NOTE

Running (Away) with the Land: A (Super) Market Problem

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INTRODUCTION

When the Supreme Court issued its 1948 opinion in *Shelley v. Kraemer*, it put an end to deploying discriminatory restrictive covenants to further racial segregation.[1] The belated application of the Fourteenth Amendment's gauze stopped the

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1. 334 U.S. 1, 23 (1948).

bleeding, but the wound would fester for years—decades into the future—as property values rose and intergenerational assets accumulated.[2] By weakly applying the Fair Housing Act's provisions, denying mortgages, and overtly engaging in discriminatory redlining to keep minorities confined to inner cities and out of the new suburbia, American institutions—from courts to lenders and banks—blocked an entire group of citizens "from perhaps the greatest wealth accumulation period/opportunity in U.S. history."[3] And as the years ticked forward, the injury remained a superficial scar, imprinted by time's jagged attempts to stitch it closed.

Today, these lasting effects persist, but the impacts of restrictive covenants in other contexts have cropped up too. These burdens are shouldered all the same—if not by design, then by society's willful tolerance. This Note, in part, explores the systems fortifying that tolerance. It examines the effects of restrictive covenants outside of housing's domain and in a different type of market: the supermarket. By tying national grocery chains' use of these restrictions to issues disproportionately impacting minority populations, this Note seeks to illustrate both why and how the history of restrictive covenants should inform the solutions. And against this foundational backdrop, this Note offers a broader look at potential remedies through existing legal avenues.[4]

Part I introduces the concept of restrictive covenants and discusses their use in the real property context. Part II argues that supermarkets, by scooping up land and adding restrictive covenants to deeds, contribute to food deserts that lead to adverse health and economic implications for low-income and minority communities. Part III provides an overview of the case law, analyzes why challenges to these anticompetitive actions have largely failed, and suggests that opening the courtroom door to a different group of litigants might lead to more successful outcomes. Part IV highlights issues with the current implementation of antitrust law—specifically through a discussion of both theory and judicial methods of market analysis—and concludes by proposing several structural and systemic changes. Finally, Part V asserts that recalibrating public policy goals through a federally backed top-down strategy or a state-driven bottom-up approach could set proper barriers in place to effectively lock out the tactics supermarkets use to lock up land.

I. RESTRICTIVE COVENANTS AND REAL PROPERTY: THE STRATEGIC SCHEME

When the Safeway grocery store in Greeley, Colorado, closed in 2014, local development director Pam Bricker took the reasonable course of action and began her search for its replacement—a replacement that ultimately, she soon realized,

2. *See* Berta Esperanza Hernández-Truyol & Shelbi D. Day, *Property, Wealth, Inequality and Human Rights: A Formula for Reform*, 34 IND. L. REV. 1213, 1216–17, 1222 (2001).

3. *Id.* at 1222.

4. Specifically, this Note aims to expand the argument by proposing ideas to reframe litigation strategies, raising antirust-specific points in the context of both theory and geographic market structure, and suggesting ways to strengthen current federal and state initiatives.

would not come for another two decades.[5] Four years earlier, officials in the small town of Stonington, Connecticut, had begun a similar scramble to find a new food retailer after the Stop & Shop left for another location, only to learn no supermarket, dollar store, or food-selling store could fill the large shopping center space for the foreseeable future.[6] Around this same time, residents in Eastham, Massachusetts, were dealing with a similar problem.[7] There, though, a supermarket had not moved away—it had simply never come.[8] In a move some observers have described as "I don't want it, but you can't have it,"[9] Stop & Shop bought a large piece of property and immediately placed it back on the market, physically unchanged but with a major new provision in the deed: "No portion of or premises on the Property shall be used, leased, occupied, or licensed for a food supermarket, a food superstore, a food warehouse store, a specialty food store . . . or for the sale of food or food products for off-premises consumption . . . ."[10] City officials declined to challenge the maneuver,[11] possibly foreseeing the sequence of events that played out just two years later in Washington, D.C., where, after much political upheaval and contentious negotiating, the mayor agreed to pay Safeway $3.6 million to remove a similar stranglehold on a neighborhood's central piece of property.[12]

The players are various and the battles distinct, but in the world of supermarket turf wars, the tactics remain tried and true. In many cases, chains move into a town, buy up nearby land capable of housing other big-box stores, modify the deed, and then lease or resell the property.[13] In others, grocers operate for a few years in a location, add lasting provisions to the deed or lease, and then flee to the suburbs.[14] The former strategy reduces competition and thus consumer choice; the latter often leaves consumers with no choice at all. Both, however, employ

5. Peter Balonon-Rosen, *When Grocery Stores Close, This Legal Phrase Can Prevent New Ones from Opening*, MARKETPLACE (Jan. 12, 2018), https://www.marketplace.org/2018/01/12/when-grocery-stores-close-little-legal-phrase-can-prevent-new-ones-opening/ [https://perma.cc/Q6V5-3WPX].

6. Bree Shirvell, *Town Has Few Options for Vacant Stop & Shop Building*, PATCH (Jan. 18, 2012, 3:11 PM), https://patch.com/connecticut/stonington/town-has-few-options-for-vacant-stop-shop-building [https://perma.cc/WGF4-F3LF]; Joe Wojtas, *Stonington Seeks Legal Help in Stop & Shop Lease Issue*, DAY (Aug. 10, 2010, 12:00 AM), https://www.theday.com/local-news/20100810/stonington-seeks-legal-help-in-stop-shop-lease-issue/.

7. *See* Robert Kuttner, *How Stop & Shop Plays Monopoly*, PROVINCETOWN INDEP. (Feb. 9, 2022), https://provincetownindependent.org/news/2022/02/09/how-stop-shop-plays-monopoly/.

8. *See id.*

9. Jeremy Bowman, *Where Have All the Inner-City Grocery Stores Gone?*, BUS. INSIDER (Apr. 4, 2012, 12:05 PM) (alterations omitted), https://www.businessinsider.com/where-have-all-the-inner-city-grocery-stores-gone-2012-4 [https://perma.cc/6D38-MACE].

10. Kuttner, *supra* note 7.

11. *See id.*

12. *See* Jeffrey Anderson, *Safeway's Ward 7 Monopoly, Explained*, WASH. CITY PAPER (Mar. 30, 2017), https://washingtoncitypaper.com/article/191558/safeways-ward-7-monopoly-explained/ [https://perma.cc/U89V-TAM5].

13. *See, e.g.*, Kuttner, *supra* note 7.

14. *See, e.g.*, Bowman, *supra* note 9.

the same common legal device—a restrictive covenant—to "scorch" the earth in communities across America.[15]

Safeway, its parent company Albertsons, and Stop & Shop are among the most well-known retailers engaging in this anticompetitive behavior—a status likely attributed to local and national press coverage detailing "How Stop & Shop Plays Monopoly" and online petitions calling on Safeway to end the practice in states such as California and Washington.[16] But other supermarkets seem to slip through unscathed—or, at least, uncontested. Walmart, for example, had shuttered 250 of its stores as of 2010, many of which remained unoccupied due to covenants in their deeds.[17] The number of chains relying on such methods remains hard to pin down, but available statistics help illustrate the scope: Albertsons, Ahold Delhaize (Stop & Shop's parent company), and Walmart together claim nearly twenty-seven percent of the national grocery store market.[18]

Employing restrictive covenants to limit or block competition is far from a novel tactic, even among supermarkets. In 1950, the court in *Oliver v. Hewitt* sided with a store operator who included a deed provision prohibiting the sale of groceries in nearby lots.[19] The court upheld the covenant, which restricted the natural use of the land, because it was employed for the plaintiff's "sole benefit" and served to "protect[] from injurious competition."[20] Today, though states are increasingly fashioning their own regulations, common law still governs the validity of many restrictive covenants.[21] Through the years, courts have shaped and sharpened requirements, often looking for the landowner's intent to bind subsequent parties, the covenant's relation to direct use or enjoyment of the land, and either actual or constructive notice to the land's subsequent owner.[22]

Many courts stress the "direct use" element—the principle that restrictive covenants serve to preserve the reasonable "enjoyment" of the property they burden.[23] Homeowners' associations, for example, often use restrictive covenants to

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15. Steve Holt, *How Leaving Stores Closed for Years Helps Grocery Chains and Hurts Communities*, CIV. EATS (Jan. 22, 2018), https://civileats.com/2018/01/22/how-leaving-stores-closed-for-years-helps-grocery-chains-and-hurts-communities/ [https://perma.cc/N28A-BUS8].

16. Kuttner, *supra* note 7; *see, e.g.*, *Shame on Albertsons*, FOOD EMPOWERMENT PROJECT, https://foodispower.org/Shame-on-Safeway-and-Albertsons/ [https://perma.cc/D3YD-K3NF] (last visited Oct. 15, 2023).

17. Bowman, *supra* note 9.

18. Annie Palmer, *Amazon's Sprawling Grocery Business Has Become an 'Expensive Hobby' with a Cloudy Future*, CNBC (Feb. 19, 2022, 9:00 AM), https://www.cnbc.com/2022/02/19/amazons-sprawling-grocery-business-has-become-an-expensive-hobby.html [https://perma.cc/GBM6-U63J].

19. 60 S.E.2d 1, 2 (Va. 1950).

20. *Id.*

21. *See* Brian Mead & Aaron Sayers, *Restrictive Covenants Evolve from Common Law to Statutory Regulation: The 2022 Watershed*, REUTERS (Feb. 22, 2022, 1:13 PM), https://www.reuters.com/legal/transactional/restrictive-covenants-evolve-common-law-statutory-regulation-2022-watershed-2022-02-22/.

22. *See, e.g.*, Winn-Dixie Stores, Inc. v. Dolgencorp, Inc., 964 So. 2d 261, 265 (Fla. Dist. Ct. App. 2007).

23. *See, e.g.*, Maule Indus., Inc. v. Sheffield Steel Prods., Inc., 105 So. 2d 798, 801 (Fla. Dist. Ct. App. 1958) (distinguishing a "covenant running with the land . . . from a merely personal covenant" because "the former concerns the . . . occupation and enjoyment thereof . . . [and] enhance[s] the value

protect property values or ensure the upkeep of neighborhoods.[24] In this context, these devices allow landowners to benefit with little detriment or harm to those on the outside. But under a framework this broad, with courts interpreting the "direct use" language so expansively, challenges to restrictive covenants that *do* frustrate other parties—like those used by supermarkets—have generally met similar fates as the claim in *Oliver*.[25] Courts reason these deed provisions incentivize companies by propping up investment expectations and have found, for instance, that "it is not unreasonable for parties in commercial-property transactions to protect themselves from competition . . . [as they] may be hesitant to invest substantial sums if they have no minimal protection from a competitor starting a business in the near vicinity."[26] This rationale rests on a court's assumption that supermarkets invest in communities because they can rely on deed protections to limit competition—either by controlling the land around them or by burdening the property left behind if *they* move to a new spot in the "near vicinity."[27] Yet, for some community members, "near" is often not near at all.[28] As will be further explained in Part III, this presents onerous obstacles to access—obstacles that ultimately outweigh otherwise persuasive reasons for preserving supermarkets' investment expectations. Furthermore, despite a court's ability to strike down covenants when the perceived harm to the public is too great, judges are rarely forced to confront this argument directly.[29] Instead, they settle challenges brought by one supermarket against another—business losses against business expectations.[30] Though community injury is sometimes a factor, in these cases, it is seldom one given much weight—or at least the weight it is worth.[31]

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of the property or renders it more convenient and beneficial to the owner"); Fort Worth 4th St. Partners v. Chesapeake Energy Corp., 882 F.3d 574, 578 (5th Cir. 2018) (finding that "the benefit of [the covenant] touches and concerns the land because it . . . specifically renders its owner's legal interest in the land more valuable").

24. *See, e.g.*, Janet M. Bollinger, Comment, *Homeowners' Associations and the Use of Property Planning Tools: When Does the Right to Exclude Go Too Far?*, 81 TEMP. L. REV. 269, 270–71 (2008).

25. *See Winn-Dixie Stores, Inc.*, 964 So. 2d at 267, 269; Deer Cross Shopping LLC v. Stop & Shop Supermarket Co., 773 N.Y.S.2d 211, 215 (Sup. Ct. 2003).

26. Acme Mkts., Inc. v. Wharton Hardware & Supply Corp., 890 F. Supp. 1230, 1242 (D.N.J. 1995) (quoting Davidson Bros. v. D. Katz & Sons, 579 A.2d 288, 295 (N.J. 1990)).

27. *Id.*

28. *See, e.g.*, Holt, *supra* note 15.

29. In *Deer Cross Shopping LLC v. Stop & Shop Supermarket Co.*, the court found the plaintiff did not demonstrate "that enforcement of the restrictive covenants is unreasonable or violates public policy." 773 N.Y.S.2d at 215. However, the insufficient public policy argument, in this context, related to the parties' original intent. *See id.* at 214. The court did not consider broader policy implications, including harm to the public resulting from the absence of a supermarket in the shopping center. *Id.*; *see also* Davidson Bros. v. D. Katz & Sons, 643 A.2d 642, 644–45 (N.J. Super. Ct. App. Div. 1994) (noting that the trial court had not examined damages from public harm once it deemed the covenant unreasonable and unenforceable).

30. *See, e.g.*, *Deer Cross Shopping LLC*, 773 N.Y.S.2d at 214–15.

31. *See, e.g.*, *Acme Mkts., Inc.*, 890 F. Supp. at 1242, 1245.

II. FOOD DESERTS AND THE CONVENIENCE STORE MIRAGE

As a primary consideration, community injury is critical because courts have the authority to invalidate a restrictive covenant for reasons of public policy.[32] But before turning to *whether* these policy arguments might find success, it is worth discussing the historical underpinning to explain *why* they should. In *Davidson Bros. v. D. Katz & Sons*, decided in 1994, the court relied on a reasonableness test to strike down a restriction blocking a new supermarket from opening in a downtown area.[33] The court first referenced the disadvantaged state of the community, pointing out that nearly thirty-seven percent of households lacked access to a vehicle.[34] Citing expert testimony and a House Select Committee report on hunger, the court then considered how reduced mobility could lead (and had already led) to disparate economic and health implications for low-income populations when grocery stores moved away:

> [T]he absence of a supermarket in a low income city neighborhood makes food more expensive and has a negative impact on diet and, therefore, on the inner city population's health. . . . "[L]ow-income consumers are unable to maximize their limited expendable resources for a basic need—food—because of the barriers of . . . location and transportation." . . . "This migration has . . . reduc[ed], and in some cases, remov[ed] the opportunity for low-income households to shop competitively. . . . 'A supermarket shouldn't be so hard [to find] in a country with so much wealth.'"[35]

The court, quoting an expert who testified on behalf of the defendants, remarked in a footnote that "none of us, as well-off as we are, would pay what the poor pay for a bottle of mayonnaise."[36] Emphasizing this overwhelming "personal hardship," the court held that the "scorched earth policy [wa]s so contrary to the public interest . . . that the covenant [wa]s unreasonable and unenforceable."[37]

The situation in *Davidson Bros.* stood at a familiar cross-section, as the relationship between restrictive covenants, real property, and public policy is both long-standing and pernicious.[38] As far back as the early twentieth century, landowners used covenants to restrict access to real estate, influencing the

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32. *See* Christopher R. Leslie, *Anti-Grocery Covenants*, *in* CONFERENCE COMPENDIUM: REFORMING AMERICA'S FOOD RETAIL MARKETS 106, 110 (2022), https://law.yale.edu/sites/default/files/area/center/isp/documents/grocery-compendium_may2023.pdf [https://perma.cc/P4N2-WND2].

33. 643 A.2d at 644–45.

34. *Id.* at 645.

35. *Id.* at 645–46 (last alteration in original) (footnote omitted) (quoting H. SELECT COMM. ON HUNGER, 100TH CONG., OBTAINING FOOD: SHOPPING CONSTRAINTS ON THE POOR 1, 4 (Comm. Print 1987)).

36. *Id.* at 645 n.1.

37. *Id.* at 648.

38. *See, e.g.*, Catherine Silva, *Racial Restrictive Covenants History: Enforcing Neighborhood Segregation in Seattle*, SEATTLE C.R. & LAB. HIST. PROJECT (2009), https://depts.washington.edu/civilr/covenants_report.htm [https://perma.cc/7EZG-L2XW] (revealing the "long history" of racial restrictive covenants in Seattle and their lasting effects on the demographics of the city's neighborhoods).

demographic makeup of neighborhoods by actively excluding racial minorities.[39] In Washington State, for example, one land development company added restrictive covenants to deeds forbidding the sale of property to "any person not of the White race."[40] The Supreme Court eventually struck down this practice in 1948, holding in *Shelley v. Kraemer* that such provisions violate the Fourteenth Amendment's Equal Protection Clause.[41] But even today, despite an inability to enforce these covenants, their indelible impact lives on in the hollow language of many deeds.[42]

The rationale behind the court's holding in *Davidson Bros.*—that is, striking down a restrictive covenant to protect and preserve community access to food—found a hook in this history. And in the years since its 1994 decision, the court's fears have largely taken shape. Although the opinion makes no mention of the term "food desert," in hindsight, that was exactly the issue the court described and sought to prevent. The U.S. Department of Agriculture (USDA) defines food deserts as "low-income tracts in which a substantial number or proportion of the population has low access to supermarkets or large grocery stores."[43] In 2015, the USDA estimated that nearly thirteen percent of census tracts fit this definition, with large numbers of households living more than one mile from a grocery store in urban areas or more than ten miles from a grocery store in rural areas.[44] A separate agency study found that across most regions, "the higher the percentage of minority population, the more likely the area is to be a food desert."[45] Access problems are most prevalent in the South, but "redlining" in the supermarket industry has hit urban areas across the country especially hard.[46] The industry's

39. *See id.*

40. *Id.*

41. 334 U.S. 1, 23 (1948).

42. *See* Cheryl W. Thompson, Cristina Kim, Natalie Moore, Roxana Popescu & Corinne Ruff, *Racial Covenants, a Relic of the Past, Are Still on the Books Across the Country*, NPR (Nov. 17, 2021, 5:06 AM), https://www.npr.org/2021/11/17/1049052531/racial-covenants-housing-discrimination [https://perma.cc/AZ8M-ZQKJ] (highlighting that "racially restrictive covenant[s] . . . can be found on the books in nearly every state in the U.S.," and explaining why "trying to remove a covenant — or its racially charged language — is a bureaucratic nightmare").

43. PAULA DUTKO, MICHELE VER PLOEG & TRACEY FARRIGAN, U.S. DEP'T OF AGRIC., ECONOMIC RESEARCH REPORT NO. 140, CHARACTERISTICS AND INFLUENTIAL FACTORS OF FOOD DESERTS 5 (2012), https://www.ers.usda.gov/webdocs/publications/45014/30940_err140.pdf [https://perma.cc/WY6L-UK4Y].

44. ALANA RHONE, MICHELE VER PLOEG, RYAN WILLIAMS & VINCE BRENEMAN, U.S. DEP'T OF AGRIC., ECONOMIC INFORMATION BULLETIN NO. 209, UNDERSTANDING LOW-INCOME AND LOW-ACCESS CENSUS TRACTS ACROSS THE NATION: SUBNATIONAL AND SUBPOPULATION ESTIMATES OF ACCESS TO HEALTHY FOOD 2 (2019), https://www.ers.usda.gov/webdocs/publications/93141/eib-209.pdf?v=4074.6 [https://perma.cc/533W-NBSA].

45. DUTKO ET AL., *supra* note 43, at iii.

46. *See* RHONE ET AL., *supra* note 44, at 28; *see also* Mengyao Zhang & Debarchana Ghosh, *Spatial Supermarket Redlining and Neighborhood Vulnerability: A Case Study of Hartford, Connecticut*, 20 TRANSACTIONS IN GIS 79, 79 (2016) ("Supermarket redlining is a term used to describe a phenomenon when major chain supermarkets are disinclined to locate their stores in inner cities or low-income neighborhoods . . . [because of perceived] lower demand; higher costs of urban land, labor, and utilities; lower profit margins from perishable food items; or risk of theft in inner cities.").

move out of inner cities tracked the rise of the suburbs in the late twentieth century, when chains chased white middle-class families' buying power to new and larger spaces.[47] "[U]rban obstacles," from crime to "depopulating neighborhoods," further accelerated the flight and widened the access gap between communities.[48]

Supermarkets did not merely up and leave, though; they "scorched" the land they left behind.[49] Relying on restrictive covenants, large chains relocated to the suburbs but blocked any attempt by a willing grocer to move into the vacant inner-city spaces. This practice exacerbated an already-existing challenge particular to urban areas: a dearth of suitable property large enough to house a big-box store.[50] In many neighborhoods, the old supermarket's home—its lot of land—was one of the few viable prospects.[51] Removing that option created (and continues to create) hardship for the roughly 2.4 million Americans without access to a vehicle living more than a mile from an alternative.[52] And this hardship fueled (and continues to fuel) health and nutrition disparities among different demographic groups.[53] When supermarket chains depart, inner-city residents are forced to rely on smaller convenience and corner stores with limited selections of healthy food.[54] If these stores provide fresh produce at all, the goods are usually marked up because of the outsized stocking costs small retailers face.[55] Some studies indicate higher prices are not limited to fresh fruits and vegetables; one analysis found that the price of a loaf of bread at a sampled convenience store was double that of a large chain outside of the neighborhood.[56] Between high prices or packaged and fast food, many households in low-income food deserts never face a real choice. Thus, it is not hard to unpack the evidence showing that a scarcity of supermarkets leads directly to health issues like obesity and its relevant implications.[57]

III. AN ARGUMENT ANALYSIS AND BUILDING A CASE FOR THE COMMUNITY

The calculated use of restrictive covenants has been, and remains, an often-overlooked but salient public policy issue—an issue, as shown, with harmful

47. *See* Jessica Crowe, Constance Lacy & Yolanda Columbus, *Barriers to Food Security and Community Stress in an Urban Food Desert*, URB. SCI., May 31, 2018, at 1, 3.

48. *Id.*

49. Davidson Bros. v. D. Katz & Sons, 643 A.2d 642, 648 (N.J. Super. Ct. App. Div. 1994).

50. Crowe et al., *supra* note 47, at 3.

51. *See, e.g.*, Bowman, *supra* note 9.

52. ECON. RSCH. SERV., U.S. DEP'T OF AGRIC., ACCESS TO AFFORDABLE AND NUTRITIOUS FOOD: MEASURING AND UNDERSTANDING FOOD DESERTS AND THEIR CONSEQUENCES 19 (2009), https://www.ers.usda.gov/webdocs/publications/42711/12716_ap036_1_.pdf [https://perma.cc/8QPG-BYV5].

53. *See id.* at 6.

54. *See* Rebecca Lee, Note, *Quenching Food Deserts: Rethinking Welfare Benefits to Combat Obesity*, 25 S. CAL. REV. L. & SOC. JUST. 241, 245–46 (2016).

55. *Id.* at 246.

56. Crowe et al., *supra* note 47, at 11.

57. Rictrell L. Pirtle, Note, *SNAP to Healthier Eating: A Comprehensive Look into How the Supplemental Nutrition Assistance Program (SNAP) Can Reduce Health Care Costs*, 7 KY. J. EQUINE, AGRIC. & NAT. RES. L. 373, 378–79 (2014).

historical roots. But challenging the practice in court has traditionally been a fruitless undertaking, and an extensive search for precedent revealed just twenty-seven relevant cases.[58] In twenty-two cases, the court upheld the covenant.[59] In three, it rendered it unenforceable.[60] And in two, plaintiffs survived motions for summary judgment.[61] The analysis of case law that follows illustrates why public policy arguments, as set forth in two cases, *Davidson Bros.* and *Acme Markets*, might be the most tenable path forward.[62]

In eleven of the twenty-two cases in which the court held for the defendant supermarket, the plaintiff, whether grocer or landlord, sought to invalidate the action by bringing traditionally relied-upon claims—for example, by showing that the covenant ran counter to the original parties' intent.[63] In one case, a Florida tenant utilizing part of a space to sell grocery items challenged

58. To locate all relevant cases, I searched for combinations of specific keywords (e.g., "restrictive covenant" and "supermarket"; "covenant" and "grocer"; "supermarket" and "covenant" and "antitrust") and combed through the results. I excluded: (1) cases decided prior to 1948 (the year the Supreme Court decided *Shelley v. Kraemer*); (2) unreported cases, which lacked the analysis needed to parse the courts' conclusions; (3) cases in which the defendant was not a supermarket, food-seller, or landlord leasing to one of the two (for example, I did not include claims against general retailers such as dollar stores, specialty stores such as bakeries or meat markets, or deli-type convenience stores); (4) cases in which the main dispute related to the covenant's contractual language (for example, I did not include cases litigating term modifications, void provisions, covenant expiration or termination dates, contractual defects, etc.); (5) cases in which the court denied summary judgment because of an issue of fact unrelated to the restrictive covenant; and (6) antitrust cases not involving a restrictive covenant. *See* cases cited *infra* notes 59–61.

59. Oliver v. Hewitt, 60 S.E.2d 1 (Va. 1950); Doo v. Packwood, 71 Cal. Rptr. 477 (Ct. App. 1968); Grand Union Co. v. Laurel Plaza, Inc., 256 F. Supp. 78 (D. Md. 1966); WLR, Inc. v. Borders, 690 S.W.2d 663 (Tex. App. 1985); Deer Cross Shopping LLC v. Stop & Shop Supermarket Co., 773 N.Y.S.2d 211 (Sup. Ct. 2003); Winn–Dixie Stores, Inc. v. Dolgencorp, Inc., 964 So. 2d 261 (Fla. Dist. Ct. App. 2007); Spanish Oaks, Inc. v. Hy–Vee, Inc., 655 N.W.2d 390 (Neb. 2003); Daitch Crystal Dairies, Inc. v. Neisloss, 190 N.Y.S.2d 737 (App. Div. 1959); Kroger Co. v. J. Weingarten, Inc., 380 S.W.2d 145 (Tex. Civ. App. 1964); J. M. Fields of Anderson, Inc. v. Kroger Co., 310 F.2d 562 (5th Cir. 1962); Parker v. Lewis Grocer Co., 153 So. 2d 261 (Miss. 1963); Golden Valley Shopping Ctr., Inc. v. Super Valu Realty, Inc., 98 N.W.2d 55 (Minn. 1959); Saint Anthony–Minneapolis, Inc. v. Red Owl Stores, Inc., 316 F. Supp. 1045 (D. Minn. 1970); Borman's, Inc. v. Great Scott Super Mkts., Inc., 433 F. Supp. 343 (E.D. Mich. 1975); Drabbant Enters., Inc. v. Great Atl. & Pac. Tea Co., 688 F. Supp. 1567 (D. Del. 1988); Nat'l Super Mkts., Inc. v. Magna Tr. Co., 570 N.E.2d 1191 (Ill. App. Ct. 1991); Downes–Patterson Corp. v. First Nat'l Supermarkets, Inc., 780 A.2d 967 (Conn. App. Ct. 2001); Serfecz v. Jewel Food Stores, 67 F.3d 591 (7th Cir. 1995); Harold Friedman, Inc. v. Kroger Co., 581 F.2d 1068 (3d Cir. 1978); Karam v. H. E. Butt Grocery Co., 527 S.W.2d 481 (Tex. Civ. App. 1975); Mark–It Place Foods, Inc. v. New Plan Excel Realty Tr., Inc., 804 N.E.2d 979 (Ohio Ct. App. 2004); Bobenal Inv., Inc. v. Giant Super Mkts., Inc., 260 N.W.2d 915 (Mich. Ct. App. 1977).

60. Davidson Bros. v. D. Katz & Sons, 643 A.2d 642 (N.J. Super. Ct. App. Div. 1994); Tippecanoe Assocs. II, LLC v. Kimco Lafayette 671, Inc., 829 N.E.2d 512 (Ind. 2005); Berkeley Dev. Co. v. Great Atl. & Pac. Tea Co., 518 A.2d 790 (N.J. Super. Ct. Law Div. 1986).

61. Although not all of the plaintiffs' claims survived, at least one in each case overcame the summary judgment hurdle. Acme Mkts., Inc. v. Wharton Hardware & Supply Corp., 890 F. Supp. 1230 (D.N.J. 1995); Harold Friedman Inc. v. Thorofare Mkts. Inc., 587 F.2d 127 (3d Cir. 1978).

62. *Davidson Bros.*, 643 A.2d at 645; *Acme Mkts., Inc.*, 890 F. Supp. at 1246.

63. *Grand Union Co.*, 256 F. Supp. at 87 (parties' intent); *WLR, Inc.*, 690 S.W.2d at 667–68 (same); *Deer Cross Shopping LLC*, 773 N.Y.S.2d at 214 (same); *Parker*, 153 So. 2d at 271 (same); *Golden Valley Shopping Ctr.*, 98 N.W.2d at 59 (same); *Oliver*, 60 S.E.2d at 3 (notice); *Doo*, 71 Cal. Rptr. at 480 (same); *J. Weingarten, Inc.*, 380 S.W.2d at 153 (same); *J. M. Fields of Anderson, Inc.*, 310 F.2d at 563

supermarket Winn-Dixie after the chain demanded enforcement of its covenant, arguing Winn-Dixie failed to provide notice.[64] The court readily dismissed the challenge and held the experienced commercial tenant "had reason to know" or, at a minimum, "the obligation . . . to examine the shopping center's chain of title."[65]

In six cases won by the defendant supermarket, the plaintiff challenged the validity of the actions by bringing at least one antitrust claim under the Sherman Act.[66] To prevail under the Sherman Act, plaintiffs must prove either a Section 1 restraint of trade violation, which requires showing a "contract, combination . . . , or conspiracy, in restraint of trade or commerce," or a Section 2 monopoly power violation, which requires evidence of an act to "monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce."[67] In each of the six cases, the court held that the plaintiff did not meet this burden—either the plaintiff lacked standing or the contested actions did not constitute anticompetitive behavior.[68] In three cases, plaintiffs also brought claims under state antitrust statutes, but those challenges were ultimately unsuccessful.[69] Perhaps the most insightful antitrust analysis offered by a court,

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(same); *Winn–Dixie Stores, Inc*., 964 So. 2d at 265 (notice and direct use); *Spanish Oaks, Inc*., 655 N.W.2d at 400 (restraint on alienation).

64. *Winn–Dixie Stores, Inc*., 964 So. 2d at 263.

65. *Id*. at 266.

66. Saint Anthony–Minneapolis, Inc. v. Red Owl Stores, Inc., 316 F. Supp. 1045 (D. Minn. 1970); Borman's, Inc. v. Great Scott Super Mkts., Inc., 433 F. Supp. 343 (E.D. Mich. 1975); Drabbant Enters., Inc. v. Great Atl. & Pac. Tea Co., 688 F. Supp. 1567 (D. Del. 1988); Nat'l Super Mkts., Inc. v. Magna Tr. Co., 570 N.E.2d 1191 (Ill. App. Ct. 1991); Serfecz v. Jewel Food Stores, 67 F.3d 591 (7th Cir. 1995); Harold Friedman, Inc. v. Kroger Co., 581 F.2d 1068 (3d Cir. 1978).

67. 15 U.S.C. §§ 1–2.

68. *Saint Anthony–Minneapolis, Inc*., 316 F. Supp. at 1048–49 (finding the "retail sale of food products essentially [was] intrastate" and "[i]nterstate commerce which could be adversely affected" was too "incidental or far removed"); *Borman's, Inc*., 433 F. Supp. at 351 (finding property not "so unique that its exclusion from tenancy unreasonably restrain[ed] and denie[d] reasonable market alternatives"); *Drabbant Enters., Inc*., 688 F. Supp. at 1578, 1583 (holding plaintiff failed to show concerted action under Section 1 or likelihood of monopolization under Section 2); *Nat'l Super Mkts., Inc*., 570 N.E.2d at 1195 (finding covenant did "not have a significant impact on competition in the relevant market area"); *Harold Friedman, Inc*., 581 F.2d at 1080 (finding "Kroger did not have sufficient market power to come dangerously close to successful monopolization"); *Serfecz*, 67 F.3d at 598 (holding "[s]uppliers of rental space to grocery retailers" lacked standing to challenge "defendants' alleged monopolistic and anticompetitive activities in the retail grocery market"). Though the court in *Serfecz* did not express an opinion on whether the actions were anticompetitive, it pointed out that

> [i]f the competing grocery stores [had] been precluded from the market and injured by defendants' actions, their injuries would be direct and they could maintain an antitrust action against the defendants. Similarly, grocery consumers could maintain an action if defendants' actions stifled competition allowing defendants to engage in monopoly pricing in the retail grocery market.

Id. (citations omitted).

69. Karam v. H. E. Butt Grocery Co., 527 S.W.2d 481, 484 (Tex. Civ. App. 1975) (upholding a grantor's restrictive covenant which blocks uses "which would create competition with his grantee" as "valid and enforceable"); Bobenal Inv., Inc. v. Giant Super Mkts., Inc., 260 N.W.2d 915, 922 (Mich. Ct. App. 1977) (upholding a restrictive covenant when there was "no danger that the agreement . . . w[ould] tend to create a monopoly of the supermarket business"); Mark–It Place Foods, Inc. v. New Plan Excel

however, is found in *Acme Markets v. Wharton Hardware & Supply Corp.*—one of the two cases in which the challenging store successfully fought off the defendant's motion for summary judgment.[70] In *Acme Markets*, decided in 1995, the court addressed claims brought under both Section 1 and Section 2 of the Sherman Act.[71] Wharton had leased a large plot of land to Giant Food, a supermarket chain with plans to develop a store on the premises.[72] The property was encumbered by a restrictive covenant benefiting Acme, a market located in a different part of town.[73] After Acme filed a complaint seeking to block the new development, Wharton asked the court to invalidate the deed's provisions.[74]

As noted, a Section 1 claim requires showing that a "contract, combination . . . , or conspiracy" between or by defendants—here, Acme and the landlord—harms competition by unreasonably restraining trade in the relevant geographic market.[75] Acme pushed the court to analyze geographic bounds expansively, arguing the relevant market included nearby towns.[76] The larger geographic region, of course, included more supermarkets, bolstering a finding against a restraint of trade. The court, after considering Wharton's expert testimony outlining a smaller land boundary, determined a genuine issue of fact existed with respect to the size of the relevant market and accordingly granted their motion for reconsideration.[77]

Wharton also brought a claim under Section 2 of the Sherman Act, alleging that the use of the restrictive covenant constituted predatory conduct with a specific attempt to monopolize.[78] Here, Wharton argued, Acme had "sufficient market power to create a dangerous probability of achieving monopoly power."[79] The court again assessed the geographic market size but found it unnecessary to choose between the market lines each party had drawn, as both produced the same result: Acme did not present the requisite "dangerous probability" of monopolizing the area because it could only block one competitor from one specific property.[80] The court reasoned Acme could not "increase its market share

Realty Tr., Inc., 804 N.E.2d 979, 995 (Ohio Ct. App. 2004) (upholding a restrictive covenant because it "pertain[ed] only to tenants within that particular shopping center" and did "not affect the rest of the community"). Notably, the court in *Mark–It Place Foods* emphasized "antitrust laws exist for the protection of competition, not competitors." *Id.*

70. 890 F. Supp. 1230 (D.N.J. 1995). The other case in which the plaintiff survived a motion for summary judgment is *Harold Friedman Inc. v. Thorofare Markets Inc.*, where the court found that the "reasonableness of the allegedly anticompetitive conduct by defendants [could] be determined only after" assessing the location and relevant bounds of the geographic market. 587 F.2d 127, 144 (3d Cir. 1978).

71. 890 F. Supp. at 1238–42.

72. *See id.* at 1234–35.

73. *See id.*

74. *See id.*

75. 15 U.S.C. § 1.

76. *Acme Mkts.*, 890 F. Supp. at 1240.

77. *Id.* at 1246.

78. *Id.* at 1241.

79. *Id.*; *see* 15 U.S.C. § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .").

80. *Acme Mkts.*, 890 F. Supp. at 1241–42.

by" employing the restrictive covenant but would "only protect the market share it currently enjoy[ed]."[81] Therefore, as to this claim, the court granted Acme's motion for summary judgment.[82] *Acme Markets* highlights the difficulties plaintiffs face when bringing claims under the Sherman Act—particularly, as will be discussed in Section V.B, the challenge of persuading courts to draw geographic markets with narrow boundaries.

Notably, the opinion also addressed an argument challenging the reasonableness of the covenant under state common law.[83] Although the court remanded the claim, it built upon factors discussed in *Davidson Bros.*: community harm and the need to weigh public policy concerns as part of the reasonableness balancing test.[84] The court stated that "a reasonable fact finder could find that the covenant adversely affects the public interest in the free transferability of land and the sale of goods to consumers in a competitive market" and that the covenant could "limit opportunity for increased grocery store competition."[85] Ultimately, when weighed against the "competing public interests," the court found that there remained a genuine issue of fact as to the reasonableness of the covenant, indicating the potential viability of a public policy argument.[86]

The significance of *Acme Markets* and *Davidson Bros.*, though, becomes most apparent after assessing the plaintiffs' winning arguments in the other two cases invalidating a supermarket's restrictive covenant.[87] Both disputes involved shopping center leases, a factor which fundamentally informed both courts' analyses.[88] In one case, the court refused to permit a "restrictive covenant[] divorced from the real estate [it was] designated to protect"—or, more specifically, covenants divorced from "the interests of the center and [of] those tenants . . . within the center."[89] If a supermarket or its successor operates in the location, its interests "may well be fully served by permitting enforcement of the covenant."[90] But when the space is "no longer being used as a grocery store location, there is no

81. *Id.* at 1242.
82. *Id.*
83. *Id.* at 1242–46.
84. *See id.* at 1245–46.
85. *Id.* at 1245.
86. *See id.* at 1246.
87. *See* Tippecanoe Assocs. II, LLC v. Kimco Lafayette 671, Inc., 829 N.E.2d 512 (Ind. 2005); Berkeley Dev. Co. v. Great Atl. & Pac. Tea Co., 518 A.2d 790 (N.J. Super. Ct. Law Div. 1986).
88. *Tippecanoe Assocs. II, LLC*, 829 N.E.2d at 514–16; *Berkeley Dev. Co.*, 518 A.2d at 796–99.
89. *Tippecanoe Assocs. II, LLC*, 829 N.E.2d at 515. Importantly, while the court in *Tippecanoe Associates* analyzed the impact of the covenant on the landlord, shopping center, and its tenants, it did not fail to address the covenant's broader effect on the public and partly supported its conclusion by noting those effects:

> The issue here . . . is whether it is reasonable to deny the public access to any grocery store in the center . . . . [T]he policy usually justifying covenants in shopping centers—protection and encouragement of investment—is inapplicable here. . . . [T]he law recognizes that public interest may under some circumstances limit the ability of private parties to arrange their affairs. This is such a case.

Id. at 516.
90. *Id.* at 515.

interest" left for a restrictive covenant to preserve.[91] In the other case, the court sided with a plaintiff who argued that a supermarket would "stabilize the economic viability of the shopping center" and "benefit . . . all of the tenants."[92] As part of its reasoning, the court stated that supermarkets are "anchor tenants" that, together with "satellite stores," allow shopping centers to "offer[] a variety of products to permit one-stop shopping."[93] Despite these wins, the fact-specific, narrow context in which both plaintiffs succeeded might limit the applicability of their arguments.

This body of case law highlights the barriers supermarkets face when challenging other supermarkets' use of restrictive covenants. They are playing the same game with the same pieces, each independently motivated to increase market share and produce profit. Against this backdrop, it remains difficult for these chains to raise the argument courts potentially leave open: harm to public interest. But both *Davidson Bros.* and *Acme Markets*, the two outliers, suggest there may be another class of plaintiffs immune to these same obstacles—a class composed of the millions of Americans living in low-income, low-access areas whose local supermarket fled elsewhere and left an abandoned building behind. Together, these two decisions underscore the fact that public policy arguments might be the only widely applicable, viable path forward. Some might argue the injury is too speculative or indirect to pass muster, but as once-tenuous lines between access and health solidify, and as studies furnish concrete facts and figures illustrating extreme price disparities, it becomes evident that communities are the true injured parties—and the parties best suited to contest these harmful restrictions.[94]

IV. TACKLING THE PROBLEM THROUGH THE COURTS: REIMAGINING ANTITRUST MARKETS AND RECALIBRATING PUBLIC POLICY GOALS

Under common law, community members could bring forth compelling public policy-oriented claims challenging the reasonableness of a covenant. But these plaintiffs' potential power—compared to that of supermarket litigants—is especially present in the antitrust setting. The following Sections propose methods and ideas that ultimately aim to push courts to consider issues of public harm more directly, as opposed to examining those concerns as part of an abstract economic analysis. Section IV.A examines two competing views of antitrust law, breaks down the standards courts use to assess restraints of trade, and briefly introduces the concept of relevant market size. This analysis builds a foundation upon which to contemplate the discussion presented in Section IV.B—specifically, the difficulties courts face when defining geographic areas and how community-member plaintiffs could force the drawing of more nuanced boundaries. Finally, Section IV.C considers various ways in which courts and society could

91. *Id.* at 514–15.
92. *Berkeley Dev. Co.*, 518 A.2d at 796.
93. *Id.*
94. *See* Crowe et al., *supra* note 47, at 11.

reimagine the goals underlying the current competition law framework to help remedy its most inequitable flaws.

A. REASONING THROUGH THE RULE OF REASON

There has been much back-and-forth, especially in recent years, over the use of the consumer welfare standard to assess antitrust claims. Under this principle, an act is anticompetitive "only when it harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality."[95] As the standard's proponents see it, antitrust law exists to prevent reduced output, decreased product quality, or higher prices from harming consumers—not to achieve other "multiple goals" (such as promoting fairness, improving income inequality, or preserving the job market).[96] To prove anticompetitive behavior, a party must provide evidence of direct harm to economic efficiency. Critics of this viewpoint argue that an action reducing competition in the market, detached from price or quality considerations, can be unreasonable on its own and attribute the rapid growth of income inequality to "lax antitrust enforcement."[97] These critics advocate for "equality-based priority-setting," which calls on courts to consider those "multiple goals" denounced by the supporters of the consumer welfare standard.[98] This alternative approach, they argue, would do "little violence to the law . . . [and] would simply help return antitrust law to first principles."[99]

The debate is significant, as the opposing sides—due to their differing objectives and analytical frameworks—often disagree about whether particular market behaviors are anticompetitive. Section 1 of the Sherman Act prohibits agreements that unreasonably restrain trade.[100] To assess most potential violations, courts look to the rule of reason, a burden-shifting test that begins with the plaintiff.[101] If the challenging party can show injury to competition, then courts will weigh the anticompetitive effects against the procompetitive benefits, balancing harms to efficiency against potential market innovation or development.[102] Aside from the rule of reason, courts can also find that restraints are per se unreasonable if they "always or almost always tend to restrict competition and decrease output."[103] In the context of supermarkets, some commentators suggest restrictive covenants

95. Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995).

96. Christine S. Wilson, Comm'r, U.S. FTC, Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get, Keynote Address at George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads? 9 (Feb. 15, 2019) (transcript available at https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf [https://perma.cc/D2SP-2266]).

97. Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 238 (2017).

98. Eric A. Posner & Cass R. Sunstein, *Antitrust and Inequality*, 2 AM. J.L. & EQUAL. 190, 207 (2022).

99. *Id.*

100. 15 U.S.C. § 1.

101. *See, e.g.*, Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018).

102. *See, e.g.*, *id.*; Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

103. *Am. Express Co.*, 138 S. Ct. at 2283 (quoting Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988)).

meet this threshold. One writer analyzing Stop & Shop's strategy described the anticompetitive effect as

> inherent in the language of its deed restrictions. . . . It is self-evident from these restrictions that Stop & Shop's tactic is solely and wholly intended to hinder competition. The actual anticompetitive effect of these restrictions is evinced by Stop & Shop's continual use of them. If the restrictions failed at deterring competition, [it] would not go to the costly lengths of employing them.[104]

From an economic development perspective, restrictive covenants entice supermarkets to enter a region because they can be deployed to fend off competition. The underlying reasoning can be analogized to the rationale behind the protection of patents.[105] While patents block competition, they "are deemed socially beneficial precisely because the prospect of a temporary monopoly itself has the capacity to induce innovation and technological development."[106] In the case of restrictive covenants, that same exclusion from competition can promote development in a different sense—economic development.[107] Thus, in some situations, it may be "reasonable to treat restrictive lease covenants, like patents, as legitimate means of acquiring temporary market power."[108] But this "temporary monopoly" can only go so far. In the case of Stop & Shop, the chain voluntarily paid millions of dollars under a lease agreement to block competition from Walmart, and "[t]he company would not have done so if it had not valued the suppression of Walmart as worth more than the money that it had paid."[109] Some commentators argue this "value" to supermarkets is the inherent reduction in output by other competitors, and this harm to efficiency constitutes per se unreasonableness under the more stringent standard.[110]

Still, even if not per se unreasonable, under the more flexible rule of reason, concrete statistics show the negative impacts on low-income communities, revealing flaws in the system.[111] Those flaws are not felt uniformly, though, and that asymmetry is the crux of the debate over what constitutes anticompetitive behavior. As explained, the consumer welfare standard places great emphasis on price and quality.[112] But due to variances in mobility, the loss of a grocery store does not burden every community member equally. For wealthier, more mobile community members, these restrictive covenants have little impact on either of

104. Karissa Kang, *How to Stop Stop & Shop's Anti-Competitive Land Acquisition Tactic*, *in* CONFERENCE COMPENDIUM: REFORMING AMERICA'S FOOD RETAIL MARKETS, *supra* note 32, at 114, 118.

105. Jay Conison, *Restrictive Lease Covenants and the Law of Monopoly*, FRANCHISE L.J., Winter 1990, at 3, 6.

106. *Id.*

107. *See id.*

108. *Id.*

109. Kang, *supra* note 104, at 118.

110. *See id.* at 118–19.

111. *See, e.g.*, ECON. RSCH. SERV., *supra* note 52, at 42–47.

112. *See, e.g.*, Posner & Sunstein, *supra* note 98, at 195.

those measures; this demographic can travel the extra distance to another supermarket with low prices and high-quality produce. But because many low-income residents depend on walking or public transportation, they live within a wildly different market.[113] For this group, the lack of an accessible grocery store inevitably leads to a reliance on small corner or convenience stores, resulting in a tangible rise in prices and a dip in quality—the type of community harm described in *Davidson Bros.*[114] Restrictive covenants reduce competition in the marketplace, but finding conduct anticompetitive depends largely on how the relevant market is defined and which consumers are considered. In turn, these choices hinge on the court's analytical lens—the side of the debate—through which it views the goals of antitrust.

B. REFORMING THE HAPHAZARD DELINEATION OF GEOGRAPHIC MARKETS

The relevant geographic area considered often determines outcomes under both Sections 1 and 2 of the Sherman Act—after all, a market's boundaries dictate the ultimate level of and effect on competition.[115] Thus, it is during this defining stage of antitrust analysis that community member plaintiffs, unlike supermarket challengers, could potentially precipitate change by offering relevant data to help center the analysis on more nuanced factors.

Delineating market lines has been a source of tension in the courts.[116] In many situations, only limited information exists.[117] In others, even with adequate and detailed data, courts and practitioners must trudge through a murky, multifactorial analysis.[118] Relevant considerations include customers' willingness or ability to substitute products, suppliers' willingness or ability to serve customers, language, custom and familiarity, and transportation costs—costs sometimes (but sometimes not) measured in dollars or time or by practicability.[119] Given the complexity and interaction of these data, courts often rely heavily on expert testimony and analysis.[120] The nature of the map-drawing exercise raises two primary concerns. First, the lack of identifiable guardrails creates scenarios ripe for imprecision. This has led some academics to argue the rule of reason jumps the bounds of the rule of law.[121] They point to the complicated analyses required when

113. *See* DUTKO ET AL., *supra* note 43, at 13.

114. Davidson Bros. v. D. Katz & Sons, 643 A.2d 642, 645 (N.J. Super. Ct. App. Div. 1994); *see* Lee, *supra* note 54, at 245–46.

115. *See* Shawn W. Ulrick, Seth B. Sacher, Paul R. Zimmerman & John M. Yun, *Defining Geographic Markets with Willingness-to-Travel Circles*, 28 SUP. CT. ECON. REV. 241, 241–42 (2020).

116. *See, e.g.*, Acme Mkts., Inc. v. Wharton Hardware & Supply Corp., 890 F. Supp. 1230, 1239–40 (D.N.J. 1995).

117. Ulrick et al., *supra* note 115, at 244–45.

118. *See* U.S. DOJ & FTC, HORIZONTAL MERGER GUIDELINES § 4.2, at 13 (2010) (listing potentially relevant factors).

119. *See, e.g.*, *id.*; United States v. Grinnell Corp., 384 U.S. 563, 576 (1966) (holding that the relevant market "reflects the reality . . . in which [defendants] built and conduct their business").

120. *See, e.g.*, McWane, Inc. v. FTC, 783 F.3d 814, 829 (11th Cir. 2015).

121. Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2569 (2013); *see also supra* notes 101–02 and accompanying text.

defining metrics like the market, and then ask: "Is antitrust too complicated for generalist judges?"[122]

The second issue, perhaps a more perilous concern, is the uniformity among consumers that the test presupposes. Any geographic market includes wide swaths of the social and economic spectrums. When conceptualizing issues like transportation costs, should courts look to how they impact the majority of consumers, or the average consumer, or the most injured consumer? Should they parse differences in income or mobility? Access to public transportation? And what about the availability of public benefits like the Supplemental Nutrition Assistance Program (SNAP) at a particular store? How should courts compare this method of payment to the universal acceptance of the dollar? Defining the relevant geographic market is a fickle dance, and courts shuffle unpredictably in a world with enormous consequences. If case law is any indication, though, it should be apparent that the hands that draw the boundaries largely exclude from the definition of the "average consumer" the nuances applicable to low-income populations.[123]

This problem is exacerbated by the fact that the burden imposed on low-income populations is often masked or hidden from those with the power to decide; to conduct a large part of their analysis, courts rely on information and experts the parties supply.[124] Even though the challenging supermarket usually prefers a narrower market definition, business considerations—not concerns about community harm—drive its ideal geographic map. Courts consider the consumer, but to secure more accurate and representative markets, impacted community members need an active voice. Influence during this process, which would force courts to confront these harms more directly, exemplifies the types of potential benefits that could be achieved by recasting community members as antitrust plaintiffs.

C. REFOCUSING ANTITRUST'S LENS THROUGH ADDITIONAL REMEDIES

As discussed in Section IV.B, courts might place more emphasis on public harm in suits brought by community member plaintiffs, but avenues for improvement exist even in the context of supermarket versus supermarket litigation. It would be more difficult for plaintiff supermarkets, as producers or suppliers in the market, to argue for principles of equality and well-being over consumer welfare-centered efficiency, but some critics of the current legal framework argue they should not have to make that argument at all—those principles should be part of the system. To achieve this, formulating new approaches with an eye toward equity could help broaden and reshape antitrust law. Influential legal scholars Eric Posner and Cass Sunstein have proposed an "ad hoc" method that

122. Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & ECON. 1, 1 (2011) (alterations omitted).

123. *See, e.g.*, Acme Mkts., Inc. v. Wharton Hardware & Supply Corp., 890 F. Supp. 1230, 1240, 1246 (D.N.J. 1995).

124. *See, e.g.*, *id.* at 1240.

involves spot-treating issues by ensuring leeway to consider inequality as part of the Sherman Act framework:

> [I]magine that the supermarket would have stayed in the poor neighborhood if restrictive covenants were not available. The result would be that the wealthier suburban consumers would be forced to pay higher prices (or travel to more distant supermarkets), while the poorer inner-city residents would retain access to fresh food. Efficiency in dollar terms is down, but welfare in human terms is up. . . . [A]gencies could apply higher standards to . . . anticompetitive actions when they directly affect pricing for low-income people. The number of such cases would likely be low, but they could arise in a range of circumstances, when the sellers in question supply basic necessities [such as] food . . . .[125]

This argument, directed at agencies but easily expanded to courts, relies on utilitarian principles to defend against efficiency losses; on the other side of those losses are distributive gains.[126] Some point to the possible harms of injecting subjective value judgments into the delineation of market boundaries, or to the uncertainty among market players themselves.[127] But is the current process any less subjective or any more certain? In many cases, it is neither—and also conveniently excludes an entire group of marketplace participants.

Other academics suggest making room for "internal provisions" within the current antitrust framework, advocating for the addition of a fairness factor like the one found in the European Union's competition regulations.[128] In this sense, considerations of equality would be woven into the fabric of the law. When defining the scope of the geographic market, a size that would result in harmful and inequitable effects could be redrawn on that basis alone, or as part of a set of parameters addressing nuanced impacts on not just the "average consumer," but on all types of residents participating in the marketplace.

As a final note, equitable concerns have long been part of common law development, and courts often find themselves—for better or for worse—weighing social, political, and economic interests. But to complement this common law call, as Judge Learned Hand remarked in *United States v. Associated Press*, a "legislative warrant" exists in antitrust:

> Congress has incorporated into the Anti-Trust Acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case. . . . [I]t has left these particular controversies to the courts, where they have been from very ancient times.[129]

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125. Posner & Sunstein, *supra* note 98, at 205.

126. *Id.* at 202.

127. Ariel Ezrachi, Amit Zac & Christopher Decker, *The Effects of Competition Law on Inequality—an Incidental By-Product or a Path for Societal Change?*, 11 J. ANTITRUST ENF'T 51, 54 (2023).

128. *Id.* at 53–54.

129. 52 F. Supp. 362, 370 (S.D.N.Y. 1943).

Universally applying considerations of fairness, even if only as one element of the assessment, seems not only judicially workable but long overdue. In both Congress and in the courts, "[t]he resulting compromises so arrived at are likely to achieve stability, and to be acquiesced in: which is justice."[130]

V. TOP-DOWN AND BOTTOM-UP ALTERNATIVES AND WEAKNESSES IN THE SYSTEM

While challenging restrictive covenants in the courts remains a viable path toward progress, this method would be akin to a gradual chipping away at their power and their present destructive effects. Therefore, to supplement litigation, a push should also be made to grease other parts of the legal system—particularly, rulemaking and legislative mechanisms—that are capable of moving the wheels toward a more equitable marketplace. The two-tiered dynamic of the issue sets forth a peculiar ground on which to consider the most efficient and effective strategies. The actors—large supermarket chains—operate on a national level. Their actions are governed in various ways by different federal agencies.[131] The consumers, however, occupy a hyperlocal place in society. Compared to the food industry's homogenous nature, those on the receiving end live in economically and socially distinct pockets across the country. This dichotomy presents a regulatory opportunity to explore two separate approaches. The first Section below addresses a possible top-down solution implemented through rulemaking by the Federal Trade Commission (FTC). The second Section offers a look at tackling the problem bottom-up by focusing on state and local statutes as piecemeal but promising remedies.

A. THE RULEMAKER AS RESTRICTIVE COVENANT BREAKER

Shortly after taking office, President Biden issued an executive order to promote competition in the American economy.[132] The directive included a section under "further agency responsibilities" related to noncompete clauses:

> [T]he Chair of the [Federal Trade Commission] is encouraged to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority . . . to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.[133]

The action came after a change in FTC leadership just a few weeks prior, when Biden named Lina Khan to head the Agency.[134] Khan has plainly stated her

130. *Id.*

131. HOUSE BUDGET COMM. DEMOCRATIC STAFF, A VISIT TO THE GROCERY STORE: HOW THE U.S. GOVERNMENT IMPACTS A ROUTINE TRIP TO THE MARKET 1–4 (2019), https://democrats-budget.house.gov/sites/democrats.budget.house.gov/files/documents/A%20Visit%20To%20The%20Grocery%20Store.pdf [https://perma.cc/XR9E-HQEB].

132. Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 9, 2021).

133. *Id.* at 36992.

134. *See* David McCabe & Cecilia Kang, *Biden Names Lina Khan, a Big-Tech Critic, as F.T.C. Chair*, N.Y. TIMES (June 17, 2021), https://www.nytimes.com/2021/06/15/technology/lina-khan-ftc.html.

stance against the traditional consumer welfare standard.[135] Instead, she supports the opposing view discussed earlier, which analyzes anticompetitive conduct within a broader framework beyond its particular impacts on efficiency, price, and quality.[136] Khan believes the FTC's end goal should encompass protections against "lower income and wages for employees, lower rates of new business creation, lower rates of local ownership, and outsized political and economic control in the hands of a few," and she has advocated for the use of rulemaking to effectuate those priorities.[137]

On January 5, 2023, nearly eighteen months after Biden issued his executive order, Khan turned the President's encouragement into action.[138] The FTC issued a notice of proposed rulemaking, "based on a preliminary finding that noncompetes constitute an unfair method of competition," that would ban employers from subjecting employees to these provisions.[139] At the outset, it is easy to see how the Agency's push to prohibit workplace noncompetes might kick-start an effort to crack down on other restrictions on competition—for example, the restrictive covenants used by supermarkets. But before addressing the relevance to anticompetitive behavior in the context of real property, it is important to note the ongoing debate over the FTC's authority to take these actions.

Though the Agency cannot issue legislative rules to carry out provisions of the Sherman Act, many (including Khan) believe the Agency derives other rulemaking power from Sections 5 and 6 of the FTC Act of 1914, which together make it illegal to engage in "unfair methods of competition" and allow the FTC "to make rules and regulations for the purpose of carrying out the provisions of this subchapter."[140] Several years after the D.C. Circuit upheld the Agency's rulemaking authority in *National Petroleum Refiners Ass'n v. FTC*, finding the statutory language "as clear as it is unlimited," Congress enacted two acts in 1975 and 1980 (collectively called the "Magnuson-Moss Procedures"), adding new procedural requirements "far beyond" the Administrative Procedure Act's (APA) mandates.[141] These changes—including a mandatory advance notice of proposed rulemaking, hearings, and more extensive regulatory analyses—significantly

135. Richard J. Pierce, Jr., *Can the Federal Trade Commission Use Rulemaking to Change Antitrust Law?* 1 (George Wash. Legal Stud., Research Paper No. 2021-42, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3933921 [https://perma.cc/5UZ6-UC9S].

136. *See* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 717 (2017).

137. *Id.* at 791; *see also* Lina M. Khan, *Section 5 in Action: Reinvigorating the FTC Act and the Rule of Law*, 11 J. ANTITRUST ENF'T 149, 152 (2023) ("Congress instead tasked the FTC with concretizing the meaning of 'unfair methods of competition' through . . . rulemaking.").

138. *See* Press Release, FTC, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition [https://perma.cc/GX3P-P93D].

139. *Id.*

140. 15 U.S.C. §§ 45, 46(g); *see* Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357 app. at 377–78 (2020).

141. 482 F.2d 672, 693, 698 (D.C. Cir. 1973); Jeffrey S. Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979, 1982 (2015).

expanded the time it took to issue new rules.[142] Since the 1980 Act, the Agency has not issued any new legislative rules using the power of Section 5.[143] Despite Congress's actions after the *National Petroleum Refiners* decision, Khan continues to cite the case in support of the FTC's authority.[144] Critics of the recently proposed noncompete rule, however, find it unlikely that today's Supreme Court would decide a similar case in the same way, pointing to trends reining in both agency power and the deference granted to their statutory interpretations under *Chevron* and the ascendant major questions doctrine.[145]

Nevertheless, there remains a belief, even among the staunchest naysayers, that the FTC might find success in the labor and employment arena—specifically, by issuing rules targeting unreasonable noncompete provisions such as those cited by President Biden and at issue in the new proposed rule.[146] As scholar Richard Pierce, Jr., who otherwise believes the Agency "probably lacks" this power under Section 5, points out, "[i]t is easy to document the adverse effects of non-compete clauses," and the Agency "would have no problem defending such a rule by referring to solid empirical evidence that non-compete clauses . . . cannot have any beneficial effect when they are contained in employment contracts applicable to low paid employees."[147]

If the FTC does have the authority and finds success in implementing these rules in the workplace context, it might offer an optimistic path forward to ending supermarkets' unrelenting grip on communities across the country. Restrictive covenants in deeds operate in functionally similar ways to noncompete clauses in employment contracts, from empirically proven evidence of direct harm to the hyperlocal impacts when defining market boundaries.

Khan also argues for using rulemaking as a supplement to adjudication, especially in areas "private litigation is unlikely to target" because of reduced bargaining power, insufficient resources, and collective action problems.[148] Tackling the issue of real property restrictive covenants in the courts presents many of the

142. *See* Lubbers, *supra* note 141, at 1982–85; Pierce, Jr., *supra* note 135, at 7.

143. Khan, *supra* note 137, at 149.

144. *See* Chopra & Khan, *supra* note 140, app. at 378–79.

145. Pierce, Jr., *supra* note 135, at 17. The court in *National Petroleum Refiners* afforded broad deference to the FTC's statutory interpretation, 482 F.2d at 698, foreshadowing the Supreme Court's move eleven years later in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984). In *Chevron*, the Court deferred to a federal agency's interpretation of an ambiguous or unclear statute. *Id.* at 843. Khan "has identified the potential availability of *Chevron* deference for a statutory interpretation," but as Pierce, Jr. notes, "[d]uring the last few years, . . . the Supreme Court has severely qualified the strength of *Chevron* deference." Pierce, Jr., *supra* note 135, at 17; *see also* KATE R. BOWERS, CONG. RSCH. SERV., IF12077, THE MAJOR QUESTIONS DOCTRINE (2022) ("[I]n a number of decisions, the Supreme Court has declared that if an agency seeks to decide an issue of major national significance, its action must be supported by clear congressional authorization. Courts and commentators have referred to this doctrine as the major questions doctrine . . . . The Supreme Court never used that term in a majority opinion prior to 2022, but the doctrine has recently become more prominent." (emphases omitted)).

146. *See, e.g*., Pierce, Jr., *supra* note 135, at 14–16.

147. *Id*. at 15–16, 23.

148. Chopra & Khan, *supra* note 140, at 373–74.

same challenges posed by attempting to litigate employers' use of workplace noncompete agreements. Adjudication produces isolated successes and is not likely to generate the needed incentives for other similar actors to end their own anticompetitive behavior.[149] Khan believes notice-and-comment rulemaking would inject a level of transparency and participation into the process and would also provide more predictability to antitrust enforcement.[150] Relying solely on adjudication produces a "speculative, possibly labyrinthine, and unnecessar[ily]" cumbersome system.[151] Most saliently, this idea is true whether it relates to striking down anticompetitive employment agreements or invalidating anticompetitive real property covenants.

Of course, the FTC could also rely on another arrow in its quiver and issue interpretive rules outlining statements of policy. These nonbinding rules would likely lack the force needed to reshape any of the underlying flawed processes, as the Agency cannot control through its own interpretations those of the Department of Justice or the courts.[152] Still, the trade-off of legal teeth for speed might offer some temporary relief and begin to set the stage for more wide-sweeping changes when (or if) the Agency wins "the case for 'unfair methods of competition' rulemaking."[153] In this way, the FTC could make its priorities known. Scholars Posner and Sunstein argue, in line with Khan, that the highest level of scrutiny should apply first to markets where anticompetitive behavior is felt most severely by low-income groups—markets such as agriculture and health care—and to industries that produce goods "essential to basic well-being."[154] Strong arguments could be (and have been) made that access to food falls squarely in this category.[155]

B. PROTECTING PIECE-BY-PIECE—OR PARCEL-BY-PARCEL

As the federal government has begun to turn more attention to restrictive covenants and anticompetitive behavior, so, too, have many states.[156] Frustrated with the body of common law traditionally governing employer-mandated noncompete agreements, legislatures around the country have stepped in to pass statutes modifying the requirements and, in some cases, the legality of these provisions. In early 2022, as many as thirty states had enacted such laws, a rapid uptick from just a decade ago and evidence of "an increasing hostility towards restrictive covenants."[157] These new regulations run the gamut—from imposing criminal

149. *See id*. at 373.

150. *Id*. at 358–59, 374.

151. *Id*. at 359 (quoting Richard D. Cudahy & Alan Devlin, *Anticompetitive Effect*, 95 MINN. L. REV. 59, 87 (2010)).

152. *See* Richard J. Pierce, Jr., *The Rocky Relationship Between the Federal Trade Commission and Administrative Law*, 83 GEO. WASH. L. REV. 2026, 2034 (2015).

153. Chopra & Khan, *supra* note 140, at 357 (alterations omitted).

154. Posner & Sunstein, *supra* note 98, at 200.

155. *See, e.g*., *id*.

156. Mead & Sayers, *supra* note 21.

157. *Id*.

penalties or increased fines to stipulating a minimum annualized rate of earnings.[158] And, as illustrated in the FTC context, it is recognizable that this renewed focus on cutting back the anticompetitive behavior of employers could lay the groundwork for states to tackle other breeds of prohibitive covenants, like those used by supermarkets in cases of real property. If a current trend exists among the states, it is toward more regulation of these practices, not less.

The most direct and successful attacks on national grocery chains have, somewhat paradoxically, come from the most hyperlocal players.[159] There is a reason behind this pattern: it is at this level that decisionmakers have first-hand exposure to the problems created by restrictive covenants—and in many cases, have a personal stake in the battle. In 2018, after going through two hostile negotiations with Safeway over restrictive covenants in separate District of Columbia wards (with one negotiation, as mentioned, resulting in a $3.6 million payment to the chain), the D.C. Council enacted ordinances to stop an "owner or operator of a grocery store or a food retail store" from imposing restrictive covenants when they prohibit "the use of the real property as a grocery store or a food retail store."[160]

The legislative history of the ordinance, replete with language echoing refrains from *Davidson Bros.*, stretches nearly four years and provides ample evidence of the Council's reasoning and intent:

> Restrictive covenants are a common practice in the grocery retail industry and are used by grocery operators as a way to protect profits and combat competition. However, for consumers these practices contribute to the creation of food deserts or at the very least fewer food options. . . . [T]his bill allows for the market to better meet the demand for healthy food options across the District, while encouraging a more equitable local food market.[161]

During those discussions, only two grocery stores served the District's Ward 7, a predominantly Black and low-income area; the residents living just one ward over, where household income is nearly twice that of Ward 7, had access to ten.[162]

Three other cities—Chicago, Illinois; Madison, Wisconsin; and Bellingham, Washington—have also chosen not to wait for direct federal or state action and have passed similar ordinances to protect local communities from supermarkets

158. *Id.*

159. *See, e.g.*, COMM. OF THE WHOLE, COUNCIL OF D.C., REPORT ON BILL 22-60, "GROCERY STORE RESTRICTIVE COVENANT PROHIBITION ACT OF 2018" 1–2 (2018); *see also* Anderson, *supra* note 12 (describing the deal D.C.'s Mayor Bowser struck with Safeway to get rid of a restrictive covenant).

160. D.C. CODE § 2–1212.61; *see* Anderson, *supra* note 12.

161. COMM. OF THE WHOLE, *supra* note 159, at 2–3.

162. Adele Peters, *How Closing Grocery Stores Perpetuate Food Deserts Long After They're Gone*, FAST CO. (Nov. 27, 2017), https://www.fastcompany.com/40499246/how-closing-grocery-stores-perpetuate-food-deserts-long-after-theyre-gone [https://perma.cc/V9AG-MKVU].

that buy up available land and let it remain vacant.[163] Still, in some of the areas most impacted, low-income and low-access groups must bear the cost of inadequate safeguards. And while this local approach can often achieve results somewhat faster than litigation or the issuance of federal rules, it is not immune to a separate set of challenges.[164] Many of the local ordinances do not apply retroactively and thus provide little relief in areas where a restrictive covenant has a decades-long life span.[165] It also leaves large and unpredictable gaps in regulation, a consequence of any piecemeal solution to a nationwide problem. Yet, until more is done at the state and federal levels—or different plaintiffs get through the courtroom door—local officials should surely continue to look out for their neighbors (and themselves).

CONCLUSION

Restrictive covenants have held property—and people—frozen in time for decades. Although they can serve valuable purposes, from incentivizing risk and innovation to ensuring companies' survival in the marketplace, the economic gains and downstream benefits to society must be placed in a broader context and analyzed under a complete framework—a framework that includes all kinds of consumers and slices of American life. When it becomes clear through direct and concrete evidence that the scale is tipping inequitably in one direction—that the guardrails set up to maintain a robust and lively market are instead leaving that same market "scorched"—alarm bells should ring indicating a wrinkle in the system. Those bells are ringing, but only some can hear their toll.

How do we quiet the noise? It might first require letting it echo in the courts. Supermarkets have traditionally challenged other competitors' use of restrictive covenants to little avail. They have brought claims under common law, alleging lack of notice or inconsistencies in the parties' intent. Others have pursued the antitrust route and have tried to establish sufficient injuries to markets or monopoly power constituting violations of the Sherman Act. It is compelling, though, that a notable victory amid a long line of failures hinged on issues of public policy. In *Davidson Bros.*, the court found that the overwhelming "personal hardship caused by the withdrawal of a supermarket" rendered the restrictive covenant "unreasonable and unenforceable."[166] The most persuasive group—the one the court found the need to protect—was not the one before the judge. Instead, it was the one directly facing that hardship. But unlike the *Davidson Bros.* court, in disputes between two supermarkets, many courts have sidestepped concerns

163. BELLINGHAM, WASH., MUN. CODE § 20.10.027; CHI., ILL., MUN. CODE § 17-1-1004; MADISON, WIS., CODE OF ORDINANCES § 28.147.

164. *See* Chopra & Khan, *supra* note 140, at 368 (comparing the relative speeds of APA rulemaking and case-by-case litigation).

165. Kang, *supra* note 104, at 120; *see, e.g.*, Kuttner, *supra* note 7 (describing restrictive covenants lasting thirty and ninety-nine years); Holt, *supra* note 15 (describing restrictive covenants lasting decades).

166. Davidson Bros. v. D. Katz & Sons, 643 A.2d 642, 648 (N.J. Super. Ct. App. Div. 1994).

about community harm. So, what if the community brought the case, removing any cover to skirt around the issue? Here, *Davidson Bros.* illustrates the expanse of possibilities if that feat is achieved.

Ultimately, each step of the analysis—from determining reasonableness to drawing the bounds of a geographic market under antitrust law—is infused with a dose of public policy, whether courts or critics admit to such a subjective undercurrent. It is hard to deny that multifactor tests pinned to the "average consumer" involve some aspect of deciding who embodies that "average"—and it is even harder to refute the premise that distinct marketplace players tug at opposite ends of antitrust's protective mechanisms. When a grocery chain challenges another grocery chain, it is easy for courts to account for the interests of participants on one of those ends. When a low-income, low-access community member must pay double for a loaf of white bread, bringing those receipts to the bench could force recognition of the other.

Still, a high hurdle comes with those promises. Litigation is slow. Knowledge, access, and resources remain scarce. In a shifting regulatory environment, one in which a growing hostility toward restrictive covenants has emerged, a top-down approach to ending some forms of anticompetitive practices may find success. Concededly, though, while the regulatory players vow to enact sweeping changes, the federal judicial gatekeepers stand ready (and likely) to strike them down. Thus, the onus may fall on state—or, as has been the case, local—governments to protect their own cities and towns from the brute force and hazardous power of nationwide supermarket chains. Because, in the end, actors with the upper hand have wielded restrictive covenants as a weapon for decades. At their genesis, these covenants were overtly antiminority. Today, they are anticompetitive, but it is not hard to draw a parallel line between the communities who must bear the consequences. There are only so many times a superficial scar can be cracked from the outside before it rips apart. And more must be done to stop the blows—to heal the wound.