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Localist Ideals, Antitrust Practice

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Localism is back in vogue. The term embodies a set of related values that antitrust has, at various times and to various degrees, foregrounded or forgotten about. In the antitrust context, localism means an acute attention to local market dynamics which, in addition to economic factors such as price, efficiency, and quality, also includes non-economic factors like local autonomy, local control, and resilience of local communities.

For decades, antitrust concerns about local autonomy, control, and resilience have been relegated to the back burner in favor of a more generic focus on consumer welfare as determined by price, quality, and innovation. However, the upheaval of the COVID-19 pandemic, along with local activism, heightening distrust of corporate power,[1] and growing awareness of the linkage between increasing consolidation and economic inequality,[2] has led many policymakers to shift their focus towards to promoting local autonomy and resilience.[3] This "localist revolution," as some have termed it, continues to gain steam.[4]

But in light of the decades of scholarship aiming to align antitrust regulation with national consumer welfare, localism's resurgence raises a simple question: how should federal antitrust regulators weigh concerns about local competition, consumer welfare, and autonomy in setting decidedly national policies? While the notion that antitrust can help promote local interests has deep historical roots,[5] federal antitrust lawyers and economists rarely propose using it as a tool to promote non-economic values of autonomy, control, and resilience.[6] A second prong of the localist agenda is a more granular examination of traditional concerns such as higher prices and lower quality. These arise when the analysis done by experts analyzes a large area or uses an average in a way that masks harm to micro areas.

The increasing consolidation of the retail grocery industry illuminates the flaws of a focus on averages of price and quality. We have chosen retail grocery to anchor our analysis for a few reasons. First, there has been increasing concentration of the grocery industry over the last three decades, with troubling local effects. This trend of increasing consolidation—highlighted recently by the mega-merger between Kroger and Albertsons—holds true at the national, state, metro, and sometimes at the neighborhood level.[7] As that consolidation has come about through both

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[1] Cornelia Woll, *Corporate Power Beyond Lobbying*, AMERICAN AFFAIRS JOURNAL (Aug. 20, 2019), https://americanaffairsjournal.org/2019/08/corporate-power-beyond-lobbying

[2] Lawrence Mishel & Josh Bivens, *Identifying the Policy Levers Generating Wage Suppression and Wage Inequality* 4 (Econ. Pol'y Inst. 2021).

[3] Mark Chou, *Going Local: Understanding and Avoiding the Dangers of Localism*, URBAN AFF. REV. 10780874231195252, 1–3 (2023).

[4] David Brooks, *The Localist Revolution*, N.Y. TIMES (Jul. 20, 2018), https://www.nytimes.com/2018/07/19/opinion/national-politics-localism-populism.html (last visited Jan 21, 2024).

[5] President Wilson once wrote that "if America discourages the locality, the community, the self-contained town, she will kill the nation." WOODROW WILSON, THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE 289 (1913).

[6] Eleanor Fox, *Against Goals*, 81 FORDHAM LAW REV. 2157, 2159 (2013).

[7] Eliana Zeballos, Xiao Dong, and Ergys Islamaj, *A Disaggregated View of Market Concentration in the Food Retail Industry* 6 (U.S. Dep't Agric. Econ. Rsch. Serv., Report No. 314, Jan. 2023), https://www.ers.usda.gov/webdocs/publications/105558/err-314.pdf?v=2808.3.

(1) vertical integration between wholesale suppliers and retail grocery stores[8] and (2) horizontal mergers between competitors like Kroger and Albertsons, we focus on both kinds of mergers.

This increasing concentration has been driven by two forces: (1) the entry of nontraditional retailers like supercenters into the retail grocery industry and (2) increasing mergers and acquisition activity amongst existing traditional supermarkets.[9] That consolidation is especially heightened in rural and small nonmetro counties where there were few stores to begin with, and where populations are often declining.[10] The unchallenged merger activity in this sector has been devastating for vulnerable communities: mergers have led to food deserts, higher prices, lower wages, and fragile supply chains in local communities across America. Additionally, retail grocery was historically a focus of the localist movement, making the topic especially ripe for our effort to envision a return to antitrust's more local roots.[11]

To be sure, the last thirty years have taught us that a policy focus on the non-economic principles underlying localism has benefits and drawbacks. We are not merely arguing that "bigness is bad." We understand that, to the extent that a preference for local autonomy disfavors mergers, it would block some positive economic effects of consolidation and corporate activity in the grocery retail industry: for instance, when supermarkets displace independent grocers, that often leads to a greater selection of healthier options at lower prices. As many current scholars have noted,[12] values such as local control and autonomy are not an absolute good (consider a local mafia for example), and a commitment to drawing out the most valuable elements of localism demands a commitment to recognizing its drawbacks. This is the challenge facing policymakers today: we argue that localist concerns must play some role in a more robust antitrust regime, but that role must have guardrails.

This is where our paper aims to contribute. Conscious of the concerns surrounding an antitrust enforcement regime motivated in part by a promotion of local interests, we make both a historical and an economic argument that antitrust enforcement should consider localist concerns when examining mergers. Historically, the antitrust movement drew from localist concerns, as recognized by both Congress and the courts.[13] Economically, a more localist antitrust enforcement

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[8] *E.g.*, Catherine Douglas Moran, *Why more grocers are bringing private label production in-house*, GROCERY DIVE (June 13, 2023), https://www.grocerydive.com/news/grocers-private-label-production-in-house-sales-manufacturing/651986.

[9] Zeballos *et al.*, *supra* note 7 at 1; *see also* Daniel Hanner *et al.*, *Dynamics in a Mature Industry: Entry, Exit, and Growth of Big-Box Retailers* (Fed. Trade Comm'n, Working Paper No. 308, Sep. 2011). One paper argued that the entry of supercenters caused increased consolidation because scale is extremely important for retailers. Larger chains get greater quantity discounts and drive out other companies by offering lower prices. Paul B. Ellickson, *The Evolution of the Supermarket Industry: From A&P to Walmart*, *in* HANDBOOK ON THE ECONOMICS OF RETAILING AND DISTRIBUTION 368, 370 (2016). This partly led to backlash in the anti-chain store movement. *See id.* at 374; *see also infra*, Section I.A.

[10] Zeballos *et al.*, *supra* note 7 at 11.

[11] *See infra*, Section I.A (discussing the anti-chain store movement)

[12] See the leading treatise on antitrust law, 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 111 (2d ed. 2000).

[13] *Infra*, Section I.A.

regime is necessary to prevent mergers that may (1) raise prices in small, isolated neighborhoods, whether rural or urban, (2) depress wages, and (3) reduce local resilience.

Perhaps most significantly, we also explain how enforcers can play a more significant role in antitrust enforcement moving forward. We list a few key steps, some already underway, that would be necessary to bring federal antitrust enforcement in closer alignment with localist concerns: First, the FTC should bolster scrutiny of merger activity in smaller markets that are particularly vulnerable to negative price and wage effects. Second, the FTC could find a way to modify its approach to defining geographic markets to reflect consumers' true elasticity of demand instead of allowing averages to mask harms. Third, we recommend the agency update its merger guidelines to articulate how it intends to weigh localist considerations—both non-economic and economic—when analyzing future mergers. Fourth, the FTC can structure its pre-merger notification process to consider effects on local markets.

As a final preliminary note, a localist approach to antitrust falls squarely under the ambit of the Clayton Act. Section 7 of the Clayton Act applies to any activities "affecting commerce" where the effect "may be substantially to lessen competition, or to tend to create a monopoly."[14] That broad language gives both the FTC and DOJ wide discretion to scrutinize mergers on a number of bases, and notably, does not define those terms. As the Warren Court recognized in *Brown Shoe Co. v. United States* (1962),[15] Congress incorporated localist values of autonomy and resilience in the language of the 1950 Celler-Kefauver Amendment, which enacted the current language of Section 7.[16] As Senator Estes Kefauver argued during the debate over Section 7, "[l]ocal economic independence cannot be preserved in the face of consolidations."[17] Representative Emmanuel Celler agreed: "Local people lose their power to control their own local economic affairs. Local matters are within remote control."[18] When the two drafted the bill, they understood that "the bill would accomplish this purpose by enabling the Federal Trade Commission to prevent those acquisitions which substantially lessen competition or tend to create a monopoly."[19] President Truman agreed that antitrust reform was a "major element" in the administration's fight to "create conditions favorable to small and independent business."[20] If the antitrust laws are to be given their full meaning, concern for local communities must factor into antitrust enforcers' calculus.

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[14] 15 U.S.C. § 18. *See generally* Richard M. Brunell, *The Social Costs of Mergers: Restoring Local Control as a Factor in Merger Policy*, 85 N.C. L. REV. 149 (2006).
[15] 370 U.S. 294, 314.
[16] Pub. L. No. 81-899, 64 Stat. 1125 (1950).
[17] 96 CONG. REC. 16,452 (1950).
[18] *Amending Sections 7 and 11 of the Clayton Act: Hearing on H. R. 988, et al. Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 81st Cong. 16 (1949).
[19] S. REP. NO. 81-1775, at 3 (1950).
[20] Statement by the President upon Signing Bill Amending the Clayton Act, PUB. PAPERS 763 (Dec. 29, 1950).

I. The Erosion of Localism in Antitrust Policy

We argue that localist concerns—that is, concerns for local autonomy, local control, and resilience of local communities—are a proper justification for antitrust enforcement. Federal antitrust enforcement in recent decades has left localist concerns in the background, but much of the original antitrust movement—which undergirded the statutory framework of antitrust—was presaged on these same localist concerns. We begin by recounting the evolution of the localist justification for antitrust. First elucidated by antitrust heroes like Louis Brandeis, it eroded overtime—first by legislative failure, then by antitrust pragmatism, and finally by ideological disagreement from the Law and Economics movement. Yet, the courts have recognized the localist justification for antitrust—and there is increasing political appetite for a return to antitrust localism. This historical analysis may thus illuminate why a revival of antitrust enforcement with the localist concern in mind comports with both the statutory and precedential components of antitrust law.

A. The Evolution of Localism in Antitrust Policy

Antitrust was not always a national concern. In the early days of American antitrust law, "antitrust antifederalists" had the upper hand. They argued that states, due to their power to incorporate corporations, should have the power to craft antitrust policy to protect their local communities.[21] However, this view of state guardianship faltered because states were incentivized to abdicate this responsibility.[22] States like New Jersey, egged on at least partly by corporate lobbying, began implementing incorporation statutes that attracted large trusts. These lenient laws allowed companies like Standard Oil to basically evade antitrust enforcement by incorporating there.[23] This behavior undermined states like Kansas and Missouri that actually enforced antitrust legislation.[24] States were simply too susceptible to corporate influence to lead antitrust enforcement.

Thus, Progressives at the federal level maintained it was the federal government's duty to enforce antitrust laws. The Sherman Antitrust Act had been crafted to reflect antifederalist concerns by presenting federal enforcement of antitrust law as merely an alternative forum for antitrust enforcement.[25] In the Progressive Era, neither party submitted to these concerns. Presidents Theodore Roosevelt and William Howard Taft argued for federal incorporation legislation, but it would be President Woodrow Wilson who established the beginnings of the modern antitrust regime.[26] Encouraged by his chief economic adviser Louis Brandeis, Wilson moved for stronger antitrust legislation.

Wilson argued for antitrust legislation to focus on the preservation of competition in local markets rather than regulating the downstream effects of monopoly on prices and wages.

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[21] Daniel A. Crane, *Antitrust Antifederalism*, 96 CALIF. LAW REV. 1, 12-14 (2008).
[22] *Id.* at 13.
[23] RUDOLPH J. R. PERITZ, COMPETITION POLICY IN AMERICA, 1888-1992: HISTORY, RHETORIC, LAW 9–10 (1996).
[24] *Id.* at 10.
[25] Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L.J. 375, 375–77 (1983).
[26] Crane, *supra* note 21 at 19–22.

Throughout the 1912 election, Wilson sold his antitrust policies partially on protecting the "little…independent man": when markets go "local, he may be crushed."[27] Brandeis was similarly concerned with protecting local control of industry.[28] He argued that the "Curse of Bigness" presented a challenge to the self-government of local communities by strangling their economic independence.[29] These concerns for the impact of consolidation on the local community were a political motivation for the antitrust legislation—including the Clayton Antitrust Act and the Federal Trade Commission Act—that marked Wilson's legislative accomplishments. Although these concerns were not given explicit coverage in the laws, Brandeisian localism had, at least in theory, won in the legislature.[30]

But its victory was short-lived. After Wilson, interest in antitrust enforcement waned on the federal level, influenced by shifts in American economic policy during World War I and the Republican interwar presidents' *laissez-faire* economic policy, which was wholly uninterested in enforcing antitrust policy.

At this time, chain stores began to pose a new threat to local communities. The first chain stores arose in the late nineteenth century to little fanfare. However, the availability of cheap capital in the 1920s caused an aggressive expansion of chain stores.[31] Now, they were moving out of the cities and threatening the small, home-owned shops that had long been the backbone of small-town economies. The loss of local control was especially animating for the anti-chain store movement, which began agitating for the FTC to wield antitrust law to protect small business.[32]

Despite public outcry, the executive branch's lack of interest and the courts' growing reticence to enforce antitrust policy left the localist movement with only one champion: Congress. In 1928, Congress tasked the FTC with investigating whether current antitrust policies could protect local business from the "chain store menace."[33] Then came the Great Depression.

Perhaps surprisingly, President Franklin Delano Roosevelt did not address the localism question in his antitrust platform. At a high level, Roosevelt was less concerned with antitrust policy than other aspects of the New Deal.[34] Yet, his administration *increased* antitrust enforcement, so this cannot explain the whole story. The Antitrust Division under Thurman Arnold broke all kinds of new ground in antitrust enforcement, but did not use it e to protect local communities

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[27] Woodrow Wilson, *An After-Breakfast Talk to the Commercial Club of Minneapolis* (Sept. 18, 1912) *in* 25 PAPERS OF WOODROW WILSON 164, 167 (Arthur S. Link ed. 1994).
[28] Barak Orbach, *Antitrust Populism*, 14 N.Y.U. J.L. & BUS. 3 (2017).
[29] Richard Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA L. REV. 1011, 1016 (2005).
[30] *Id.* at 1063; *see also* E. E. Steiner, *A Progressive Creed: The Experimental Federalism of Justice Brandeis*, 2 YALE L. & POL'Y REV. 1, 2 (1983).
[31] F. J. Harper, *"A New Battle on Evolution": The Anti-Chain Store Trade-at-Home Agitation of 1929–1930*, 16 J. AM. STUD. 407, 409 (1982).
[32] *Id.* at 410.
[33] Schragger, *supra* note 29, at 150.
[34] In fact, the National Industrial Recovery Act actively undermined antitrust enforcement. Gene M. Gressley, *Thurman Arnold, Antitrust, and the New Deal*, 38 BUS. HIST. REV. 214, 215 (1964).

specifically, even though the 1932 Democratic Party platform contained the traditional Brandeisian localism.[35] Arnold's predecessor Robert Jackson was a pragmatist, focusing his antitrust enforcement on mergers that threatened the national welfare.[36] Arnold moved even further in this direction, reframing this antitrust pragmatism as a philosophical disagreement. He rejected the traditional localist justification for antitrust law, i.e., that antitrust acted as a vehicle to protect local communities. He argued, *contra* Brandeis, that this belief was "an expression of a religion which condemns largeness as economic sin," whose use would render antitrust law "an anachronism."[37] To him, the role of antitrust enforcement was chiefly to reduce consumer prices, not to increase local control over industry, ensure the resilience of local communities from national economic woes, or maintain the independence of small business.[38] Due to their business practices, chain stores *did* reduce consumer prices, on top of creating job opportunities and diversifying the goods available in a community.[39] They were therefore not highly concerning to the Justice Department.

Yet these business practices were exactly what localists feared. In 1935, seven years after the original assignment, the FTC released its report on chain stores. By this time, agitation against chain stores had reached a fever pitch. The House, led by populist Texas Democrat Wright Patman, held multiple hearings about the "chain store menace." The hearing transcripts uncovering the chain stores' predatory practices were sensational, reaching sales totals "never attained by any previous special committee."[40] The predatory practices ranged from "killing prices," where a chain store lowers prices in one area to destroy competition, to demanding higher prices for independent buyers, to demanding "kickbacks" in the form of "advertising fees" for large purchases.[41]

The Robinson-Patman Act ("RPA") was Congress' solution.[42] Although the RPA was initially successful in reducing the profit rate of chain stores,[43] this success was not long-lasting. We identify three reasons. First, it was not antitrust legislation. As Tim Wu explains, the RPA was an *anti-chain* law: its primary purpose was to protect local businesses from chain stores' predatory

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[35] 79 Cong. Rec. 13537 (1935).
[36] *See* Tony A. Freyer, Antitrust and Global Capitalism, 1930–2004 24–26 (2006). Jackson did often use the localist justification for antitrust in campaigns for an expansion to antitrust policy. *See, e.g.*, Robert H. Jackson, 71 U.S. L. Rev. 575 (1937) (address before the Trade & Com. Bar Ass'n and Trade Ass'n Execs., Sept. 17, 1937).
[37] Thurman W. Arnold, The Bottlenecks of Business 4 (1940).
[38] Alan Brinkley, *The Antimonopoly Ideal and the Liberal State: The Case of Thurman Arnold*, 80 J. Am. Hist. 557, 570–71 (1993).
[39] Schragger, *supra* note 29, at 111.
[40] *Id.* at 152.
[41] Tim Wu, The Curse of Bigness: New Deal Supplement 17 (2020).
[42] Passed as a series of amendments to the Clayton Antitrust Act, the Robinson-Patman Act's provisions prohibit sellers from price discrimination when the effect of the discrimination substantially (1) "lessen[s] competition," (2) "tend[s] to create a monopoly," or (3) "injure[s], destroy[s], or prevent[s] competition with any person who grants or knowingly receives the benefit of the discrimination." 15 U.S.C. §13. This was intended to ban the price discrimination that privileged chain stores, although courts have interpreted this to prohibit most volume discrimination. Herbert Hovenkamp, *Progressive Antitrust*, 2018 U. Ill. L. Rev. 71, 84 (2018).
[43] As smaller retailers clawed back market share, chain store stocks underperformed the market by 66%, and their profits faced steep declines. Matt Stoller, Goliath: The 100-Year War Between Monopoly Power and Democracy 165 (2020).

pricing practices, not to oppose "bigness" for bigness' sake.[44] In fact, its proposed successor would be a "death tax" completely unrelated to whether the chain stores implemented any anticompetitive practices.[45] Second, the RPA was poorly drafted.[46] The statute has no market-power requirement, no injury requirement, and no price-analysis requirement.[47] The Supreme Court has recognized that compliance with the RPA potentially conflicts with the Sherman Antitrust Act.[48] Finally, the political will to enforce the RPA died off. Federal antitrust agencies did little with the act after the 1950s. For their part, the courts could not decide how to engage with it. In one instance, the Supreme Court interpreted it to prohibit quantity discounts even when they are made available to all purchasers.[49] Later Courts, though, interpreted the RPA to also require some showing that the offending company had a reasonable probability to recoup their predatory losses.[50] Legal scholars—even staunch supporters of rigid antitrust enforcement—have cast doubt on the RPA's effectiveness, even if it were enforced perfectly.[51]

But its failure was *not* in valuing local communities over economic efficiency. Congress made the choice, as it did with the Sherman Antitrust Act, that preserving national output was not the sole justification for antitrust policy. In fact, Congress continued to use the localist justification in antitrust legislation. Congressional debates over the Celler-Kefauver Act—which scrutinized vertical and conglomerate mergers—often centered localist concerns.[52] And, for a while, it played out that way in the Courts.

B. The Court's Recognition of Localism in Antitrust

In interpreting the law, the Court has often recognized the localist justification for antitrust. Even during the first round of struggle over antitrust, the Supreme Court recognized that antitrust law had a political justification—the maintenance of "all the small dealers in the commodity"—separate from economic aims.[53] For instance, Justice Hugo Black wrote that the Sherman Act rests on the premise that free competition provides "an environment conducive to the preservation of democratic political and social institutions," echoing—although not explicitly referencing—the localist justification.[54] In *United States v. Aluminum Co. of America* (2d Cir. 1945), Judge Learned Hand observed that "there are other[reasons which forbid monopoly], based upon the belief that great industrial consolidations are inherently undesirable…because of the helplessness of the

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[44] Tim Wu, *The Curse of Bigness: New Deal Supplement*, CURSE BIGNESS TIM WU COLUMBIA GLOB. REP. 2018, 19 (2020), https://scholarship.law.columbia.edu/faculty_scholarship/2671.
[45] STOLLER, *supra* note 43 at 165.
[46] *See* John Murray, *The Robinson-Patman Act: A Sampling of Advocacy*, 10 BUFF. L. REV. 336, 337 (1961) ("virtually all who are students of [the Act] would agree with this observation").
[47] Hovenkamp, *supra* note 43, at 83.
[48] Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69, 84 (1979).
[49] FTC v. Morton Salt Co., 334 U.S. 37, 44 (1948).
[50] Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993).
[51] PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 2340 (4th ed. 1978).
[52] Brunell, *supra* note 14, at 186-90.
[53] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323 (1897).
[54] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

individual before them."[55] According to Judge Hand, one of the Sherman Act's purposes was "to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units."[56]

The Warren Court was the most explicit about the localist justification for antitrust. In *Brown Shoe Co. v. United States* (1961), Chief Justice Earl Warren considered the localist justification for antitrust policy in blocking a merger that would put local shoe companies out of business.[57] The Court examined the Celler-Kefauver Act of 1950, concluding that "retaining 'local control' over industry and the protection of small businesses" were major concerns for Congress when they passed it.[58] Congress, in the Court's narrative, was attempting to preserve an economic way of life that depended on "local control of industry and upon small business."[59] In passing Celler-Kefauver, Congress desired "to promote competition through the protection of viable, small, locally owned businesses, [with the appreciation] that occasional higher costs and prices might result from the maintenance of fragmented industries and markets." [60] Congress chose decentralization, and the Court decided that it must give effect to that decision.[61]

We do not argue that maintaining local control was the sole purpose Congress considered in passing its slate of antitrust legislation. The drafters of most antitrust legislation never clearly distinguished whether the negative effects of consolidation—whether on a person's feeling of power or on the ability of small business to flourish—were predicated on local ownership of business, local independence from supply chain shocks, or the maintenance of economic conditions (e.g., prices and wages) that foster a sustainable local community. We also do not argue that there is a single correct vision—whether Congressional or judicial—of the role local interests should play in antitrust enforcement. The agencies ultimately have the latitude to decide what role localism will play in their enforcement.

The discord between Justice Black's majority opinion and Justice Potter Stewart's dissent in *United States v. Von's Grocery Co.* exemplifies this difference.[62] In the Los Angeles retail grocery market, Von's Grocery Company, the third-largest retail grocer, acquired its competitor Shopping Bag Food Stores, the sixth-largest retail grocer.[63] Together, though, they only were 7.5% of all the retail groceries sold in Los Angeles. [64] Despite their small combined market share, the rapid consolidation of grocery stores in Los Angeles. prompted the Court to block the merger.[65] The

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[55] United States v. Aluminum Co. of Am., 148 F.2d 416, 428 (2d Cir. 1945).
[56] *Id.* at 429.
[57] Brown Shoe Co. v. United States, 370 U.S. 294 (1962).
[58] *Id.* at 315–16.
[59] *Id.* at 334.
[60] *Id.* at 344.
[61] *Id.* at 346.
[62] United States v. Von's Grocery Co., 384 U.S. 270 (1966).
[63] *Id.* at 272.
[64] *Id.*
[65] *Id.* at 273.

Court held that the Celler-Kefauver Act prohibits mergers that could lead to future market concentration, not just those immediately harming competition.[66]

But Justices Black and Stewart both used the Act's purpose as justifications for their position. Justice Black saw the Act as enacted specifically to protect small businesses. To him, this purpose implied prohibiting further mergers in markets with a sustained decline in the number of small businesses.[67] Mergers between large companies had decreased competition, as measured by the number of individual competitors, so the merger was illegal.[68] Justice Stewart reasoned that Celler-Kefauver's primary purpose was barring large corporations from acquiring small companies, highlighting Congress' concerns over absentee ownership of local business and the survival of small businesses.[69] Thus, a large corporation acquiring another large corporation should not attract immediate scrutiny if the market was still competitive.[70] Because Los Angeles maintained a competitive grocery market, the merger was not illegal under Congress' original purpose in crafting the law.

Justice Stewart's view is decisively narrower than Justice Black's. But the interesting point in both views is that neither view disagrees with a fundamental assumption: antitrust laws should protect local interests as Congress intended. It should bar the transfer of American business "from local communities to distant cities where men on the 54th floor…decide the fate of communities with which they have little or no relationship."[71] Unfortunately for antitrust localism, this victory in the courts was not permanent.

C. *The Decline of Antitrust Localism*

The ascendancy of the Law and Economics movement decisively undermined the localist justification for antitrust. This was not a uniquely conservative endeavor. Thurman Arnold's Antitrust Division did portend this shift by reframing the purpose of antitrust law from the protection of small business and local control to economic outcomes.[72] Still, the Court often relied on the localist justification in evaluating practices under the Sherman, Clayton, and Celler-Kefauver Acts.[73] However, the rise of the Chicago School would reject both of these notions with a new philosophy of antitrust enforcement.

Robert Bork exemplifies the Chicago School's position on antitrust localism well. In *The Antitrust Paradox*, he argued to shift the antitrust paradigm to focus on "consumer welfare," as defined by the "wealth of the nation."[74] In other words, "consumer welfare" did not implicate

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[66] *Id.* at 277–278.
[67] *Id.* at 277.
[68] *Id.* at 279.
[69] *Id.* at 283. (Stewart, J., dissenting).
[70] *Id.* at 288. (Stewart, J., dissenting).
[71] United States v. Falstaff Brewing Corp., 410 U.S. 526, 541–42 (1973).
[72] *See* Section I.A, *supra*.
[73] *See* Section I.B, *supra*.
[74] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 90 (1993).

consumer power or local control. Instead, it was basically synonymous with maximizing economic efficiency, which would benefit consumers. The metrics by which one could judge antitrust enforcement were prices, wages, quality, and innovation. To Bork, if antitrust legislation *ever* implicated the protection of local business, this was only "complementary," and any conflict between the two should thus be resolved in favor of consumer welfare.[75] And Bork's narrow focus had a side effect that made it quite palatable to the burgeoning new conservatism: it decreased the role of the federal government in the economy.[76] This political justification displaced the traditional localist justification of the antitrust founders.

Accordingly, President Ronald Reagan's Justice Department followed the Chicago School's model. William Baxter, Reagan's Assistant Attorney General for the Antitrust Division, proclaimed that he was not "concerned with fairness to smaller competitors."[77] The 1982 Merger Guidelines mention small firms once, only to note that—contrary to the Court's reasoning in *Von's Grocery*—the consolidation of small firms is unlikely to have anticompetitive consequences.[78] And the judiciary bought into this idea of a Law and Economics analysis of antitrust, even if this economics suffered from serious oversimplifications: perfect information, no entry barriers, numerous capable entrants, and undifferentiated products.[79] The Burger Court would go on to confirm the consumer welfare standard, even quoting Bork himself.[80] This withdrawal from the original intent of antitrust legislation presaged a merger Wild West.

The decline of antitrust enforcement has been lamented by academics and practitioners alike.[81] By dialing back enforcement so much, the antitrust laws were unable to combat growing inequality and the decline in local communities. We see from the history of U.S. legislation that Congress believed in antitrust localism. The question now is how the revival of antitrust enforcement under the New Brandeis school can consider merger impact on local communities as part of its recognition of Brandeisian antitrust ideals. Perhaps questioning grocery retail mergers—as the original localist movement had—can help ground this analysis.

II. How Relaxed Antitrust Enforcement of Retail Grocers Harms Local Communities

By now, the effects of retail grocery consolidation are painfully familiar to many Americans. Since the Kroger-Albertsons merger was announced, many state attorneys general have convened

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[75] Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. LAW ECON. 7, 10 (1966).
[76] Herbert J. Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PA. L. REV. 1843, 1847 (2020).
[77] Stacy Mitchell, *The View from the Shop—Antitrust and the Decline of America's Independent Businesses*, 61 ANTITRUST BULL. 498, 504 (2016).
[78] U.S. DEP'T OF JUST. & FED. TRADE COMM'N, 1982 Merger Guidelines § III.a.1 (Dec. 1981), https://www.justice.gov/archives/atr/1982-merger-guidelines.
[79] Hovenkamp & Scott Morton, *supra* note 76.
[80] Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).
[81] *See*, *e.g.*, Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017).

sessions across their states to give local communities a chance to weigh in.[82] The opposition has been resounding. At over a dozen listening sessions in Nevada—three of which were attended by FTC Chair Lina Khan—citizens raised concerns about higher prices, reduced accessibility to affordable drug prescriptions, and layoffs. [83] At one session in Colorado, Chair Khan asked: "Is there anybody here who supports the merger and wants to share any reasons for it?" No one spoke up.[84]

Grocers have defended their mergers zealously. In a February 2024 press release, Kroger reiterated its consistent position: mergers mean lower prices, higher pay, and better quality.[85] In Kroger's telling, greater consolidation enables it to lower prices, which means it can achieve greater market capture. With more regular customers, Kroger CEO Rodney McMullen wrote, Kroger can "reinvest in even lower prices, a better shopping experience, and higher wages."[86] Kroger's vision is a national one. Like its retail grocer peers, Kroger concerns itself little with the peculiar concerns of those in the Las Vegas Valley, or Phoenix, Denver, or any other localized community for that matter—especially rural ones.[87] Its position insists that regulators must zoom out when weighing the effects of nationwide mergers. Overall, any negative effects are localized and can be mitigated with divestiture. The general story of lower prices is, in the view of Kroger and its peers, virtually unassailable.

This part critiques that view. It considers what greater attention to local-level effects of retail grocer consolidation illuminates about the general effect of such consolidation. We show that greater consolidation of retail grocers tends to lead to higher prices in many communities, which undermines the dominant view that mergers produce across-the-board, positive price effects. We then show that these upward price effects are particularly concentrated in rural markets, which beckons for greater attention to both national and local price effects. Finally, once the conventional narrative of pro-merger advocates is disrupted, the other negative externalities of retail grocery consolidation—especially, harms to local supply chain resilience—become particularly troublesome.

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[82] *E.g.*, Mark Hays, *Arizona Attorney General's Investigation into Albertson's-Kroger Merger "Still Ongoing,"* HERALD REV. MEDIA (Feb. 11, 2024), https://www.myheraldreview.com/news/business/arizona-attorney-generals-investigation-into-albertsons-kroger-merger-still-ongoing/article_ab3055c0-c602-11ee-b547-dfc869ddcb40.html.

[83] Jarah Wright, *Las Vegas valley residents voice concerns over proposed Kroger-Albertsons merger*, LAS VEGAS NEWS KTNV (Sept. 13, 2023), https://www.ktnv.com/news/las-vegas-valley-residents-voice-concerns-over-proposed-kroger-albertsons-merger (last visited Feb 15, 2024).

[84] Tamara Chuang, *FTC Chair Hears Only Opposition to Proposed Kroger-Albertsons Merger during Denver Stop*, COLO. SUN (Nov. 1, 2023), http://coloradosun.com/2023/11/01/kroger-albertsons-merger-king-soopers-ftc-chair/ (last visited Feb 15, 2024).

[85] Kroger Co., *Building on Its 20-Year Track Record of Enhancing Value, Kroger will Lower Prices for More Customers, Consistent with Its Approach to Previous Mergers*, PR NEWS WIRE (Feb. 13, 2024), https://www.prnewswire.com/news-releases/kroger-to-lower-prices-following-merger-with-albertsons-cos-302059961.html.

[86] *Id.*

[87] Matt Bloom, *Rural Towns Fear Kroger-Albertsons Merger Will Close Stores and Raise Prices*, MARKETPLACE (2023), https://www.marketplace.org/2024/02/26/the-u-s-is-suing-to-block-the-25-billion-kroger-albertsons-merger/ (last visited Apr 29, 2024).

A. Grocery Consolidation Will Likely Lead to Higher Prices in a Large Number of Local Markets

Looking at market concentration only the national level, one might overlook the harmful effects of increasing concentration in the grocery retail industry. Perhaps unsurprisingly, from the national to the county level, the Herfindahl–Hirschman Index (HHI) of retail grocery is lowest at the national level.[88] Ultimately, concentration at the national level is "significantly lower than most industries."[89] However, fixating on the national level can also obscure the levels of concentration in many smaller geographical areas which are obviously the ones that matter to any given consumer choosing among stores for their grocery shopping.[90] In the grocery context, those differences are stark. For the year 2019 the HHI increases dramatically at each geographical area—it moves from 593 (national) to 1,332 (State) to 1,881 (metropolitan statistical area) to 3,737 (county).[91] The dramatic difference between even the metro-level HHI and the county-level HHI—the county level of concentration is more than double the metro level—is particularly revealing. The typical distance from home to food retailers is between 4-10 miles for consumers,[92] mapping much more closely to the county level in terms of space.

The fact of heightened concentration in certain regions/localities areas raises special concerns about potential price increases. An FTC study published in 2018 examined the price effects in fourteen regions affected by mergers, of which eight occurred in highly concentrated markets and six occurred in moderately concentrated or unconcentrated markets.[93] On average, most of the significant price increases followed mergers in highly concentrated markets.[94] Of those mergers resulting in price *decreases*, most of these occurred in markets where there was little or moderate market concentration.[95]

The character of these more highly concentrated, local markets is instructive. The two county types with the highest levels of concentration in the food retail industry are (1) rural and (2) small nonmetro counties.[96] Because most households travel only four miles to make the

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[88] *Id.*
[89] *Id.* (citing Grullon et al., 2019).
[90] *Id.* (citing Rossi-Hansberg et al., 2021)
[91] *Id.* at 6.
[92] *Id.* at 6 (citing Taylor and Villa-Boas, 2016; Ver Ploeg et al., 2015).
[93] Daniel S. Hosken, Luke M. Olson & Loren K. Smith, *Do Retail Mergers Affect Competition? Evidence from Grocery Retailing*, 27 J. ECON. MGMT. STRATEGY 3, 4 (2018).
[94] *Id.* at 17.
[95] *Id.*
[96] Eliana Zeballos, Xiao Dong, and Ergys Islamaj, U.S. Dep't Agric., *A Disaggregated View of Market Concentration in the Food Retail Industry* at iv, 11 (Jan. 2023), https://www.ers.usda.gov/webdocs/publications/105558/err-314.pdf?v=2808.3.

majority of their food purchases,[97] competition is highly localized within a 1- to 3-mile radius of a grocery store.[98]

At a minimum, in light of the general trend of merger activity in highly concentrated areas often coinciding with price increases, acute concentration in certain metro areas and counties begs for greater attention to local market effects.[99] To be sure, high market concentration does not on its own necessitate intense scrutiny of merger activity in such markets. Mergers can and do produce efficiencies that reach consumers through price reductions.[100] Supermarkets also have many options to differentiate themselves from competitors, such as with the types of food and non-food items they carry, store locations, or the types of consumers they target.[101] And when supermarket competitors in a given market do not produce highly substitutable products, it is less likely that a merger would lead to a price increase. But the general fact of increasing concentration in small markets, coupled with an awareness of the particular vulnerability of such concentrated markets to negative price effects, is enough to merit further scrutiny of merger activity in the rural and nonmetro areas where such concentration is so common. The mounting body of evidence of the harms caused by this merger activity (e.g., the rise in food deserts observed by Professor Leslie[102]) is enough to merit extreme caution from regulators.

B. Grocery Consolidation May Lead to Depressed Wages for Specialized Workers in Certain Localities

The potential monopsony effects of increased merger activity are significant, and opposition to recent merger activity has been vocal.[103] Supermarket grocers consistently rank among the largest private employers in the United States, with Wal-Mart leading the way at 2.3 million employees.[104] In an industry that is particularly concentrated in local markets, the possibility is increased for the exercise of monopsony power in the labor market.

Supermarkets house many kinds of occupations, which may come under substantial monopsonic pressure in certain communities. So while the average worker in the supermarket is

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[97] Michele Ver Ploeg, *Where Do Americans Usually Shop for Food and How Do They Travel To Get There? Initial Findings From the National Household Food Acquisition and Purchase Survey* (U.S. Dep't Agric., March 2015).
[98] Paul B. Ellickson & Paul L.E. Grieco, *Wal-Mart and the Geography of Grocery Retailing*, 75 J. URBAN ECON. 1 (2013); Peter Arcidiacono et al., *The Competitive Effects of Entry: Evidence from Supercenter* Expansion, 12 AM. ECON. J. APPL. ECON. 175 (2020).
[99] *See* Section III.A.2 *infra*.
[100] *Id.* at 18.
[101] *Id.* at 17; *see also* Daniel Hosken & Steven Tenn, *Horizontal Merger Analysis in Retail Markets*, SSRN (Jan. 19, 2015), https://ssrn.com/abstract=2552548 (last visited Feb. 17, 2024).
[102] Christopher R. Leslie, *Food Deserts, Racism, and Antitrust Law*, 110 CAL. L. REV. 1717, 1751 (2022).
[103] The Kroger merger has been particularly pointed for the level of union opposition. *See, e.g.,* United Food & Com. Workers' Int'l Union, *America's Largest Union of Essential Grocery Workers, Announces Opposition to Kroger and Albertsons Merger* (2023), https://www.ufcw.org/press-releases/americas-largest-union-of-essential-grocery-workers-announces-opposition-to-kroger-and-albertsons-merger/ (last visited Feb 17, 2024).
[104] Frank Holmes, *Top 10 Largest Fortune 500 Employers In The U.S.*, FORBES, https://www.forbes.com/sites/greatspeculations/2022/10/26/top-10-largest-fortune-500-employers-in-the-us/ (last visited Feb 17, 2024).

likely elastic (the employee responsible for shelving items probably has enough flexibility to resist whatever monopsonic impact a merger might have on a given community), those with more specialized skills possess less flexibility. In a rural community in Michigan, for example, a butcher may be forced to accept whatever wage Wal-Mart or Kroger sets, especially if independent grocers have exited the market. The same could be true of a pharmacist, pastry chef, or baker, all of whom are routinely employed by supermarkets (they are, after all, *super*markets). Regression analyses have found a "small negative relationship between employment concentration and wages for private-sector employers."[105]

The heterogeneous nature of labor market concentration should give regulators pause to consider how localized market dynamics may coalesce to either mitigate or inflame the monopsonic pressures that may follow mergers. This is particularly true when dealing with metro and county-level areas with less employment in general and smaller occupations, as these tend to have higher levels of concentration.[106] At bottom, "[e]mployment concentration in the United States is not one story, but many," and our regulatory framework should not disregard the circumstances, however limited as a general matter, when concentration leads to unlawful exercises of wage-setting power.[107]

C. *Grocery Consolidation Weakens Supply Chain Resiliency and Reduces Efficiency in Many Markets*

Today, a few large and powerful actors control production, processing, distribution, and retailing of retail food across the world.[108] For instance, in the United States, around 50 beef plants process 98% of all American beef.[109] The consolidation of major food retailers has heralded significant downstream consolidation among food suppliers.[110] On average, only 14 cents of every dollar sold in grocery stores makes it to producers, in great part due to consolidation reducing the power of producers to set prices.[111]

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[105] Elizabeth Weber Handwerker & Matthew Dey, U.S. Dep't of Labor, *Some Facts about Concentrated Labor Markets in the United States* at 18 (June 2022).
[106] *Id.*
[107] *Id.* at 19.
[108] Mary K. Hendrickson *et al.*, *The Food System: Concentration and its Impacts: A Special Report to the Family Farm Action Alliance* (Sept. 14, 2020), https://rules.house.gov/sites/republicans.rules118.house.gov/files/Concentration%20and%20Options%202020%20Final%209%2015.pdf.
[109] Michael Corkery & David Yaffe-Bellany, *The Food Chain's Weakest Link: Slaughterhouses*, N.Y. TIMES, (April 18, 2020), https://www.nytimes.com/2020/04/18/business/coronavirus-meat-slaughterhouses.html.
[110] *See, e.g.*, Tina L. Saitone & Richard J Sexton, *Concentration and Consolidation in the U.S. Food Supply Chain: The Latest Evidence and Implications for Consumers, Farmers, and Policymakers*, 25 FED. RSRV. BANK OF KAN. CITY ECON. REV. 58 (2017); Richard J. Sexton & Tian Xia, *Increasing Concentration in the Agricultural Supply Chain: Implications for Market Power and Sector Performance*, 10 ANNU. REV. RESOUR. ECON. 229 (2018); Patrick Woodall & Tyler L. Shannon, *Monopoly Power Corrodes Choice and Resiliency in the Food System*, 63 ANTITRUST BULL. 198 (2018).
[111] U.S. Dep't of Agric., *USDA Announces Framework for Shoring Up the Food Supply Chain and Transforming the Food System to Be Fairer, More Competitive, More Resilient*, https://www.usda.gov/media/press-releases/2022/06/01/usda-announces-framework-shoring-food-supply-chain-and-transforming (June 1, 2022) (last visited Feb 17, 2024).

Increasing concentration of retail grocers threatens supply chain resilience nationwide. Retail grocers play a vital role in the global supply chain because they have significant control over what products are made and at what price. Supermarkets "determine what is produced, where, to what standards and price, and the outlets from which food is to be sold."[112] Their reach is amplified even more because they supply ingredients and meals to restaurants, hospitals, and schools, and also sell "a variety of consumer goods such as clothing, furniture and petrol, along with banking and financial services."[113] However, unlike local food systems, which are more nimble and resilient,[114] the global supply chains providing for these supermarkets are often unstable. The very scale of the supply chain often means that small shocks early in the supply chain can cause drastic downstream consequences across the globe."[115] Additionally, today's global supply chain "encourages uniform production practices," which may be efficient under 'good' conditions, but also struggle to adapt to sudden changes in global conditions.[116]

The supply chain disruptions caused by the COVID-19 pandemic[117] and the war in Ukraine[118] have illuminated the current vulnerabilities of a highly concentrated food system. During the pandemic, grocery retail demand increased significantly, with consumers spending far less at restaurants and much more on at-home cooking.[119] Yet the supply chains cultivated by powerful retail grocers failed to adapt. "Conventional food supply chains, with package sizes and infrastructure intended for wholesale buyers, struggled to adapt for retail sales, and large concentrated meat and dairy processors and long-haul transportation networks were disrupted by labor shortages as workers became ill."[120] The end result was higher food prices and more frequent food shortages for consumers.[121]

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[112] David Burch, Jane Dixon & Geoffrey Lawrence, *Introduction to Symposium on the Changing Role of Supermarkets in Global Supply Chains: From Seedling to Supermarket: Agri-Food Supply Chains in Transition*, 30 AGRIC. HUM. VALUES 215 (2013).
[113] *Id.*
[114] *See generally* Subhashni Raj *et al.*, *Connected and Extracted: Understanding how Centrality in the Global Wheat Supply Chain Affects Global Hunger Using a Network Approach*, 17 PLoS One 1; Dawn Thilmany *et al.*, *Local Food Supply Chain Dynamics and Resilience during COVID-19*, 43 APPLIED ECON. PERSPS. & POL'Y 86 (2021)
[115] Michael J. Puma *et al.*, *Assessing the evolving fragility of the global food system* 10 ENV'T RSCH. LETTERS 1, (2015).
[116] Sarina Macfadyen *et al.*, *The Role of Food Retailers in Improving Resilience in Global Food Supply*, 7 GLOB. FOOD SECUR. 1 (2015).
[117] Rajendra Jadhav Thukral Naveen & Nigel Hunt, *Coronavirus Upends Global Food Supply Chains in Latest Economic Shock*, REUTERS, Apr. 3, 2020, https://www.reuters.com/article/idUSKBN21L2V4/ (last visited Feb 17, 2024).
[118] Jack Nicas, *Ukraine War Threatens to Cause a Global Food Crisis*, N.Y. TIMES (Mar. 20, 2022), https://www.nytimes.com/2022/03/20/world/americas/ukraine-war-global-food-crisis.html (last visited Feb 17, 2024).
[119] Michael C. Hall *et al.*, *Beyond panic buying: consumption displacement and COVID-19*, 32 J. SERV. MGMT. 113 (2021); Tyne Morgan, *Some Growers Plow Under Fields As Fruit, Vegetable Demand Disappears*, PACKER (Apr. 20, 2020), https://www.thepacker.com/news/industry/some-growers-plow-under-fields-fruit-vegetable-demand-disappears.
[120] Amy Marusak *et al.*, *Resilient Regional Food Supply Chains and Rethinking the Way Forward: Key Takeaways from the COVID-19 Pandemic*, 190 AGRIC. SYST. 103101 (2021) (citing Jill E. Hobbs, *Food supply chains during the COVID-19 pandemic,* 68 CAN. J. AGRIC. ECON. 171 (2020)).
[121] *Id.*

Weakened local supply chains also contribute to reduced economic efficiencies. This is due to the simple fact that in an increasingly precarious world, resiliency provides economic value to consumers. A 2023 study found that reducing the market power of food-industry intermediaries (such as retail grocers, wholesalers, etc.) would contribute surpluses to consumers and producers alike when correlated economic shocks occur.[122] In such circumstances, "consumers and farmers benefit from both higher average economic surplus and reduced variability of surplus from policies that induce more competitive supply chains."[123] Unlike a policy that aimed primarily to localize food production and disperse supply across diverse geographic regions (which led to decreased production efficiencies and increased processing costs that were not balanced by gains in resiliency), a policy of increasing competition amongst market intermediaries produces a "win-win" for consumers, who benefit from reduced prices, and producers, who benefit from increased sales.[124]

This paper started with the basic observation that increasing concentration of retail supermarkets has caused a great deal of harm and engendered stark opposition from stakeholders nationwide. This part challenged the conventional defense of that concentration as net beneficial to consumers. In truth, increasing retail grocery concentration leaves consumers with higher prices, threatens specialized workers with reduced wages, and ultimately reduces the resiliencies of our food systems. If the current merger-friendly system operated as its proponents intended, antitrust authorities may have less grounds for intervention. But its patent failure to deliver on its most basic tenets of reduced prices and increased surpluses makes obvious the need for agency action.

III. Proposals for Developing a More Localist Antitrust Regime

Developing a more localist antitrust regime requires a multifaceted approach that considers all arms of the FTC's authority. Such a regime must maintain a careful balance between the historical, political, and economic justifications for localist policy and those market movements that produce better prices for consumers. This regime must also be sensitive to the limitations on the FTC's capacity. To that end, we aim for an enforcement paradigm that not only efficiently leverages the FTC's limited resources but also shifts the onus of initial compliance onto businesses themselves. This approach encourages companies to play a proactive role in enforcement by submitting their cases for FTC review, thereby streamlining the FTC's role in merger enforcement—and potentially mitigating additional burdens during the approval process. This dual approach not only aims to expedite processes for compliant entities but also reserves punitive measures for those detrimentally affecting local markets.

A. Tailoring FTC Enforcement Practices to Promote Localism

1. The FTC should bolster scrutiny of mergers affecting vulnerable localized markets.

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[122] Jeffrey Hadachek, Meilin Ma & Richard J. Sexton, *Market Structure and Resilience of Food Supply Chains under Extreme Events*, 106 AM. J. AGRIC. ECON. 21 (2024).
[123] *Id.* at 32-33.
[124] *Id.* at 41.

At a minimum, regulators should tailor their enforcement approach to attend to the specific vulnerabilities and needs of smaller, localized markets. The FTC's current enforcement authority gives it ample discretion to concentrate its scrutiny in geographical areas where merger activity is more likely to cause harm. That discretion should be used to attend to the unique characteristics and challenges faced by smaller communities, which tend to already have higher market concentration. There are three primary ways in which the FTC can do this.

The benefits of heightened prosecutorial scrutiny on merger effects on smaller, more rural, and nonmetro markets are manifold. First, as noted above, mergers are particularly harmful when they occur in already concentrated markets, which leaves localized communities—which are already marked by heightened levels of concentration—especially vulnerable to both monopolistic and monopsonic externalities of these mergers. Moreover, the FTC should attend to supply chain vulnerabilities by more closely tracking the distribution centers, transportation networks, and suppliers serving even smaller, localized markets.

2. The FTC must modify its approach to defining geographic markets to reflect consumers' true elasticity of demand.

An essential part of tailoring the FTC's enforcement approach to promote localist values is more accurately defining the relevant geographical markets for consumers based on actual consumer preferences and behaviors. As Professor Christopher R. Leslie has observed, the FTC has historically defined relevant geographic markets in terms of metropolitan statistical areas ("MSAs"), which are larger than cities.[125] The typical assumption made by both the FTC and courts is that the relevant geographic market for grocery stores should be defined in miles, since subsequent supermarket merger cases, the agency continued to define the relevant geographic market in miles, not blocks or walking distances.[126] The consequence of this, as Professor Leslie noted, is that the FTC approves mergers that create food deserts for entire communities of consumers who cannot reach the grocery store via car.[127] Professor Leslie's focus was on urban communities, but there is no reason to think this does not apply to rural areas, where food deserts are quite common.[128] Even in such communities, where most folks may have access to a car, a consumer's geographical market still depends on factors such as the composition of their home (e.g., how often can a consumer access a family car), the state of that vehicle, or the infrastructure in the town. The ultimate effect of the disregard of consumers' true ability to travel is higher prices

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[125] Leslie, *supra* note 102, at 1753.
[126] *Id.* at 1750 (noting that FTC had often defined the relevant geographic market as an entire MSA) (citation omitted).
[127] *Id.* at
[128] Emily M. Broad Leib, *All (Food) Politics Is Local: Increasing Food Access Through Local Government Action*, 7 HARV. L. & POL'Y REV. 321, 324 (2013) (citing Michele Ver Ploeg, Vince Breneman, Paula Dutko, et al., U.S. Dep't Agric.: Econ. Rsch. Serv., *Access To Affordable And Nutritious Food: Updated Estimates Of Distance To Supermarkets Using 2010 Data*, at iii (2012), https://www.ers.usda.gov/publications/pub-details/?pubid=45035) ("According to recent data, 9.7% of the U.S. population, or 29.7 million people, live in food deserts.")).

for consumers, since "distant supermarkets cannot price discipline grocery sellers that are within walking distance of food desert residents."[129]

The FTC should adjust its approach to defining geographic markets for consumers in a number of ways. First, it can integrate geographic information systems (GIS) data to analyze spatial variations in market behavior and accessibilities. GIS data can be combined with transportation data to assess the availability and accessibility of different modes of transportation (e.g., personal vehicles, public transit, ride-sharing services) for different consumer segments. This data-driven approach could reveal underserved areas or populations that face significant barriers to accessing certain markets.

The FTC can also account for different elasticities of demand among different buckets of consumers. Within a given market (however defined), there will likely be significant variations between consumer groups regarding their willingness or ability to travel to acquire goods. The FTC could account for these differences by segmenting both consumers *and* products. For consumers, it could segment groups based on demographic factors such as income levels, age, or household compositions. This could capture essential factors such as how far someone is willing to travel to purchase groceries. This analysis should also be informed by further consideration of the relevant product, and specifically, how *frequently* consumers should be expected to purchase the product. For example, consumers may be more willing to travel farther for infrequent or high-value purchases (e.g., automobiles, appliances) than for routine or low-cost items such as groceries.

Finally, the FTC can also more accurately measure geographic markets for labor. When considering retail jobs, courts often define the labor market size quite broadly. This accords with the principle that low-skill labor is more substitutable than high-skill labor. In the recent case of *Deslandes v. McDonald's USA, LLC*, for instance, a federal district court found that McDonald's could not have labor market power in the relevant market because it was "undisputed that, within three miles of [plaintiff's] home were two McDonald's restaurants and between 42 and 50 other quick-serve restaurants. Within ten miles of [plaintiff's] home were 517 quick-serve restaurants."[130]

However, this traditional analysis ignores the reality that (1) low-skill workers also have less ability to move to different jobs and (2) localized factors (including cultural and socioeconomic factors) can decrease the elasticity of a local labor supply. On the first point, low-skill workers naturally have less financial means to relocate, and as such, the relevant labor markets are tighter than high-skill counterparts, like business executives. Their relevant geographical markets may also be constrained for the same reasons as consumers: they have limited access to well-maintained cars and roads to get them to the workplace. Additionally, more localized factors can determine the substitutability of labor. For instance, in a Southern market with a historical antagonism toward union jobs and workers of color, it might be more challenging for low-skill grocery workers of

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[129] Leslie, *supra* note 102, at 1751 (citation omitted).
[130] *See, e.g.,* Memorandum Opinion and Order at 11, Deslandes v. McDonald's USA, No. 19-C-5524 (N.D. Ill. June 28, 2022).

color to find union employment. A myopic focus on travel capacity alone would ignore these dynamics that limit a worker's ability to acquire employment elsewhere.

3. The FTC should continue to attend closely to localized market dynamics when scrutinizing mergers.

Any antitrust regime that promotes local interests must more closely attend to highly localized market dynamics. In recent decades, a focus on the national and regional effects of mergers has threatened to obscure local-level market dynamics that have significant effects on consumer welfare. For instance, bank mergers that may have benefitted many consumers have nonetheless led to reduced access to local banks in some urban neighborhoods. This reduced access lessens the ability of some communities (especially Black ones) to access financial services, forcing them to borrow at higher interest rates, often from predatory lenders. [131] A focus on bank competition at too high a level of geographic abstractions misses the threats to smaller communities that suffer from bank closures.

Clearly, the FTC already knows how to examine the granular local effects of mergers, as shown by its recent scrutiny of hospital mergers. Hospital mergers pose special trouble for local communities because their price effects are so tightly interwoven with insurers who provide in-network pricing based on location. Hospitals compete with each other first for inclusion within insurers' health plan networks; then, in-network hospitals compete for patients.[132] Local hospital consolidation reduces the number of in-network substitutes with which insurers can negotiate, which increases the leverage of hospitals when bargaining contracts with insurers, leading to higher prices. In light of these localized effects, FTC challenges of these mergers have been closely attuned to local competition dynamics between hospitals. The FTC considers closely the geographic concentration of competition, the subtle differences in services offered by healthcare providers, and even such minute details as numbers of beds available in a hospital, and even state regulatory schema around permitting that affect the ability of competitors to enter the market.[133] These are all highly localized dynamics which might otherwise be obscured by a large-scale focus on national competition between hospitals. The same principles are true of dialysis mergers and the FTC's analysis of those.

The FTC's complaint in the Kroger-Albertsons merger aligns with this approach.[134] A less localist approach to merger review, in this case, could have simply assessed the effects of the merger on competition between retailers who sell groceries. However, Guideline 2 in the latest merger

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[131] Bennett Capers & Gregory Day, *Race-ing Antitrust*, 121 MICH. L. REV. 523, 535 (2023); *see also* Jeremy C. Kress, *Reviving Bank Antitrust*, 72 DUKE L.J. 519 (2022) (observing that banking mergers have led to reduced local access financial services).

[132] *See* Complaint at 8, *In re* RWJ Barnabas Health, Saint Peter's Healthcare Sys., No. 9409 (Fed. Trade Comm'n June 2, 2022).

[133] *Id.* at 3-11; Complaint at 3-4, 7-9, *In re* Hackensack Meridian Health, Inc., No. 9399 (Fed. Trade Comm'n Dec. 4, 2020).

[134] Complaint, *In re The Kroger Co.*, No. D-9428 (Fed. Trade Comm'n Feb. 26, 2024) ("Kroger-Albertsons Complaint").

guidelines—addressing direct competition between firms—requires a more detailed look at the many fronts along which firms compete, including: the firms' strategic deliberations or decisions; prior merger, entry, expansion or exit events; customers' willingness to switch between different firms' products; the impact of competitive actions on rivals; and the impact of eliminating competition between the firms. [135] In line with this approach, with the Kroger-Albertsons merger, the FTC pointed out that supermarkets inhabit a unique space in the grocery market, owing in part to their "flywheel" of data analytics abilities, reward programs, and the differentiated services they offer, which include fuel stations and pharmacies.[136] The FTC noted that there are many different market segments within the retail grocery space, not all of which offer viable substitutes for one another: club stores, limited assortment stores, premium organic stores, dollar stores, and e-commerce retailers all offer different products and experiences at significant price differences.[137] As such, the anticompetitive effects of a merger between Kroger and Albertsons would not be mitigated by the presence of these other companies.

Importantly, the FTC also took care to parse out the unique characteristics of local labor markets. Instead of simply defining the geographic market more broadly (i.e., by pointing to the low-skill nature of some retail grocery work) the FTC observed that competition for *unionized* labor has distinct qualities which a merger between two of the main competitors for union labor would threaten.[138] Whether or not a court will give purchase to the FTC's careful segmentation of these localized market dynamics, its attention to those dynamics will force courts and corporations alike to confront those important factors squarely.

4. The FTC should update its merger guidelines to articulate a new set of localist factors to be weighed with each merger.

Perhaps the most straightforward and transparent way for the FTC to instantiate a more localist approach is through the merger guideline process. To bring its merger guidelines in line with localist values, the FTC would need to describe what makes for an adequate balance between the non-economic factors of local resilience, autonomy, and control, as well as economic factors of efficiency, price, and quality. This would provide consistency, clarity and predictability in enforcement practices, while also giving the FTC flexibility to rely on the broad range of values that undergird localism.

Of course, it would be challenging to articulate a precise method of weighing these non-economic principles alongside cold, hard economic concerns for efficiency and price. That Congress never articulated which Historically, many antitrust scholars have been afraid to consider issues such as local control or resiliency because local preferences for those attributes vary. By contrast, it has been safer to assume that all consumers like lower prices or higher quality (holding all else equal), and antitrust analysis has proceeded on that basis only. But as a method of

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[135] U.S. DEP'T OF JUST. & FED. TRADE COMM'N, Merger Guidelines § 2.2 (Dec. 18, 2023), https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf ("2023 Merger Guidelines").
[136] *Id.* at 7-9.
[137] *Id.* at 8-9.
[138] *Id.* at 15-17.

determining what consumers think is best, omitting these dimensions may not be the best we can do.[139]

Two key steps will help overcome this challenge. First, the FTC should consult local communities directly to gauge their preferences. This could also include some sample local surveying as a baseline for understanding local tastes. These surveys may reveal that consumers *prefer* to not have the option of discounted goods if it means those goods come at the cost of local control or diversity of choice. It is also possible that, to the extent local control leads to higher prices or lower quality products, consumers prefer *less* of it. But whatever a court or regulator may think a local community wants, there is no better substitute for determining this question than asking the community itself.

Additionally, the FTC should bolster its awareness of localized effects by continuing to cooperate with state antitrust authorities. Sometimes these regulators will be more closely attuned to the intricacies of anticompetitive effects from regional and national mergers—a state antitrust regulator in west Michigan may know more about the dynamics of rural grocery competition in Muskegon than someone living in DC. Greater coordination between these federal and state authorities could help the FTC develop nuanced accounts of the most local effects of even national mergers. Local nonprofits and advocacy groups are other sources of information that may have the time and resources to dig deeply into local issues in a way that a busy state AG's office does not.

To the extent a localist regime may sound limiting to regulators (insofar as it forces regulators to confront difficult questions about non-economic values), its wide scope also liberates regulators from a myopic focus on economic concerns alone. A localist approach leaves regulators with sufficient room to acknowledge the reality that certain localist values will be more pressing depending on the context. In a large, competitive market with flexible consumers, it is possible that a focus on prices or quality is appropriate and preferable; that is less likely in a smaller, highly concentrated market. A localist approach accordingly does not bind itself to a one-size-fits-all approach to every merger in every market. That is a strength, not a weakness.

B. Leveraging FTC Rulemaking to Promote Localism

The FTC has broad rulemaking authority to regulate competition. While this authority may not explicitly empower the FTC to block mergers on specifically localist bases, it does not preclude the agency from incorporating localist concerns in its decisions on allocating its scarce resources. This approach could prove beneficial in the absence of new legislation from Congress. Despite a bipartisan interest in enhancing antitrust enforcement,[140] legislative dysfunction makes

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[139] See Neil W. Averitt & Robert H. Lande, *Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law*, 10 LOY. CONSUMER L. REV. 44 (1998); Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713 (1997); Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L.J. 175 (2007); Robert H. Lande, *Consumer Choice As the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503 (2001).
[140] Molly Ball and Brody Mullins, *Biden's Trustbuster Draws Unlikely Fans: 'Khanservative' Republicans*, WSJ (2024), https://www.wsj.com/politics/policy/lina-khan-ftc-antitrust-khanservatives-a6852a8f (last visited Apr 7, 2024).

it improbable that Congress will enact new antitrust laws in the near future,[141] especially laws that specifically implicate localist concerns to the degree reflected in the historical context of antitrust legislation.

Fortunately, there are several existing regulatory mechanisms that address localist concerns across various sectors, from banking to healthcare to broadcasting. In each of these domains, regulatory enforcement has been successful in situating localist interests within the broader missions of the agency. The FTC could benefit from examining these approaches as potential models.

The FCC's recent localism proposal may be instructive here. For context, in 2017, the FCC eliminated the broadcast main studio rule,[142] which had required that stations maintain its main studio in or within 25 miles of the local community it serviced.[143] The main studio rule had been in place, in one form or another, since 1939.[144] The Communications Act of 1934 mandates that the FCC ensure the "fair, efficient, and equitable distribution of radio service" to each local community through its regulatory authority.[145] The FCC had long read that mandate to implicate the localist interest.[146] In eliminating the main studio rule, it undermined its localist mission.[147]

In 2024, with the explicit purpose of counteracting the erosion of localist interests that had occurred under the Reagan and Trump FCCs in mind,[148] the FCC proposed a rule that provides for priority review to applications filed by stations that certify that they provide locally originated programming.[149] This priority review would be triggered only by "complex" applications, i.e., applications that face delays due to non-compliance issues, formal objections, or some other issue requiring an extended staff review.[150] That is to say, "simple" applications – applications without holds or complications – would continue to be processed according to traditional FCC routines.[151] This approach would incentivize stations to carry local programming so that they may benefit from

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[141] *The Bipartisan Big Tech Antitrust Bill Falls Victim to Political Gridlock*, BLOOMBERG.COM, Aug. 22, 2022, https://www.bloomberg.com/news/newsletters/2022-08-22/tech-antitrust-bill-from-klobuchar-grassley-gets-stuck-in-dc-limbo (last visited Apr 7, 2024).
[142] Elimination of the Main Studio Rule, Notice of Proposed Rulemaking, 32 FCC Rcd. 8158, 8202, para. 2 (2017) (codified at 47 C.F.R. pt. 73) ("Main Studio Elimination NPRM").
[143] 47 C.F.R. § 73.1125(a)-(d) (2017) (amended in 2018). *See* Reregulations and Rules Oversight of the AM, FM, and TV Broadcast Rules, 44 Fed. Reg. 69933, 69934 app. 1 (December 5, 1979); *see also* Broadcast Localism, 19 F.C.C. Rcd. 12425, 12425 (Jul. 1, 2004) (discussion of the Main Studio Rule and its localist rationale).
[144] Main Studio Elimination NPRM, 32 FCC Rcd. at 8202, para. 4.
[145] 47 U.S.C. §307(b).
[146] Priority Application Review for Broadcast Stations That Provide Local Journalism or Other Locally Originated Programming, Notice of Proposed Rulemaking, 89 Fed. Reg. 8622, 8623, para. 2 (proposed Feb. 8, 2024) (to be codified at 47 C.F.R. pt. 73) ("Priority Application Review NPRM").
[147] Priority Application Review NPRM, 89 Fed. Reg. at 8623, paras. 4-5. *See also* Main Studio Elimination NPRM, 32 FCC Rcd. at 8202 (Dissenting Statement of Jessica Rosenworcel).
[148] Priority Application Review NPRM, 89 Fed. Reg. at 8623, paras. 4-5.
[149] *Id.* at 8623, para. 6.
[150] *Id.* at 8624, para. 10.
[151] *Id.* at 8624, paras. 12-13.

accelerated processing and approval timelines, but without unduly burdening either the regulatory agency or the station with slower review times for run-of-the-mill applications.[152]

In furnishing this plan, the FCC recognizes a fundamental idea: access to locally relevant news and information is important independent of the economic efficiencies of resource allocation in media.[153] Local media plays a vital role in fostering democracy,[154] promoting civic engagement,[155] and maintaining cultural identity.[156] Media consolidation "leads to *less* total newsgathering in a local market," bringing "large and devastating effects on the diversity and vitality of our civic dialogue."[157] "Like Wal-Mart coming to town, the existing news providers look around at the new reality and figure out pretty fast that they ought to head for the exit."[158] Perhaps this sounds a little like the original antitrust enforcers[159]—and a little like the neo-Brandeisian approach.[160] With this motive in consideration, the FTC could likewise extend similar protections to other sectors, ensuring that mergers and acquisitions do not erode the fabric of local communities.

However, transposing this regulation to the FTC faces some challenges. The FCC's application review process does not have a statutory deadline.[161] This provides the FCC considerable leeway in determining how it prioritizes its application review process. The FTC does not have this luxury. The Hart-Scott-Rodino (HSR) Act requires that the merger clearance process be completed in thirty days, which may be extended for an additional thirty days according to the discretion of the FTC or DOJ Antitrust Division.[162] As the FTC has noted, these statutory deadlines are "extraordinarily short."[163] This limitation requires some innovation on behalf of antitrust enforcers.

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[152] Id.
[153] *See id.* at 8623, para. 7.
[154] *See, e.g.,* Revision of Programming and Commercialization Policies, 98 F.C.C.2d 1076, 1078, para. 31 (1984) (codified at 47 C.F.R. pt. 73) (the FCC's purpose in promoting localism in non-entertainment programming is facilitating an "informed public opinion[, which is] necessary in a functioning democracy").
[155] 2014 Quadrennial Regulatory Review, 81 Fed. Reg. 76220, 76234, para. 91 (2014); *see also* 2010 Quadrennial Regulatory Review, 77 Fed. Reg. 2868, 2898, paras. 178-82 (2010) (discussing the relationship between local media and civic participation).
[156] Broadcast Localism, 19 F.C.C. Rcd. 12425, 12449 (Jul. 1, 2004) (Statement of Commissioner Jonathan S. Adelstein, Approving in Part and Concurring in Part).
[157] Broadcast Localism, 23 F.C.C. Rcd. 1324, 1400 (Jan. 24, 2008) (emphasis in original).
[158] Id.
[159] *See*, *e.g.*, Louis D. Brandeis, *A Curse of Bigness*, *in* Other People's Money and How the Bankers Use It 162, 174-78 (1914) (discussing The Burlington).
[160] See, e.g., Lina Khan, The New Brandeis Movement: America's Antimonopoly Debate, 9 J. EUR. COMPET. LAW PRACT. 131 (2018) ("Dominant corporations wield outsized influence over political processes and outcomes, be it through lobbying, financing elections, staffing government, funding research, or establishing systemic importance that they can leverage. They use these strategies to win favourable policies, further entrenching their dominance.")
[161] *See Forest Guardians v. Babbitt*, 174 F.3d 1178, 1191 n.19 (10th Cir. 1998) (citing *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (1984)) (FCC's application review process is not governed by mandatory deadlines, but instead the Administrative Procedure Act's "reasonable time frame" requirement).
[162] 15 U.S.C. § 18a(b).
[163] Premerger Notification, Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178, 42178 (Jun. 29, 2023) ("Premerger Notification NPRM").

The HSR pre-merger notification form's Item 4(c) already requires that merging companies provide "all studies, surveys, analyses and reports" prepared by a company for the purpose of evaluating an acquisition with respect to "market shares, competition, competitors, markets, [and] potential for sales growth or expansion into product or geographic markets" to the evaluating agency.[164] Furthermore, the HSR form's Item 7(c) requires a company disclose information about the relevant geographic markets in which the company operates.[165]

But this may not be enough. First, neither Item requires companies to provide more than basic information about their interaction with local markets. Although Item 4(c) already mandates companies to provide their own internal analyses of their local market share, this requirement may not be useful if a merging company has not previously assessed its market share in various localities. This mandate was likely beneficial in evaluating supermarket mergers, exemplified by the Kroger-Albertsons case study. Given that supermarket competition primarily takes place at the local level, the merging companies' internal documents focused their competitive analysis on "a radius of several miles around each store."[166] Whether the FTC obtained these internal documents through Item 4(c) or through a request for supplemental documents is a question only the enforcement agency can answer. But what is clear is that these internal documents may not even exist in company records—even if they did in the Kroger-Albertsons case.

Item 7(c)'s requirements do provide the FTC with information about the geographic market in which the merging companies operate. These geographic markets can be misleading.[167] State- and even city-level data does not tell the whole story in many industries, from retail grocery to healthcare to education. If a monopolist retail grocer's workforce goes on strike, for instance, entire neighborhoods may be subject to a food desert. Only localized geographic data can ensure that the FTC remains alert to these dangers in the enforcement process. The FTC deserves some credit here—it has already recognized some of the problems with Item 7(c). In 2023, the FTC proposed changes to the HSR pre-merger notification form that would require street-level data from a wide array of industries.[168] Even better, it would require merging companies to submit the latitude and longitude of each of its establishments.[169]

The second issue is that companies might not be evaluating or analyzing data that would be relevant to the FTC's new broader conception of competition in the course of conducting a merger. For example, in recent years, the FTC has expanded its view of unfair competition to more seriously consider the effect of mergers on labor markets.[170] Given that labor markets are fair game

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[164] Instructions to the Notification and Report Form for Certain Mergers and Acquisitions, 16 C.F.R. § 803, app. B (2024) ("HSR Instructions").
[165] Id.
[166] Kroger-Albertsons Complaint at 20.
[167] *See supra*, Section III.A.2.
[168] Premerger Notification NPRM, 88 Fed. Reg. at 42201.
[169] *Id.*
[170] *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, Merger Guidelines § 2.10 (Dec. 18, 2023), https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf ("2023 Merger Guidelines").

for antitrust law—even at the conservative Roberts Court,[171] enforcement agencies are beginning to bring more complaints on these labor theories of antitrust.[172]As it stands now, Item 4(c) does not require a company to disclose its labor market share unless it had considered that document *for the purpose of evaluating or analyzing the acquisition*.[173] This creates a dilemma for both companies and enforcement agencies that seek to ensure fairness in local labor competition. In order to ensure the fair disposition of HSR forms, the FTC will certainly need more information when it believes that the labor market might be impacted. Although these situations can be obvious—like when Penguin Random House applies to merge with Simon & Schuster, thus cornering the market for authors—it can also be hidden. And with antitrust enforcers willing to take on these fights like Chair Lina Khan and Assistant Attorney General Jonathan Kanter, labor market data will be more important to ensuring that the disposition of HSR forms is not delayed. It is in the best interest of the companies and the watchmen that this data is available to the latter.

We propose two approaches that can build on the current pre-merger process. First, the FTC can require that merging companies submit detailed information regarding their impact on localized markets during the pre-merger notification process. This requirement would provide the FTC with insights tailored to assessing how mergers and acquisitions could potentially monopolize *specific* local communities—either through stifling competition in the goods or labor markets, or through decreasing consumer choice. The Hart-Scott-Rodino Act gives considerable discretion to the FTC in determining how to structure the pre-merger notification process. The FTC's mandate extends to requiring that the pre-merger notification "be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine [if such acquisition may] violate the antitrust laws."[174] The FTC may thus require companies to submit data in a form that antitrust enforcers are better able to use.

Although the FTC should continue collecting latitude-longitude data, as we discuss in Section III.A.2, there are a multitude of delineations that would likely be more useful to the FTC than this raw data.[175] For example, in 1980, the USDA's Economic Research Service released "Commuting Zones," which are meant to identify the local economies where people live and work.[176] Although the ERS last updated them in 2000, other researchers have updated them for

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[171] *See*, *e.g.*, *NCAA v. Alston*, 141 S. Ct. 2141, 2167 (2021); *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006).
[172] Complaint at 17, *United States v. Penguin Random House, LLC*, No.: 1:21-cv-02886 (D.D.C. Nov. 2, 2021); Kroger-Albertsons Complaint at 15.
[173] HSR Instructions at 6.
[174] 15 U.S.C. § 18a(d)
[175] *See* Christopher S. Fowler & Leif Jensen, *Bridging the Gap between Geographic Concept and the Data We Have: The Case of Labor Markets in the USA*, 52 ENVIRON. PLAN. ECON. SPACE 1395 (2020). The data that Fowler & Jensen use is available at https://sites.psu.edu/psucz/data/.
[176] U.S. DEP'T AGRIC. ECON. RSCH. SERV., *Commuting Zones and Labor Market Areas* (Mar. 26, 2019), https://www.ers.usda.gov/data-products/commuting-zones-and-labor-market-areas/.

2020.[177] Commuting Zones are more focused on the connectivity of rural places than most other regionalizations, partly because they include smaller and more remote locations.[178] And although they are meant to measure labor markets, Commuting Zones have been used to measure localized markets for healthcare[179] and energy.[180] In fact, the FTC may begin using them to evaluate labor competition.[181] The FTC can require that, before submitting the HSR form, that companies themselves process their data—whether this be number of facilities, revenue, labor costs, or even supplier diversity—using Commuting Zones. This would allow the FTC to shift its limited resources from further processing the data provided to them by these large companies—who, frankly, have the capacity to process it themselves—towards closer scrutiny or more speedy processing. This submission would also allow companies whose mergers do not pose a substantial threat to competition more readily prove their innocuousness.

But this can get tricky. Take Pharmacy A, a chain of 1,000 stores in the West Coast. Pharmacy A is looking to expand and buys Pharmacy B, a chain of 1,000 stores on the East Coast. Let's presume that this merger is *completely* fine—it does not meaningfully impact prices or wages in local markets. It also does not impact local autonomy or control: Pharmacy B was run out of New York City; its stores in Alpharetta, Georgia were never locally owned. In Pharmacy A's first HSR request, it should not have to face the burden of submitting info and analysis for *two thousand* markets.

There are two ways that the FTC could assuage this burden. At the outset, not all industries would be subject to this type of disclosure. The FTC already has a list of industries from whom localized data would be more helpful in evaluating mergers, ostensibly because previous antitrust concerns have been raised in similar mergers.[182] This already does some preliminary, if rudimentary, risk-based screening. But a pharmacy merger would already be suspect under this line of scrutiny, so this would not do much good for Pharmacy A.

First, the FTC could establish clear threshold criteria that trigger the need for a detailed local market analysis. For example, if the combined market share of the merging companies in any localized market exceeds a certain percentage (e.g., 40%), a more detailed submission would be required for *that* market. Only after determining that, for instance, Pharmacy A and Pharmacy B would have an outsized market share in the Atlanta metropolitan area, would a more granular neighborhood-level analysis be necessary. Furthermore, the FTC might require that a merging company provide information specifically on communities that history has taught them are

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[177] *See, e.g.,* Christopher S. Fowler, Danielle C. Rhubart & Leif Jensen, *Reassessing and Revising Commuting Zones for 2010: History, Assessment, and Updates for U.S. 'Labor-Sheds' 1990–2010*, 35 POPUL. RES. POLICY REV. 263 (2016); Christopher S. Fowler, *New Commuting Zone delineation for the U.S. based on 2020 data*, CTR. FOR OPEN SCI. (2024).
[178] Fowler and Jensen, *supra* note 154 at 1397.
[179] Craig Garthwaite, Tal Gross & Matthew J. Notowidigdo, *Hospitals as Insurers of Last Resort* 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 21290, 2015).
[180] Daniel Kraynak, *The Local Economic and Welfare Consequences of Demand Shocks for Coal Country* 8 (Nov. 20, 2023) (unpublished manuscript) (on file with SSRN).
[181] Premerger Notification NPRM, 88 Fed. Reg. at 42185.
[182] *Id.* at 42201.

especially vulnerable to merger costs, such as low-income urban neighborhoods and remote rural communities,[183] so that no market is left behind. Thus, a pharmacy with 2,000 stores would probably only have to submit information for a few of the markets it will operate in.

Another idea is that the FTC could pursue some form of sampling approach. Instead of analyzing all 2,000 markets, the FTC could request a representative sample of markets (both geographic and by market type), whereby it could assess potential impact without requiring exhaustive data on every single market. The primary issue here is that it is unclear what a representative sample would look like, and how the FTC would be able to trust that the data provided by a company is representative of the markets that they are planning to enter. Perhaps a random sample of markets may be best here, coupled with further requests when a merging company is moving into a historically vulnerable market.

Second, the FTC may get more creative and require merging companies to submit other metrics for evaluating the local market impacts of proposed mergers. Take, for instance, pricing strategies in local markets. Imagine three pharmacy chains with stores in Baltimore. Pharmacy A primarily operates in low-income, majority-black neighborhoods; Pharmacy B operates in the middle-income university neighborhoods; and Pharmacy C operates throughout the city. Pharmacy C applies with the FTC to buy out Pharmacy A for reasons unrelated to their competition in Baltimore. Pharmacy C would still be required to submit any of its Maryland office's internal analyses that discuss strategies to compete with either Pharmacy A or Pharmacy B – even if these analyses were not reviewed as part of the merger. This requirement might allow the FTC to drill down on any expected changes due to the merger if it believes that the merger might be litigated. And even if the FTC does not view blocking this merger as a beneficial use of resources, it can refer closer analysis of this merger to the Maryland Attorney General's office. Requiring that this information be provided early would be instrumental in ensuring the speedy disposition of merger applications, as the HSR Act intended.

The challenges to these approaches are important to note. The HSR Act does not provide the FTC unlimited discretion in determining the pre-merger notification guidelines.[184] As it stands today, "necessary and appropriate" authority is a "capacious" grant of authority.[185] But it may still require that the FTC consider the costs of compliance weighed against the benefits of providing this information.[186] Furthermore, the Supreme Court is currently considering just how much authority "necessary and appropriate" provides an agency.[187] If companies find providing this information to be burdensome, this could present a challenge to the FTC's rulemaking authority.

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[183] *See* Christopher R. Leslie, *Food Deserts, Racism, and Antitrust Law*, 110 CAL. L. REV. (2022). An earlier draft of this paper discussed the impact of race in antitrust law. While this prism is certainly important, it is unclear whether the FTC has the power to engage in race-conscious antitrust enforcement. Thus, we've focused on race-neutral antitrust enforcement, which would hopefully have downstream effects on racial inequality in, for instance, access to food.

[184] See Justin Hurwitz, Premerger Notification Proposal Faces a Rocky Path, REG. REV., Aug. 28, 2023.
[185] Michigan v. EPA, 576 U.S. 743, 752 (2015).
[186] See id.
[187] Loper Bright Enters. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted* 143 S. Ct. 2429 (2023).

There are two responses to this. First, the comment period required by the Administrative Procedure Act should allow companies to air their grievances and suggest alternative measures that could lighten the burden of providing this information.[188] Second, many companies already process the information that the FTC would require.[189] They simply do not yet provide it to the FTC during the pre-merger notification process.

Furthermore, some may argue that the proposed rules are "arbitrary and capricious" under the Administrative Procedure Act.[190] But a rule is "arbitrary and capricious" if "the agency has relied on factors which Congress has not intended it to consider."[191] Whatever one's view on whether antitrust enforcement *should* consider local markets, Congress certainly evinced some intent that it should.[192] In providing the FTC with the authority to tailor the pre-merger notification process to enforce the antitrust laws, the HSR Act allows the FTC to request localized information. Some have argued, in different contexts, that the HSR Act's "necessary" language when taken in the context of the two-submission process (i.e., the FTC can submit a secondary request for more information) means that not all information related to a merger can be required.[193] But in this context, the FTC would use the initial submission to apprehend whether there should be a second submission. This initial submission would not be the final inquiry.

IV. Conclusion

Although this paper does argue that (1) as a historical matter, antitrust law was at least partly rooted in localist concerns, and (2) as an economic matter, consolidation threatens local communities today, nothing in this paper should imply that antitrust enforcers should make localism their sole or even their primary mission. Rather, this paper has sought to provide a framework that properly situates localist interests within the broader framework of antitrust. Although we focused on grocery retailers in this paper—due to their heightened role in past, present, and future antitrust litigation—this is just one industry on which local communities depend. Hospitals and pharmacies have also seen increased scrutiny under this burgeoning antitrust regime.

This paper's focus on the FTC does not intend to undermine the substantial work done on the state level in antitrust. States have a strong interest in protecting their peculiar local

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[188] 5 U.S.C. § 553.
[189] *See* Premerger Notification NPRM, 88 Fed. Reg. at 42201 ("[B]usinesses often track sales at the local level in the ordinary course of business for these sectors.")
[190] *See*, *e.g.*, AM. HOSP. ASS'N, *AHA Urges FTC to Withdraw Proposed Changes to Premerger Notification Rules*, (Sept. 5, 2023) (comment on Premerger Notification NPRM, expressing opposition on "arbitrary and capricious" grounds); Tomer D. Elkayam, *Federal Trade Commission Proposed Rules Shake Up M&A Market*, LOYOLA U. CHI.: INSIDE COMPLIANCE (Sept. 28, 2023) (discussing "arbitrary and capricious" argument against the Premerger Notification NPRM).
[191] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).
[192] *See* Part I.A, *supra*.
[193] See Justin Hurwitz, Premerger Notification Proposal Faces a Rocky Path, REG. REV., Aug. 28, 2023.

communities from market consolidation as well. We argue instead that federal antitrust enforcement also has a role to play in protecting local communities. And, of course, we recognize the strong role that the DOJ has often played in enforcement as well.

Finally, our proposals to bring localism back into antitrust enforcement should be read as harmonizing with the broader antitrust goal of halting unfair methods of competition. Under the leadership of Chair Khan and Commissioners Slaughter and Bedoya, the FTC has already taken tremendous strides in bringing antitrust back to the forefront of the political conversation. Our hope is only to contribute one piece to the localist momentum within that movement.