time turned a blind eye to the tens of thousands of squatters that

²⁴⁴ See generally Eisenberg, *supra* note 24.

²⁴⁵ See, e.g., Revesz, *supra* note 17, at 1495–98 (discussing how the plight of the coal miner has been used to rebut those pushing for environmental reforms and explaining how the loss of jobs in the coal mining industry has been a “rallying cry” for those opposed to government regulations).

²⁴⁶ In the current discourse on coal, the face of “the coal miner” is often a white Appalachian. Yet, other coal-producing regions may be geographically, racially, and legally distinct, while also facing similar issues related to environmental hazards and economic dependency. A substantial number of Native tribes and reservations rely on coal mines or coal-fired power plants as their main sources of livelihoods. Many of these tribes also decry the so-called “war on coal.” As mines and plants have closed, the impact on diverse communities has been difficult. See Ramo & Behles, *supra* note 87, at 515; Terry Anderson, *The Native American Coal War*, FORBES (May 18, 2016), <https://www.forbes.com/sites/realspin/2016/05/18/the-native-american-coal-war/#d1d8a867fb40> [https://perma.cc/RYR7-V3CW]; Turkewitz, *supra* note 87.

²⁴⁷ Most recently, both environmental and economic distributive injustice concerns surrounding the use of high-volume hydraulic fracturing to extract natural gas and oil from shale have mostly been confined to rural areas in Appalachia and elsewhere. See Eisenberg, *supra* note 127, at 209–26 (discussing inequitable environmental hazards and economic costs of Marcellus and Utica shale gas drilling, partially underlying Appalachia); Elena Pacheco, Note, *It's a Fracking Conundrum: Environmental Justice and the Battle to Regulate Hydraulic Fracturing*, 42 *ECOLOGICAL L.Q.* 373, 380–85 (2015).

²⁴⁸ See generally STOLL, *supra* note 83.

²⁴⁹ *Id.* at xiv–xv.

claimed adverse possession to subsections of those many acres.²⁵⁰ Motivated by a burgeoning anti-“mountain people” sentiment, however, and supported by the courts, elite title-holders were mostly able to evict residents from the land on which the residents had built homes, cultivated farms, and formed communities.²⁵¹

Appalachians have since experienced a consistent history of limited access to ownership interests in the land they worked and lived on or near.²⁵² Even this early evolution bore environmental justice implications, as regional residents had already lost autonomy and the prospect of self-determination.²⁵³ Some commentators continue to point to Appalachia’s geographic isolation as an explanation for its persistent regional poverty.²⁵⁴ But this isolation narrative discounts other key factors that have shaped Appalachian poverty, namely, this initial land dispossession and the subsequent arrival of the extractive industry.²⁵⁵

Those regional residents who were able to acquire land remained vulnerable to the loss of another form of property: mineral rights. The agents of nineteenth-century speculators in natural resources were “men of great guile and charm” who would take advantage of regional residents’ limited literacy and access to information.²⁵⁶ Due to this unequal bargaining power, regional residents’ interests in their timber and minerals “were virtually given away.”²⁵⁷ With so much land and so many minerals owned by powerful out-of-state ac-

²⁵⁰ *Id.* at 10 (explaining that “[a]s long as political elites pretended not to see the flaunting of private property and constitutional authority, they could continue to believe that the interests of the backwoods aligned with those of the nation-state”).

²⁵¹ *Id.* at 9–16.

²⁵² See, e.g., BETH SPENCE ET AL., W. VA. CTR. ON BUDGET & POLICY, WHO OWNS WEST VIRGINIA? 7 (2013), <https://d3n8a8pro7vhmx.cloudfront.net/wvcbp/pages/468/attachments/original/1511177697/land-study-paper-final3.pdf?1511177697> [https://perma.cc/4CAE-7KQJ].

²⁵³ Cf. Daniels et al., *supra* note 37, at 64–65. The loss of autonomy like that seen in Appalachia is among the themes shaping rural environmental injustice. New Mexico, for example—currently considered the poorest state in the nation—experienced a similar land grab in the nineteenth century, when unscrupulous speculators used similar tactics to dispossess residents of their land. Ann M. Eisenberg, *Land Shark at the Door? Why and How States Should Regulate Landmen*, 27 *FORDHAM ENVTL. L. REV.* 157, 179 (2016). Parallels also exist with the experience of African-American farmers in the South, and Native Americans removed by the U.S. government. The loss of control over land renders communities vulnerable to outsiders shaping the future of their land uses and socioeconomic development. See generally STOLL, *supra* note 83 (arguing that the enclosure of land and land dispossession are central to the history of capitalism and the rise of socioeconomic inequality).

²⁵⁴ STOLL, *supra* note 83, at 17; Nicholas F. Stump & Anne Marie Lofaso, *De-Essentializing Appalachia: Transformative Socio-Legal Change Requires Unmasking Regional Myths*, 120 *W. VA. L. REV.* 823, 825–29 (2018).

²⁵⁵ See generally STOLL, *supra* note 83.

²⁵⁶ HARRY M. CAUDILL, *NIGHT COMES TO THE CUMBERLANDS: A BIOGRAPHY OF A DEPRESSED AREA* 63 (1963).

²⁵⁷ *Id.* at 73–75; see STOLL, *supra* note 83, at 35 (describing a West Virginia farmer and civic leader lamenting that “this great natural wealth went into the hands of syndicates for a nominal sum and was lost to the people”).

tors, the stage was thus set by the mid-nineteenth century for a corporate takeover of Appalachia.²⁵⁸

Appalachian coal mining began in earnest in the nineteenth century. In turn, the state and federal legal apparatus served to funnel local residents into the coal labor machine, to give the coal industry a mandate to pollute freely, and to deprive local residents of opportunities for redress.²⁵⁹ The Battle of Blair Mountain in 1921 was a turning point in the evolution of Appalachian society. Coal miners, growing intolerant of inhumane working and living conditions, rose up against mine operators when their efforts to unionize were suppressed. After federal troops intervened, the miners alone were tried, and organized labor in the coalfields suffered a long-lasting blow.²⁶⁰

In more recent history, Pat McGinley highlights how the Surface Mining Control and Reclamation Act of 1977 (SMCRA) involved a “broken promise” to protect coalfield communities.²⁶¹ Before the act, unregulated mining practices exacted significant environmental harms in Appalachia.²⁶² During those years, mining states engaged in a race to the bottom. Although some attribute this to the legislatures’ desire to remain competitive through lax regulatory oversight, states such as West Virginia seemed generally beholden to industrial interests.²⁶³ Public outcry in the 1960s reached “a crescendo.” The SMCRA introduced a set of federal regulations designed to address problems associated

²⁵⁸ Cf. STOLL, *supra* note 83, at 27 (describing “the industrial invasion of Appalachia” as “slow violence that brought an end to agrarian autonomy in places like West Virginia”).

²⁵⁹ See Brandon Nida, *Demystifying the Hidden Hand: Capital and the State at Blair Mountain*, 47 HIST. ARCHAEOLOGY 52, 54 (2013).

²⁶⁰ *Id.* at 63.

²⁶¹ Patrick C. McGinley, *From Pick and Shovel to Mountaintop Removal: Environmental Injustice in the Appalachian Coalfields*, 34 ENVTL. L. 21, 54 (2004); see Nicholas F. Stump, *Mountain Resistance: Appalachian Civil Disobedience in Critical Legal Research Modeled Law Reform*, 41 ENVIRONS: ENVTL. L. & POL’Y J. 69, 107–14 (2017) (describing acts of civil disobedience by Appalachians in response to the Surface Mining Control and Reclamation Act).

²⁶² McGinley, *supra* note 261, at 48–49. McGinley writes,

The most visible adverse impacts of coal strip mining were the scars gashed in Appalachian mountainsides. Surface mining strips away forest vegetation, causing erosion and attendant stream sedimentation and siltation, accompanied by negative impacts on aquatic life and drinking water supplies. In some coalfield regions, iron-laden sulphuric acid mine drainage pollution from underground mining produces red-orange stained stream beds and renders watercourses ecologically sterile. . . . [M]ining contaminated or depleted underground aquifers that provide domestic and farm water supplies to many coalfield families. Loud noise and dust from blasting and earth-moving activities disturb nearby communities and wildlife. . . . Landslides caused by indiscriminate dumping of mine spoil downslope on steep Appalachian mountainsides buried cars, homes, and sometimes killed people.

Id.

²⁶³ *Id.* at 50; Nida, *supra* note 259, at 54.

with mining, and also created the Office of Surface Mining.²⁶⁴ The SMCRA reduced the disastrous effects of mining pre-1977, but not enough, even today, to fully mitigate the adverse environmental, economic, and social impacts the industry has imposed on coalfield communities.²⁶⁵

Another prominent example of policymakers' failure to address Appalachian environmental injustice is the law's treatment of black lung. According to relatively recent investigative reports, black lung—a preventable but often fatal disease that afflicts coal miners—has seen a resurgence among coal miners.²⁶⁶ Reporters argued that both the coal industry and federal oversight of safety regulations failed to protect miners from the coal dust that causes black lung.²⁶⁷ Despite this failure, the federal government has approved a mere 7.6% of miners' applications for black lung benefits.²⁶⁸

U.S. society benefited from the sacrifice of Appalachia's land and people, and coal production has often been lauded for its collective benefits. The American industrial revolution was powered by coal from West Virginia, Pennsylvania, and Kentucky; coal-fired power accounted for virtually all manufacturing on the eastern seaboard after 1850.²⁶⁹ Coal continues to comprise a substantial portion of the U.S. energy mix, and many still view it as a cheap source of energy with a handful of regrettable consequences.²⁷⁰ Notwithstanding the gains the country has reaped from the sacrifice of Appalachia, the widespread environmental justice issues have yet to be remedied.

Despite the many harms the extractive industry brought to Appalachia, the decline of coal did its own damage. This shift also cannot be dismissed purely as a private phenomenon unworthy of public intervention. Many point to lowered costs of extracting one of coal's main competitors, natural gas, with the advent of high-volume hydraulic fracturing technology.²⁷¹ But the full story also involves increased environmental regulations, "including the Transport Rule, Mercury Air Toxics Standards, and the Clean Power Plan," which have

²⁶⁴ McGinley, *supra* note 23, at 307.

²⁶⁵ McGinley, *supra* note 261, at 54.

²⁶⁶ Heather Willard, *Black Lung Cases Soar, Senators Seek to Curb Rise*, LOGAN DAILY NEWS (Aug. 28, 2018), https://www.logandaily.com/news/black-lung-cases-soar-senators-seek-to-curb-rise/article_3f27bd80-50e1-5af6-bdd3-d2eaade1341a.html [<https://perma.cc/7XPM-YF2J>].

²⁶⁷ Howard Berkes, *As Mine Protections Fail, Black Lung Cases Surge*, NPR (July 9, 2012), <https://www.npr.org/templates/transcript/transcript.php?storyId=155978300> [<https://perma.cc/B2ME-QCZY>].

²⁶⁸ Brian C. Murchison, *Due Process, Black Lung, and the Shaping of Administrative Justice*, 54 ADMIN. L. REV. 1025, 1027 (2002).

²⁶⁹ STOLL, *supra* note 83, at 34.

²⁷⁰ McGinley, *supra* note 23, at 307.

²⁷¹ Revesz, *supra* note 17, at 1550; see RICHARD L. REVESZ & JACK LIENKE, STRUGGLING FOR AIR: POWER PLANTS AND THE "WAR ON COAL" 141, 146–54 (2016).

also had an effect on the industry.²⁷² Because of these and other factors, coal's market share of the U.S. energy mix dropped from fifty percent in 2009 to thirty-four percent in 2012.²⁷³ Professor McGinley concludes "that few in the conservation/environmental community, the coal and power industries, nor leaders of any political stripe are advocating planning and action to address the reality of declining coal production in central Appalachia and what it portends for coalfield communities."²⁷⁴

The causes of the decline of coal are the subject of much debate. For the most part, this debate is framed as a classic "jobs versus environment" tension, which tends to fall along political lines or urban-versus-rural ones. Pro-coal commentators insist that measures such as the Obama administration's Clean Power Plan would have direct impacts on mining communities' livelihoods.²⁷⁵ Those who support a policy of reducing carbon emissions often insist that coal has declined and will decline for other reasons—such as automation and competition from natural gas.²⁷⁶

More recently, prominent environmental scholars have acknowledged that environmental regulations may indeed have adverse economic consequences for discrete populations.²⁷⁷ This is an important step. By insisting that market causes alone have killed coal—and that therefore, the socioeconomic decline and increased vulnerability of coal communities is acceptable—environmentalists undermine their own cause. The nation's energy supply has always been crafted by policy. Direct subsidies, tax benefits, and the aforementioned lax regulatory regime have paved the way for fossil fuels to dominate for the past two hundred years. Wind-generated energy, for example, requires major up-front investments that would likely deter investors, but for the investment incentives crafted by state and federal policymakers.

The claim that coal's decline "just happened" rings somewhat hollow when considered in this light. Congress's decision to barely regulate natural gas was intentional.²⁷⁸ Coal's decline cannot simply be attributed to "natural causes"; rather, government policies allowed—and at times actively contributed to—the industry's decline. It is possible to recognize this decline as a difficulty for coalfield communities while also celebrating the decline's implica-

²⁷² Revesz, *supra* note 17, at 1550; see REVESZ & LIENKE, *supra* note 271, at 141, 146–54.

²⁷³ McGinley, *supra* note 23, at 308.

²⁷⁴ *Id.* at 311.

²⁷⁵ See generally Ann M. Eisenberg, *Alienation and Reconciliation in Social-Ecological Systems*, 47 ENVTL. L. 127 (2017).

²⁷⁶ *Id.*

²⁷⁷ Revesz, *supra* note 17, at 1493–98. See generally BEYOND ZERO-SUM ENVIRONMENTALISM (Sarah Krakoff et al. eds., 2019) (discussing tradeoffs and "winners and losers" of environmental policies).

²⁷⁸ Eisenberg, *supra* note 127, at 207–08.

tions for better carbon emissions policy. But failing to acknowledge the role of public decisionmakers in both creating and abandoning the coalfields leaves those communities “forgotten”—or better put, sacrificed once to produce energy, then sacrificed anew in the name of a clean environment for everyone.²⁷⁹

The Appalachian story is often framed as unique. Although it might be a particularly extreme example, other rural communities have been trapped in similar relationships with extractive industries, growing dependent on the very industries harming them.²⁸⁰ Thus, when the industries have declined, in the absence of sound transitional policy—which is often lacking in the “boom/bust” scenarios associated with natural resource extraction—the communities are left with little.²⁸¹ In either case, the unsubtle harms to the environment and the people paint a picture of a knowing collective sacrifice of the rural population, as do the unmitigated economic losses.

3. Manufacturing

Manufacturing is a third sector that has historically been one of the few lifelines sustaining the rural way of life. Although deindustrialization has affected urban centers, rural communities have been disproportionately dependent on manufacturing and are more likely to lack other opportunities when plants close.²⁸² As is the case with natural resource extraction and agriculture, the law’s treatment of the manufacturing sector over the past several decades has raised both environmental justice and just transitions concerns in relation to rural welfare.

Much has been written about the rash of manufacturing plant closures of the 1980s and 1990s.²⁸³ With the advent of the North Atlantic Free Trade

²⁷⁹ Cf. Eisenberg, *supra* note 275, at 147 (discussing populist alienation from the federal environmental law apparatus).

²⁸⁰ See Karen Clay & Alex Weckenman, *When Are Resources Curses and Blessings? Evidence from the United States 1880–2012*, at 2, 4–7 (Dec. 2016) (unpublished manuscript) (on file with the author).

²⁸¹ In the past several years, federal efforts have been made to assist Appalachian coal communities, but it is not clear what their impact stands to be. See Ann M. Eisenberg, *As the Coal Industry Shrinks, Miners Deserve a Just Transition—Here’s What It Should Include*, THE CONVERSATION (Nov. 4, 2019), <https://theconversation.com/as-the-coal-industry-shrinks-miners-deserve-a-just-transition-heres-what-it-should-include-116340> [<https://perma.cc/NNE5-RHFL>].

²⁸² Anderson, *supra* note 8, at 467–68; see Nico Thomas & Steve Campbell, *The Geography of Manufacturing: The Case of MEP and Rural Manufacturers*, NIST MANUFACTURING INNOVATION BLOG (Jan. 31, 2018), <https://www.nist.gov/blogs/manufacturing-innovation-blog/geography-manufacturing-case-mep-and-rural-manufacturers> [<https://perma.cc/PF4X-VQCM>] (“When there are downturns in manufacturing the economic impacts disproportionately affect rural communities.”).

²⁸³ See, e.g., Fran Ansley, *Inclusive Boundaries and Other (Im)possible Paths Toward Community Development in A Global World*, 150 U. PA. L. REV. 353, 415 (2001); Ansley, *supra* note 26, at

Agreement (NAFTA) under the Clinton administration, as well as other measures such as the treaty creating the World Trade Organization, many longstanding manufacturing plants opted to relocate to places where labor was cheaper and regulations were laxer.²⁸⁴ As this swift change spread throughout the country, mass layoffs displaced workers, and, in some instances, entire towns.²⁸⁵

Yet, both then and now, the displacement issue has remained at the periphery.²⁸⁶ Today, little nuanced commentary seeks to understand the ongoing ramifications of widespread deindustrialization.²⁸⁷ Most sum up this phase as historical background, with a handful of words—globalization, deindustrialization, or outsourcing of jobs, for instance. Little modern scholarship harkens back to the specific measures that purported to address the large-scale displacement of the many workers and communities whose livelihoods had evolved over time around the manufacturing sector.²⁸⁸ With the benefit of hindsight, it seems clear that the federal legal measures implemented to minimize workers' losses could hardly be called a good-faith effort.²⁸⁹

One of those federal efforts was the Trade Adjustment Act of 1974 (TAA). The TAA attempted to offset the effects of reduced trade restrictions on workers and communities.²⁹⁰ The Act provided compensation for lost wages and job retraining for workers who could make a showing that their losses

1758–62; Leslie Kay & Kevin Griffin, *Plant Closures: Assessing the Victims' Remedies*, 19 WILLAMETTE L. REV. 199, 199–200 (1983).

²⁸⁴ See Sara Dillon, *Getting the "Message" on Free Trade: Globalization, Jobs and the World According to Trump*, 16 SANTA CLARA J. INT'L L. 1, 16–17 (2018).

²⁸⁵ See Virginia L. Duquet, Note, *Advantages and Limitations of Current Employee Ownership Assistance Acts to Workers Facing a Plant Closure*, 36 HASTINGS L.J. 93, 93 (1984) (explaining that "[j]ob loss is a harsh reality or an ominous threat facing many American workers" and stating that "[i]n many instances, a plant closure not only affects individual employees, but also can devastate an entire community").

²⁸⁶ See Dillon, *supra* note 284, at 14, 44 (explaining how commentators and writers did not focus on the problem of job loss caused by globalization, and faulting the "silence of elites" for allowing the perception in rural America that the country's leaders are indifferent to their hardship).

²⁸⁷ See *id.*

²⁸⁸ UW-WHITEWATER FISCAL & ECON. RESEARCH CTR. & REDEVELOPMENT ECON., *THE ECONOMIC AND FISCAL IMPACT OF WISCONSIN'S BROWNFIELDS INVESTMENTS* 19 (Nov. 2015) [hereinafter *BROWNFIELDS INVESTMENTS*], <https://dnr.wi.gov/topic/Brownfields/documents/bsg/uwwreport.pdf> [<https://perma.cc/3K62-LWUG>]. *But see* Dillon, *supra* note 284, at 2 (acknowledging that job losses are associated with a globalized economy).

²⁸⁹ See Dillon, *supra* note 284, at 14 (arguing that "this explosive issue was broadly ignored" from the 1990s onward, and that elites such as trade law attorneys focused on technical legal questions that were a "side show" for regular people).

²⁹⁰ Shana Fried, Note, *Strengthening the Role of the U.S. Court of International Trade in Helping Trade-Affected Workers*, 58 RUTGERS L. REV. 747, 749 (2006). President Kennedy's Trade Expansion Act of 1962 technically created the trade adjustment assistance program, but commentators agree that this was not a meaningful avenue for worker benefits until the 1974 amendment relaxed eligibility criteria. *Id.*

stemmed from international competition.²⁹¹ The Department of Labor administers the TAA, and continues to hear petitions from workers claiming displacement today. Diverse industries are affected by international competition. But the vast majority of claims come from employers and workers in the manufacturing sector.²⁹² Since the start of the program, several million workers have taken advantage of it.²⁹³

Although preferable to inaction, the Act has been criticized as failing to provide adequate compensation for workers' and communities' losses. Economists disagree about its overall effects. Some argue that it is "reasonably effective as compensation," though perhaps not as a means for effective retraining or relocation assistance.²⁹⁴ Critics cite studies illustrating that by transitioning to the program, the average worker loses approximately thirty percent of his or her wages. These workers are also unlikely to ever find jobs that pay as well or have benefits comparable to the work they lost.²⁹⁵ Of importance to the aging rural population, the program proves least effective for older workers who have been in their particular industry for an extended period.

In the 1980s and 1990s, a social movement arose in response to the only partially mitigated trend of large-scale displacement. This movement was due, at least in part, to TAA's inability to account for all losses—particularly where entire communities were displaced.²⁹⁶ Activists agitated for private and public recognition of the economic upheaval that plant closures effectuated.²⁹⁷ Some modest judicial and legislative gains came from the plant-closure movement. But for the most part, deindustrialization was swift, and its fallout only minimally addressed through law.²⁹⁸

Among those modest successes was the 1988 Worker Adjustment, Retraining and Notification Act (WARN Act) that was passed in response to

²⁹¹ *Id.* at 749–51.

²⁹² Tom DiChristopher, *Sizing up the Trade Adjustment Assistance Program*, CNBC (June 26, 2015), <https://www.cnbc.com/2015/06/26/is-aid-to-trade-displaced-workers-worth-the-cost.html> [<https://perma.cc/N4JX-CGX9>].

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*; see Kara Reynolds & John Palatucci, *Does Trade Adjustment Assistance Make a Difference?* 13 (Am. Univ. Dep't of Econ., Working Paper No. 2008-12, 2008) (stating that "TAA workers earned on average 30 percent less than they made at their previous job").

²⁹⁶ *Cf.* Ansley, *supra* note 283, at 415 (discussing the need for social movements to highlight issues of "economic justice and [that social movements are] capable of carrying on the best of what we began in the plant-closing campaigns of past decades, yet also capable of going significantly beyond the old [social movements] in their awareness of the highly asymmetrical global system and their openness to the claims of the excluded and oppressed").

²⁹⁷ *See id.* at 367–69.

²⁹⁸ *Id.* at 353–55; Dillon, *supra* note 284, at 12–14.

widespread plant closures with the goal of aiding dislocated workers.²⁹⁹ Yet, even from its inception, critics were skeptical that the WARN Act would meaningfully address the vulnerability associated with layoffs. The Act's language was vague and unclear, raising difficulties in application.³⁰⁰ Perhaps most egregiously, the WARN Act required only that employers with one hundred or more employees provide sixty days' advance notice of a planned closing or "mass layoff" of fifty employees or more.³⁰¹

The deindustrialization trend is thus arguably the least subtle example of an unjust transition from traditional rural livelihoods. Although the U.S. economy enjoyed a net boom from the swift and unmitigated measures that undermined this rural economic lifeline, many small communities dependent on one major employer were essentially destroyed.³⁰² Today's ghost towns—communities that have ceased to exist due to full-scale out-migration and abandonment—can often trace their death directly back to a plant closure. These losses were distributed to urban centers as well. But rural communities' dependency on manufacturing, lack of alternatives, and the subsequent proliferation of rural blight all suggest that rural communities bore a disproportionate burden of these economic losses. And these losses were generally justified in the name of "progress" or the aggregate welfare.

Like resource extraction and agribusiness, rural manufacturing brought environmental degradation in addition to economic losses. Rural environmental justice concerns surrounding manufacturing manifested both before and after deindustrialization. Although rural manufacturing pollution is understudied, examples such as West Virginia's "Chemical Valley" in the Kanawha River Valley and Louisiana's "Cancer Alley" in a rural, black community outside Baton Rouge illustrate both substantive and procedural rural environmental justice concerns arising from manufacturing.³⁰³

²⁹⁹ Ethan Lipsig & Keith R. Fentonmiller, *A WARN Act Road Map*, 11 LAB. LAW. 273, 273 (1996).

³⁰⁰ *Id.*

³⁰¹ 29 U.S.C. § 2102 (2018); see Ansley, *supra* note 283, at 372 n.33 (recognizing that the passage of the WARN Act was a victory for the plant-closure social movement, but calling it an "extremely limited" protection for displaced workers).

³⁰² See generally Peter Cole, *A Tale of Two Towns: Globalization and Rural Deindustrialization in the U.S.*, 12 WORKINGUSA 539 (2009) (comparing the experiences of two rural communities that lost major employers after NAFTA and observing the range of small-town suffering from minimal to severe).

³⁰³ Victor Blackwell et al., *Toxic Tensions in the Heart of 'Cancer Alley'*, CNN (Oct. 20, 2017), <https://www.cnn.com/2017/10/20/health/louisiana-toxic-town/index.html> [<https://perma.cc/EAK8-S4DJ>]; Laura Parker, *A Century of Controversy, Accidents in West Virginia's Chemical Valley in Lead-up to Spill*, NAT'L GEOGRAPHIC (Jan. 16, 2014), <https://news.nationalgeographic.com/news/2014/01/140116-chemical-valley-west-virginia-chemical-spill-coal/> [<https://perma.cc/KM4W-8A7E>].

For almost one hundred years, the Kanawha River Valley hosted the nation's largest concentration of chemical plants, achieving "a degree of global infamy" over the years because of accidents and explosions.³⁰⁴ In 2014, a chemical spill contaminated drinking water for more than 200,000 people in nine counties in West Virginia for an extended period.³⁰⁵ But even before the spill, "it was not unusual to find black water running from kitchen faucets" in the area, "[o]r to see children with chronic skin rashes. Or bathtub enamel eaten away, leaving locals to wonder what the same water was doing to their teeth."³⁰⁶ Local residents have spent decades attempting to use the law to protect themselves, but have achieved few successes.

"Cancer Alley," Louisiana, has had a similar story. The small town of La-Place, Louisiana, is one of the rural communities alongside the series of plants on the road from New Orleans to Baton Rouge. In a town surrounded by dozens of petrochemical plants, a sign posted by activists warns residents that they are "more likely to get cancer due to chloroprene air emissions."³⁰⁷ According to the Environmental Protection Agency ("EPA"), residents in this community "face the highest risk in the country of developing cancer from air toxins."³⁰⁸ Like in the Kanawha River Valley, residents have used a variety of legal strategies to fight the plants over the years, with few improvements to show for it.

After deindustrialization, brownfields and property vacancy have perhaps become the more widespread rural environmental justice concerns, which affect former manufacturing communities but also others that have lost population.³⁰⁹ When plants left communities, they left their built infrastructure behind. These leftover buildings may be contaminated, highly expensive to address, and the most dominant feature of a rural town.³¹⁰ Although the EPA's brownfields program provides assistance for rural communities to remediate such sites, the scale of today's rural property vacancy, abandonment, and dilapidation suggests that many rural communities are fending for themselves in dealing with this burden.³¹¹ Due to their size, more limited land use regula-

³⁰⁴ Parker, *supra* note 303.

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ Blackwell et al., *supra* note 303.

³⁰⁸ *Id.*

³⁰⁹ See UW-WHITEWATER FISCAL & ECON. RESEARCH CTR. & REDEVELOPMENT ECON., *supra* note 288, at 19.

³¹⁰ *Id.*

³¹¹ See Christine A. Picker & Kevin Jack, *Brownfields Redevelopment in Illinois*, 88 ILL. B.J. 526, 526 (2000) ("[S]mall towns and rural settings also can include brownfield properties. [These properties] drain[] a community of resources. In small towns and rural settings, the brownfield often used to be that town's main employer and economic lifeblood."); *id.* at 542 (discussing small town taking advantage of state and federal grant money to engage in brownfield redevelopment); Kim Skobba et al., *What About Rural Blight? Housing and Neighborhood Conditions in Southeastern Small Towns*, 0

tions, and other socioeconomic challenges, the task of remediation is naturally harder for rural communities.³¹² Where problem properties remain, they act both as a hazardous impediment to healthy environments and as an ongoing symbol of economic loss.³¹³

To summarize, the overall theme in the legal regimes shaping key rural livelihoods over the past several decades is a pattern of decisionmakers choosing to trade rural welfare for some other perceived benefits. The Federal Reserve, the FmHA, Congress, and state legislatures opted to facilitate the rise of agribusiness to the detriment of the small farmer. These acts concentrated economic losses and environmental burdens on rural communities in the name of cheap, abundant food. The SMCRA and natural gas regulations have been weak, while measures to mitigate the decline of extractive jobs have been minimal; the former measures were justified by cheap, reliable energy, while the latter inaction has been justified by environmental benefits. And plants were permitted to abruptly close up shop despite entire towns' reliance on them. Meanwhile rural residents have been left to deal with a widespread rise in vacant, abandoned, or contaminated industrial and residential buildings. In each of these sectors, the law led to rural communities' disproportionate share of economic losses and substantial environmental burdens. This analysis shows that it is not accurate to suggest that the rural America in decline "died" or "was forgotten." The public used rural America for gain; rural America was sacrificed, and that sacrifice is on the public's conscience.

One might be tempted to argue that at least some rural residents have brought these scenarios on themselves. According to some, rural residents should now be left to reap what they have sown by "voting against their interests."³¹⁴ Put more mildly, others argue that it is condescending to second-guess

RURAL SOC. 1, 22–23 (2019) (discussing findings suggesting that dilapidated housing stock is prevalent in small towns, that small towns face particular difficulties in remediating property issues "where scale, demand, and limited financial and human capital resources are barriers to maintaining and improving local housing conditions," and that more research is needed to understand strategies to address blighted properties in small towns); Sylvia Carignan, *EPA Cleanup Grants Divide Urban, Rural Communities*, BLOOMBERG ENV'T (June 18, 2018), <https://news.bloombergenvironment.com/environment-and-energy/epa-cleanup-grants-divide-urban-rural-communities> [<https://perma.cc/9MB4-GW6L>] (suggesting that EPA grant application process for brownfield redevelopment may disadvantage rural communities); see also EPA, BROWNFIELDS AND LAND REVITALIZATION IN SMALL, RURAL, AND TRIBAL COMMUNITIES (2019) https://www.epa.gov/sites/production/files/2019-09/documents/final_small_rural_tribal_508compliant.pdf [<https://perma.cc/734D-VP4Y>].

³¹² See generally Ann M. Eisenberg, *Addressing Rural Blight: Lessons from West Virginia and WV LEAP*, 24 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 513 (2016); Eisenberg, *supra* note 5.

³¹³ Cf. UW-WHITEWATER FISCAL & ECON. RESEARCH CTR. & REDEVELOPMENT ECON., *supra* note 288.

³¹⁴ Cf. CATTE, *supra* note 116, at 21 ("Following Trump's victory, pundits often engaged in a projection of a . . . fantasy, one where Appalachia might be isolated and left to reap what it had sown."); Frank Rich, *No Sympathy for the Hillbilly*, DAILY INTELLIGENCER (Mar. 20, 2017),

rural preferences as they are expressed at the voting booth. There is, perhaps, some truth to the idea that anti-tax, anti-government sentiment in some places has contributed to rural infrastructural decline or the persistence of hazardous industries.³¹⁵ Residents fail to vote for the higher taxes that might help promote local safeguards, vote against land-use planning, and at times enthusiastically embrace these hazardous industries when they come calling.³¹⁶

But blithe dismissals of the challenges illuminated above fail to account for several key points. First, in each of these sectors, literature on rural social movements indicates that rural communities have often attempted to expel these hazardous industries or improve their working and living conditions, only to have those efforts crushed.³¹⁷ Second, a robust body of literature demonstrates that rural needs are often excluded from policy making.³¹⁸ Points one and two suggest that there is more complexity to rural participation in the political process than electoral maps reveal. Limited access to information and other resources may facilitate some rural residents' complicity in their own disenfranchisement.³¹⁹ Finally, literature on structural inequality suggests that one ought to pause and dig deeper before blaming marginalized groups for their own marginalization.³²⁰

<http://nymag.com/daily/intelligencer/2017/03/frank-rich-no-sympathy-for-the-hillbilly.html> [<https://perma.cc/V5YU-SLYR>]. In his article, Rich discusses *National Review*'s Kevin Williamson's statement: "The truth about these dysfunctional, downscale communities is that they deserve to die. Economically, they are negative assets. Morally, they are indefensible." *Id.* Rich goes on to suggest that "[m]aybe, like Hochschild's new friends in Louisiana's oil country, they'll keep voting against their own interests until the industrial poisons left unregulated by their favored politicians finish them off altogether." *Id.*

³¹⁵ See Anderson, *supra* note 8, at 480–81.

³¹⁶ See *id.*

³¹⁷ See generally SHANNON ELIZABETH BELL, *OUR ROOTS RUN DEEP AS IRONWEED: APPALACHIAN WOMEN AND THE FIGHT FOR ENVIRONMENTAL JUSTICE* (2013) (discussing grassroots Appalachian environmental justice advocacy); MONTRIE, *supra* note 175 (same).

³¹⁸ See Eisenberg, *supra* note 5, at 202–03 (explaining how a synthesis of rural legal literature suggests that rural needs suffer from an omission concern in policy making, as well as a misapprehension/stereotype concern among largely urban decisionmakers).

³¹⁹ See Ashwood & MacTavish, *supra* note 167, at 274 ("Utilitarian thinking behind development and growth machine logic can leave those who may receive limited benefits none-the-less in support of schemes that perpetuate their own vulnerability . . . Rural as a dumping ground to house the by-products and extract the materials necessary for industry can be internalized by those living in such places.").

³²⁰ Cf. CATTE, *supra* note 116, at 21–22; Philip Bump, *The Source of Black Poverty Isn't Black Culture, It's American Culture*, *THE ATLANTIC* (Apr. 1, 2014), <https://www.theatlantic.com/politics/archive/2014/04/the-source-of-black-poverty-isnt-black-culture-its-american-culture/359937/> [<https://perma.cc/S885-2TZX>].

IV. CONTEMPLATING EQUITABLE RURAL REFORM

Having laid a foundation to characterize rural distributive injustice, this Part briefly addresses the “what should be done about it” question, leaving further explication for future projects. It suggests that achieving distributive justice for rural America requires either: (1) addressing inequity across the board—rural and non-rural—through a more just distribution of resources for everyone, or (2) pursuing remedial considerations specific to rural communities.³²¹

Addressing inequity generally is perhaps the more straightforward way to address rural distributive injustice. Other communities delineated along non-geographic lines, such as race, have experienced comparable or worse inequities, as have marginalized urban communities. To prioritize rural communities in zero-sum allocations of resources would raise its own questions of justice.

Yet, helping everyone would help rural communities. The loss of rural livelihoods would not be felt so acutely if unemployment did not make people so vulnerable to housing insecurity, health problems, and bankruptcy. Similarly, the loss of rural jobs and the destruction of the rural environment would not be so problematic if people had the means to relocate or afford medical care. Far-reaching legislation such as the proposed “Green New Deal” would help rectify inequities stemming from limited access to decent work and a decent environment.

³²¹ Although not contemplated in depth here, increasing access to mobility is another avenue worth exploring for potentially mitigating rural vulnerability. For an exchange on impediments to mobility “in regions where it is needed most,” see generally Sheila R. Foster, *The Limits of Mobility and the Persistence of Urban Inequality*, 127 YALE L.J. F. 480 (2017), https://www.yalelawjournal.org/pdf/Foster_styrqpy4.pdf [<https://perma.cc/E666-NEU6>] (discussing urban inequality and racial/economic stratification as impediments to mobility); Sara Pratt, *Civil Rights Strategies to Increase Mobility*, 127 YALE L.J. F. 498 (2017), https://www.yalelawjournal.org/pdf/Pratt_wkyqnv49.pdf [<https://perma.cc/9ADS-RX9X>] (discussing civil rights-based impediments to mobility); Schleicher, *supra* note 2 (discussing responses to the impediments); David Schleicher, *Surreply: How and Why We Should Become Un-Stuck!*, 127 YALE L.J. F. 571 (2017), https://www.yalelawjournal.org/pdf/Schleicher_24qnzowt.pdf [<https://perma.cc/V9TA-XBUM>] (acknowledging racial discrimination and segregation as impediments to mobility while arguing against the “false hope” that policy can revive declining areas); Naomi Schoenbaum, *Stuck or Rooted? The Costs of Mobility and the Value of Place*, 127 YALE L.J. F. 458 (2017), https://www.yalelawjournal.org/pdf/Schoenbaum_dyqnv2cu.pdf [<https://perma.cc/36SZ-QRZ4>]; Alec MacGillis, *The Coal Industry Is Dying, and It’s Leaving Communities Like This One to Pick Up the Pieces*, MOTHER JONES (May 28, 2018), <https://www.motherjones.com/environment/2018/05/the-coal-industry-is-dying-and-its-leaving-communities-like-this-one-to-pick-up-the-pieces/> [<https://perma.cc/FZ8G-USDS>] (highlighting how fewer Americans moved in 2017 than in any year dating back to the 1950s, and offering *New York Times* columnist David Brook’s explanation as to the reason why: people no longer have confidence in the economy). Another topic for further discussion is Revesz’s more general idea that distributional concerns should factor more heavily into government regulation. Revesz, *supra* note 17, at 1555.

The Green New Deal, although not fully defined as of this writing, would pursue a massive jobs program geared toward creating economic opportunity while also weaning the country from fossil fuels.³²² Alternative measures to address inequity, such as universal basic income, a federal guarantee of employment, single-payer healthcare, and free, high-quality education would also help to rectify the concerns outlined in this Article. One might be tempted to dismiss this option as politically or economically unrealistic. But similar initiatives have been pursued in the past, and ongoing consideration of legislation like the Green New Deal suggests that these proposals are not outlandish.³²³

A universalist approach to distributive justice is the preferable one. Economists, agricultural experts, and others grappling with the issue of rural revitalization are often flummoxed by tailored approaches. Federal transitional policies geared toward addressing rural displacement have not been particularly successful.³²⁴ The vastness of the crumbling rural infrastructure is overwhelming.³²⁵ Dead industries are unlikely to be revived, and nor should they be in most cases.

Tinkering to find the perfect revitalization policy or public-private partnership faces a profound uphill battle to fix large-scale rural decline and longstanding under-investment.³²⁶ Some success stories exist. But quick fixes—such as “teaching coal miners to code,” “investing in microbreweries,” or “having them grow hemp”—discount the complexity of this issue while also disregarding the preferences and capabilities of locals.³²⁷ Perhaps it should be recognized that the private sector simply is not the solution here, and for good reason. The law has empowered the private sector so robustly, and it has wronged rural communities so dramatically, pursuing corporate incentives or benevolence to “save” rural America would merely be sending rural communities back into the lion’s den.

Of course, some might observe that many rural residents would not vote for these measures or the politicians that support them. These skeptics might also point to the fact that rural residents have disproportionate voting power,

³²² Lydia DePillis, *What’s the Green New Deal? Depends Who You Ask*, CNN (Jan. 31, 2019), <https://www.cnn.com/2019/01/31/politics/what-is-the-green-new-deal/index.html> [<https://perma.cc/5JXX-5UUG>].

³²³ See generally Voth, *supra* note 75 (discussing the major phases of federal rural development policy from the creation of the U.S. Department of Agriculture and the Morrill Act in the 1860s through the late twentieth century).

³²⁴ Eisenberg, *supra* note 24, at 330; Revesz, *supra* note 17, at 1525, 1526–55.

³²⁵ See generally Eisenberg, *supra* note 5.

³²⁶ See Porter, *supra* note 10.

³²⁷ See Hardy, *supra* note 41; Erica Peterson, *From Coal to Code: A New Path for Laid-Off Miners in Kentucky*, NPR (May 6, 2016), <https://www.npr.org/sections/alltechconsidered/2016/05/06/477033781/from-coal-to-code-a-new-path-for-laid-off-miners-in-kentucky> [<https://perma.cc/S8KQ-EACT>].

suggesting that they are not in need of advocacy.³²⁸ This tension is admittedly complex; it is presumed that disproportionate rural representation in legislatures is problematic. Although this question is outside the scope of this paper, as noted above, this stance discounts rural minorities who do not vote for conservatives. Further, this disproportionate power does not square with rural communities' disproportionately low per capita resources, higher rates of persistent poverty, and limited access to basic services, such as broadband, schools, doctors, and lawyers.³²⁹ It is true that many rural residents would disagree with the recommendations presented in this Article and make those sentiments known at the voting booth. But it is not true that someone who opposes subsidized healthcare deserves to go bankrupt because of medical expenses, or that someone who supports coal mining deserves to die from black lung. This Article does not ask what some rural residents would vote for; rather, it asks what is just.

As an alternative or complement to a universalist approach, remedies tailored to rural conditions may also make a difference. Yet, even a more tailored approach would require redirecting more resources toward rural communities to address their basic needs. Rural residents are literally and urgently unsafe in light of closures of hospitals and police departments stemming from drops in local tax coffers; states should intervene to provide these needed services.³³⁰ At a somewhat less immediate level, communities in decline can be helped to decline with dignity. Communities that stand to be revitalized may benefit from resources strategically geared toward economic diversification. Both types of communities would benefit from efforts to address the country's aging infrastructure, for which federal precedent does exist.³³¹ Limits on corporate power to use land and people with impunity would also help empower rural workers

³²⁸ See Bassett, *supra* note 124, at 743 (discussing stereotypes about rural voters—such as: (1) “[r]ural dwellers are thought to live in peaceful idyllic settings where issues are simple and unproblematic”; (2) it is believed that the “political interests of rural dwellers are more fully protected than warranted by their actual numbers”; and (3) that “the issue most important to rural dwellers, that of federal subsidies to protect family farms, receives both attention and substantial congressional funding”). Bassett labels these stereotypes as “[f]alse. Entirely, demonstrably false.” *Id.*

³²⁹ See *generally id.* (arguing that rural voters are in fact underrepresented and misunderstood in large part because of campaign financing); Pruitt & Showman, *supra* note 42 (discussing rural residents' difficulties accessing basic services); Robin Runge & Christyne J. Vachon, *Planting the Seeds and Getting into the Field: The Role of Law Schools in Ensuring Access to Justice in Rural Communities*, 59 S.D. L. REV. 616 (2014) (arguing that lawyers and the legal profession dedicate less energy and attention to rural issues than they do urban issues).

³³⁰ See Anderson, *supra* note 8, at 470, 483, 486–94.

³³¹ See Voth, *supra* note 75, at 1265–71.

and communities to better protect themselves and ensure a more just distribution of burdens and benefits.³³²

In either case, though, it must be understood that rural communities cannot, ethically and practically, be left to rectify their plight alone. The distributive justice critique presented above demonstrates that this problem is a collective one. Public decisionmakers have failed to address persistent rural poverty. Their actions have sacrificed rural communities that are declining in the name of aggregate benefits. It is thus now these decisionmakers' task to rectify rural distributive injustice. Even if one is skeptical of the moral case for rural salvation, the practical one still reigns because urban communities depend so heavily on rural productive activities, and because of the threats to stability that unjust transitions have wielded. Thus, no matter what the precise path toward the outcome may be, this Article necessarily implies that a fairer proportion of resources and protections must be directed toward rural communities.

CONCLUSION

This Article attempts to answer the questions, "What happened to rural America and what should be done about it?" because current public and scholarly discussions are failing to. Common answers are that "rural America died" and "it is unclear that anything can be done." These answers are inadequate. Allowing chronic rural poverty to continue is a political choice. For communities in decline, they did not "die"; decades of knowing law and policy decisions made rural people and places worse off in the name of collective benefits, including cheap energy, clean energy, cheap and abundant food, cheap goods, and a higher GDP. These decisions effectuated distributive injustice through political institutions, concentrating burdens on a sacrificial population in the name of collective gain. This distributive injustice became layered atop the more glaring substantive distributive injustice that also shapes rural communities, including the law's inequitable allocations of resources and persistent poverty that fall harder on the shoulders of rural communities of color.

These problems are not unsolvable, however. A more equitable allocation of resources and protections to all marginalized populations would go far to rectifying rural inequity. So, too, would tailored approaches that do more to address the distinct forces that created today's rural conditions. In any case, whether it is for reasons of human compassion, public complicity, or a pragmatic concern for food and energy provision, rural challenges are not just a "rural problem"—they are everyone's problem.

³³² Cf. Daniels et al., *supra* note 37, at 92 (discussing the need to more carefully consider potential harms caused by environmental protection initiatives).

