Geographic Discrimination: Of Place, Space, Hillbillies, and Home

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GEOGRAPHIC DISCRIMINATION: OF PLACE, SPACE, HILLBILLIES, AND HOME

William Rhee* & Stephen C. Scott**

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This Essay explores the two-sided challenge of geographic discrimination, where U.S. citizens receive disparate treatment from other citizens or the government solely because of where they live or self-identify as home, through the interdisciplinary concepts of space, place, and distance; and an original examination of discrimination against Appalachians. Such disparate treatment is unavoidable and even arguably politically correct. Where we call home matters in a number of legitimate ways to include our access to jobs and services, culture, educational opportunities, and other basic human capabilities. Although technology has increased individual mobility more than ever before, a majority of Americans nevertheless live in the same state where they were born.

But even the most invidious geographic discrimination—locational prejudice—remains largely legal under U.S. law. As exemplified by sports rivalries and Appalachian stereotypes, Americans continue to make the stereotyping sampling error, sweeping categorical assumptions about people from a particular place that they probably would not make about race or gender. The “hillbilly” epithet long hurled at Appalachians is one of the oldest examples of locational prejudice in U.S. history. Although Appalachians are often stereotyped as a marginalized poor White minority, in reality, if all the counties defined by federal statute as Appalachia became one state, that state would be the third largest state in the nation with about 17% nonwhite citizens.

Appalachians, like other regional identities, possess considerable definitional problems. Most locational prejudice against Appalachians has probably occurred in places outside Appalachia. Generations of Appalachians have been forced to move to find jobs in the so-called Great Migration of the late 19th and 20th centuries. These self-declared urban Appalachians still consider Appalachia their home. Despite the U.S. District Court encompassing Cincinnati, Ohio, rejecting treating Appalachians as a protected class under the Civil Rights Act of 1964, the City of Cincinnati passed a Human Rights Ordinance in 1992 that remains the only known U.S. law to proscribe Appalachian discrimination. What distinguishes Appalachian discrimination from other U.S. geographic discrimination, however, is the remarkable official recognition that Appalachia has historically suffered locational prejudice by the federal government and by the nine states within Appalachia.

Such invidious locational prejudice—as distinguished from the unavoidable consequences of personal choice and regional planning—requires a remedy. How should U.S. law treat citizens who embody multiple, intersecting protected classes like race, gender, and sexual orientation? Geography has long provided a practical and principled panacea to the longstanding intersectionality (or multidimensionality) problem. Focusing on home and practical geography may not only allow policy makers to reconcile competing individual identities
and protected classes but also help eliminate pretextual discrimination while encouraging concrete compromise.

U.S. law already distinguishes its equal protection jurisprudence geographically with its hierarchy of national, state, county, and municipal law. Basic human capabilities like having a place to live, a job to provide for your family, and a school to teach your children to contribute to U.S. society all require geographic place and space. Ultimately, freedom from discrimination means freedom to come home to where you are equally valued and possess equal opportunity.

I. INTRODUCTION

Why is geographic discrimination against people solely based on where they call home legal? How do we choose between competing identity claims such as race, gender, and sexual orientation? Is there a more systematic way to identify pretextual policies that seem non-discriminatory on their face but actually perpetuate undesirable discriminatory effects?

This Essay uses geographic concepts of place, space, and distance to (1) proscribe locational prejudice, intentional discrimination against U.S. citizens solely because of where they live or self-identify as home; (2) address the difficult dilemma of reconciling competing legal identity claims as exemplified by intersectional (or multidimensional) discrimination; and (3) make pretextual discrimination policies easier to identify. All legal systems of course employ

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1 The U.S. Equal Employment Opportunity Commission ("EEOC") has defined "intersectional discrimination" as

when someone is discriminated against because of the combination of two or more protected bases (e.g., national origin and race). "Some characteristics, such as race, color, and national origin, often fuse inextricably ... Title VII [of the Civil Rights Act of 1964] prohibits employment discrimination based on any of the named characteristics, whether individually or in combination."

Because intersectional discrimination targets a specific subgroup of individuals, Title VII prohibits, for example, discrimination against Asian women even if the employer has not also discriminated against Asian men or non-Asian women.


2 Webster's Dictionary defines "pretext" as a "purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs." Pretext, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/pretext (last visited Oct. 31, 2018). Pretextual discrimination is where seemingly legitimate, nondiscriminatory reasons for an action are shown in actuality to provide pretextual cover for illegal intentional discrimination. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–53 (1981).
geographic boundaries and concepts in their legal doctrine. We begin to test these geographic concepts through an original examination of Appalachian discrimination.

First, geographic discrimination, where U.S. citizens receive disparate treatment from other citizens or the government solely because of where they live or self-identify as home, remains two sided. On the one hand, where we call home matters in a number of legitimate ways to include our access to jobs and services, culture, educational opportunities, and other basic human capabilities. Although technology has increased individual mobility, most Americans nevertheless live within the same state where they were born.

On the other hand, even the most invidious geographic discrimination—locational prejudice—remains largely legal under U.S. law. As exemplified by sports rivalries and Appalachian stereotypes, Americans continue to make the stereotyping sampling error, sweeping categorical assumptions about people from a particular place that they probably would not make about race or gender. The "hillbilly" epithet long hurled at Appalachians is one of the oldest examples of locational prejudice in U.S. history. Although Appalachians are often stereotyped as a marginalized poor White minority, if Appalachia, as currently defined by federal statute, was considered one state, Appalachia would be the third largest state in the nation by population. In reality, Appalachia

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4 “Geographic discrimination” remains the broader concept that encompasses both benign and intentional discrimination on the basis of locale. “Locational prejudice” is the intentional subset of geographic discrimination.

5 For further discussion of human capabilities, see infra Part II.


8 For further discussion of the stereotyping sampling error, see infra Section III.


encompasses tremendous racial, ethnic, and cultural diversity within its small towns and expanding urban areas.\(^{12}\)

Second, the geographic boundaries of the applicable legal authority’s physical jurisdiction and the materially factual ambit of the parties’ everyday lives already provide familiar legal limits. Upon these well-established legal geographic constraints, we superimpose a three-part analysis to evaluate geographic discrimination claims:

1. the social construct of *place* (although “home” remains the most important place, “place” includes others like where one works),\(^ {13}\)

2. the physical reality of *space* (e.g., the actual physical location of one’s current abode, job, and favorite recreational facilities),\(^ {14}\) and

3. the mixed social-physical concept of *distance* (i.e., the location of something in relation to something else that measures access or exposure).\(^ {15}\) Distance can be literal or figurative.\(^ {16}\) For example, one’s daily commute to and from work and home is literal distance. An employee’s perception of the gap between her current employment and her desired promotion is a more figurative form of distance. Whether physical or social, distance must always be objectively quantifiable.

By using these well-established interdisciplinary terms,\(^ {17}\) this Essay seeks to mine the rich critical geography literature for legal purposes. For example, the Statue of Liberty’s space may be Liberty Island, New York, NY 10004,\(^ {18}\) at 40.68920 Latitude and -74.04450 Longitude,\(^ {19}\) but its place as “The Statue of Liberty Enlightening the World” has been much broader and iconic

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12 See Stump & Lofaso, supra note 9, at 829–35; see also infra Section III.A.1.
14 *Id.* (defining space).
15 *Id.* at 511–16 (defining distance).
16 For further discussion, see infra Section V.B.
17 These concepts are familiar to critical housing studies and cultural geography scholars. See generally ALISON BLUNT & ROBYN DOWLING, HOME (2006).
19 Statue of Liberty National Monument, Directions, GOOGLE MAPS, https://www.google.com/maps/place/40%C2%2B041'22.4%22N+74%C2%B002'40.2%22W/@40.689571,-74.0466737,17z/data=!3m1!4b1!4m6!3m5!1s0x0:0x0!7e2!3m4!1d40.689567!4d-74.0444851 (last visited Oct. 31, 2018).
since its 1886 dedication as a gift from the people of France to the United States.\textsuperscript{20}

This place has been anthropomorphized for legal or policy purposes into symbolizing the entire United States or Democracy itself.\textsuperscript{21} Lady Liberty’s place was what inspired doomed pro-democracy Chinese demonstrators in May 1989 to erect a 33-foot Styrofoam-and-plaster replica of the Statue in Beijing’s Tiananmen Square.\textsuperscript{22} Communist Army tanks later flattened the Statue during the Tiananmen Massacre.\textsuperscript{23} After the September 11, 2001, World Trade Center terrorist attacks, U.S. country music star Toby Keith penned a battle song\textsuperscript{24} entitled \textit{Courtesy of the Red, White and Blue (The Angry American)} with the words “And the Statue of Liberty started shaking her fist” in the chorus,\textsuperscript{25} reflecting the outrage of an entire nation.

Within the geographic context, a legal authority can scrutinize specific facts and evidence to determine whether (and how) the defendant’s alleged discrimination in various identity categories, including location, has impaired the alleged victims’ human capabilities. The unavoidable reality is that much of daily life is composed of regular habit and routines.\textsuperscript{26} People have self-reported that “about 43% of [their] actions were performed almost daily and usually in the same context.”\textsuperscript{27}


\textsuperscript{22} \textit{Id.}

\textsuperscript{23} \textit{Id.}


Finally, because pretextual discrimination often relies upon geography, place, space, and distance provide useful tools with which to smoke out discrimination from seemingly neutral policies and to encourage concrete compromise. Ultimately, freedom from discrimination means freedom to come home to a place where you know you are equally valued and possess equal access to opportunity.

II. BASIC HUMAN CAPABILITIES AT HOME

Focusing on individual people’s practical, daily physical access to specific places and spaces begs two further questions. Access to what? Access for what? Consequently, this Essay’s geographic focus pairs well with the Human Capabilities Approach popularized by Martha Nussbaum, Amartya Sen, and their Human Development and Capability Association. Nussbaum has defined the Capabilities Approach as asking, “when comparing societies and assessing them for their basic decency or justice, . . . , ‘What is each person able to do and to be?’” This approach values every individual person’s choices and freedom.

A. The Capabilities Approach

The Capabilities Approach is an aggregate concept—it cannot be reduced to a checklist of specific rights or privileges. Capabilities are the “most important elements of people’s quality of life.” They “are plural and qualitatively distinct: health, bodily integrity, education, and other aspects of individual lives cannot be reduced to a single metric without distortion.”

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28 For further discussion, see infra Section V.C.
30 See, e.g., AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).
31 See About, HUM. DEV. & CAPABILITY ASS’N, https://hd-ca.org/about (last visited Oct. 28, 2018); see also AN INTRODUCTION TO THE HUMAN DEVELOPMENT AND CAPABILITY APPROACH: FREEDOM AND AGENCY ii (Séverine Denculin & Lila Shahani, eds., 2009), https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/40248/IDL-40248.pdf, [hereinafter HUMAN DEVELOPMENT AND CAPABILITY APPROACH], (listing Amartya Sen as the HDCA’s Founding President and Martha C. Nussbaum as its successive President).
32 NUSSBAUM, supra note 29, at 18.
33 See id.
34 Id.
35 Id.
Human capabilities are “the totality of opportunities” a person “has for choice and action in her specific political, social, and economic situation.”

This Capabilities Approach utilizes three central concepts: (1) functioning, (2) capability, and (3) agency. A “functioning” is “being or doing what people value and have reason to value.” A “capability” is “a person’s freedom to enjoy various functionings—to be or do things that contribute to their well-being.” Finally, “agency” is “a person’s ability to pursue and realize goals she values and has reason to value.”

For example, “being healthy and well-nourished” is a functioning. Having affordable, sufficient access to nutritious food, adequate health care, and adequate exercise is necessary for a person to have the capability to enjoy this functioning. Lastly, a person must possess sufficient time, knowledge, and resources for the agency to choose whether to exercise such capability. The choice ultimately is hers alone.

While capabilities by their very nature vary from person to person and context to context, there are more important “central capabilities” so fundamental “that their removal makes a life not worthy of human dignity.” Even though central capabilities are more fundamental, they alone are not sufficient. To live a dignified life, a person still must have access to other capabilities above and beyond central capabilities. Although Nussbaum has created her own list of 10 central capabilities, the point here is not to quibble about the specifics of any list—because the same central capability can be expressed in multiple, overlapping ways—but rather to emphasize the need in

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36 Id. at 21.
37 HUMAN DEVELOPMENT AND CAPABILITY APPROACH, supra note 31, at 22.
38 Id.
39 Id.
40 Id. at 31.
41 NUSSEBAUM, supra note 29, at 18.
42 Id. at 18–19.
43 Id. at 31.
44 Nussbaum’s ten central capabilities are (1) life (“[b]eing able to live to the end of a human life of normal length”); (2) bodily health; (3) bodily integrity; (4) senses, imagination, and thought (being able to use these human characteristics “in a way . . . informed and cultivated by an adequate education”); (5) emotions (“[b]eing able to have attachments to things and people”); (6) practical reason (“[b]eing able to form a conception of the good and to engage in critical reflection about the planning of one’s life”); (7) affiliation (including “freedom of assembly and political speech,” and “nondiscrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin”); (8) other species (“[b]eing able to live with concern for and in relation to animals, plants, and the world of nature”); (9) play; and (10) control over one’s environment. Id. at 33–34.
45 For example, Nussbaum’s dignitary central capabilities explanation echoes much U.S. Supreme Court fundamental rights jurisprudence. See generally Maxine Goodman, Human Dignity in Supreme Court Constitutional Jurisprudence, 84 NEB. L. REV. 740 (2006).
any democracy for a legal determination of more fundamental central capabilities to allow law to prioritize competing capabilities. What U.S. law calls fundamental rights are more broadly understood to be central capabilities.

B. Central Capabilities Need Place and Space

Out of the many possible central capabilities, Equal Protection and statutory rights against housing, employment, and educational discrimination have been explicitly recognized by the U.S. Fifth and Fourteenth Amendments and various civil rights laws. We focus on these three capabilities because they parallel the three Appalachian discrimination areas discussed below. As Virginia Woolf observed in *A Room of One's Own*, we all need literal and figurative space to live, work, and flourish.


47 The reason why this Essay employs “central capabilities” instead of “fundamental rights” is because there are central capabilities, such as the right to be free from geographic discrimination, not considered fundamental rights under U.S. law.


51 For further discussion, see infra Section IV.D.

52 Virginia Woolf, *A Room of One’s Own* (1929). As Woolf observed, “[A] woman must have money and a room of her own if she is to write fiction.” *Id.* at 4. Woolf imagines that William Shakespeare’s imaginary, but equally gifted, sister Judith Shakespeare would have failed and committed suicide during Shakespeare’s time. *Id.* at 80.

53 See *id.* at 3–4, 21, 79.
1. A Home of One’s Own

Home evokes both space and place. As space, home is simply our current domicile, where our physical base of operations is presently located. As place, however, as the saying goes, there indeed is no place like home.

As both space and place, home is salient to identity discrimination. Home as space cabins broad discriminatory theories into a more pragmatic, manageable, and limited geographic context. An unattractive physical home can even be called “homely.” This manageable and limited context remains because home provides a daily geographic anchor for the alleged victim’s everyday life. While as a place, home “is a piece of the whole environment that has been claimed by feelings.” Simply put, home is one’s personal sanctuary “within which one acts out and forges an identity.” Because “multiple social processes intersect in and constitute home,” through home “multiple identities—of gender, race, class, age, and sexuality—are reproduced and contested.”

54 As Fox observes,

Whatever else it might be, home is a place. This may be a space or a place in the memory or imagination, or a place in all of these senses plus more besides—such as an environment that is endowed with spiritual or symbolic significance. A ‘home place’ is also actively fashioned by those who inhabit it or are believed to, including human subjects and vitalizing forces (for example, ancestral or legendary presences).


56 The words “no place like home” have been attributed to many popular works. The earliest known work might be the song “Home, Sweet Home” in John Howard Payne’s 1823 opera Clari, or the Maid of Milan. Henry Bishop, Home, Sweet Home, in JOHN HOWARD PAYNE, CLARI, OR THE MAID OF MILAN (1823).


58 Although “[h]ome is sometimes a state of mind,” EDMUNDS BUNKŠE, GEOGRAPHY AND THE ART OF LIFE 94 (2004), this Essay limits “home” to “a series of feelings and attachments, some of which, some of the time, and in some places, become connected to a physical structure that provides shelter.” BLUNT & DOWLING, supra note 17, at 10.


61 BLUNT & DOWLING, supra note 17, at 27.
German philosopher Otto Bollnow recognized that because we spatially situate our home in relation to our relationship to the group, where we call home is a reference point from which we define our outlook on the world.\(^{62}\) A place called home simultaneously functions as the center of “one’s existence” while “overflow[ing] into, and [being] reflexively defined by, larger geopolitical and natural spheres.”\(^{63}\) As a result, politics inescapably surround or even permeate our home from our inevitable social interactions within and outside our home.\(^{64}\) Not only have culture and technology blurred the lines between public and private, home and work, but also our view of home is unavoidably shaped by our own unique normative lens.\(^{65}\)

Another German philosopher, Martin Heidegger, believes that we inhabit the world by dwelling in a home where we feel settled and at peace.\(^{66}\) There is a reason why the next question asked among new acquaintances after the obligatory exchange of names is often “where are you from?” or “where’s home for you?”\(^{67}\)

In other words, everybody needs a place called home where they can develop and refine their own self-identity. Maya Angelou noted that the “ache for home lives in all of us, the safe place where we can go as we are and not be questioned.”\(^{68}\) Roman philosopher Pliny the Elder is credited with first saying that home is “where the heart is.”\(^{69}\) Although different cultures and different languages might use different words, they do appear to share a “pool of common properties” about home.\(^{70}\)

But often, like family, our home is our home for better or for worse. If our childhood was filled with rejection or abuse, our childhood home can be a place of great pain. We can be subjected to “house arrest” within our own home. Immigrants and children of immigrants can find themselves caught between competing visions of home.\(^{71}\) Literal and figurative refugees, migrants, slaves, former slaves, and other marginalized people can be homeless or forced to call a


\(^{63}\) Id. at 20.

\(^{64}\) Id. at 78.

\(^{65}\) Id. at 80–83.

\(^{66}\) Id. at 21 (citing Martin Heidegger, Building Dwelling Thinking, in BASIC WRITINGS (David Farrell Krell ed., 1993)).


\(^{68}\) MAYA ANGELOU, ALL GOD’S CHILDREN NEED TRAVELLING SHOES 196 (1991).

\(^{69}\) FOX, supra note 54, at 2.

\(^{70}\) Id. at 10.

\(^{71}\) See generally GABRIEL SHEFFER, DIASPORA POLITICS: AT HOME ABROAD (2003) (ebook).
less than desirable place home. There also are the actual “homeless” who daily must struggle to secure food, shelter, and other life necessities that those with comfortable homes take for granted. In its most sinister manifestation, the human need for home can be weaponized into a terror weapon. “Domicide” is the homicide of your home.

As Janet Zandy wrote, “finding a place in the world where one can be at home is crucial.” Home can be “literal: a place where you struggle together to survive;” a “dream: ‘a real home,’ something just out of one’s grasp;” or a “nightmare: a place to escape in order to survive as an individual.”

But we can change our home over time. Although we do not get to choose our birth or childhood home, we can choose to move our home elsewhere as adults. Anthropologist Mary Douglas recognized that “home is not only a space, it also has some structure in time.”

As Appalachian author bell hooks wrote,

Each year of my life as I went home to visit, it was a rite of passage to reassure myself that I still belonged, that I had not become so changed that I could not come home again. My visits home almost always left me torn: I wanted to stay but I needed to leave, to be endlessly running away from home.

Some spend their adult lives seeking an alternative to their childhood home only to find their way back to their youth home, perhaps really seeing it for the first time. Others believe that once you leave, you never really can return home.

A parochial, narrow home viewpoint might blind us from other perspectives, truth, or even self-enlightenment. For some, a broader perspective requires leaving home. Paradoxically, the very comfort and security of our home might delude us to favor unfairly neighbors from home and to discriminate unjustly against visitors from away. Some find home away from their original home: “Then home is no longer just one place. It is locations. Home is that place

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72 See generally id.
75 JANET ZANDY, CALLING HOME: WORKING CLASS WOMEN’S WRITINGS 1 (1990) (emphasis in original).
77 BELL HOOKS, BELONGING: A CULTURE OF PLACE 17 (2009).
which enables and promotes varied and everchanging perspectives, a place where one discovers new ways of seeing reality, frontiers of difference.\textsuperscript{78}

Human culture and mythology continue to glorify the Ancient Greek nostos,\textsuperscript{79} the hero’s epic fight to return home.\textsuperscript{80} Nostos has not only given us nostalgia, the painful longing for an absent home, but also nostimo, the Greek word for delicious or handsome. Greek language and culture therefore derives their conceptions of what tastes good and what looks good from their understanding of homecoming.\textsuperscript{81} While away from home, we can even be homesick.

Considering the importance of home,\textsuperscript{82} it is unsurprising that both U.S.\textsuperscript{83} and international law\textsuperscript{84} prohibit housing discrimination. One of the biggest reasons to be away from home is to go to work to make a living.

2. A Job of One’s Own

In modern capitalist economies, the ability to earn money through employment is an unavoidable necessity for an adequate life.\textsuperscript{85} Not surprisingly, every possible list of fundamental rights or central capabilities\textsuperscript{86} includes some

\textsuperscript{78} Bell Hooks, \textit{Yearning: Race, Gender, and Cultural Politics} 148 (1991).

\textsuperscript{79} Nostos is an ancient Greek word for an epic tale where a hero fights to return home. See Anna Bonifazi, \textit{Inquiring into Nostos and Its Cognates}, 130 Am. J. Philology 481, 486 (2009).

\textsuperscript{80} See id.; see also Elisabeth Bronfen, \textit{Home in Hollywood: The Imaginary Geography of Cinema} (2004) (examining the notion of home in selected movies).


\textsuperscript{82} See generally Fox, supra note 54.


\textsuperscript{85} “Labor” is one of the four classical economic factors of production. Paul R. Krugman & Maurice Obstfeld, \textit{International Economics: Theory and Policy} 160 (4th ed. 1997). The Bible recognized work as one of humanity’s first responsibilities. “The Lord God took the man and put him in the garden of Eden to work it and keep it.” \textit{Genesis} 2:15 (English Standard). In the Bible, the Apostle Paul also commanded able-bodied people to work to earn their livelihood. “[I]f anyone is not willing to work, let him not eat.” \textit{2 Thessalonians} 3:10 (English Standard).

form of Nussbaum’s formulation, “the right to seek employment on an equal basis with others” and “being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.”

3. A School of One’s Own

Although the U.S. Supreme Court has held that the right to education is not a fundamental right under the federal U.S. Constitution, state constitutions and international law recognize education as a central capability. Nussbaum identified “an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training” as a central capability.

All central capabilities—including housing, employment, and education—require space and place to function. Locational prejudice, however, may discriminate based on one’s space and place. Therefore, these three rights can be indirectly sabotaged by locational prejudice.

III. POLITICALLY INCORRECT LOCATIONAL PREJUDICE

Locational prejudice might be the last politically correct form of discrimination in the United States. Political correctness notwithstanding, locational prejudice is a particularly pernicious form of geographic discrimination where a person receives negative treatment solely because of animus over where she lives or self-identifies as home.

Locational prejudice is pernicious because it fails to rely upon any legitimate empirical inferences. Like racism and sexism, to justify its irrational animus locational prejudice cherry picks a few anecdotal examples or stereotypes.


NUSSBAUM, supra note 29, at 34.


NUSSBAUM, supra note 29, at 34.
that fail to provide an accurate sample of the population of people from a particular place. Our only point here is to highlight that racism, sexism, other historical forms of discrimination, and locational prejudice all rely on stereotyping. We otherwise do not intend any false equivalencies or hierarchies.

In statistical terms, locational prejudice lacks reliability\(^{92}\) and validity.\(^{93}\) Its sweeping categorical inferences about all people from a particular place are simply not supported by its flawed, limited sampling (the "stereotyping sampling error").\(^{94}\) This stereotyping sampling error is literally the dictionary definition of discrimination.\(^{95}\)

Although this criticism should be obvious,\(^{96}\) the undeniable fact remains that people who would never similarly essentialize race or gender categories continue to prejudge and stereotype people from a particular place.\(^{97}\) Why do public figures who should know better continue to express locational prejudice?\(^{98}\) Why avoid the stereotyping sampling error\(^{99}\) with race and gender but not with location? One possible explanation is that while U.S. law proscribes racial and gender prejudices, locational prejudices remain legal.\(^{100}\) Regardless of legality, however, locational prejudice is simply shoddy analysis.

What makes locational prejudice even more intractable is its inherent intersection with multiple identity categories. While sports rivalries demonstrate locational prejudice’s apparent political correctness, the regional planning process harnesses useful factual data from respected sources like the U.S. Census Bureau; continuously improving geographic information systems (GIS) mapping technology; and a proactive, detailed geographic framework. Finally, the

\(^{92}\) Statistical reliability is “the extent to which it is possible to replicate a measurement, reproducing the same value (regardless of whether it is the right one) on the same standard for the same subject at the same time.” Lee Epstein & Gary King, The Rules of Inference, 69 U. Chi. L. Rev. 1, 83 (2002).

\(^{93}\) Statistical validity is “the extent to which a reliable measure reflects the underlying concept being measured.” Id. at 87.

\(^{94}\) See Ferrari & Rhee, supra note 11, at 850–51 (utilizing the stereotyping sampling error).


\(^{96}\) For further discussion, see infra notes 212–213 and accompanying text.

\(^{97}\) Essentialism assumes that one or a few members of a group represent the entire group. Will Rhee, Entitled to Be Heard: Improving Evidence-Based Policy Making Through Audience and Public Reason, 85 Ind. L.J. 1315, 1328 & n.71 (2010) (citing Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581, 588 (1990)).

\(^{98}\) For further discussion, see infra notes 263–266 and accompanying text.

\(^{99}\) Id.

\(^{100}\) See Ferrari & Rhee, supra note 11 and accompanying text.

\(^{101}\) For further discussion, see infra Section III.B.
regional planning process can help distinguish locational prejudice from less avoidable forms of geographic discrimination and provide the beginnings of a potential legal remedy.

A. An Intersectional or Multidimensional Concept

As complex and free human beings, we all pride ourselves on our unique individuality. Each human being possesses many dimensions. These dimensions can be embodied physical human traits such as our race, gender, height, and weight or more expressive human traits such as our religious beliefs (or lack thereof), our fan support of particular sports teams, and our membership in a political party. Law, society, or popular culture identifies some of these human traits like race or gender as materially relevant and ignores others like our height or fan affiliation with a particular sports team as irrelevant.

The individual human traits that a person might choose as most important to her self-identity are not necessarily the same human traits emphasized by law. Traditionally, law lacks the flexibility and agility to accommodate individualized conceptions of intersectional identity.

In particular, multiracial Americans demonstrate this definitional disparity between individual self-concept and crude legal categories. Multiracial Americans are the fastest growing demographic group in the nation. From 2014–2060, Americans who self-identify with two or more races are projected according to U.S. Census data to increase by 225.5%. Multiracial people can experience discrimination from people who identify with one or more of their races and from people of other races.

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104 See id.
105 See id.
106 See id.
109 Id. at 1051 tbl.1.
The multiracial professional golfer Tiger Woods—whose father was African American, Chinese, and Native American and mother was Thai, Chinese, and Dutch—self-identified as “Cablinasian”—a combination of Caucasian, Black, Indian, and Asian—but when prompted on official forms, Woods selected the “African American” and “Asian” boxes because “those are the two [he] was raised under and the only two [he] know[s].” In an interview with Oprah Winfrey, Woods opined, “I’m just who I am... whoever you see in front of you.”

Before 2000, Woods and other multiracial Americans were forced to choose only one 1997 Office of Management and Budget (OMB) “White,” “Black or African American,” or “Asian” racial and ethnic category when responding to the U.S. Census. Since 2000, Woods and other multiracial Americans have had the opportunity to choose all of the OMB racial and ethnic categories they want on the U.S. Census. The U.S. Census admits that these racial categories are based on “self-identification” and a “social definition of race recognized in this country.”

The 2000 change in the U.S. Census racial and ethnic categories was the culmination of the “Multiracial Movement,” a social change movement of multiracial Americans and their families who objected to having to pick and choose only one racial or ethnic category on the Census. This successful movement demonstrates that race is a flexible social construct. Multiracial Americans resisted choosing only one racial category on the Census because such a practice erased their true identities.

While race and other human identities are social constructs, they also reflect lived experience, particularly for people with identities against which law has discriminated. With certain human traits like race, gender, and sexual orientation, the law has historically discriminated against human beings who possessed stigmatized traits (e.g., Black people, women, gay) and favored human...

112 Id. (quoting the Oprah Winfrey Show).
113 Id.
115 Id.
116 Id.
beings who possessed privileged traits (e.g., White people, men, straight). For example, U.S. law has implemented racist, sexist, and homophobic systems to allocate or restrict both material and status-related resources solely based upon people’s race, gender, or sexual orientation.

Intersectionality (which originally referred to the nexus of race and gender and later broadened into multidimensionality) not only demonstrates the many complex ways society can disadvantage or privilege people based on their individual identity but also recognizes that multiple systems of privilege or oppression can conflict with and reinforce each other. Where two or more benefiting or burdening systems intersect, unique multidimensional categories and experiences result. For example, a wealthy White heterosexual male may benefit from laws and social norms more than a wealthy White homosexual male, a poor White heterosexual female, or a poor Black homosexual female.

Like the three (or four) spatial dimensions, geography is also by definition intersectional (or multidimensional). Every individual human being uniquely occupies distinctive physical space and idiosyncratically measures place and distance. Law also underestimates how practical geography implicitly or explicitly constrains the other people—at work, at school, or while doing life—with whom we interact daily and unfortunately from whom we can experience prejudice.

Yet, geography is also forced to aggregate people into larger spaces and places like city blocks, neighborhoods, towns, counties, states, regions, countries, alliances, conferences, and continents. Because they include greater numbers of diverse human beings within their growing boundaries, these larger geographic units of analysis encompass more multidimensional intersections between different identity categories. For example, although one

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119 See Mutua, Future Directions, supra note 103, at 373.
120 Id.
121 See Athena D. Mutua, Multidimensionality Is to Masculinities What Intersectionality Is to Feminism, 13 NEV. L.J. 341, 344 (2013) [hereinafter Mutua, Multidimensionality] (citing Crenshaw, supra note 1, 1242–43 n.3.
122 Id. at 346.
123 Id.
124 For an overview of the legal and social implications of the intersection of these categories, see Mutua, Multidimensionality, supra note 121.
125 The four dimensions are length, width, depth, and time. See Fourth Dimension, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/fourth%20dimension (last visited Nov. 1, 2018).
126 Geographical scale is “not a preordained hierarchical nomenclature for ordering the world” but is “made by and through social processes.” Sallie A. Marston, A Long Way from Home: Domesticating the Social Production of Scale, in SCALE AND GEOGRAPHIC INQUIRY: NATURE, SOCIETY AND METHOD 172 (E. Shepherd & R. McMaster eds., 2004).
127 See id.
neighborhood composed of a few city blocks might be predominantly minority and poor, the entire metropolitan area—to include the more expensive, predominantly White suburbs—presents a more integrated racial and socioeconomic picture.

B. Sports Rivalries

Like geography, sports rivalries are also intersectional (or multidimensional). For better or worse, many Americans are more passionate and knowledgeable about sports than any law or policy. As Newsweek reporter Mark Starr commented, “In this fragmented age, it often seems that only sports can bind the nation—across its divides of class, race and gender—in common cause and celebration.”

In 2007, a New York Times story headline ironically proclaimed, “After 88 Years of Rivalry, the Last as Us and Them.” Two rival Uniontown, New Jersey, high schools, with student attendance zones that divided Uniontown north and south with the town’s “own Mason-Dixon line,” were consolidating into one high school in the fall—ending a bitter Thanksgiving Day rivalry game that had been fought annually between the two high schools for the past 88 years. Rooting for your home team to beat the visiting team is a “complicated, double-edged process of inclusion and exclusion.”

On the one hand, cheering for the home team can create and maintain a place’s collective identity. Your home team’s success encourages your home’s connectedness and provides public pride and pleasure to individual team members and fans and to your entire team. Shared pride over the home team’s ascendency promotes cooperation, teamwork, and community.


Id.

ROOTING FOR THE HOME TEAM, supra note 128, at 2.

Id.

Id.

Id.

Id. at 3.
Every sports team not only represents a place but also anthropomorphically personifies that place with its name and mascot. The place literally becomes the team name and persona. In Appalachia, the U.S. National Football League ("NFL") American Football Conference ("AFC") Pittsburgh Steelers remain nostalgically named after steel workers ("Steelers") even though steel mills have not operated within Pittsburgh’s city limits since the late 1980s.

On the other hand, sports rivalries have literally or figuratively excluded other people. The history of U.S. sports of course reflects the same racism, sexism, and prejudice prevalent in the nation at large. In the annual zero-sum competition, for the home team to win, the visiting team must lose. There can only be one champion.

Furthermore, booing or hating the away team involves a negative animus reminiscent of racism, sexism, and other forms of bigotry. In sports, the most extreme form of socially acceptable bigotry might be the annual rivalry game. Both authors are personally familiar with one college football rivalry, the "Backyard Brawl" between two Appalachian college football teams, the West Virginia University ("WVU") Mountaineers and the University of Pittsburgh ("Pitt") Panthers. When interviewed about the "Backyard Brawl" in 2007, former Pitt football center J.C. Pelusi observed: "[Y]ou really didn’t care about winning the game. All you cared about was really hurting the people on the other side of..."

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141 See ROOTING FOR THE HOME TEAM, supra note 128, at 3.

142 For discussion of a high school rivalry game, see supra notes 130–131 and accompanying text.
the football field. They didn’t like us a whole lot and we didn’t like them a whole lot and there wasn’t a whole lot of respect.”

In the rivalry, WVU’s hatred of Pitt remains equally pronounced. When asked in 2014 during an ESPN College Gameday appearance in Morgantown, West Virginia (the home of the WVU football team), who he would pick to win a Pitt versus Duke game, country music star Brad Paisley, a West Virginian, initially responded, “We have a little chant about those [Pitt] guys, you wanna hear it?” The home WVU crowd then started chanting, “Eat $#!+ Pitt!” Later, Paisley picked Duke to win. He admitted his pick was “mostly because I hate them.”

Such extreme locational prejudice can also exacerbate preexisting tensions between neighbors. Sports rivalry even catalyzed actual physical conflict in the 1969 “Soccer War” between El Salvador and Honduras. Three qualifying matches for the 1970 Mexico City World Cup demonstrated that “[s]occer, metaphor for war, at times turns into real war.” The Soccer War raged for six days. Both nations suffered over 2,000 casualties. After the war, more than 100,000 Salvadorans fled Honduras, severely injuring the Honduran economy. Fortunately, sports rivalry appears to have little influence (outside the normal entertainment and tourism context) on the professional regional planning essential to maintain the United States’ high standard of living.

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147 See Yuriy Veytskin et al., supra note 145.

148 See id.

149 See id.

C. Regional Planning

Creating and maintaining the considerable public, cultural, residential, and commercial infrastructure and features throughout the United States requires tremendous planning and coordination. We briefly overview the most common types of regional planning. While one may remain blissfully unaware of it, this interconnected web of complex planning unavoidably channels and limits our daily life choices and routines. Moreover, the data generated by such planning can provide a rich and more objective context for discrimination disputes and feasible remedies.

Most U.S. land-use planning and zoning decisions involve up to four local bodies to whom states have delegated their zoning authority under the police power: the local legislature (for example, board of aldermen or city council); the zoning commission; the planning commission; and the board of adjustment (or zoning board of appeals). A U.S. Department of Commerce model code, the Standard State Zoning Enabling Act, has been adopted by most states as state law and mandates these four bodies.

Whether local land-use decisions are made through a fair and orderly process or ad hoc, subjective, individual deal-making remains disputed. Notwithstanding such dispute, local governments have an incentive to create and follow comprehensive land-use plans before exercising their police power to zone because the plans’ policies, goals, and objectives provide persuasive evidence of the rational basis of their land-use decisions.

A comprehensive land-use plan is an official public document preferably (but often not) adopted as law by the local government as a policy guide to decisions about the physical development of the community. Usually it sets forth, in a general way, using text and maps, how the leaders of local government want the community to develop in the future. The length of the future time period to be addressed by a

151 See U.S. CONST. amend. X.


comprehensive plan varies widely from locale to locale, and is
often set by state legislation enabling or requiring local
governments to plan.\footnote{Id. at 27–28.}

The American Planning Association has recognized four principal characteristics
of a rational, comprehensive planning process. It is (1) future-oriented; (2)
continuous; (3) based upon a determination of present and projected conditions
within the plan's area; and (4) fair.\footnote{Id. (citing APA Policy Guide on Smart Growth, AM. PLANNING ASS’N (Apr. 15, 2012), https://www.planning.org/policy/guides/adopted/smartgrowth.htm).}

Although an in-depth examination is beyond the scope of this Essay, we
highlight aspects of this comprehensive planning process because it provides
critical evidence and context with which to evaluate alleged geographic
discrimination. Particularly salient to this Essay are (1) public works planning;
(2) residential planning; (3) cultural planning; and (4) commercial planning for
their impact on central capabilities like housing, employment, and education.

1. Public Works Planning

Regional planning in the public sector of course is very different than
regional planning in the private sector. Among other differences, public planning
is usually defined by capital budgets and typically is not motivated by profit.\footnote{Id. at 27–28.}
The American Public Works Association defines public works as the
"combination of physical assets, management practices, policies, and personnel
necessary for government to provide and sustain structures and services essential
include the familiar water, utilities, and trash collection functions.\footnote{Id.}

While public works functions are well-established, controversy remains
over who provides them.\footnote{Id.} Are they provided by traditional local government
organizations, private contractors, or some combination?\footnote{Id.}

Because government still by and large controls public works in the
United States, political influence is more important to public works planning than
other, more private planning. With public works planning, the relevant
government agency and planner "find themselves developing the project,
justifying the project, begging for funding, tip-toeing through political changes,
[and] dealing with not-in-my-backyard (NIMBY) coalitions.\textsuperscript{163} Because electricity, water, recycling, and trash are available throughout the nation, such public utilities require integrated national networks to meet both local and national needs. Consequently, public works require complex planning and coordination to function.\textsuperscript{164} Functioning public utilities are also essential for residential homes to flourish.

2. Residential Planning

Designing and building homes in close proximity to public highways, roads, services (like schools and hospitals), shopping, and jobs requires remarkable planning and coordination.\textsuperscript{165} When laying out a new residential area, a planner must consider at least eight major issues: (1) commercial viability; (2) the design’s place and space; (3) the design’s environmental impact; (4) pedestrian and vehicular access and movement; (5) integration of other use structures like “shops and services, pubs and restaurants, . . . religious and other community buildings,” and “spaces for business use”\textsuperscript{166}; (6) safety and ease of finding your way around; (7) contemporary residential townscape features; and (8) social life in outdoor spaces.\textsuperscript{167} Much social life outside the home involves cultural recreation.

3. Cultural Planning

Cultural planning has been defined as “a community-wide process of creating a vision for cultural programming and development.”\textsuperscript{168} A cultural facility is

\textsuperscript{163} PSMJ RES. INC., supra note 158.


\textsuperscript{165} MIKE BIDDULPH, INTRODUCTION TO RESIDENTIAL LAYOUT 1 (2007).

\textsuperscript{166} Id. at 6–7.

\textsuperscript{167} Id. at 6–9.

a building used primarily for the programming, production, presentation, and/or exhibition of cultural disciplines—such as music, dance, theater, literature, visual arts, and historical and science museums. Cultural facilities like concert halls, art galleries, performing arts center, etc. can be an important anchor for a community, often creating a cultural identity for a place.169

Cultural facilities can often provide the “launching point for a broader cultural plan.”170 Because they attract people, cultural facilities often have a symbiotic relationship with commercial facilities.

4. Commercial Planning

Finally, all the other types of planning inevitably affect commercial planning because there is a “close and important interaction” between customers’ willingness to travel and the location of businesses.171 Consumers’ “trip distribution pattern” and businesses’ “location distribution pattern” form the “business land-use system” of a town or city.172 Although e-commerce, the “buying and selling of products and services exclusively through electronic channels,” continues to increase,173 e-commerce currently is less than 10% of all U.S. retail sales.174 Recently, more employers are limiting employee telecommuting and requiring employees to commute to a physical work location.175

D. U.S. Federal Geographic Statistics

All forms of regional planning employ free and comprehensive U.S. federal geographic statistics. The decennial U.S. Census is mandated in Article I, Section 2 of the U.S. Constitution.176 Because the U.S. Census Bureau’s data

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169 Id.
170 Id.
172 Id. at 498.
174 Id. at 13.
176 U.S. CONST. art. I, § 2 ("The actual Enumeration shall be made . . . within every subsequent Term of ten Years, in such Manner as they shall by Law direct.")
about the United States’ people and economy determines so many essential
government functions,177 U.S. Census data should be authoritative and
reliable.178

Not the U.S. Census Bureau, but rather the U.S. Office of Management
and Budget (OMB) in the Executive Office of the President of the United States
determines the geographically defined core based statistical areas (CBSAs)
federal agencies use to collect federal statistics.179 A CBSA contains a core area
with a substantial population nucleus and adjacent communities that possess “a
high degree of economic and social integration with that core.”180

CBSAs further break down into two smaller areas, metropolitan and
micropolitan. Metropolitan areas contain 50,000+ people. Micropolitan areas
contain greater than 10,000 but less than 50,000 people.181 Counties or their
equivalent are the “geographic ‘building blocks’” for micropolitan and
metropolitan statistical areas.182 The largest city within each statistical area is
designated a “principal city.”183

Metropolitan and micropolitan boundaries do not necessarily reflect
urban-rural divides.184 In fact, these statistical areas are solely for statistical
purposes and are not intended to reflect nonstatistical purposes.185 Metro and

177 Among other purposes, U.S. Census data is used to “determine the distribution of
Congressional seats to states,” “make planning decisions about community services,” and
“distribute more than $675 billion in federal funds to local, state and tribal governments each year.”
About the Bureau: What We Do, U.S. CENSUS BUREAU, https://www.census.gov/about/what.html
(last visited Oct. 28, 2018).

*1 (E.D. La. Oct. 18, 2004) (denying a motion to exclude a printout of U.S. Census website data);


180 Id.

181 Id.

182 Id.

183 Id.

184 Id.

185 Id.
micro areas can cross state lines. For example, Russell County, Alabama, is part of the Columbus, Georgia, metro area.¹⁸⁶

There are of course other readily available sources of U.S. national and geographic data. Perhaps most familiar to average citizens are the telephone area codes of the North American Numbering Plan¹⁸⁷ and the U.S. Postal Service Zoning Improvement Plan (ZIP) code.¹⁸⁸ Both concisely pinpoint specific geographic areas of the United States.

E. Geographic Information Systems (GIS)

Such geographic statistics can be processed into geographic information using computer-based geographic information services (GIS). As the saying goes, a picture is worth a thousand words.¹⁸⁹ There are many different open-source GIS computer applications available.¹⁹⁰ Popular versions of GIS include


¹⁸⁸ In a five-digit ZIP code, the first digit designated a broad geographical area of the United States, ranging from zero for the Northeast to nine for the far West. This number was followed by two digits that more closely pinpointed population concentrations and those sectional centers accessible to common transportation networks. The final two digits designated small Post Offices or postal zones in larger zoned cities. See U.S. POSTAL SERV., THE UNITED STATES POSTAL SERVICE: AN AMERICAN HISTORY 1775–2006, 33 (2012), https://about.usps.com/publications/pub100.pdf.


free virtual three-dimensional mapping applications like Google Earth and the National Aeronautics and Space Administration’s (NASA’s) WorldWind.

Geographic information is “knowledge acquired through processing geographically referenced data. [GIS] are (1) functionality provided by a software entity through its interfaces defined as named sets of operations and, (2) provisions of information generated from geospatial data.” GIS provide “a rich set of spatial analysis tools for managing spatial data, identifying spatial relationships, measuring spatial concepts, and making spatial predictions.”

Although GIS maps provide useful summary demonstrative aids that increase general understanding of data, most relevant here is GIS mapping “as a tool for discovery and analysis throughout the investigation” and “not merely a decoration for the resulting manuscript.” The analysis of GIS maps capitalizes upon the reality that “social processes operating in space produce patterns.” Most social and legal processes have a predetermined spatial structure because “objects and events that are geographically proximate are often related, whether through causation or correlation.”

In light of such versatility, GIS have already been used to analyze alleged systemic discrimination in education, housing, and voting. These unique features make GIS ideally suited to analyze geographic discrimination as well.

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194 Li, supra note 190, at 578.
196 Id.
197 Id.
198 Id.
201 See M. Horn, GIS and the Geography of Politics, in NEW DEVELOPMENTS IN GEOGRAPHICAL INFORMATION SYSTEMS: PRINCIPLES, TECHNIQUES, MANAGEMENT AND APPLICATIONS 939 (P.A. Longley et al. eds., abr. 2d ed. 2005).
IV. COLOR IT APPALACHIAN

After losing a wager on the 2010 Olympic Men’s Ice Hockey Championship Game between the United States and Canada, U.S. President Barack Obama—who is of Black Kenyan and White Kansan ethnicity—famously gave Canadian Prime Minister Stephen Harper—who is of White Scottish and White English ethnicity—a case of Obama’s favorite brew, the Appalachian beer Yuengling.

According to popular U.S. mythology, Appalachia has been long considered a place where poor Whites live. In fact, when asked if President Lyndon Johnson’s 1960s War on Poverty had a racial color, the War on Poverty’s “Chief Midwife” Adam Yarmolinsky responded, “Color it Appalachian if you are going to color it anything at all.”

Appalachia is the geographic space that is defined by the Appalachian Mountains in the eastern United States. In the 1560s, Spanish and French cartographers first named the region “Appalchen” after mistakenly assuming that the region was the Apalachee Native American tribe’s residence. The region became “Appalachia” in the 1800s, defining the region in social, economic, and cultural ways. This geographic place—and a shared history of exploiting

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208 Id.
natural resource wealth from that place—continues to define Appalachian identity and distinguish prejudice against Appalachians from that against other U.S. minority groups. Accordingly, prejudice against Appalachians remains prejudice against people from a particular geographic place, namely home.

Locational prejudice against Appalachians predates the establishment of the United States and remains not only socially acceptable but also legal. American citizens and national leaders regularly employ Appalachian stereotypes that would likely be unthinkable for other classifications like race or gender.

Locational prejudice against Appalachians could be legally remedied in one of two ways: (1) a simple change in legal doctrine or (2) legal recognition that Appalachians suffer from past inequality and inequity deserving federal and state protection. Remediating locational prejudice, however, is more complicated than simply adopting new legal protections because of the unavoidable discrimination that accompanies where we live, where we work, and where we belong.

A. Are Hillbillies Hilarious or Offensive?

The history of public ridicule towards Appalachians in the United States is older than the United States itself. This public ridicule, unfortunately, has persisted into the twenty-first century. For example, on June 2, 2008, while campaigning for Republican Presidential Nominee John McCain in West Virginia, former Republican Vice President Dick Cheney made an incest joke,

209 Although Appalachia has multiple definitions, this Essay adopts the Appalachian Regional Commission’s (ARC) statutory definition of Appalachia as spanning the length of the Appalachian Mountains, including parts of 12 states—Alabama, Georgia, Kentucky, Maryland, Mississippi, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, and Virginia—and all of West Virginia. See 40 U.S.C. §§ 14101–14102 (2018); see also The Appalachian Region, ARC, https://www.arc.gov/appalachian_region/TheAppalachianRegion.asp (last visited Sept. 24, 2018). What defines an Appalachian remains a disputed question today. See, e.g., Anne Rachel Terman, Intersections of Appalachian Identity, in APPALACHIA REVISITED: NEW PERSPECTIVES ON PLACE, TRADITION, AND PROGRESS 73 (William Schumann & Rebecca Adkins Fletcher eds., 2016).

210 See infra Section IV.D.

211 See ANTHONY HARKINS, HILLBILLY: A CULTURAL HISTORY OF AN AMERICAN ICON 13–46 (2004). Although the origins of the word “hillbilly” are uncertain, the most credible theory is that Scots—either in Scotland or the United States—linked two older Scottish expressions for “fellow” or “companion,” hill-folk and billie, to form “hillbilly” in the late nineteenth century. Id. at 48.
adding, "And we don’t even live in West Virginia. You can say those things when you’re not running for re-election."212 Cheney later apologized.213

More recently, native Appalachian J.D. Vance popularized breathtaking stereotypes in his New York Times Bestseller (one of six books "to help understand Trump’s win,"214 and a soon-to-be-made major motion picture directed by Ron Howard215), Hillbilly Elegy: A Memoir of Family and Culture in Crisis.216

Vance’s very title communicated his intent to eulogize Appalachia’s death and “crisis” culture. He eulogized the American Dream of Appalachian upward generational mobility, writing, “We’ve learned, painfully, that for the multigenerational poor, home might be the worst enemy. Appalachian loyalty to the land is the stuff of legend, yet the stubbornness of poverty in the region means that those who stay risk being poor forever.”217 Vance’s allegedly evidence-based coup de grâce on his native homeland was to conclude coldly yet coherently that “[i]f we cannot improve . . . the mountain hollow—and the evidence suggests we can’t—then the best anti-poverty program is a ticket to somewhere else.”218 As native Appalachian and law professor Jedediah Purdy219

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213 According to Cheney’s spokeswoman, “[t]he vice president’s offhand comment was not meant to hurt anyone . . . On reflection, he concluded that it was an inappropriate attempt at humor that he should not have made. The vice president apologizes to the people of West Virginia for the inappropriate remark.” Cheney Apologizes, supra note 212.


218 Id. As explained below, Vance has created a nonprofit organization with the stated mission to help Ohio and Appalachia. See infra note 254 and accompanying text.

observed upon reading Vance’s book, “writing about yourself and the people you love is always an exercise in both loyalty and betrayal.”

While most of *Hillbilly Elegy* was autobiographical, Vance generalized Appalachians with common characteristics:

- as “truly irrational,”
- as spending their “way into the poorhouse,”
- as having thrift “inimical” to their “being,”
- as having “homes” that are “chaotic mess[es],”
- as having “[a]t least one member of the family us[ing] drugs,”
- as “hit[ting] and punch[ing] each other, all in front of the rest of the family, including young children,”
- as not studying as children and not making “our kids study when we’re parents,” and
- as “never giving [their children] the tools—like peace and quiet at home—to succeed.”

By so doing, Vance committed the stereotypical sampling error. Although his empirical evidence is largely limited to his personal experience, he nevertheless essentializes all Appalachians based on his biased personal sample. As Elizabeth Catte commented in response to an interview of Vance, “It is telling how infrequently individuals who are both Black and Appalachian appear in his remarks. While bemoaning [Appalachians’] basic cognition, he takes liberties with his own by refusing to acknowledge that not all [Appalachians] are white.”

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221 VANCE, supra note 216, at 146–47. To be fair to Vance, even though he wrote his insulting sentences with the seemingly universally applicable “we,” he later wrote, “Not all of the white working class struggles . . . . My grandparents embodied one type: old-fashioned, quietly faithful, self-reliant, hardworking.” Id. at 147.

222 See Cheney Apologizes, supra note 212 and accompanying text.

In fact, the widespread, bipartisan acceptance\textsuperscript{224} of Vance's empirically suspect conclusions\textsuperscript{225} demonstrates the ongoing battle over the public narrative of Appalachia.

1. The Ongoing Battle over Appalachia's Public Story

A number of Appalachian scholars have persuasively documented how for centuries outsiders have silenced native Appalachian voices in oversimplified, disingenuous explanations of what supposedly ails the Appalachian region.\textsuperscript{226} As Catte observed, "Using Appalachians to fill made-to-

\textsuperscript{224} See supra notes 214–215 and accompanying text. As Professor Lisa Pruitt astutely summarized:

There is often what I call a “shock and awe” character to the response [to \textit{Hillbilly Elegy}], a “there are actually people like Vance and his family out there in America” response. Who knew? ... [T]o illustrate just how over the top the media response to \textit{Hillbilly Elegy} has been, let me quote a few reviews. Bloomberg identified the book as “the most popular choice for best book of 2016.” ... [The] \textit{New York Times} ... called the book “a compassionate, discerning sociological analysis of the white underclass.” ... The \textit{Economist} ... opines that “you will not read a more important book this year.” In short, the reviewer falls hook, line and sinker for Vance’s tough love, personal responsibility prescription, calling it a “bracing tonic.”

One reason I am surprised by the glowing reviews (especially among left-leaning outlets) and the “millions sold” is that I would not have expected 21[st century] Americans—particularly among the chattering classes (and I know a shocking number of law professors who have read this book)—to be so interested in a story of white class migration.


\textsuperscript{225} For example, Appalachian authors who have presented their own personal narratives to counter Vance's story have pointed out that Vance's story could be an outlier and not an accurate representation of the entire diverse Appalachian population. See, e.g., Betsy Rader, \textit{I Was Born in Poverty in Appalachia. 'Hillbilly Elegy' Doesn't Speak for Me.}, WASH. POST (Sept. 1, 2017), https://www.washingtonpost.com/opinions/i-grew-up-in-poverty-in-appalachia-jd-vances-hillbilly-elegy-doesnt-speak-for-me/2017/08/30/734abb38-891d-11e7-961d-2f373b3977ee_story.html?utm_term=.54da18942a4; Travis D. Stimeling, \textit{We’re Not Singing a Hillbilly Elegy: Challenging Stereotypes in Contemporary Appalachian Song}, OUPBLOG (Aug. 17, 2017), https://blog.oup.com/2017/08/appalachian-music-stereotypes/. See also infra notes 252–261 and accompanying text.

order constituencies, anchored by race, is a tired game." In particular, there is a "longstanding pattern of presenting Appalachia as a monolithic ‘other America’ that defies narratives of progress." Perhaps the greatest harm of this misleading monolithic myth is that it renders invisible the considerable diversity that actually exists in Appalachia. Thus, this longstanding myth has enabled the rest of the nation to accept Appalachia as a "‘sacrifice zone’ of cultural and environmental degradation."

Here are select counterexamples to refute three malevolent monolithic narratives that (1) Appalachia only cares about coal jobs; (2) Appalachians are predominantly White Scots-Irish; and (3) Appalachia singlehandedly won the 2016 U.S. Presidential election for Donald Trump.

i. **The Coal Industry is no Longer a Significant Appalachian Employer**

First, it is a myth that Appalachia "digs" only coal. The coal industry is no longer a significant employer in Appalachia. The federal government has

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227 CATTE, supra note 205, at 4.

228 Id. at 9.

229 Accord id. at 27; STUMP & LOFASO, supra note 9, at 833.

230 JOYCE M. BARRY, STANDING OUR GROUND: WOMEN, ENVIRONMENTAL JUSTICE, AND THE FIGHT TO END MOUNTAINTOP REMOVAL 98 (Marie Tedesco ed., 2012). As Barry explained, "[w]hen populations are viewed as outside mainstream American culture, culturally backward, or too connected to nature, it becomes difficult to garner support from outside the region." Id. at 99.

231 CATTE, supra note 205, at 5. For example, in 2017, coal miners were less than 2% of West Virginia’s workforce. GWYNN GUILFORD, THE 100-YEAR CAPITOLIST EXPERIMENT THAT KEEPS APPALACHIA POOR, SICK, AND STUCK ON COAL, QUARTZ (Dec. 30, 2017), https://qz.com/1167671/the-
awarded $94 million in grants to coal-impacted Appalachian communities to encourage them to diversify and grow their local economies beyond coal. In fact, from 2000 to 2010, the top three Appalachian employers were Food, Lodging, and Entertainment; State and Local Government; and Health and Social Services.

ii. Appalachians Are Not Mostly White Scots-Irish

Second, the claim that Appalachia remains a pure bastion of Scots-Irish White folk is demonstrably false. In the past, African American coal miners have made up 20-50% of the Appalachian mining workforce. The largest post-Civil War armed uprising in U.S. history took place in 1921 at the Battle of Blair Mountain in West Virginia, where more than 13,000 coal miners and their allies (including about 2,000 African Americans) fought the coal barons’ private armies, West Virginia police and militia, and the U.S. military.

Although Appalachia remains predominantly White, it is much more diverse than its stereotyped national portrayal. Seventeen and one-half percent of all Appalachians identify as belonging to a racial minority (as compared to the national average of 33.7%). Appalachia’s African American and Hispanic growth rate is greater than most of the nation. More people in Appalachia identify as African American than Scots-Irish. Nearly half of southern Appalachia’s population growth since 1990 came from Latinos moving to Appalachia. Latino Appalachian entrepreneurs have started successful

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235 CATTE, supra note 205, at 21.


237 CATTE, supra, note 205, at 9.

238 Id. at 27.

239 Stump & Lofaso, supra note 9, at 833 (citing William Schumann, Introduction: Place and Place-Making in Appalachia, in APPALACHIA REVISITED: NEW PERSPECTIVES ON PLACE, TRADITION, AND PROGRESS 8 (William Schumann & Rebecca Adkins Fletcher eds., 2016)).
businesses in places like Dalton, Georgia; Morganton, North Carolina; and Morristown, Tennessee.\textsuperscript{240}

Although Appalachia is known to have more traditional family relationships and values than much of the nation,\textsuperscript{241} West Virginia, the only state entirely in Appalachia,\textsuperscript{242} nevertheless has the highest concentration of transgendered teenagers in the United States.\textsuperscript{243}

\textbf{iii. Appalachia Did Not Singlehandedly Win the 2016 U.S. Election for President Donald Trump}

Finally, the claim that Appalachia won the 2016 U.S. Presidential election for Trump is also false. Although by percentage of actual votes West Virginia supported Trump more than any other state in the nation, the actual number of votes are a different story. While 2.6 million New Yorkers and 4.6 million Floridians voted for Trump, only 489,371 West Virginians voted for Trump.\textsuperscript{244} Eight out of the ten best congressional districts for President Donald Trump were in New York City, which, of course, is not located in Appalachia.\textsuperscript{245}

The media coverage of McDowell County, West Virginia, demonstrates this misrepresentation of President Trump’s Appalachian support. The \textit{Huffington Post} called its story about McDowell County a “glimpse at the America that voted Trump into office.”\textsuperscript{246} CBS News correspondent Ted Koppel concurred, calling McDowell County “unambiguously[] Trump Country.”\textsuperscript{247}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{240}] Eric Franklin Amarante, \textit{The Unsung Latino Entrepreneurs of Appalachia}, 120 W. VA. L. REV. 773, 775 (2018).
\item[\textsuperscript{242}] \textit{See} 40 U.S.C. §§ 14101, 14102 (2018) (listing all West Virginia counties as in Appalachia).
\item[\textsuperscript{244}] \textit{Id.} at 834–35 (citations omitted).
\item[\textsuperscript{245}] \textit{Catte, supra} note 205, at 10. New York, however, includes counties considered within the statutory definition of Appalachia. \textit{See} 40 U.S.C. §§ 14101, 14102.
\item[\textsuperscript{246}] \textit{Id.} at 26 (quoting Sam Levine, \textit{This County Gives a Glimpse at the America That Voted Trump into Office}, \textit{HUFFINGTON POST} (Nov. 18, 2016, 10:43 AM), https://www.huffingtonpost.com/entry/mcdowell-county-trump_us_582f18ddd0b030997bb6a0a).
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When CNN reported that Trump had won 90% of the Republican primary vote in McDowell County, West Virginia, CNN failed to mention that McDowell County’s actual primary votes totaled only just over 700.248 Because of historically low voter turnout, Trump won McDowell County in the general election with only 27% of the reported vote.249

Although Appalachia admittedly suffers from many social problems, all of Appalachia’s social problems can also be found elsewhere in the United States without the patronizing rancor too often reserved for Appalachia.250

In response to such caricatured outsider narratives, Appalachians recently have become more emboldened to tell their own more nuanced, complex stories.251 For example, J.D. Vance exemplifies the intersectionality of geographic identity, as his recent life experience actually contradicts Appalachian stereotypes. Vance was raised in Middletown, Ohio.252 Although at the time of writing *Hillbilly Elegy* he lived in the California Bay Area, Vance has moved back to Columbus, Ohio (the capital of Ohio, one of the states in Appalachia, but actually located outside Appalachia),253 and established a

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248 Id. at 14.
249 Id. at 26.
250 See id. at 2.

Even before Donald Trump’s election, Appalachia was treated as a kind of Rosetta stone for deciphering rural white poverty in America. In its aftermath, media inquiries . . . confirmed many residents’ deep-seated fear that the national press only shows up when the news is bad, or to make them look like fools or freaks. Instead of inviting input on how to frame their stories, reporters seemed to be looking for people to fit a frame they already had in mind.

*Id.*

252 VANCE, *supra* note 216, at 12. Middletown is located in the Butler and Warren Counties of Ohio. See *Visitors, CITY OF MIDDLETOWN, OHIO*, https://www.cityofmiddletown.org/148/Visitors (last visited Oct. 29, 2018) (linking Butler County and Warren County Visitors Bureaus). Although both Counties are outside the statutory definition of Appalachia, see 40 U.S.C. §§ 14101–14102 (2018), this Essay accepts that people from outside these statutorily defined areas can nevertheless self-identify as Appalachian. See infra Section IV.C.

nonprofit organization ostensibly to help Ohioans.254 A venture capitalist255 exploring running for political office as a Republican,256 he graduated from Yale Law School257 and married an Indian-American lawyer he met there258 who at the time of writing is clerking for U.S. Supreme Court Chief Justice John Roberts.259 Vance allegedly has been mentored by Battle Hymn of the Tiger Mother260 author (and Yale law professor) Amy Chua and entrepreneur Peter Thiel.261

2. If Race Were Substituted for Place, the Appalachian Narrative Would Be Very Different

Substitute “African American” for “West Virginian” or “Appalachian” in Cheney262 and Vance’s263 aforementioned locationally prejudicial generalizations. Are all Black people incestuous? Are all Black people lazy, irrational spendthrifts who are prone to violence and never give their children the tools to succeed with chaotic homes and at least one family member addicted to drugs? Imagine the deserved condemnation both men would have received over such racial remarks. Neither Cheney nor Vance made such disparaging remarks about race because they presumably knew better.264


257 CATTE, supra note 205, at 43.

258 Id.

259 Id.


261 CATTE, supra note 205, at 43.

262 See Cheney Apologizes, supra note 212 and accompanying text.

263 Vance, supra note 216 and accompanying text.

264 We reiterate that our only point here is to highlight that racism and locational prejudice both rely upon stereotyping. We otherwise do not intend any false equivalencies.
Yet with locational prejudice, why do they and others lack similar restraint? As Professor Jill Fraley has observed, “Apparently, some professionals are not concerned that it is still acceptable to laugh about Appalachia.” Why do they make the stereotyping sampling error with Appalachians when they would never do so with race?

Moreover, Elizabeth Catte and others have argued that stereotyping White Appalachians actually provides pretextual support for racism against African Americans. By perpetuating the essentialized (and inaccurate) myth that all Appalachians are stupid White people, Catte argue that Vance is actually providing a White straw man counterexample to rebut charges of racism against “why don’t you people help yourselves?” blaming African American stereotypes:

In Elegy and in Vance’s comments about Elegy’s subjects, White Appalachians take on the qualities of an oppressed minority much in the same way conservative individuals view African Americans: as people who have suffered hardships but ultimately are only holding themselves back. This construction allows conservative intellectuals to talk around stale stereotypes of African Americans and other nonwhite individuals while holding up the exaggerated degradations of a white group thought to defy evidence of white privilege.

Whether stereotypical or not, locational prejudice against Appalachians has a well-established history that predates the nation’s founding.

B. Historical Discrimination Against Appalachians

Congress found and codified that the Appalachian “people” are unified by two important aspects of their history: (1) their history of harvesting the Appalachian Mountains’ rich natural resources to power growth outside Appalachia and (2) their history of poverty—the fact that the Appalachian people

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265 Jill M. Fraley, Invisible Histories & the Failure of Protected Classes, 29 HARV. J. ON RACIAL & ETHNIC JUST. 95, 95 (2013).
266 See supra note 94 and accompanying text.
267 CATTE, supra note 205, at 36–41.
269 CATTE, supra note 205, at 36–37.
270 “Congress finds and declares that the Appalachian region of the United States... lags behind the rest of the Nation in its economic growth and that its people have not shared properly in the Nation’s prosperity.” 40 U.S.C. § 14101 (2018).
have been improperly excluded from their fair share of the Nation’s prosperity. A U.S. Presidential Commission, whose findings were endorsed by the federal government and nine states, called such continuing injustice to the Appalachian people “The Legacy of Neglect.” The Commission explained this history of neglect in more detail:

Where a society depends primarily on the extraction of natural resources for its income and employment—as did the people of Appalachia—it is extremely important that a high proportion of wealth created by extraction be reinvested locally in other activities. The relatively low proportion of native capital did not produce such a reinvestment in large sections of the region. Much of the wealth produced by coal and timber was seldom seen locally. It went downstream with the great hardwood logs; it rode out on rails with the coal cars; it was mailed between distant cities as royalty checks from nonresident operators to holding companies who had bought rights to the land for 50 cents or a dollar an acre. Even the wages of local miners returned to faraway stockholders via company houses and company stores.

The genesis and purpose of harmful Appalachian stereotypes were to maintain the oppression and exploitation of Appalachian people. As Fraley observed, law has long understood that stereotypes are tools to effectuate discrimination. What people who should know better fail to realize is that

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271 Id.
272 See infra note 393 and accompanying text.
274 Id. at 20.
275 See Stump & Lofaso, supra note 9, at 847; see also HARKINS, supra note 211, at 56–57 (explaining how early 20th century industrialists used locational prejudice in a negative public relations campaign designed to rebut growing popular criticism of their exploitative labor practices). As with other identity slurs and labels (the Lesbian Gay Bisexual Transgender Questioning (LGBTQ) “pink triangle” being perhaps the most well-known), some activists have tried to repurpose the term “hillbilly” to represent the authentic Appalachian people. See, e.g., id. at 216–26; see also Pink Triangle, SCHOOLS OUT UK, http://www.schools-out.org.uk/?resources=pink-triangle (last visited Dec. 16, 2018) (explaining that in Nazi concentration camps “men convicted for sexual deviance, including homosexuality, wore a pink triangle”).
276 Fraley, supra note 265, at 97–98. As Fraley stated, “relatively little research has focused on the connection between stereotypes and discrimination.” Id. at 97 n.17 (citing MELINDA JONES, SOCIAL PSYCHOLOGY OF PREJUDICE 10 (2002)). “Scholars disagree as to whether stereotypes cause (or precede) discrimination . . . or emerge as a justification for discrimination (and therefore follow
hillbilly stereotypes share a demeaning, historical ugliness with racial, gender, and sexual orientation slurs.\textsuperscript{277}

Therefore, people who would never intentionally discriminate against race, gender, or sexual orientation might nevertheless intentionally discriminate against location like Appalachia.\textsuperscript{278} For example, self-identified “liberal middle-class whites” in Cincinnati admitted to a \textit{Los Angeles Times} reporter that although their parents strictly forbade them from using racial epithets, their families freely used the term “hillbilly” at home without comparable censure.\textsuperscript{279} An urban Appalachian woman, who was a partner at a prominent Cincinnati law firm, also related to the reporter that during a job interview in the 1980s right after she had graduated from law school, a Cincinnati senior partner informed her “that he had to ‘be careful’ about hiring anyone with a mountain accent.”\textsuperscript{280}

\textbf{C. Boundary Drawing Problems}

This Essay argues that all locational prejudice should be legally prohibited.\textsuperscript{281} Like anti-Muslim bigots who attack Sikhs under the mistaken belief that a Sikh turban is a Muslim head covering,\textsuperscript{282} people and organizations as evidence of it).” \textit{Id.} With the latter theory, “stereotypes develop to ‘explain and justify’ both prejudice and exploitation.” \textit{Id.} (quoting Monica Biernat & John F. Dovidio, \textit{Stigma and Stereotypes, in The Social Psychology of Stigma} 90 (Todd F. Heatherton ed., 2000)).


\textsuperscript{278} For example, law professors and expert witnesses should know better. Yet U.S. law professor Jill Fraley, a native Appalachian, in 2013, stated that a fellow law professor had “publicly analyzed [her] facial structure,” presumably for Appalachian-like physical features (whatever that means), and “an expert witness asked if [her] mother was also [her] cousin.” Fraley, \textit{supra} note 265, at 95. A 1972 U.S. congressional report even concluded that “Appalachians do not have the cultural background and skills to live in the cities.” \textit{William W. Philliber et al., The Invisible Minority: Urban Appalachians} 117 (Univ. Press of Kentucky ed., 1981) (quoting \textit{Rural Development Act of 1972: Hearing on H.R. 12931 before the H. Comm. On Agric., 92d Cong.} (1972)) (internal quotation marks omitted).


\textsuperscript{280} \textit{Id.}

\textsuperscript{281} For further discussion, see \textit{infra} Section V.A.

that exhibit locational prejudice should be held accountable for their animus period, regardless of the true identity of their intended victims. If an employer refuses to hire an otherwise qualified applicant under the mistaken belief that the applicant is Appalachian, then that employer should be liable for locational prejudice against Appalachians even if the applicant is actually from Colorado. It is the societal evil of locational prejudice that should be legally proscribed. Discriminators should not otherwise be rewarded for ignorant prejudice.283

Although locational prejudice presents clear evil, geographic identity is much more difficult to recognize than race. In particular, there remains much controversy over how to define the Appalachian region,284 let alone how to define whether or not someone is truly an Appalachian.285 In an attempt to minimize boundary drawing definitional challenges, we accept the current definition of Appalachia as defined by federal statute.286 In our view, any changes to this geographical definition of Appalachia should be made through statutory amendment for clarity. As far as individual Appalachian status, we attempt to rely more on objectively verifiable factual place and space than self-identification with three categories: (1) native Appalachians; (2) resident Appalachians; and (3) urban Appalachians.

1. Native Appalachians

A native Appalachian is simply someone who was born in Appalachia or spent her formative childhood years in Appalachia. Because many distinctive human characteristics like accent or the way we talk are formed around birth,287 a native Appalachian might suffer locational prejudice even if she no longer lives in Appalachia. In fact, the two published cases examined below concern native Appalachians living and working outside of Appalachia.288 A native Appalachian may or may not consider Appalachia to be her current home.


284 See, e.g., Christopher A. Cooper et al., A Geography of Appalachian Identity, 51 SE. GEOGRAPHER 457 (2011).

285 For a discussion about the narrative battle over who is an Appalachian, see supra Section IV.A.1.


288 See infra Section IV.D.2, IV.D.3.
2. Resident Appalachians

A resident Appalachian is someone who may or may not have been born in Appalachia but moved to Appalachia later in life and now considers Appalachia to be her home.

3. Urban Appalachians

An urban Appalachian is a native Appalachian who was forced to leave Appalachia to find work. During the Great Migration of the 1940s to 1960s, four million resident Appalachians moved to Eastern and Midwestern cities in search of work. The two published cases examined below concerned urban Appalachians. Similar to first- or second-generation immigrants, there can be first- or second-generation urban Appalachians, people who were born outside Appalachia, raised by urban Appalachians, and self-identify as Appalachian.

While locational prejudice in all forms should be illegal, should native, resident, or urban Appalachians receive different legal protections? Locational prejudice tends to occur in places away from the victim’s home. Consequently, urban Appalachians probably experience the greatest risk of locational prejudice.

Regardless of definition, unlike other forms of discrimination that are clearly forbidden under robust U.S. laws like the U.S. Constitution, state constitutions, and federal and state statutes, Appalachian discrimination remains legal.

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290 See infra Section IV.D.2, IV.D.3.


292 There can of course exist intraregional locational prejudice. The intra-Appalachian Hatfield-McCoy Feud between the West Virginian Hatfields and the Kentuckian McCoys is an infamous example. See, e.g., LISA ALTHER, BLOOD FEUD: THE HATFIELDS AND THE MCCoYS: THE EPIC STORY OF MURDER AND VENGEANCE (2012). Although the same intersectional logic applies, intraregional locational prejudice is beyond the scope of this Essay.

D. Appalachians Currently Lack Enforceable U.S. Legal Protections

Given locational prejudice’s apparent political correctness, it is not surprising that Appalachians would suffer actual discrimination because of their Appalachian status. While there is a dearth of reliable urban Appalachian data, Fraley has collected statistical snapshots of police, housing, public accommodation, employment, and educational discrimination against urban Appalachians. In 1967, the U.S. Secretary of Agriculture Orville L. Freeman publically admitted that many urban Appalachians “are the victims of discrimination.” In 1974, then Ohio Governor and Appalachian Regional Commission member John Gilligan remarkably admitted that majority urban “Appalachian ghettos” suffered from state sponsored discrimination.

Although clearly sympathetic to Appalachian welfare, Governor Gilligan nevertheless exhibited inverse locational prejudice, more positive but just as paternalistic as pejorative presuppositions. Gilligan labeled urban Appalachians “an ‘invisible constituency’ in the urban areas to which they have gone.” To explain urban Appalachians’ apparent political invisibility, the Governor committed the stereotyping sampling error. Gilligan claimed that Appalachians fail to take advantage of “any efforts that might assist them in

294 See supra Part III.
295 Fraley, supra note 265, at 101–07 (internal citations omitted); see also Walker, supra note 204, at 345–48 (2013) (collecting authorities).
297 Gilligan, supra note 289, at 25.
298 Id.
299 In the Appalachian Regional Commission’s own official magazine, Governor Gilligan admitted:

There is a tendency in most cities to ignore or downgrade the provision of municipal services in these [Appalachian ghetto] areas. Garbage and trash are not picked up as often. Policing and health services are below par. And schools frequently are insensitive of the special needs of the Appalachian children. The epithet of “hillbilly” is hurled at them.

Gilligan, supra note 289, at 30.
300 See Stump & Lofaso, supra note 9. Harkins recognized that this “distinct but parallel construction, the stalwart, forthright, and picturesque mountaineer . . . premised on the same notion of a mythic . . . population wholly isolated from modern civilization” historically emerged in response to the humiliating hillbilly stereotype. HARKINS, supra note 211, at 4–5.
301 Gilligan, supra note 289, at 24.
302 See supra note 94 and accompanying text.
making the move to the city, either before they leave or when they arrive," that "[b]y custom and tradition, Appalachian people prize family over organization," and that they possess "a long-standing disinclination . . . to join organizations."

Because anti-Appalachian discrimination remains legal in the United States, urban Appalachians are often called an "invisible minority." In 1879, while ironically invalidating a discriminatory law from Appalachian West Virginia, the U.S. Supreme Court hypothesized that "a law . . . excluding all naturalized Celtic Irishmen" from jury duty would be "inconsistent[t] with the spirit" of the Fourteenth Amendment Equal Protection Clause. "[N]aturalized Celtic Irishmen" could be a period euphemism for Appalachians. Since the infamous Korematsu Japanese internment case in 1944, however, the Court

Governor Gilligan claimed that less than 5% of job seeking urban Appalachians turn to the federal or state employment offices for help; they would rather go from one prospective employer to another looking for a job than stand in line or submit to what are construed as the humiliating procedures of a social service. The same attitude with respect to other public services was also found by [other Conference attendees]. Standing in line or filling out forms is not something an Appalachian takes kindly to.

Id. at 28.

Id. at 24. The problem with the Governor's statement is not the data (although given the difficulty of comprehensively and consistently identifying urban Appalachians its accuracy probably is suspect). The problem is assuming that Appalachian cultural stupidity and backwardness are the causes. Why not let the incomplete data speak for itself and avoid relying on unsubstantiated stereotypical explanations? Or better yet, why not recognize that the mere fact that some Appalachians may require such help does not mean that all Appalachians require the same help? Moreover, why the inflexible, zero-sum tradeoffs? Can Appalachians not take advantage of both federal and state employment office services and personally talk to potential employers like any other person? Can Appalachians not prize family and organization like any other person? Can Appalachians not patiently wait in line or complete forms like any other person if they know their effort will be worth it?

Admittedly, U.S. popular and cultural mores have changed significantly over the 40-some years since Gilligan's article. Notwithstanding the passage of time, imagine the public reaction if a current Governor made the same comments today about a racial group.

See, e.g., PHILLIBER ET AL., supra note 278; Fraley, supra note 265, at 99 n.25 (collecting authorities).

Strauder v. West Virginia, 100 U.S. 303, 308 (1879) (striking down a West Virginia statute that excluded Blacks from jury duty as violating the Fourteenth Amendment’s Equal Protection Clause), abrogated on other grounds by Taylor v. Louisiana, 419 U.S. 522 (1975) (invalidating exclusion of women from jury duty).

See HARKINS, supra note 211, at 42, 63, 92, 130 (mentioning Celtic and Irish stereotypes associated with the hillbilly).

See Korematsu v. United States, 323 U.S. 214, 234–35 (1944) (Murphy, J., dissenting).
GEOGRAPHIC DISCRIMINATION

has consistently treated “national origin” discrimination the same as racial discrimination.\textsuperscript{309}

The only published U.S. civil rights doctrine concerning Appalachians is from Cincinnati, Ohio. The U.S. federal district court there in two opinions declined to extend federal national origin protections to Appalachians. The City of Cincinnati’s 1992 Human Rights Ordinance explicitly protects Appalachians. To the authors’ knowledge, no U.S. executive, legislative, or judicial government branch at the federal, state, or local level has ever taken official action against any Appalachian discrimination.

1. One District Court Has Rejected Finding Appalachians a Protected “National Origin” Class Under the Civil Rights Act of 1964.\textsuperscript{310}

There are only two reported court opinions concerning Appalachian discrimination.\textsuperscript{311} Both reported opinions come from the U.S. District Court for the Southern District of Ohio, Western Division. The Western Division encompasses seven Appalachian counties and Cincinnati.\textsuperscript{312} Although Cincinnati is not considered part of Appalachia,\textsuperscript{313} according to the Urban Appalachian Community Coalition, a study of census tract populations from 2005-2009 identified 35,637 Cincinnati residents (or 10.7% of Cincinnati’s 2009 total population).


\textsuperscript{311} See Higginbotham v. Ohio Dep’t. of Mental Health, 412 F. Supp. 2d 806, 813 (S.D. Ohio 2005); Bronson v. Bd. of Educ., 550 F. Supp. 941, 959 (S.D. Ohio 1982). Should the district court or U.S. Court of Appeals for the Sixth Circuit ever wish to revisit this question of Appalachian “national origin” discrimination, both cases are distinguishable. Because the Plaintiffs in Bronson never responded to the Defendants’ Appalachian argument in their Opposition to the Defendants’ Motion to Dismiss, the legal issue was never really before the Court. \textit{Bronson}, 550 F. Supp. at 959 (“Plaintiffs have not responded to this point ... and have failed at any point to cite any authority indicating that . . . Appalachians . . . are within the purview of § 2000d. In fact, Plaintiffs have conceded that Appalachians share a national origin common with American citizens generally.”). The Bronson court decided to “assum[e] \textit{arguendo} that the Plaintiffs [had] not abandoned their national origin claims.” \textit{Id.} Likewise, the Higginbotham court found Plaintiff’s Title VII claims time barred and only addressed the legal question for the sake of argument. \textit{Higginbotham}, 412 F. Supp. 2d at 812–13 (adding the caveat “procedural defects notwithstanding”).

\textsuperscript{312} Compare S.D. \textit{Ohio} L.R. 82.1 (Venue of Actions within the District) (defining the “Western Division” as encompassing Cincinnati and the Ohio counties of Adams, Brown, Butler, Clermont, Clinton, Hamilton, Highland, Lawrence, Scioto, and Warren), http://www.ohsd.uscourts.gov/sites/ohsd/files/Local2%20Rules%20EFFECTIVE.January%201%202016.pdf, with \textit{Counties in Appalachia}, ARC, https://www.arc.gov/counties (listing all of the Western Division Ohio counties except Butler, Clinton, and Warren as being in Appalachia) (last visited Sept. 19, 2018).

\textsuperscript{313} Urban Appalachian Community Coalition, supra note 289.
population\textsuperscript{314}) as urban Appalachians.\textsuperscript{315} From 1985 to 1990, the largest social group migration to the greater Cincinnati area was the 20,894 new urban Appalachians.\textsuperscript{316}

In \textit{Bronson v. Board of Education of the City School District of Cincinnati},\textsuperscript{317} Black and Appalachian parents unsuccessfully sought a preliminary and permanent injunction to enjoin Cincinnati Public Schools from closing a neighborhood school in violation of two federal civil rights acts.\textsuperscript{318} Denying the injunction, the court also dismissed the Appalachian Plaintiffs because the court could find no authority that “national origin” in the Civil Rights Act of 1964 “was intended to include Appalachians or to include groups such as Appalachians who do not possess a national origin distinguishable from that of other citizens of the United States.”\textsuperscript{319} The Plaintiffs did not appeal the district court’s decision.

Twelve years later, in 1994, the Equal Employment Opportunity Commission (EEOC) followed \textit{Bronson}’s logic (without citing the opinion) in \textit{Dewitt v. Rubin}.\textsuperscript{320} In \textit{Rubin}, the EEOC affirmed the administrative dismissal of a so-called American-Kentuckian’s national origin employment discrimination claim, and held “that discrimination on the basis of one’s being from Kentucky is not tantamount to discrimination on the basis of national origin for Title VII [of the Civil Rights Act of 1964] purposes.”\textsuperscript{321} While close, \textit{Dewitt} remains


\textsuperscript{315} Urban Appalachian Community Coalition, \textit{supra} note 289.


\textsuperscript{317} 550 F. Supp. 941 (S.D. Ohio 1982). This motion for preliminary injunction was filed under the ongoing \textit{Bronson} school desegregation case that had begun in 1974. For the early history of the \textit{Bronson} case, see \textit{Bronson v. Bd. of Educ.}, 510 F. Supp. 1251, 1257–64 (S.D. Ohio 1980).


\textsuperscript{320} Appeal No. 01945384, 1995 WL 481354 (E.E.O.C. Aug 10, 1995).

\textsuperscript{321} \textit{Id.} at *2 (interpreting 42 U.S.C. §§ 2000e-2(a) to (d) (2018)).
inapposite because, according to the statutory definition of Appalachian, some—but not all—of Kentucky is considered part of Appalachia.322

Twenty-three years later, in 2005, a White Appalachian female nurse, Linda Higginbotham, unsuccessfully sued her former employer, the State of Ohio Department of Mental Health, and her former supervisors for employment discrimination under Title VII and other statutes.323 Among her factual allegations, the Plaintiff claimed that when she told her nursing supervisor that her Appalachian “kinfolk” were coming to visit her for the December holidays, the supervisor “responded to this information with a frown and said nothing.”324 Later, the supervisor allegedly referred to the Plaintiff as a “white Appalachian hillbilly.”325 Unsurprisingly, the Higginbotham court followed Bronson and declined to extend federal national origin protections to Appalachians “because Appalachian ancestry has not been recognized as a protected status under any federal law to date.”326 The Plaintiff did not appeal the court’s grant of summary judgment for the Defendants.

Although the EEOC327 and federal courts have expanded federal national origin protections to include subnational groups from current or defunct foreign nations like the Kurds,328 the Roma (Gypsies),329 Hispanics,330 Arabs,331

324 Id. at 810.
325 Id.
326 Id. at 813.
328 See 2 EEOC COMPLIANCE MANUEL (BNA) § 622:0002 (2002).
329 See id.
330 Diaz, supra note 327, at 668 (citation omitted).
331 Id. (citation omitted).
Acadians (Cajuns), Serbians, Creoles, and Hopis, they have refused to extend the same protections to domestic subnational groups like Confederate Southern Americans. In so doing, both the EEOC and federal courts have stayed consistent with Bronson's original reasoning. As the Third Circuit explained, "[w]here one cannot trace ancestry to a nation outside the United States, a former regional or political group within the United States... does not constitute a basis for a valid national origin classification." From a doctrinal standpoint, the obvious change would be to eliminate the formalistic requirement of tracing ancestry to a nation outside the United States from the national origin classification. Although no court has yet done so, at least two articles have advocated for such a doctrinal change.

2. Cincinnati's Human Rights Ordinance is the only known U.S. law that protects Appalachians from discrimination.

Proceeding chronologically, this Section examines (i) the Cincinnati City Council's initial hearings and findings; (ii) the Human Rights Ordinance that resulted; (iii) its preemption by state and federal law; and (iv) its enforcement.

i. City Hearings and Findings

In 1992, the Cincinnati City Council held hearings concerning a proposed Human Rights Ordinance to be added to its Municipal Code. In addition to the traditional protected classes of race, gender, age, color, religion, disability status, marital status, ethnic origin, and national origin, the Ordinance added two—then novel—protected classes: sexual orientation and

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335 Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 154 F.3d 1117, 1118 (9th Cir. 1998).

336 Storey v. Burns Int'l Sec. Servs., 390 F.3d 760, 765 (3d Cir. 2004); Williams v. Frank, 757 F. Supp. 112, 120 (D. Mass. 1991) (holding, in a case where the plaintiff was mocked because of his accent, that "[s]outherness is not a protected trait.").

337 Storey, 390 F.3d at 766 (Scirica, C.J., concurring).

338 See Diaz, supra note 327, at 667–71; Walker, supra note 207, at 338.

339 CINCINNATI, OHIO, CODE OF ORDINANCES 490 (July 29, 1992) (Council meeting voting sheet on file with authors).
Appalachian regional origin. As the First District of the Ohio Court of Appeals later determined, Ohio law at the time explicitly excluded sexual orientation from state discrimination protection. Federal law was more than a decade away from recognizing that same-sex couples had the right to marry.

Although the sexual orientation language was extremely controversial at the time (and would be repealed through a referendum amending the City Charter the following year), the Appalachian regional origin language reportedly was not controversial. Apparently, the Ordinance was originally proposed to add only one novel protected class, sexual orientation. Mike Maloney—Founder and former Director of the Cincinnati Urban Appalachian Council (UAC), city planner, Plaintiff’s expert witness in Bronson, and a married gay man—

340 Id.
344 Another popular referendum repealed the earlier City Charter amendment in 2004. In 2006, the Cincinnati City Council voted 8 to 1 to reinstate sexual orientation as a protected class and include transgender in its sexual orientation definition in the Human Rights Ordinance. Eric Resnick, Cincinnati Passes LGBT Human Rights Ordinance: City Becomes Ohio’s 13th With Such a Measure, GAY PEOPLE’S CHRON. (Mar. 17, 2006), http://www.gaypeopleschronicle.com/stories06/march/0317061.htm; see also CINCINNATI, OHIO, MUNICIPAL CODE § 914-1-S, https://library.municode.com/oh/cincinnati/codes/code_of_ordinances?nodeId=TITIXMI_CH914UNDIPR (last visited Oct. 29, 2018).
346 Michael Maloney explained that he observed constant Appalachian discrimination against his sister starting when he was age 11. Interview with Michael Maloney, Founding Policy Director of the Urban Appalachian Council, and Maureen Sullivan, First President of the Urban Appalachian Council, Cincinnati, Ohio (Nov. 17, 2017) [hereinafter Maloney & Sullivan Interview] (transcript on file with West Virginia Law Review). Maloney said he conceived of the idea of Appalachians as a protected class to provide them with structural protection against overt and covert discrimination. Id. He also stated that he spearheaded the amendment with Virginia Coffrey, a Black urban Appalachian from West Virginia, and Ernie Mynatt, an urban Appalachian from Kentucky. Id.
successfully lobbied to add the Appalachian regional origin language to the proposed Ordinance.\textsuperscript{347}

Chief Counsel of the Cincinnati City Solicitor’s Office Rodney Prince, who helped draft the Human Rights Ordinance, later stated that he was against the inclusion of Appalachians in the Ordinance because he “simply did not feel that there was one identifiable [Appalachian] group out there . . . experiencing discrimination.”\textsuperscript{348} Prince clarified that he could not say he did not think it was necessary at the time “because there was testimony about real problems.”\textsuperscript{349}

While the hearings revealed problems Appalachians faced because of locational prejudice, Maureen Sullivan,\textsuperscript{350} then Director of UAC, reportedly could not recall any documented instance where a Cincinnatian had been denied housing or a job because she was Appalachian.\textsuperscript{351}

After the hearings concluded, the Cincinnati City Council found “that discrimination in employment, housing, and public accommodation, based on . . . Appalachian regional origin” and the other protected classes in the proposed Ordinance “adversely affects the health, welfare, peace, and safety of the Cincinnati community.”\textsuperscript{352} After a 7-2 vote,\textsuperscript{353} Cincinnati passed a Human Rights Ordinance now codified in Chapter 914, Unlawful Discriminatory Practices.\textsuperscript{354} One of the seven Councilmembers who voted to adopt the Ordinance was Black Councilman Dwight Tillery. Tillery admitted that he initially found the Appalachian inclusion in the proposed Ordinance “interesting” but voted for the Ordinance anyway, concluding, “what harm” could the inclusion cause?\textsuperscript{355}

\textsuperscript{347} Thomas E. Wagner, Phillip J. Obermiller & Melinda B. Wagner, Fifty Years of Appalachian Advocacy: An Interview with Mike Maloney, J. of Appalachian Studies 174, 175 (Spring/Summer 2013) [hereinafter Mike Maloney].

\textsuperscript{348} Mountain People, supra note 344.

\textsuperscript{349} Id.

\textsuperscript{350} Sullivan explained that she was raised by an Appalachian mother and Irish father. She stated that she grew up in the Appalachian Cincinnati community where, in her words, she saw the sheer resilience, goodness, and beauty of people who were struggling to improve themselves while combating regional discrimination. Maloney & Sullivan Interview, supra note 345. For her, their story of “working together and coming together” to repel the “systemic issues that needed to be addressed” made the fight worth it. Id.

\textsuperscript{351} Id.

\textsuperscript{352} CINCINNATI, OHIO, CODE OF ORDINANCES 490 (July 29, 1992) (Council meeting voting sheet on file with authors).


\textsuperscript{354} CINCINNATI, OHIO, MUNICIPAL CODE § 914.

\textsuperscript{355} Pasternak, supra note 279.
ii. The Human Rights Ordinance

The Cincinnati Human Rights Ordinance is apparently the only civil rights law in the United States with Appalachians as a protected class. It defines "Appalachian regional origin" as "birth or ancestral origin from that area of the eastern United States consisting of the counties listed in an Appalachian Regional Origin Document which shall be maintained on file with the Clerk of Council." The Clerk's Appalachian Regional Origin Document has mirrored ARC's definition of Appalachia. "Discriminate" is defined as "to unlawfully segregate, separate or treat individuals differently based on . . . Appalachian regional origin."

The Ordinance explicitly proscribes restrictive covenants, housing discrimination, and employment discrimination against Appalachians. It empowers the City Manager to appoint "a Complaint Officer" to enforce these provisions. As such, the Complaint Officer "may conduct investigations, hearings, and conciliation, make determinations, issue orders and perform such duties as are necessary and appropriate."

iii. Preemption and Applicability

Although the Cincinnati Human Rights Ordinance only applies within the geographic boundaries of the City of Cincinnati, cities like Cincinnati can mandate additional civil rights protections above state and federal protections provided the city protections do not conflict with state and federal protections.

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356 Accord Harkins, supra note 211, at 213; Diaz, supra note 327, at 665 (citation omitted); Mike Maloney, supra note 345, at 175.

357 CINCINNATI, OHIO, MUNICIPAL CODE § 914-1-A1.


359 CINCINNATI, OHIO, MUNICIPAL CODE § 914-1-D1.

360 Id. § 914-1-R.

361 Id. § 914-3.

362 Id. § 914-5.

363 Id. § 914-9(A).

364 See OHIO CONST. art. XVIII, § 3 ("Municipal powers of local self government").

The U.S. Supreme Court has held that states are free to allocate power between state and local rule as they see fit.366

Ohio is considered a “home rule” state where “[m]unicipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with” state law.367

iv. Enforcement

Except for Appalachian regional origin, all other protected classes in the Cincinnati Human Rights Ordinance are now also protected by federal and state law.368 Recognizing that federal or state enforcement authorities would probably preempt any serious investigation into alleged discrimination of the overlapping protected classes, the Ordinance’s unique complaint procedure369 only applies when the “state or federal government has not exercised jurisdiction and provided mechanism for redress.”370 With Appalachian regional origin

366 See Hunter v. City of Pittsburgh, 207 U.S. 161, 176 (1907) (“We have nothing to do with the interpretation of the Constitution of the state and the conformity of the enactment of the assembly to that Constitution; those questions are for the consideration of the courts of the state, and their decision of them is final.”)


369 Section 914-9(B)(2) states:

If informal methods of conciliation fail to effect the elimination of such alleged unlawful discriminatory practice and it is determined by the Complaint Officer that the alleged unlawful discriminatory practice is conduct over which the state and/or federal government has exercised jurisdiction and provided a mechanism for redress to an aggrieved party, the Complaint Officer shall notify the complainant and respondent that no other action will be taken pursuant to this chapter and will provide complainant with information relating to appropriate state or federal legislation and enforcement agencies which may have jurisdiction.


370 Id. §§ 914-9(B)(3), 914-15.
discrimination, however, the City’s Complaint Procedure remains the sole means of enforcement.\textsuperscript{371}

If not preempted by state or federal enforcement authorities, the Complaint Officer can hold a determination hearing concerning the alleged Human Rights Ordinance violation.\textsuperscript{372} The Complaint Officer also can issue a notice of violation and order to cease and desist.\textsuperscript{373} Thirty days after service of the cease and desist order, if the alleged violator “has not eliminated or corrected the unlawful discriminatory practice,” then the Complaint Officer can fine the alleged violator “$100 per day for each day of substantial non-compliance” with this Ordinance “not to exceed a total of $1,000.”\textsuperscript{374} Failure to comply with a cease and desist order is a “misdemeanor of the fourth degree,”\textsuperscript{375} punishable by a maximum $250 fine or 30 days imprisonment for individuals\textsuperscript{376} and up to a $2,000 fine for organizations.\textsuperscript{377}

3. What distinguishes Appalachians from other domestic subnational groups is the official recognition by the federal government and nine states of discrimination against Appalachians.

As the Congressional Research Service observed, “[t]hroughout the twentieth century, events occurred which caused Americans to perceive that Appalachia was a separate region isolated from the rest of the country.”\textsuperscript{378} National television coverage of the 1960 Presidential campaign highlighted Appalachia’s appalling poverty.\textsuperscript{379} In March 1963, when a record-breaking flood

\textsuperscript{371} Since the Ordinance’s passage, no one apparently has filed a complaint alleging Appalachian regional origin discrimination with the Office of Administrative Hearings. Interview with Thomas Beridon, Chief Hearing Examiner of the City of Cincinnati Office of Administrative Hearings, Cincinnati, Ohio (Nov. 17, 2017). As Maloney said, “Historically and to this day, Appalachians don’t expect much. Why would you complain to [the government] because you never expected [the government] to do anything for you.” Maloney and Sullivan Interview, supra note 345. Instead, according to Maloney and Sullivan, Appalachians have turned inward to their own communities for support. Id. Today, Cincinnatians likely do not know about the Ordinance’s protection of Appalachians because such protection is not widely advertised in the community. Thomas Beridon, supra note 371.

\textsuperscript{372} CINCINNATI, OHIO, MUNICIPAL CODE § 914-9(B)(3).

\textsuperscript{373} Id. § 914-9(B)(5).

\textsuperscript{374} Id. § 914-11.

\textsuperscript{375} Id. § 914-13.

\textsuperscript{376} Id. § 902-7(c)(4).

\textsuperscript{377} Id. § 902-5.


\textsuperscript{379} Id. at 2.
devastated central Appalachia, President John F. Kennedy met with the affected state governors, asking what he could do to help. The ultimate result of that meeting was the formation of the President’s Appalachian Regional Commission (PARC).

PARC’s members were representatives from the nine Appalachian governors’ offices of Alabama, Georgia, Kentucky, Maryland, North Carolina, Pennsylvania, Tennessee, Virginia, and West Virginia; and the major federal agencies operating in Appalachia—the Area Redevelopment Administration; Atomic Energy Commission; National Aeronautics and Space Administration (NASA); Small Business Administration; Tennessee Valley Authority; and the U.S. Departments of Agriculture; Defense; Health, Education, and Welfare (the precursor of the Departments of Education and Health and Human Services); Interior; Labor; and Treasury.

Shortly before his death, Kennedy charged PARC “to prepare a comprehensive action program for the economic development of the Appalachian Region.” After Kennedy’s assassination, President Lyndon Johnson directed PARC to write their recommendations in a 1964 report.

In Appalachia: A Report by the President’s Appalachian Regional Commission, PARC recommended the creation of a “regional organization to allow maximum use of both existing and new resources in a continuing development effort.” PARC’s recommendation resulted in Congress passing the Appalachian Regional Development Act (ARDA) to create the Appalachian Regional Commission (ARC) in 1965.

Although ARC remains the first federal regional authority or commission, Congress has subsequently created at least six additional regional authorities or commissions.

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381 Congressional Research Service, supra note 378, at 3.
382 Id. at ix.
383 Appalachia Report, supra note 273, at II.
384 Id.
385 Id.
387 ARC’s historical predecessor was the New Deal Tennessee Valley Authority (TVA), which was originally responsible for developing a geographic area that included the mountainous regions of six Appalachian states. See 16 U.S.C. § 22 (2018). The reason why the TVA is no longer considered a regional authority or commission is because the TVA morphed into a public energy utility. See About TVA, TVA, https://www.tva.gov/About-TVA (last visited Oct. 29, 2018) (stating that the TVA “is a corporate agency of the United States that provides electricity for business customers and local power companies serving 9 million people in parts of seven southeastern states”); see also Our History, TVA, https://www.tva.gov/About-TVA/Our-History (last visited Oct. 29, 2018).
authorities or commissions to coordinate geographic development efforts. Out of all federal regional authorities or commissions, ARC is the only one arguably dedicated to one subnational area and group, that of Appalachia and Appalachians. Although the 2018 federal budget blueprint initially proposed eliminating funding for ARC, Congress subsequently restored ARC's funding in its 2018 budget and confirmed a new ARC Co-Chair.

In 1964 and 1965, the federal government and nine state governments took official notice not only that the “Appalachian people” constitute a distinct subnational group in the United States but also that these governments have a responsibility to remedy the unfair treatment the Appalachian people have received in comparison to the rest of the United States. This remarkable de jure recognition of the “national liability” for the Appalachian people’s “individual
“distress” could arguably justify federal discrimination protections for Appalachians.\textsuperscript{392}

Enshrined in federal statute is the legislative finding that “Congress finds and declares that the Appalachian region of the United States . . . lags behind the rest of the Nation in its economic growth and that its people have not shared properly in the Nation’s prosperity.”\textsuperscript{393}

In its report, officially adopted by the federal government and nine state governments,\textsuperscript{394} PARC observed that the “average Appalachian . . . has not matched his counterpart in the rest of the United States as a participant in the Nation’s economic growth”\textsuperscript{395} and that Appalachians have been “too frequently deprived of the facilities and services of a modern society.”\textsuperscript{396} PARC also may have implicitly admitted that the government had treated the rest of the country more favorably than Appalachia:

What [PARC] has found is a record of insufficiency—a history of traditional acts not performed, of American patterns not fulfilled. This sets Appalachia apart from the rest of the Nation . . . . The sins of commission in Appalachia are numerous and as opaque as history: what was omitted—the traditional pattern of growth thwarted by this neglect—is, on the other hand, transparent and may be simply stated.\textsuperscript{397}

While these official factual findings concerning Appalachian injustice could arguably support the extension of traditional civil rights protections to

\textsuperscript{392} Id. The question of whether these remarkable federal public admissions could constitute \textit{de jure} discrimination is beyond the scope of this Essay.


\textsuperscript{394} The Alabama, Georgia, Kentucky, Maryland, North Carolina, Tennessee, Virginia, and West Virginia state governors all signed a letter stating that they had “studied the report” and “its recommendations,” “want[ed] to express [their] approval of the principles and actions provided for” in the report, and “pledge[d] [their] separate and associated support in working within [their] States and throughout the region to bring into action the . . . program the report proposes.” \textit{Appalachia Report, supra} note 273, at IV. The Governor of Pennsylvania signed a separate letter because he disagreed with the proposed structure of the ARC. \textit{Id.} at VI–VII. The U.S. Secretaries of Agriculture; Commerce; Defense; Health, Education, and Welfare; Interior; and Treasury; the Administrators of the Area Redevelopment Administration; Small Business Administration; and National Aeronautics and Space Administration; the Chairmen of the Atomic Energy Commission; and the Tennessee Valley Authority signed a letter expressing their “support for the action program outlined in the report” and pledging the federal government’s “full participation” in the report’s program “and its implementation.” \textit{Id.} at IX. Finally, Congress stated in a federal statute, “Congress recognizes the comprehensive report of the President’s Appalachian Regional Commission documenting these findings.” 40 U.S.C. § 14101(a) (1965 Findings and Purpose).

\textsuperscript{395} \textit{Appalachia Report, supra} note 273, at XV.

\textsuperscript{396} \textit{Id.} at 16.

\textsuperscript{397} \textit{Id.}
Appalachians, the reality is that locational prejudice not only is multidimensional and more complicated than traditionally proscribed prejudice like racism but also can encompass racism and other more one-dimensional forms of traditional prejudice.

E. Place and Space Are More Complicated than Race

Appalachian discrimination needs a legal remedy. While this Essay is not against the extension of existing civil rights law to apply to Appalachians or new legislation explicitly to protect Appalachians, it recognizes the limitations of the traditional civil rights approach. As Appalachians have experienced under current U.S. law, the problem with protected classes is that drawing such limited legal boundaries publicly and officially communicates that it is acceptable to discriminate against people who lie outside those boundaries.398 On the other hand, legal rules—particularly standing or jurisdictional rules—need to be clear and easy to apply.399

Location compounds and confounds this tension between oversimplification and clarity. We all need literal and figurative space to live, work, and flourish.400 While all public policy involves tradeoffs, perhaps none are as zero sum as place and space.

In particular, locational prejudice is difficult to capture appropriately with clear and easily applied rules because location intersects with many other protected classes; location can make a substantive difference in housing, employment, and education; and location conveys demographic truths and useful empirical data.

1. Location Intersects with Many Other Protected Categories Like Race and Gender

Addressing discrimination of a single protected class is difficult enough, but addressing the intersection of multiple protected classes is even more complex.401 For example, when faced with limited resources or imperfect formalist legal categories, should antidiscrimination law treat a transgendered Black Appalachian woman differently from a straight White Appalachian man? How about a transgendered Black Appalachian woman versus a transgendered Black female New Yorker? Is one more deserving of legal protection than the other? Should an individual who happens to live at the diverse intersection of a

398 Fraley, supra note 265, at 98.
399 Accord Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg., 545 U.S. 308, 321 (2005) (Thomas, J., concurring) (“Jurisdictional rules should be clear.”).
400 See WOOLF, supra note 52, at 3–4, 21, 79.
401 See, e.g., Terman, supra note 209, at 73.
number of protected classes benefit from all of them, or is one protection enough? Should law prioritize certain protected classes above others? Law obviously cannot protect everyone; what are its proper limits?

Although many protected classes have definitional problems, Appalachian regional identity is particularly difficult to define. For example, according to the ARDA’s geographic definition, Allegheny County, Pennsylvania, which contains the city of Pittsburgh, is considered part of Appalachia. With Pittsburgh within its borders, Allegheny County is doing much better than most of Appalachia and most of Pennsylvania. According to 2012 data, its average earnings per job were $54,798, higher than Pennsylvania’s $49,519 average and the national $49,468 average. As far as annual employment growth from 2009-2012, Allegheny County’s 0.9% average exceeded Pennsylvania’s 0.8% average but was slightly below the national 1.0% employment growth average. Home of the National Football League Pittsburgh Steelers, National Hockey League Pittsburgh Penguins, Major League Baseball Pittsburgh Pirates, and at least ten higher education institutions including the University of Pittsburgh, Carnegie Mellon University, and Duquesne University, Allegheny County had 4,863,300 people in 2016 which made it the 24th most populous county in the nation.

402 For example, U.S. law no longer defines race as specifically (and repugnantly) as Louisiana’s “one drop” rule. See Plessy v. Ferguson, 133 U.S. 587 (1890), overruled by Brown v. Bd. of Educ., 347 U.S. 483 (1954); see also Donald Braman, Of Race and Immutability, 46 UCLA L. Rev. 1375 (1999).


404 See Allegheny County, PA, ECON. DIVERSITY IN APPALACHIA, http://economicdiversityinappalachia.creconline.org/Profiles/?Fips=42003 (last visited Nov. 1, 2018) [hereinafter ECON. DIVERSITY IN APPALACHIA]; see also EDWARD FESER ET AL., APPALACHIAN REG’L COMM’N, ECONOMIC DIVERSITY IN APPALACHIA 86, 106 (2014).

405 ECON. DIVERSITY IN APPALACHIA, supra note 404.

406 Id.


Historically, Allegheny County has enjoyed the patronage of wealthy donors like Andrew Carnegie and Henry Phipps. At the end of the 19th century, the New York Tribune's American Millionaires found 44 millionaires living in Allegheny County. In 2010 dollars, those 44 millionaires would be billionaires today. In 2017, Livability.com, a website that annually evaluates cities with 20,000-350,000 people, ranked Pittsburgh its 19th most livable city.

Should people from Allegheny County receive the same legal protections as other Appalachians? How about the six Appalachian counties in the Atlanta, Georgia, metropolitan service area that have grown more than 250% since 1980? How about the one that has grown 700% since 1980?

Even if this putative protected class is limited to native Appalachians and urban Appalachians, how and where should the law draw the line? Can Appalachian transplants, people born elsewhere who moved to Appalachia, claim Appalachian protected status?

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411 Id. at 107.
412 Id.
414 Ferrari & Rhee, supra note 11, at 890.
415 Id.
416 For further discussion, see supra Section IV.C.
417 If nonnative transplants to Appalachia can subsequently claim Appalachian legal status, then should Rachel Dolezal be able to claim the protected legal status of a Black female even though she was born White? Decca Aitkenhead, Rachel Dolezal: 'I'm Not Going to Stoop and Apologise and Grovel,' GUARDIAN (Feb. 25, 2017, 4:00 AM), https://www.theguardian.com/us-news/2017/feb/25/rachel-dolezal-not-going-stoop-apologise-grovel. Dolezal became infamously known as a person who was born in Montana to White parents but decided later in life to self-identify as a Black person. Id. She was a well-known and respected “Black” civil rights activist, Branch President of the Spokane, Washington, National Association for the Advancement of Colored People (NAACP), chair of Spokane’s police ombudsman commission, and Eastern Washington University teacher when a local TV news crew in 2015 confronted her about her White biological heritage on camera. Id.

The story quickly went viral. Id. Later it was discovered that Dolezal had once sued a university for discriminating against her because she was White. Id. In 2017, she was jobless and feeding her family on food stamps. Id. She had applied for over 100 jobs, but no one would hire her, even to stack grocery shelves. She claimed to be able to count the number of her remaining friends on her fingers. Id.

Dolezal explained, “The narrative was that I’d offended both communities in an unforgivable way, so anybody who gave me a dime would be contributing to wrong and oppression and bad things. To a liar and a fraud and a con.” She seeks “to open up this dialogue about race and identity, and to just encourage people to be exactly who they are.” Id; see also Rachel Dolezal, In Full Color: Finding My Place in a Black and White World (2017).
Because they are a minority group outside Appalachia often living in cities like Cincinnati with well-established hostility or discrimination against them, urban Appalachians probably require the most legal protection. Yet what should their legal boundaries be? How should law measure genuine self-identification to Appalachia? Must an urban Appalachian be born in Appalachia? How many intervening generations is too many for a person born outside Appalachia to claim Appalachian identity? How can a non-native prove that she is “Appalachian” enough to merit legal protection? Do they have to fulfill Appalachian stereotypes or meet some oversimplified (but clear) checklist to be considered Appalachian for legal purposes? If they excel at hiding (or “covering”) their Appalachian identity and are less likely to suffer discrimination as a result, are they less deserving of legal protection? What if they rebel or renounce their Appalachian identity for a season? Are they legally protected then? How about if they subsequently return, prodigal like, to their Appalachian roots?

2. Unlike Race or Gender, Location Can Make a Substantive Difference in Housing, Employment, and Education

One of the moral arguments against traditional discrimination such as racism is the simple “colorblind rule” that “under any standards of morality or fairness one’s race ought to be legally irrelevant.” Setting aside ongoing debates about the accuracy or wisdom of colorblindness, location is unavoidably relevant to fairness in basic human needs like housing, employment, and education. The availability and feasibility of suitable housing most certainly varies by location. One of the lasting criticisms of the “gentrification” of urban

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neighborhoods is that the rising costs that accompany gentrification cause the minority, lower income residents who used to live there to leave and subsequently keep minority, lower income residents out.

As urban Appalachians have demonstrated, where you live obviously affects where you work. Americans are constantly moving because of jobs. Likewise, the cost of housing has increased the length of commutes from home to work. Although some jobs allow telecommuting through the internet, more companies are limiting teleworking and requiring employee physical presence at work.

As so-called "white flight" from cities to the suburbs has demonstrated, where you live also affects your children's educational opportunities. Federal courts have recognized that housing and school patterns feed on each other.

423 "Gentrification" is defined as the migration of affluent people into former working-class neighborhoods. Although scholars have long argued that gentrification may harm urban communities by displacing long-term residents, the research on any causal connection between affluent residents moving in and blue collar residents moving out is mixed. Isaac William Martin & Kevin Beck, Gentrification, Property Tax Limitation, and Displacement, 54 URB. AFF. REV. 33, 35 (2018).

424 Id. at 34.

425 For a discussion of the Great Migration of four million resident Appalachians in search of work outside Appalachia, see supra Section IV.C.3.


428 See Thomas Blake, Commuting Costs and Geographic Sorting in the Housing Market, 44 REAL EST. ECON. 1 (2016)


430 "White flight" is defined as "the departure of whites from places (such as urban neighborhoods or schools) increasingly or predominantly populated by minorities." White flight, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/white%20flight (last visited Nov. 11, 2018). See generally John R. Logan, Zhang Weiwei, & Deirdre Oakley, Court Orders, White Flight, and School District Segregation, 1970-2010, 95 SOC. FORCES 1049, 1075 (2017).

From an antidiscrimination standpoint, what makes the complex relationship between location and housing, employment, and educational opportunity especially challenging is the fact that Americans everyday legally choose to discriminate on the basis of location for innocuous housing, employment, or educational reasons. We choose to live in a certain neighborhood to attend a particular school. We must leave our current school and sell our current home because a working parent has obtained a new job in a different locale. With the increased income from a new job, we move to a better home, a better neighborhood, and a better school.

3. Unlike Race or Gender, Location Can Convey Demographic Truths and Useful Empirical Data.

Unlike other protected classes like race or gender, the geographic location of your home can convey more useful and accurate information about you and your neighborhood. Because the geographic perspective by definition scales every place and space, when we zoom out and away from individual homes, past neighborhoods and hometowns, the big picture that emerges is of the homeland. The first Office of Homeland Security Director Tom Ridge said, “when the hometown is secure, the homeland is secure.”

V. HOMELAND INSECURITY

The very term “homeland” has long promoted patriotism and nationalism by evoking family imagery in service of the state. Perhaps most

Sch. Bd. of Educ., 512 F.2d 37 (2d Cir. 1975); NAACP v. Lansing Bd. of Educ., 559 F.2d 1042 (6th Cir. 1977)).

432 For further discussion, see supra Section III.E.3. See generally Census Data: Census Data by Zip Code, DARTMOUTH LIBR. RES. GUIDES, https://researchguides.dartmouth.edu/census/ZIP (last visited Dec. 16, 2018) (listing online websites to find U.S. Census data by zip code or equivalent). See also Data Reports: Socioeconomic Data Profile by County, APPALACHIAN REG’L COMM’N, https://www.arc.gov/research/DataReports.asp (last visited Oct. 29, 2018).


435 Accord BLUNT & DOWLING, supra note 17, at 167 (utilizing “homeland (in)security”).

436 See Anne McClintock, Family Feuds: Gender, Nationalism and the Family, 44 FEMINIST REV. 61, 63 (1993) (describing the “iconography of familial and domestic space” used to depict a nation as a homeland). Deborah Cowen considers such nationalistic family imagery as seeking to legitimize “the production and reproduction of domination and exploitation.” Deborah Cowen,
infamously, the German Nazi Party abused the idealized feminine concept of Homeland (Heimat) and the masculine concept of a German Fatherland to further its insecure aspirations of a master Aryan race. Under the evil Apartheid system, the dominant but insecure White minority Afrikaners in South Africa created isolated Black ghettos for the legally inferior Black majority South Africans called homelands (bantustans). After the fall of Apartheid and the Black majority's accompanying political empowerment, select White minority Afrikaners have ironically sought to create a new, independent bantustan just for Whites. In response to the September 11, 2001, terrorist attacks against the United States, what eventually became the U.S. Department of Homeland Security immediately embraced the label "homeland," a term that until then had been largely foreign and unfamiliar to Americans.

To avoid insecure geographic discrimination, this Essay advocates proscribing individual locational prejudice regardless of protected class or other historical limitations of U.S. civil rights doctrine; and utilizing human capabilities and geographic limits to cabin both intersectionality and pretextual discrimination while promoting constructive compromise. Only then can everyone's homeland truly be secure.

A. A Protected Class Limited to Locational Prejudice

Freedom from locational prejudice in U.S. law currently remains a right without a remedy. This Essay simply argues that anyone who intentionally discriminates against another person because of locational prejudice—even when factually mistaken about the victim's identity—should be held legally accountable. The evil underlying locational prejudice, the stereotyping sampling error, is the same evil underlying racism, sexism, sexual orientation prejudice,

From the American Lebenstraum to the American Living Room: Class, Sexuality, and the Scaled Production of "Domestic" Intimacy, 22 ENV'T AND PLAN. D: SOC'Y AND SPACE 755, 762 (2004).

See BLUNT & DOWLING, supra note 17, at 160.

Id.

Id. at 160–61.


See supra Section IV.D.

Cf. Senn, supra note 283 and accompanying text.

See supra note 94 and accompanying text.
and religious discrimination. The perpetrator marginalizes the victim by relying on irrational negative assumptions about the victim's identity. In our view, the stereotyping sampling error alone—subject to fair and rigorous proof requirements—should be sufficient to proscribe such pernicious conduct. Ultimately, the stereotyping sampling error hurts everyone by using flawed reasoning to distribute societal benefits or burdens unfairly.

Existing limitations to U.S. civil rights doctrine to include the state action, tiers of scrutiny, and protected class requirements have been persuasively criticized as historical anachronisms. Notwithstanding our agreement with such criticism, the easiest way to proscribe geographic discrimination in U.S. civil rights law right now would be to allow domestic geographic subgroups like Appalachians to become protected classes. In particular, an Appalachian discrimination lawsuit might arguably establish state action with the remarkable official admissions of discrimination from PARC and other government actors.

The biggest drawback of a locational prejudice protected class in our view would be the continued intractability of the intersectionality problem. Geographic identity—by being inherently physical, provable, circumstantial, and intersectional—can provide useful limits on intersectionality.

See supra notes 95–101 and accompanying text.
Locational prejudice should be subject to rigorous intent proof requirements comparable to the proof of racial animus. See Washington v. Davis, 426 U.S. 229 (1976). See generally Kushner, supra note 48, at § 3.II.B (“Proof of Intent”).


See Kushner, supra note 48, at § 4:26 (“A four-tier model: a rationality plus tier requiring interests articulated by the state or assumed by the court—toward substantive equal protection”).

See Diaz, supra note 327; Walker, supra note 207.


See supra Section IV.D.

See supra Section IV.D.3.

See id.

For further discussion, see supra Section V.A.
B. Geographic Limits to Intersectionality

When viewed systemically or collectively, intersectionality can lead to nihilism. We are all unique individuals and want to be viewed and treated as such, but law simply lacks the tools and resources always to evaluate us as idiosyncratic individuals.

Law therefore unavoidably must rely upon imperfect rules that group individuals into different categories. Although intersectionality provides a powerful critique of oversimplified (and thus unfair) legal rules, anyone can point out that they possess additional identities (intersecting categories) not captured by existing legal rules.

For example, assume there are two White men named John and Jack. While the law might only see two White men, John points out that he is a self-made Appalachian descended from a poor single mother while Jack inherited great wealth from his rich Long Island, New York, family. Although these socioeconomic status and family inheritance categories are extremely important, even foundational, to John’s personal identity, they are largely irrelevant to U.S. civil rights law.

One way to avoid absurd results is to prioritize intersecting identities that law historically unjustly marginalized over intersecting identities that law historically privileged or ignored. Under this approach, a Black woman’s intersectionality should receive closer scrutiny than a White man’s intersectionality solely because of the proven, historical legacy of government-sponsored discrimination against Blacks and women.

But closer scrutiny does not mean reverse discrimination. All law is context specific. Antidiscrimination law requires a deep analysis of the specific factual context. The capabilities approach combined with the geographic perspective provide a deep factual context through which to explore intersecting identities constructively.


457 See supra Section III.A.

458 See KUSHNER, supra note 48, at §§ 8:5 (“Wealth”), 9:5 (“Other Classifications”) (stating that the U.S. Supreme Court has refused to scrutinize wealth, close relative, or college legacy preference application classifications).

459 See generally id. at § 5:2 (“Race”) (collecting cases).

460 See generally id. at § 7:1 (“Gender”) (collecting cases).


462 See supra Section II.
How would this geographic capability-based inquiry work? While this process requires much further research and reflection, we offer an initial framework for discussion:

(1) the plaintiff should specifically allege:
   (a) which identity or identities the defendant discriminated against;
   (b) the specific geographic locations (place and space) where the plaintiff daily creates, experiences, or nurtures that identity or those identities from her home;
   (c) which of her specific, legally recognized capabilities were impaired by such discrimination;
   (d) the place or places where the alleged discrimination occurred; and
   (e) how the defendant caused the impairment of the plaintiff’s capability or capabilities by literally or figuratively creating distance, ensuring that distance is quantified through an objective standard.

(2) the defendant should respond to the plaintiff’s discrimination claims; and

(3) the legal decision maker should utilize time-sensitive maps, geographic statistics, and GIS along with more traditional discovery to find the relevant facts with which to evaluate the individualized discrimination claims against particular capabilities in a specific geographic context.

As an example, we shall compare how Bronson v. Board of Education of the City School District of Cincinnati was decided under established U.S. civil rights law with this alternative approach.463

1. The Plaintiff Should Specifically Allege Impacted Identity, Impaired Capability, and Distance

While a plaintiff has the freedom to define her identity against which the defendant allegedly discriminated, the plaintiff must back her defined identity up with specific capabilities the defendant ostensibly impaired because of identity discrimination. In the Bronson lawsuit, Black and Appalachian parents and students464 sought a preliminary and permanent injunction against the Board of


464 The district court defined the Appalachian Plaintiffs as native and urban Appalachians. Bronson, 550 F. Supp. at 946. For definitions of native and urban Appalachians, see supra Section IV.C.1, 3.
the Cincinnati Public School District to stop the planned closure of the Peaslee Primary School (grades K-3) in the Over-the-Rhine neighborhood of Cincinnati, Ohio, under 42 U.S.C. § 1983, the Equal Protection Clause of the 14th Amendment, and Title VI of the Civil Rights Act of 1964.

These U.S. civil rights laws severely limited the Appalachian Plaintiffs from defining their impacted identity in three ways. Specifically, the district court (1) refused to recognize Appalachians as a protected class; (2) never addressed the possibility of treating Black Appalachians ("Affrilachians") as an intersectional protected class; and (3) assumed the necessity of racial/national origin balancing, where the Peaslee School's racial/national origin student enrollment percentage must exceed the School District's overall enrollment racial/national origin average percentage to be actionable under U.S. civil rights law. A more flexible geographic approach would not have been subject to these three limitations.

First, as previously discussed, the district court held that the Appalachian Plaintiffs lacked standing to bring the lawsuit because Appalachians are not a protected class under Title VI of the Civil Rights Act. The geographic approach would have avoided such inflexible and arbitrary line drawing and allowed Appalachians legal protection from discrimination.

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467 U.S. CONST. amend. XIV.


471 Bronson, 550 F. Supp. at 950 n.4. With school desegregation, racial balancing can be used to eliminate racially identifiable schools:

Fundamentally a desegregation plan must eliminate racial identifiability of schools... When a history of segregation... forces the court to fashion a remedy, it is within the equitable authority of the court to use racial ratios as a starting point in formulating a remedy... Of course, no uniform degree of racial mixing of students is or could be required in order to end segregated schools and counter the pervasive effects of years of segregatory practices... But awareness of the racial composition of the system as a whole provides a reference for determining what are racially identifiable schools within that system. The test of identifiability then becomes the substantial disproportion in composition compared to the racial composition of the school system.


472 See supra Section IV.D.1 for an earlier discussion of Bronson.

Second, the district court opinion ignored the possibility that some of the majority Black students at Peaslee might have self-identified as Appalachian as well. Although the published opinion is unsurprisingly silent about this intersectional possibility, because Peaslee’s Over-the-Rhine neighborhood had well-established Black and Appalachian communities at the time, such intersectional students were nevertheless possible. Like a young Tiger Woods, parents and students of Affrilachian or other identities intersecting with Appalachian identity may have been forced to limit their identity to claim protected class status.

Third, because the geographic approach treats plaintiffs (or alleged victims) as individuals, it eschews the need for crude aggregate identity statistical measures of disparate impact, critical mass, racial predominance, or other forms of racial or national origin balancing. Although such aggregate measures still provide useful starting points for analysis, the geographic approach allows for a more nuanced inquiry.

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474 The opinion is silent about whether the Black and Appalachian student percentages therein are separate or overlapping. This possible confusion might have been caused by the Plaintiffs’ own data. The Court admitted all of the Plaintiffs’ Exhibits into evidence. Bronson, 550 F. Supp. at 945 n.1. The Court found that Peaslee was 81.9% Black in 1981–1982 and 3.97% Appalachian in 1973. Id. at 946. One of the Plaintiffs’ exhibits, which was not properly authenticated and thereby excluded, apparently estimated Peaslee as approximately 15% Appalachian in 1973. Id. The district court judge explained that the 15% Appalachian figure would not have changed his ruling. Id. at 950 n.4. The districtwide percentage of Appalachian students in 1973 was estimated by the District as 17.27% and by the Plaintiffs as approximately 32%. Id.

475 For a discussion of the history of urban Appalachians in the Over-the-Rhine neighborhood, see Zane L. Miller & Bruce Tucker, Changing Plans for America's Inner Cities: Cincinnati's Over-the-Rhine and Twentieth-Century Urbanism xviii, 46, 59, 61–66, 71–82, 91 (1998). For example, in 1944, six pastors from the West End of the Over-the-Rhine neighborhood issued a joint statement urging their apparently White, non-Appalachian congregations to practice a “neighborliness toward both ... mountaineer and Negro neighbors.” Id. at 62 (citation and internal quotation marks omitted). There were even multiple efforts in the late 1960s to define Over-the-Rhine as an official Appalachian cultural enclave. Id. at 71–72.

Two Bronson Plaintiff parents believed that the Peaslee School was so important to Over-the-Rhine that they purchased the School in 1984, two years after its closure, and created the Peaslee Neighborhood Center with “an educational philosophy that encourages participatory learning and draws on the lived experience of the participants.” History, Peaslee Neighborhood Ctr., http://peasleecenter.org/history/about/ (last visited Nov. 29, 2018). Today, the Peaslee Neighborhood Center seeks to “empower[] folks to claim their beauty, strength, and voices.” Id.

476 For a discussion of Tiger Woods’ multiracial identity, see supra Section III.A.

477 See Kushner, supra note 48, at § 3:9 (“Disproportionate Impact”) (collecting cases).

478 See id. at § 1:5 (“Overview and Models of Equal Protection”) (discussing the “critical mass” concept in Grutter v. Bollinger, 539 U.S. 306 (2003)).


480 See Fischbach et al., supra note 470, at 502, 504.

481 See, e.g., Morgan, 401 F. Supp. at 232.
For example, if the Cincinnati School District hypothetically decided to discriminate against only Affrilachian students but not Black students or White Appalachian students at Peaslee, this geographic approach would allow Affrilachian plaintiffs to bring a discrimination case against the District even if the percentage of Affrilachian students at Peaslee was less than the districtwide averages for Affrilachian students, Black students, or White Appalachian students.

Under our proposed geographic framework, the Appalachian Plaintiffs could have pleaded an urban Appalachian identity\(^{482}\) (to include Affrilachian identity) and deprivation of their central capacity of an adequate education.\(^ {483}\) The place of this alleged deprivation was the Peaslee Primary School, specifically, its closing.

To establish educational or literal distance, the Plaintiffs could have utilized either (1) objective educational quality data (and accompanying educational expert witness analysis) to demonstrate how closing Peaslee would have rendered the Plaintiffs’ children’s education inadequate, or (2) objective mapping data of the individual Plaintiff families’ day-to-day home, work, and school locations; routes; and routines to illustrate how closing Peaslee would have increased the Plaintiffs’ commuting time or distance to access an adequate education.

As explained below, however, Bronson’s factual findings appeared to preclude the Plaintiffs from making an objective distance argument. Consequently, the District probably would have been able to refute the Plaintiffs’ geographic claims.

2. The Defendant Should Respond to Each Specific Allegation

Geographic discrimination’s more individualized approach would also allow the defendant to respond to each specific allegation in a more individualized manner. Treating the plaintiff as an individual in her daily place, space, and distance context provides a defendant with more tailored ways of specifically rebutting discrimination claims. The Bronson opinion notably lacks this level of detail.

Under the flawed but familiar burden-shifting framework,\(^ {484}\) if the defendant articulates a legitimate, non-discriminatory reason for the plaintiff’s

\(^{482}\) For a discussion of the definition of urban Appalachians, see supra Section IV.C.3.

\(^{483}\) See supra Section II.B.3; Nussbaum, supra note 29, at 34.

claimed discrimination, then the burden of production would shift back to the plaintiff to demonstrate that the defendant’s reasons are actually pretextual.\textsuperscript{485}

In \textit{Bronson}, assuming the veracity of the district court’s factual findings, the Cincinnati Public School District probably would have been able to respond adequately even to geographic discrimination allegations. The District’s claims that the school closings were unavoidably necessary because of a budget crisis were unrebuted by the Plaintiffs.\textsuperscript{486} In fact, obtaining state loans because of the District’s budget crisis would have required Peaslee’s closure anyway because Peaslee did not conform to the state rule of containing at least 15 classes.\textsuperscript{487}

Even before its closure, Peaslee was not a high performing school. Assuming that Peaslee was identifiable as an Appalachian school, its achievement scores ranked 18th-24th out of the 25 so-called Appalachian schools in the District.\textsuperscript{488} Closing Peaslee therefore did not deprive Appalachian students of a high performing Appalachian school.

Neither would closing Peaslee subject former Peaslee students to worse facilities, worse academic programs, or a substantially longer commute. The two elementary schools where former Peaslee students would attend also had better facilities and comparable academic programs.\textsuperscript{489} The replacement schools were only three and six blocks away from Peaslee.\textsuperscript{490} The district court concluded that the Plaintiffs had “utterly failed to prove any distinction” between the educational programs at Peaslee and its replacement school or “to establish that any harm will be caused” by the student transfer.\textsuperscript{491} The \textit{Bronson} Plaintiffs therefore probably would have had difficulty establishing distance under our geographic approach.

Finally, the Plaintiffs “failed to explain in precisely what manner the family or neighborhood structure, and religion of Appalachians differ from those of any other group.”\textsuperscript{492} They “conceded that Appalachians share a national origin common with American citizens generally.”\textsuperscript{493} Even the Plaintiffs did not classify Peaslee as a “heavily” or “predominantly” Appalachian school.\textsuperscript{494} Although our geographic approach allows a plaintiff to plead an intersectional identity, any plaintiff of course still must explain not only how their

\textsuperscript{485} See \textit{id.}


\textsuperscript{487} \textit{Id.} at 949.

\textsuperscript{488} \textit{Id.} at 950 n.4.

\textsuperscript{489} \textit{Id.} at 947, 950.

\textsuperscript{490} \textit{Id.} at 947.

\textsuperscript{491} \textit{Id.} at 950 n.4.

\textsuperscript{492} \textit{Id.} at 946 n.3.

\textsuperscript{493} \textit{Id.}

\textsuperscript{494} \textit{Id.} at 952–53.
intersectional identity makes them different from any other group but also how the alleged geographic discrimination is related to that intersectional identity.

3. The Court Should Evaluate Each Discrimination Claim in Geographic Context

Perhaps the greatest benefit of the geographic approach is the amount of objective contextual information available to the parties and the court. Instead of relying on the adversarial process or the “battle of the experts” where often the side with the best (usually more expensive) expert witness wins, a court can use the rich publically available geographic data to scrutinize the fit between the plaintiff’s discrimination claims and alleged impacted capacities.

Under this Essay’s approach, a plaintiff should be required to submit an actual map of the relevant place (including, if physical, her home), space, and, if physical, alleged distance underlying her geographic discrimination claim. The map should also contain—or at least allege on information or belief—the objectively verifiable distance required for geographic discrimination. A court’s local rules could require it as part of the pre-trial order and hearing. With the ready availability of mapping technology, such a map should be relatively easy and inexpensive for a plaintiff to create. More importantly, such required maps would not only narrow the case’s scope but also would invaluably contextualize the case with concrete facts, locations, and routines.

Like many other school desegregation cases, Bronson employed geographic data, maps, and expert testimony. As the gatekeeper of the admissibility of evidence, the trial court should rigorously evaluate all

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495 See, e.g., JOHN D. NORTH, 8 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 86:58 (4th ed. 2017) (“Expert testimony—‘Battle of the experts’”).

496 For a discussion of the types of publically available geographic data, see supra Section III.C-E.

497 See, e.g., FED. R. CIV. P. 8(b)(5), 11(b)(3).

498 See generally FED. R. CIV. P. 16 (describing federal civil pre-trial orders), 83 (authorizing local U.S. district court rules).

499 For a discussion of how GIS can improve analysis by revealing social patterns otherwise not readily noticeable, see id.

500 For a discussion of how GIS can improve analysis by revealing social patterns otherwise not readily noticeable, see id.


The Bronson Court rejected the Plaintiffs’ expert testimony from Dr. Michael Maloney, a former city planner and Director of the Urban Appalachian Council. Although Maloney is clearly an unabashed advocate for Appalachians in Cincinnati, his own measures for determining Appalachian neighborhoods in Cincinnati demonstrate how difficult it can be to aggregate self-defining identity categories like Appalachians into collective statistics. Since 1986, Maloney and his collaborators have used a set of criteria (periodically revised and updated) that they admit ironically rely upon the stereotyping sampling error to determine poor Appalachian neighborhoods. They acknowledge that

[the term Appalachian is not synonymous with poverty. The vast majority of Appalachians in the [Cincinnati] metropolitan areas are not poor, not on welfare, and are not high school dropouts. Most own their homes and have relatively stable families. They are a predominantly blue collar group. About 10 percent hold managerial and professional jobs, and that their statistics exclude Affrilachians and “higher status Appalachians,” but nevertheless employ six “Criteria for Classifying Neighborhoods as Appalachian” that rely upon negative Appalachian stereotypes.

In response to the argument that they were making the stereotyping sampling error, Maloney and Auffrey “acknowledge the circular reasoning involved in using these negative criteria to define Appalachian neighborhoods. We can say minimally that Cincinnati’s Appalachian leaders concur that these

503 See, e.g., Fed. R. Evid. 103-105, 702.
504 Bronson, 550 F. Supp. at 945 n.1.
505 See Mike Maloney, supra note 345, at 175.
506 For a discussion of how difficult it can be to define Appalachians, see supra Section IV.C.
507 See supra note 11 and accompanying text.
508 Maloney & Auffrey, supra note 316, at 51.
509 Because Affrilachians “tend to blend into the larger African American community,” they are “not identifiable” through Maloney’s analysis. Id.
510 Maloney hypothesized that “higher status Appalachians do not concentrate in ethnic enclaves” and thus would not live in so-called Appalachian neighborhoods. Id.
511 These six criteria are: (1) greater than 23% of the families are below the poverty level; (2) less than 41.0% of families are African American; (3) less than 80% of the persons 25 years or older are high school graduates; (4) more than 7% of the persons 16-19 years old who are not in school are not high school graduates; (5) more than 62% of the persons 16-19 years old are jobless (includes those unemployed and those not in the civilian labor force); and (6) more than 3 persons per average family. Id. at 53 & tbl. 5A. On their face, these criteria appear to perpetuate stereotypes that Appalachians are (1) poor; (2) White; (3) high school dropouts; (4) unemployed; and (5) responsible for more children than they can handle.
are Cincinnati neighborhoods with high percentages of people with Appalachian origin.512

Such apparently unavoidable "we-know-it-when-we-see-it" tautologies highlight the general need to scrutinize geographic data closely and the specific need to scrutinize the individual geographic reality (for example, space, place, and distance) of a plaintiff who claims a complex intersectional self-identity about which it would be difficult if not impossible to obtain aggregate data.

C. Exposing Pretextual Discrimination, Encouraging Concrete Compromise

Finally, because pretextual discriminators operate much like the geographic capability-based inquiry above, this approach would also help prevent pretextual discrimination and encourage workable compromise. Pretextual discrimination is most common in the employment discrimination context where an employer can, among other actions, (1) fail to follow its own policies; (2) treat similarly situated employees in a disparate way; or (3) change its explanation for an employment decision.513

Pretextual discrimination, however, need not be limited to the employment context. It is simply illegal intentional discrimination masquerading under seemingly legitimate, nondiscriminatory reasons.514 If an organization or a state actor wanted to discriminate intentionally on a larger scale against a particular identity group, the discriminator could use that identity group’s practical geographic reach to discriminate pretextually against the group. Seemingly facially neutral measures, when employed within a particular group’s specific geographic context, can have the same effect as intentional discrimination.

For example, voting discrimination has a long history of seemingly race-neutral measures like writing tests and poll taxes being employed to discriminate

512 Id. at 53.
513 See, e.g., Edwards v. Hiland Roberts Dairy, Co., 860 F.3d 1121, 1125–27 (8th Cir. 2017). More generally, a plaintiff can show that a defendant’s allegedly nondiscriminatory reason for the plaintiff’s adverse treatment is pretextual by arguing that the defendant’s reason (1) had no basis in fact; (2) was not the real reason for the defendant’s actions; or (3) was insufficient motivation for the defendant’s action. See IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, 4 STATE & LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 9.18 (“Intentional Discrimination—Plaintiff’s Reply Burden—Pretext”) (2018). See also generally Empl. Prac. Guide ¶ 618.762 (C.C.H. 2018) (“National Origin Discrimination: Pretext”) (collecting cases); Donald S. Rothschild & Brian M. Dougherty, Proving Discrimination Circumstantially through Evidence of Pretext, 27 DUPage Cty. B. Ass’n (2014–2015), https://www.dcba.org/mpage/vol270515art2 (collecting cases).
514 For a definition of pretextual discrimination, see supra note 2 and accompanying text.


Pretextual discrimination and interest-based negotiation fortunately share much in common. While pretextual discrimination closely scrutinizes individual parties’ interests and capabilities to find seemingly unobjectionable ways to discriminate intentionally, an interest-based negotiation seeks the converse. Starting with an intractable conflict like allegations of pretextual discrimination, the negotiation closely scrutinizes individual parties’ interests and capabilities to forge an unobjectionable compromise. Both processes rely upon finding hidden alternatives among daily details and geographic realities.

VI. CONCLUSION: GOING HOME

As Charles Dickens wrote in The Life and Adventures of Martin Chuzzlewit, “And though home is a name, a word, it is a strong one; stronger than magician ever spoke, or spirit answered to, in strongest conjuration.” Notwithstanding its strength, “home” paradoxically may also be the double-edged sword perpetuating discrimination. In Letter to My Daughter, Maya Angelou defined home as “a place” inside ourselves “where we belong and maybe the only place we really do.” Angelou recognized that true freedom required liberation from the insecure, exclusionary notion of home itself, explaining that “[y]ou only are free when you realize you belong no place—you belong every place—no place at all.”

“Home” by definition requires keeping unwelcome others outside its borders. As both a place and a space, home presents an insecure win-lose zero-

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319 MAYA ANGELOU, LETTER TO MY DAUGHTER 76 (2008).
321 For example, “not being home” is a matter of realizing that home was an illusion of coherence and safety based on the exclusion of specific histories of oppression and resistance, the repression of differences, even within oneself.” Minnie Bruce Pratt, Identity: Skin Blood Heart, in
sum game. Unless we include and accept you as one of us, our home can only exist by physically and symbolically excluding others. We must protect the homeland by keeping the barbarians outside the gates. As the Greek poet C.P. Cavafy observed in *Waiting for Barbarians*, fear of nonexistent outsider barbarians invading the homeland can be abused as “a kind of solution.” The protracted absence of outside visitors (visitors who have overstayed their welcome) is what ultimately makes a “home” a home.

Everyone can be “at home” right now only if we stop using division of and difference from others to determine our own identity. Instead, share place and space. Welcome everyone to consider our home their home. Like the consolidation of two previously rival high schools into one, we can reframe home and away to become a broader home.

One can be genuinely proud of one’s own individual identity but not at the expense of other people’s identities. If identities differ, as they are bound to do, the differing parties can agree to disagree while maintaining security in their own distinctive self-identity.

For example, deeply religious people morally opposed to same-sex marriage can agree to disagree, secure enough in their own identity to avoid seeking to use law to bludgeon the other side into involuntary submission. Patriotic White Americans who support law enforcement can agree to disagree with Black Lives Matter advocates over the unprovable assumption whether or not the U.S. law enforcement system is racist while working together to

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See supra Section II.B.1.

See supra notes 130–131 and accompanying text.


improve training and policies to prevent further avoidable police shootings. Republican President Ronald Reagan can zealously oppose Democratic Speaker of the House Tip O’Neill over national policy and legislation while giving a speech proudly honoring O’Neill for his service. You can say “tomato” and I can say “tomahto.”

Opposing identities thus can coexist without avoidable conflict or contradiction. Such conflict is unavoidable only when an identity majority chooses prejudice of an opposing identity minority over coexistence. Although true, these statements admittedly can sound like powerless platitudes. The geographic perspective however can empower these truths by placing them within an individualized physical space and a contextual place, reducing the actual and metaphorical distance between us all.

As the traditional African American spiritual song Going Home explained,

Going home, going home . . . Work all done, care laid by, going to fear no . . . . Lots of folk gathered there, all the friends I knew . . . . Nothing’s lost, all’s gain. No more fear or pain. No more stumbling by the way. No more longing for the day. Going to roam no more.

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President Ronald Reagan said:

But in addition to celebrating a country and a personal friendship, I wanted to come here tonight to join you in saluting Tip O’Neill, to salute him for the years of dedication and devotion to country.

. . .

Tip, you are a true son of Boston College and our friend, and we salute you. You are also a leader of the Nation, and for that we honor you. But you also embody so much of what this Nation is all about, the hope that is America. So, you make us proud as well, my friend; you make us proud.


See George Gershwin & Ira Gershwin, Let’s Call the Whole Thing Off, in SHALL WE DANCE (RKO Radio Pictures 1937).


Czech composer Antonín Dvořák supposedly incorporated the melody of this old African American spiritual song into the largo of his “New World Symphony.” ANTONÍN DVOŘÁK, Symphony No. 9 in E Minor, in Op. 95, B. 178 (New World Symphony 1893). Dvořák composed the symphony while visiting the United States, and in 1893 allegedly said, “in the Negro melodies of America I discover all that is needed for a great and noble school of music.” Michael Beckerman, The Real Value of Yellow Journalism: James Creelman and Antonin Dvořák, 77 THE MUSICAL Q. 749, 749 (1993) (citation and internal quotation marks omitted).
The epic roaming hero can only truly come home by renouncing the fight to return home. In *Waiting for the Barbarians*, the book inspired by Cavafy's poem, J.M. Coetzee's Magistrate experienced true peace and freedom only when he stopped othering the "Barbarians." Perhaps what Maya Angelou understood was what a commentator of Coetzee's work boldly declared, "the creation of a new, truly inclusive collectivity, a community that would not be dependent on the affirmation of identity or sameness but founded on a recognition of our infinite difference." If so, then as T.S. Eliot wrote, "And the end of all our exploring will be to arrive where we began and to know the place for the first time." "And when we find ourselves in the place just right, 'Twill be in the valley of love and delight."