

Food Deserts, Racism, and Antitrust Law

Christopher R. Leslie*

what man calls civilization
always results in deserts

- Donald Robert Perry Marquis

Millions of Americans live in food deserts, a term that describes urban neighborhoods and rural regions where residents do not have access to healthy, affordable food. Food deserts are neither natural nor inevitable. Many food deserts result from the deliberate choices of supermarkets to maximize their profits by shifting resources to suburban consumers while affirmatively blocking other grocery stores from operating in food deserts. This Article examines the history, business logic, and illegality of these corporate decisions.

In many ways, food deserts are a tale of two covenants: racial covenants and anticompetitive covenants. During the era of white flight, racial covenants and their lingering effects prevented Black families from moving to the suburbs. Supermarkets followed white families out to the new communities. Not content to simply expand into new locations in the suburbs, many supermarket chains abandoned their inner-city stores. When they sold these locations, many supermarkets imposed scorched-earth covenants in their deeds of sale that forbade any future owner from operating or allowing a supermarket at that location. These anticompetitive covenants prevented any other grocery store from serving the families left behind. This one-two punch of hemming nonwhite families into certain neighborhoods and then preventing supermarkets from existing in these same neighborhoods devastated the physical health of racial minorities and the economic health of their communities.

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This Article explains why food deserts are an antitrust problem. Many food deserts were caused, in part, by anticompetitive covenants and other market failures. Despite this, courts fail to appreciate the antitrust significance of food deserts because judges define markets too broadly based on the attributes of an “average” consumer: wealth and mobility. Consequently, the residents of food deserts are effectively denied the protection of antitrust law.

Courts should treat food deserts as relevant geographic markets for antitrust purposes. Doing so is consistent with antitrust principles and would enable valid antitrust claims to proceed and to invalidate the anticompetitive covenants that create and perpetuate food deserts. Antitrust officials can also leverage the power that they possess during the merger review process to negotiate enforceable promises by supermarket chains to waive enforcement of their restrictive covenants. Applied correctly, antitrust law is a valuable weapon in a larger arsenal of policy prescriptions to remedy the problem of hunger and poor nutrition in America’s food deserts.

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INTRODUCTION

Life is hard in a desert. Water is scarce and vegetation sparse. While many animals have adapted to these conditions, this scarcity—combined with the heat of day and the chill of night—makes deserts inhospitable for most people. Writers and poets often use the desert as a metaphor for bleak landscapes and lives.¹

Scholars use this desert metaphor to describe urban neighborhoods and rural regions where residents do not have access to healthy, affordable food. Denominated as “food deserts,” these are areas of food scarcity. Unable to access healthy, affordable food, residents of food deserts consume unhealthy fast food because it is cheap and accessible. Unhealthy food temporarily relieves hunger but at a high cost to long-term well-being. Life in a food desert is tough, often grim.²

“Desert” is a flexible word. As a noun, it refers to the barren landscape. As a verb, “desert” means “[t]o leave or quit with an intention to cause a permanent separation; to forsake utterly; to abandon.”³ To understand and solve the problem of food deserts, one must appreciate both parts of speech.

This Article observes food deserts through the lens of antitrust law and policy. Doing so exposes how food deserts are neither natural nor inevitable. They result from the deliberate choices of supermarkets to maximize their profits by shifting resources to suburban consumers while affirmatively blocking other grocery stores from operating in food deserts. This Article examines the history, logic, and illegality of these corporate decisions.

Part I discusses “desert” as a noun. Millions of Americans live in food deserts. When low-income households lack transportation and live beyond walking distance to the nearest supermarket, families often find themselves unable to purchase healthy food due to unavailability and high prices. Consequently, the residents of food deserts suffer adverse health outcomes. Moreover, the absence of supermarkets has ripple effects that depress the entire local economy.

1. See, e.g., PAUL BOWLES, *THE SHELTERING SKY* (1949); PERCY SHELLEY, *OZYMANDIAS* (1818).

2. See N.Y. L. SCH. RACIAL JUST. PROJECT, *UNSHARED BOUNTY: HOW STRUCTURAL RACISM CONTRIBUTES TO THE CREATION AND PERSISTENCE OF FOOD DESERTS* 5 (2012) [hereinafter *UNSHARED BOUNTY*], http://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1002&context=racial_justice_project [https://perma.cc/GG68-VG47] (“Food is life. It is necessity and pleasure, family and community, culture and power. When plentiful and freely shared, food creates healthy communities and strong societies; when scarce or unfairly distributed, it damages and, in time kills, spirit, body, family, community.”).

3. *Scot Properties, Ltd. v. Wal-Mart Stores, Inc.*, 138 F.3d 571, 573 (5th Cir. 1998) (quoting *Desert*, *BLACK’S LAW DICTIONARY* 446 (6th ed. 1990)); see HAW. REV. STAT. § 711-1109.7 (2018) (“[D]esert’ means to leave without the intent to return.”).

Part II discusses “desert” as a verb. Supermarkets deserted many of America’s inner cities as part of the disastrous process of white flight.⁴ Through school and highway construction, as well as mortgage subsidies, governments encouraged the exodus of white families from cities to suburbs. Supermarkets soon followed, vacating their inner-city locations. Black families, however, were prevented from moving to the suburbs—and closer to supermarkets—first because of racial covenants and then by discriminatory loan practices. These families were left behind—deserted—in neighborhoods without supermarkets or any sellers of healthy, affordable food.

Part III explains how, in many cases, food deserts did not evolve naturally or accidentally. They were created intentionally, by design. When supermarkets abandoned their inner-city locations, many of them imposed scorched-earth covenants in their deeds of sale that forbade any future owner from operating or allowing a supermarket at that location. In some areas, supermarkets inserted these covenants into subleases (rather than deeds of sale) to achieve this same result. Additionally, supermarkets sometimes “went dark,” the industry term for a supermarket shuttering a store location that it owns but leaving it vacant so that no other food seller could occupy the space.

In many ways, food deserts are a tale of two covenants: racial covenants and restrictive covenants. During the era of white flight, racial covenants and their lingering effects prevented Black families from moving to the suburbs. Supermarkets followed white families out to the new communities. Not content to simply expand into new locations in the suburbs, many supermarket chains abandoned their inner-city stores. Upon exiting their old haunts, they used restrictive covenants to prevent any other large grocery store from serving the nonwhite families left behind. This one-two punch of hemming nonwhite families into certain neighborhoods and then preventing supermarkets from existing in these same neighborhoods devastated the health of racial minorities and their communities.

Part IV explains why food deserts represent an antitrust problem. Many food deserts were caused, in part, by restrictive covenants, weak merger enforcement, and other market failures. Scorched-earth covenants, in particular, are inherently anticompetitive and create market power that makes inner-city residents vulnerable to the twin antitrust harms of inflated prices and inadequate supply. Despite this, courts fail to appreciate the antitrust significance of food deserts. Federal courts define geographic markets too broadly based on the attributes of an “average” consumer: wealth and mobility. Most importantly, because judges incorrectly assume that all consumers have cars, those judges fail

4. When writing about social issues, terminology can be tricky because it changes over time. Phrases like “food deserts” and “inner city” are commonly used by courts and scholars, but they are also contested and may become dated or even offensive to some people. As of this writing, however, this terminology is the most accepted and neutral.

to define relevant geographic markets properly. The residents of food deserts are thereby effectively denied the protection of antitrust law.

Part V explains how antitrust law should apply in the context of food deserts. After explaining why facilitating the return of supermarkets into food deserts is a proper policy goal, this Part argues that food deserts are relevant geographic markets for antitrust purposes. Defining geographic markets in a manner that recognizes the commercial realities of food deserts should enable valid antitrust claims to proceed. Antitrust officials can also leverage their power during the merger review process to negotiate enforceable promises by supermarket chains to waive enforcement of their restrictive covenants. Finally, Part V describes the role of antitrust law as but one weapon in a larger arsenal of policy prescriptions to remedy the problem of hunger in America's food deserts.

I.

FOOD DESERTS IN AMERICA

Food deserts are a function of access,⁵ which is generally determined by proximity to supermarkets.⁶ The U.S. Department of Agriculture (USDA), for example, defines urban food deserts as low-income areas in which at least one-third of the residents live more than one mile from the nearest supermarket.⁷ Although no single agreed-upon definition of food deserts exists,⁸ the distance to affordable healthy food is a critical variable for assessment.⁹ Transportation access is a major driver in determining where low-income consumers shop for

5. See UNSHARED BOUNTY, *supra* note 2, at 5 (“In general, even though researchers measure food deserts in various ways, when they label an area a ‘food desert’ they tend to mean that those living within the area lack easy access to healthy food.”).

6. Junfeng Jiao, Anne V. Moudon, Jared Ulmer, Philip M. Hurvitz & Adam Drewnowski, *How to Identify Food Deserts: Measuring Physical and Economic Access to Supermarkets in King County, Washington*, 102 AM. J. PUB. HEALTH e32, e32 (2012) (“Because supermarkets generally offer a variety of healthy foods at reasonable cost, food access is defined by proximity to a supermarket or large grocery store.”); see Teresa A. Hubley, *Assessing the Proximity of Healthy Food Options and Food Deserts in a Rural Area in Maine*, 31 APPLIED GEOGRAPHY 1224, 1224 (2011) (defining food deserts as “a populated area with deficient access to the most well-stocked outlets, the large stores or supermarkets that usually provide abundant, good quality, low-priced food choices”).

7. PAULA DUTKO, MICHELE VER PLOEG & TRACEY FARRIGAN, U.S. DEPT. OF AGRIC., CHARACTERISTICS AND INFLUENTIAL FACTORS OF FOOD DESERTS 5 (Aug. 2012), https://www.ers.usda.gov/webdocs/publications/45014/30940_err140.pdf [<https://perma.cc/9RSE-Q7UV>].

8. See Marianne Bitler & Steven J. Haider, *An Economic View of Food Deserts in the United States*, 30 J. POL'Y ANALYSIS & MGMT. 153, 171 (2011) (noting difficulty in defining food deserts); see also Michele Ver Ploeg, *Access to Affordable, Nutritious Food Is Limited in “Food Deserts,”* AMBER WAVES (Mar. 1, 2010), <https://www.ers.usda.gov/amber-waves/2010/march/access-to-affordable-nutritious-food-is-limited-in-food-deserts/> [<https://perma.cc/84DK-FS9E>] (“Defining what lack of access to affordable and nutritious food means and estimating how many people are affected by living in food deserts is not straightforward. A number of different measures are possible.”).

9. See, e.g., D.C. CODE § 48-311 (2015) (“‘Food desert’ means an area where more than 50% of the population is at or below 185% of the average median income level and where an individual cannot obtain a wide selection of fresh produce and other nutritious foods within 1/2 of a mile of the individual’s residence.”).

food.¹⁰ Many inner-city residents neither own cars nor live close enough to public transportation that stops within walking distance of a supermarket.¹¹ The lack of cars is one of the distinguishing characteristics of a food desert.¹²

Even if consumers can occasionally traverse the miles to a supermarket via car or public transportation, the long distances and inconvenience force consumers to purchase items with longer shelf lives, rather than perishable fresh produce.¹³ These canned and packaged products are often highly caloric, sodium-laden, and have little or no nutritional value.¹⁴ Residents of food deserts face food insecurity, “a condition where people have limited access to sufficient, safe, and nutritious food to meet their daily need for healthy living.”¹⁵ Whatever metric is employed, food deserts are communities without meaningful access to affordable, healthy food.

A. *The Magnitude of Food Deserts*

Researchers have identified food deserts in many, if not most, major American cities, from New England to the West Coast and from the upper Midwest to the South.¹⁶ For example, after a steady exodus of supermarkets

10. See Lillian MacNell, *A Geo-Ethnographic Analysis of Low-Income Rural and Urban Women's Food Shopping Behaviors*, 128 *APPETITE* 311, 318 (2018); Mengyao Zhang & Ghosh Debarchana, *Spatial Supermarket Redlining and Neighborhood Vulnerability: A Case Study of Hartford, Connecticut*, 20 *TRANSACTIONS IN GIS* 79, 84 (2016) (“Low-income residents usually do not have enough economic support and/or access to transportation (e.g. personal cars) to travel that ‘extra’ distance to buy healthy food from other stores or from chain supermarkets in the suburbs.”).

11. See JUDITH BELL, GABRIELLA MORA, ERIN HAGAN, VICTOR RUBIN & ALLISON KARPYN, *ACCESS TO HEALTHY FOOD AND WHY IT MATTERS: A REVIEW OF THE RESEARCH* 11 (2013).

12. See, e.g., Rylle Seymour, *Food Deserts Are Ripe for Business*, 44 *B.C. ENV'T. AFFS. L. REV.* 421, 421 (2017) (“People living in food deserts typically live at or below the Federal Poverty Level, lack vehicle access, are more than a quarter mile from the nearest supermarket, and do not have access to nutritious food.”); MICHELE VER PLOEG, VINCE BRENEMAN, TRACEY FARRIGAN, KAREN HAMRICK, DAVID HOPKINS, PHIL KAUFMAN, BIING-HWAN LIN, MARK NORD, TRAVIS SMITH, RYAN WILLIAMS, KELLY KINNISON, CAROL OLANDER, ANITA SINGH, ELIZABETH TUCKERMANTY, RACHEL KRANTZ-KENT, CURTIS POLEN, HOWARD MCGOWAN & STELLA KIM, U.S. DEP'T OF AGRIC., *REPORT TO CONGRESS: ACCESS TO AFFORDABLE AND NUTRITIOUS FOOD: MEASURING AND UNDERSTANDING FOOD DESERTS AND THEIR CONSEQUENCES*, at iii (2009) (noting that 2.2% of American households live more than a mile away from a supermarket and lack access to a vehicle); Peter Kelley, *'Food Deserts' Abound in King County for Those Without Cars, UW Study Shows*, *UNIV. OF WASH. NEWS* (Oct. 8, 2012), <https://www.washington.edu/news/2012/10/08/food-deserts-abound-in-king-county-for-those-without-cars-uw-study-shows/> [<http://perma.cc/MS7Q-D8LD>] (“King County has no substantial food deserts, provided one has a car. Take away the car, however, and food deserts — areas where low-income people have limited access to low-cost, nutritious food — appear to fill the county map.”).

13. See Rebecca Lee, *Quenching Food Deserts: Rethinking Welfare Benefits to Combat Obesity*, 25 *S. CAL. REV. L. & SOC. JUST.* 241, 242–43 (2016).

14. See *id.* at 243.

15. Zhang & Debarchana, *supra* note 10, at 82 (citation omitted).

16. See, e.g., Sonje Hawkins, *Desert in the City: The Effects of Food Deserts on Healthcare Disparities of Low-Income Individuals*, 19 *ANNALS HEALTH L. ADVANCE DIRECTIVE* 116, 120 (2009) (“Chicago has been designated one of many ‘food desert zones’ in this country, along with other cities that include Detroit, Michigan, Cleveland, Ohio, Milwaukee, Wisconsin, and Houston, Texas.”); Mary

beginning in 2005, the city of Detroit was left without “a single grocery chain store within the city limits.”¹⁷ Similarly, in New Haven, Connecticut, when Shaw’s closed its downtown location in 2010, hundreds of households without easy access to cars lost the only full-service supermarket within walking distance of their homes.¹⁸

The USDA estimates that 23.5 million people live in food deserts in the United States, defined as “low-income areas that are more than 1 mile from a supermarket.”¹⁹ More recent research puts the number at just below 30 million people.²⁰ Studies have identified over 6,500 food deserts in America.²¹ Ultimately, precisely how many food deserts exist and how many people reside in them depends on selection criteria and measurement techniques.²² However measured, the problem is entrenched and has disadvantaged generations of inner-city families.²³ And efforts to make food deserts verdant start with great fanfare but generally end without success.²⁴ Despite the recognition of the problem,²⁵

Story, Karen M. Kaphingst, Ramona Robinson-O’Brien & Karen Glanz, *Creating Healthy Food and Eating Environments: Policy and Environmental Approaches*, 29 ANN. REV. PUB. HEALTH 253, 259 (2008) (“The most affected rural counties were in the Great Plains and Rocky Mountain regions, the Deep South, the Appalachian region of Kentucky and West Virginia, and the western half of Texas.”); Samantha Masunaga, *Fresh & Easy Closing 30 Stores in Southern California*, L.A. TIMES (Mar. 23, 2015), <http://www.latimes.com/business/la-fi-fresh-and-easy-20150323-story.html> [https://perma.cc/T96C-SWJU].

17. Jada Fehn, *Swamped: How Local Governments Can Improve Health by Balancing Exposure to Fat, Sugar, and Salt-Laden Fringe Foods*, 24 J. AFFORDABLE HOUSING & CMTY. DEV. L. 565, 573 (2016).

18. Scott E Russell & Patrick C. Heidkamp, ‘Food Desertification’: *The Loss of a Major Supermarket in New Haven, Connecticut*, 31 APPLIED GEOGRAPHY 1197, 1197 (2011).

19. VER PLOEG ET AL., *supra* note 12, at 35; see DUTKO ET AL., *supra* note 7, at 1.

20. 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 BRENNEMAN, PAULA DUTKO, RYAN WILLIAMS, SAMANTHA SNYDER, CHRIS DICKEN & PHILLIP KAUFMAN, U.S. DEP’T OF AGRIC.: ECON. RSCH. SERV., ACCESS TO AFFORDABLE AND NUTRITIOUS FOOD: UPDATED ESTIMATES OF DISTANCE TO SUPERMARKETS USING 2010 DATA, at iii (Nov. 2012), <https://www.ers.usda.gov/publications/pub-details/?pubid=45035> [https://perma.cc/DFH4-2JVT]) (“According to recent data, 9.7% of the U.S. population, or 29.7 million people, live in food deserts.”).

21. DUTKO ET AL., *supra* note 7, at iii.

22. See Jiao et al., *supra* note 6, at e34 (“Our results demonstrated that estimates of populations living in food deserts depend on how the criteria are defined and what measurement techniques are employed.”).

23. See Elizabeth Eisenhauer, *In Poor Health: Supermarket Redlining and Urban Nutrition*, 53 GEOJOURNAL 125, 126 (2001) (noting that “lack of access to quality food sources — and thus adequate nutrition — has been a central cause of diminished health in the urban poor, and that this reduced access has constrained choices and changed behavior over generations”).

24. See Nathan A. Rosenberg & Nevin Cohen, *Let Them Eat Kale: The Misplaced Narrative of Food Access*, 45 FORDHAM URB. L.J. 1091, 1111–12 (2018) (noting how many of Walmart’s promises to open food stores in food deserts were ultimately abandoned).

25. See, e.g., BELL ET AL., *supra* note 11, at 6 (“Even as recognition of the problem is growing and progress is being made, between 6 and 9 percent of all U.S. households are still without access to healthy food.”).

grocery stores continue to desert America's inner cities.²⁶ Although many food deserts are rural,²⁷ and rural communities have less access to chain supermarkets,²⁸ this Article focuses on urban food deserts because these have unique causes and warrant a particular legal response.

Even when a grocery seller is technically accessible, residents of food deserts face higher prices.²⁹ The “biggest factor” causing residents of poor neighborhoods to pay more for groceries is the absence of major chains.³⁰ Independent urban grocers charge 10–60 percent more than chain supermarkets.³¹ Convenience stores in food deserts can charge even more.³² In particular, occupants of food deserts face significantly higher prices for nutritious food.³³ Paradoxically, consumers with less money face higher prices, which reduces their purchasing power even further. To the extent that food access is a function of price,³⁴ these price disparities further increase food insecurity for the residents of food deserts. These relatively higher prices deter low-income households from consuming healthier food, such as fresh fruit and vegetables.³⁵

26. See Samina Raja, Changxing Ma & Pavan Yadav, *Beyond Food Deserts: Measuring and Mapping Racial Disparities in Neighborhood Food Environments*, 27 J. PLAN. EDUC. & RSCH. 469, 470 (2008) (“In cities across the country, for example, the number of supermarkets—an important food retail destination—is declining.”); Masunaga, *supra* note 16.

27. See Broad Leib, *supra* note 20, at 324.

28. See Lisa Powell, Sandy Slater, Donka Mirtcheva, Yanjun Bao & Frank J. Chaloupka, *Food Store Availability and Neighborhood Characteristics in the United States*, 44 AM. J. PREVENTIVE MED. 189, 192 (2007) (“In our full national sample, controlling for population, rural and farm versus urban areas have significantly fewer numbers of available food stores of all types with the greatest lack of availability for chain supermarkets (14% of that available in urban zip codes).”).

29. See DUTKO ET AL., *supra* note 7, at 3 (“In addition to having poor access, residents of impoverished or deprived areas frequently face higher prices for food and other necessities.”).

30. Chanjin Chung & Samuel L. Myers, Jr., *Do the Poor Pay More for Food? An Analysis of Grocery Store Availability and Food Price Disparities*, 33 J. CONSUMER AFFS. 276, 276 (1999); Powell et al., *supra* note 28, at 193.

31. Eisenhauer, *supra* note 23, at 130.

32. See Andrea Freeman, *Fast Food: Oppression Through Poor Nutrition*, 95 CALIF. L. REV. 2221, 2254 (2007) (noting that the prices in West Oakland convenience stores “are fifty to 100 percent higher than prices for identical items sold in grocery stores”).

33. See Linlin Fan, Kathy Baylis, Craig Gundersen & Michele Ver Ploeg, *Does a Nutritious Diet Cost More in Food Deserts?* 49 AGRICULTURAL ECON. 587, 593 (2018); Zhang & Debarchana, *supra* note 10, at 82 (“In terms of prices, majority of research showed that the poor had to pay more for healthy foods.”).

34. See Angela Donkin, Elizabeth Dowler, Simon J. Stevenson & Sheila A. Turner, *Mapping Access to Food in a Deprived Area: The Development of Price and Availability Indices*, 3 PUB. HEALTH NUTRITION 31, 37 (1999) (“Reasonable access is being able to obtain a variety of healthy foods at a reasonable price.”).

35. See Fehn, *supra* note 17, at 573; Karen M. Jetter & Diana L. Cassady, *The Availability and Cost of Healthier Food Alternatives*, 30 AM. J. PREVENTIVE MED. 38, 43 (2005).

B. Consequences

Local food environments affect residents' dietary choices.³⁶ Research shows that in at least some food deserts, the lack of access to affordable, high-quality food causes people to eat a less healthy diet.³⁷ Supermarkets are the linchpin. Because supermarkets are more likely to offer healthy foods at lower prices than smaller stores, the presence of a supermarket correlates with greater fruit and vegetable consumption and overall healthier diets.³⁸ In turn, the absence of supermarkets causes low-income consumers to pay higher prices for less nutritious food.³⁹ Without supermarkets in striking distance, residents of food deserts purchase their meals from convenience stores where healthy options are slim or absent.⁴⁰ Denied access to fresh produce and other healthy foods, residents of food deserts eat diets more laden with fat, sugar, and salt.⁴¹

The lack of proximity to supermarkets has significant and deleterious health consequences for the residents of food deserts.⁴² Replacing grocery stores with fast-food establishments and convenience stores changes the nutritional environment and affects food choices in a way that “play[s] a substantial role in the current obesity epidemic.”⁴³ Natural experiments comparing West Los

36. See Powell et al., *supra* note 28, at 189 (“Examining factors that characterize individuals’ local environments can help to provide evidence on the extent to which neighborhood factors are related to behavioral choices and obesity. One such factor relates to the availability of local area food stores.”); UNSHARED BOUNTY, *supra* note 2, at 25 (“Though a causal relationship between obesity and an unhealthy food environment is difficult to establish for a number of reasons, data does exist to support the proposition that environment influences food intake.”).

37. See Hubley, *supra* note 6, at 1224 (“Low access to supermarkets in the United States has been linked with poor quality diets.”); Deja Hendrickson, Chery Smith & Nicole Eikenberry, *Fruit and Vegetable Access in Four Low-Income Food Deserts Communities in Minnesota*, 23 AGRIC. & HUM. VALUES 371, 382 (2006).

38. See Powell et al., *supra* note 28, at 189 (“The availability of supermarkets has been associated with more fruit and vegetable intake, more healthful diets, and lower rates of obesity.”); Shannon Zenk, Amy J. Schulz, Barbara A. Israel, Sherman A. James, Shuming Bao & Mark L. Wilson, *Neighborhood Racial Composition, Neighborhood Poverty, and the Spatial Accessibility of Supermarkets in Metropolitan Detroit*, 95 AM. J. OF PUB. HEALTH 660, 663 (2005) (“At least 3 previous quantitative studies, all of which examined chain supermarkets, have suggested that closer proximity to supermarkets is associated with better-quality diets.”).

39. See Chung & Myers, *supra* note 30, at 277 (“A 1995 study of Detroit area grocers found that city shoppers paid higher prices for a less nutritious choice of foods than suburban shoppers because of a lack of large supermarkets in low-income neighborhoods.”); see also Hubley, *supra* note 6, at 1224 (“Supermarkets are considered desirable because they can, through economies of scale, provide lower prices and greater variety, thus mitigating some of the common factors that may prevent consumers from making healthy food choices.”).

40. See Hunt Allcott, Rebecca Diamond, Jean-Pierre Dubé, Jessie Handbury, Ilya Rahkovsky & Molly Schnell, *Food Deserts and the Causes of Nutritional Inequality*, 134 Q.J. ECON. 1793, 1796 (2019). Ultimately, Allcott et al. challenge the conventional wisdom that proximity to supermarkets improves diets, but they do note that supermarkets offer more healthy options than small grocery stores and convenience stores. *Id.*

41. See UNSHARED BOUNTY, *supra* note 2, at 6.

42. See Zenk et al., *supra* note 38, at 663 (“Inadequate accessibility to supermarkets may contribute to less-nutritious diets and hence to greater risk for chronic, diet-related diseases.”).

43. Story et al., *supra* note 16, at 254.

Angeles and South Los Angeles demonstrate a strong link between the number of grocery stores selling fresh produce and a significantly lower rate of obesity.⁴⁴ One study in New Orleans of almost four thousand adults found that each additional supermarket in one's neighborhood significantly reduced an individual's propensity for obesity, while the presence of fast-food restaurants and convenience stores increased those odds.⁴⁵ Supermarkets are critical, as "people living in areas with access to a supermarket exhibit a twenty-four percent lower prevalence of obesity than those living in areas without supermarkets."⁴⁶

In addition to obesity, food deserts adversely impact the overall health of residents.⁴⁷ Food desert diets are higher in fat, salt, and sugar, which translates into higher rates of heart disease, hypertension, and diabetes.⁴⁸ Research shows that "living in a food desert can mean greater rates of obesity, premature death, and lower quality of life, especially for mothers and children."⁴⁹ These adverse health effects can permanently affect children who grow up in food deserts by hindering cognitive development and creating susceptibility to many ailments.⁵⁰ The ultimate impact is often a shortened life plagued by chronic illnesses.⁵¹

Beyond these health consequences, the absence of supermarkets has important economic and social effects for inner cities. Supermarkets can provide critical jobs for the residents of inner-city neighborhoods, especially for young people who can develop work experience and transferable skills.⁵² The presence

44. See Lee, *supra* note 13, at 246–47.

45. J. Nicholas Bodor, Janet C. Rice, Thomas A. Farley, Chris M. Swalm & Donald Rose, *The Association Between Obesity and Urban Food Environments*, 87 J. URB. HEALTH 771, 771 (2010).

46. Broad Leib, *supra* note 20, at 322; see Rebecca C. Woodruff, Regine Haardörfer, Ilana G. Raskind, April Hermstad & Michelle C. Kegler, *Comparing Food Desert Residents with Non-Food Desert Residents on Grocery Shopping Behaviours, Diet and BMI: Results from a Propensity Score Analysis*, 23 PUB. HEALTH NUTRITION 806, 811 (2020) (residents of food deserts have significantly higher body-mass index).

47. See Zhang & Debarchana, *supra* note 10, at 84 ("Therefore as stores close, vulnerable urban residents are either traveling farther to purchase nutritious, competitively priced groceries or paying inflated prices for low quality, processed foods at the corner stores. These situations, affecting both individual health and health of a neighborhood, widen the urban grocery gap, increase food insecurity, and perhaps create a food desert.").

48. See UNSHARED BOUNTY, *supra* note 2, at 6; VER PLOEG ET AL., *supra* note 12, at 6.

49. MARI GALLAGHER RSCH. & CONSULTING GRP., GOOD FOOD: EXAMINING THE IMPACT OF FOOD DESERTS ON PUBLIC HEALTH IN CHICAGO 7, 9 (July 18, 2006), <https://www.mari Gallagher.com/wp-content/uploads/2020/02/ChicagoFoodDesertReport-Full-1.pdf> [<https://perma.cc/KVR3-8J78>].

50. See UNSHARED BOUNTY, *supra* note 2, at 6.

51. See MARI GALLAGHER RSCH. & CONSULTING GRP., *supra* note 49, at 9 ("[C]ommunities that have no or distant grocery stores, or have an imbalance of healthy food options, will likely have increased premature death and chronic health conditions, holding other influences constant.").

52. See Tom Larson, *Why There Will Be No Chain Supermarkets in Poor Inner-City Neighborhoods*, 7 CAL. POL. & POL'Y 22, 23 (2003) ("Supermarkets are an important source of jobs and experience for young people. Workers aged 16 to 24 hold 34% of the jobs in grocery stores, where many young people have their first jobs."); UNSHARED BOUNTY, *supra* note 2, at 6 ("The lack of supermarkets in a community can also affect employment within a community, as supermarkets are a source of jobs for employees with a variety of skill sets.").

of supermarkets can enhance local communities as “[i]ncreased food access has been linked to results as diverse as improved educational outcomes and crime reduction.”⁵³ Conversely, the departure of supermarkets from poor neighborhoods discourages other investments and harms nearby non-food stores, resulting in “long term community isolation and loss of resources [that] can increase distress, hopelessness, and hostility.”⁵⁴

II.

RACE AND THE WHITE FLIGHT OF SUPERMARKETS

During the early twentieth century, urban residents enjoyed competitive markets for fresh produce and other groceries.⁵⁵ But then supermarket chains emerged and proliferated, eliminating independent grocers.⁵⁶ Conceived during the Great Depression, the supermarket model for selling food took hold quickly in American cities, with the number of supermarkets growing to 1,200 in 1936 and quintupling to 6,000 just four years later.⁵⁷ Supermarkets exploited economies of scale and scope, offering a greater variety of products at relatively low prices.⁵⁸ Beyond these efficiencies, however, these new behemoths also employed price discrimination to destroy smaller independent grocers.⁵⁹ With mom-and-pop grocery stores largely vanquished, city dwellers became reliant upon supermarkets. This dependence would prove tragic once urban demographics began to shift.

A. *How White Flight and Supermarket Exodus Created Food Deserts*

The flow of African Americans and recent immigrants into urban centers fueled racial tensions. White homeowners feared loss of perceived status if they lived in a neighborhood with “too many” Black residents.⁶⁰ As minority families

53. Broad Leib, *supra* note 20, at 322.

54. Eisenhower, *supra* note 23, at 129.

55. *See id.* at 127 (“At the beginning of the 20th century, the retail food industry was dominated by locally based independent grocers.”).

56. *See* Larson, *supra* note 52, at 33 (“In the 1920s, chain supermarkets started out as low-price competitors to small mom-and-pop grocery stores. In the past seventy years, the chain stores have taken over most of the grocery market putting many small stores out of business.”); Joe Kane, *The Supermarket Shuffle*, 9 MOTHER JONES 7 (1984).

57. Emanuel B. Halper, *Supermarket Use and Exclusive Clauses*, 30 HOFSTRA L. REV. 297, 363 (2001).

58. *See* VER PLOEGET AL., *supra* note 12, at 87; *id.* at 320 (noting how supermarkets could save on labor and warehousing expenses).

59. *See* Eisenhower, *supra* note 23, at 127 (noting that this was one animating purpose behind “the Robinson-Patman Act of 1936, sometimes called the ‘anti-A&P law’, which prevented wholesalers from charging retailers different prices within the same market when costs of doing business were not different”).

60. *Jorman v. Veterans Admin.*, 654 F. Supp. 748, 765 (N.D. Ill. 1986), *aff’d*, 830 F.2d 1420 (7th Cir. 1987) (“But the Court believes that the causes of rapid white flight lie fundamentally in the attitudes of white homeowners who fear neighborhood instability and deterioration and, in Dr. Berry’s terms, ‘loss of status’ when the level of black residents in a neighborhood exceeds a certain level.”).

moved into cities, white households recreated segregation by emigrating to new suburbs that became the periphery of expanding metropolitan areas. This white flight was largely driven by anti-Black racism.⁶¹ The consequences for those left behind were great. As relatively wealthier white households abandoned the inner city, they left behind a depreciating housing stock and business districts entering the first stages of decline. When white-majority neighborhoods transitioned into nonwhite-majority neighborhoods, the minority-majority neighborhoods “suffer[ed] decreases in services, property value, maintenance, school quality, and other amenities.”⁶²

Every level of government encouraged and subsidized racial migration. At both the local and federal levels, various loan subsidies bankrolled the white exodus.⁶³ The Federal Housing Administration (FHA) focused its resources on extending credit and capital to white families wishing to leave the changing demographics of the city for the racially homogenous suburbs.⁶⁴ The federal government used racially discriminatory underwriting requirements, including “endors[ing] discriminatory zoning as a means toward ensuring that nuisances, which were defined to include Black people, were avoided.”⁶⁵

Government construction projects purposefully encouraged white flight from inner cities to suburbs. Local school boards, for example, erected schools in suburbs in a manner that rewarded and hastened white flight.⁶⁶ Governments constructed highways out to new suburban developments.⁶⁷ Wide swaths of

61. See George C. Galster, *White Flight from Racially Integrated Neighborhoods in the 1970s: The Cleveland Experience*, 27 URB. STUD. 385, 391 (1990) (noting that white residents fled racially integrated neighborhoods because of their segregationist views).

62. Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795, 808 (1996) (“This power means that all-white neighborhoods do not generally suffer the decreases in services, property value, maintenance, school quality, and other amenities that all-black neighborhoods do.”).

63. See Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 137 (2013) (“Loan subsidies were paired with a host of related programs designed to enable (white) families the ability to escape the (black) urban center city and live instead in manufactured semipastoral communities.”).

64. See Matthew Jerzyk, *Gentrification’s Third Way: An Analysis of Housing Policy & Gentrification in Providence*, 3 HARV. L. & POL’Y REV. 413, 414 (2009) (“For new African American renters and homeowners, the monetary benefits of the Federal Housing Administration (FHA), such as access to credit and capital for home improvements, dried up as the FHA benefit programs focused on the white population moving into the suburbs.”).

65. Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540, 1555 (2012).

66. See *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 386–87 (4th Cir. 2001) (noting that “the Board’s pattern of school construction could have facilitated or even hastened white flight to the suburbs”); see also *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 20–21 (1971) (“People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.”).

67. See Anders Walker, *When Gangs Were White: Race, Rights, and Youth Crime in New York City, 1954-1964*, 55 ST. LOUIS U. L.J. 1369, 1373–74 (2011) (noting how Brooklyn’s transition from

Black neighborhoods were destroyed to make room for highways that connected suburban homes to downtown offices.⁶⁸ Commentators at the time called this phenomenon “[w]hite men’s highways through black men’s bedrooms.”⁶⁹ These highways helped facilitate the white flight that would further segregate and diminish the quality of Black neighborhoods.⁷⁰

Thus, governments subsidized white flight to the suburbs through policies such as mortgage discrimination, highway and utility development, school construction, and zoning.⁷¹ Sociologist Nancy Denton summed up the situation:

A host of private, public, and governmental actors deliberately created residential segregation. The real estate industry, banks, appraisers, and insurance agents translated private prejudice into public action ultimately sanctioned by the federal government in Federal Housing Administration (FHA) loan policies and the federal highway program. As a result, the post-World War II suburban growth was for whites; blacks remained in the cities.⁷²

Between 1950 and 1970, America’s suburban population doubled from 36 million to 72 million.⁷³ In Atlanta alone, the 1960s saw over 60,000 white residents move to the suburbs, taking advantage of the new expressways to commute to their jobs in the city.⁷⁴

Supermarkets followed white consumers out to the suburbs.⁷⁵ But those chains didn’t just open new stores in the new suburbs. Focused on pursuing

nearly all white to nearly all Black and Hispanic was “accelerated by massive white flight to distant suburbs facilitated by ambitious freeway projects sponsored by New York planner Robert Moses”).

68. See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 128–29 (2017).

69. Oliver A. Houck, *The Vieux Carre Expressway*, 30 TUL. ENV’T L.J. 1, 22 (2016) (“Between 1956 and 1965, the first decade of the federal interstate program, new freeways destroyed more housing units (330,000) than were built by the entire federal housing program (240,000).”); see Deborah N. Archer, “White Men’s Roads Through Black Men’s Homes”: *Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1265 (2020) (“In states around the country, highways disproportionately displaced Black households and cut the heart and soul out of thriving Black communities as homes, churches, schools, and businesses were destroyed.”).

70. See Houck, *supra* note 69, at 22 (“To be sure, urban freeways did not cause white flight all by themselves—green space and white schools were the magnets—but the freeways were the facilitators, the means of getting it done.”).

71. See Swati Prakash, *Racial Dimensions of Property Value Protection Under the Fair Housing Act*, 101 CALIF. L. REV. 1437, 1452–56 (2013).

72. Denton, *supra* note 62, at 803; see also ROTHSTEIN, *supra* note 68, at 60 (“First, the government embarked on a scheme to persuade as many [W]hite families as possible to move from urban apartments to single-family suburban homes. Then, once suburbanization was under way, the government, with explicit racial intent, made it nearly impossible for African Americans to follow.”).

73. DONNA L. FRANKLIN, *ENSURING INEQUALITY: THE STRUCTURAL TRANSFORMATION OF THE AFRICAN-AMERICAN FAMILY* 126 (1997).

74. Michael Lewyn, *How City Hall Causes Sprawl: A Case Study*, 30 ECOLOGY L.Q. 189, 194 (2003) (“As early as the 1960s, this first generation of expressways facilitated massive “white flight” to suburbia: the city lost over 60,000 whites between 1960 and 1970.”).

75. See Eisenhower, *supra* note 23, at 127 (“As (white) middle class families began leaving the cities, the growing stores followed.”); UNSHARED BOUNTY, *supra* note 2, at 6 (“Supermarkets, along with many other types of businesses, followed white middle-class incomes to the suburbs.”).

suburban dollars, supermarket chains also shuttered their old locations, “leaving many inner-city neighborhoods with few or no full-service markets—often for decades.”⁷⁶ One study showed that “90 percent of the conventional grocery stores, located in low-income neighborhoods, [that] either closed voluntarily or went out of business, did so to relocate into the suburbs.”⁷⁷ As supermarkets pulled up stakes in the inner city, they left behind a population that skewed older, more poor, and less white.⁷⁸ White flight therefore ultimately played a major role in creating urban food deserts.⁷⁹

African Americans could not follow the supermarkets out to the suburbs due to first state-sanctioned and then private racial discrimination. Until the early twentieth century, in many areas, de jure segregation had prevented even well-off Black families from residing in white neighborhoods.⁸⁰ After the Supreme Court struck down state and local residential race laws as violative of the Fourteenth Amendment,⁸¹ individuals inserted racial covenants into their property deeds, which prevented private owners from selling their houses to Black buyers. During the midcentury great migration to the suburbs, racial covenants in northern cities like Chicago kept African American families hemmed into neighborhoods that supermarkets would later abandon.⁸²

Even after the Supreme Court invalidated racial covenants in residential real estate as unconstitutional,⁸³ segregation continued. The FHA financial resources that had funded white exodus from inner cities were not available to Black families.⁸⁴ Government officials encouraged and participated in redlining, a form of lending discrimination that rendered nonwhites ineligible for housing loans.⁸⁵ White suburbanites employed myriad mechanisms to prevent or limit the

76. BELL ET AL., *supra* note 11, at 6 (“Beginning in the 1960s and 1970s, white, middle-class and working-class families left urban centers for homes in the suburbs, and supermarket chains went with them, leaving many inner-city neighborhoods with few or no full-service markets—often for decades.”).

77. Davidson Bros. v. D. Katz & Sons, Inc., 274 N.J. Super. 159, 166 (App. Div. 1994) (quoting HOUSE SELECT COMM. ON HUNGER, OBTAINING FOOD: SHOPPING CONSTRAINTS ON THE POOR, 100th Cong., 1st Sess. (1987)).

78. See KANE, *supra* note 56, at 7.

79. See Broad Leib, *supra* note 20, at 324 (“Food deserts formed in urban areas after many white, middle-class Americans moved to the suburbs in the 1960s and 1970s and supermarkets migrated with them.”).

80. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 26–41 (1993).

81. See Buchanan v. Warley, 245 U.S. 60, 82 (1917).

82. See UNSHARED BOUNTY, *supra* note 2, at 13 (“The predominantly African American neighborhoods in the Southside of Chicago were ‘hemmed in’ by residences encumbered by racial covenants.”).

83. See Shelley v. Kraemer, 334 U.S. 1, 22–23 (1948).

84. See Jerzyk, *supra* note 64, at 414.

85. See Paul Gowder, *Racial Classification and Ascriptive Injury*, 92 WASH. U. L. REV. 325, 363–64 (2014) (“Government complicity in the discrimination included ‘redlining’—or endorsing lending discrimination—a practice that sometimes excluded entire cities from federal loan benefits.”).

migration of Black families.⁸⁶ Real estate agents often played an active role in fomenting residential segregation.⁸⁷ For example, “[i]n 1955, a survey of twelve brokers serving a suburban Los Angeles neighborhood of twelve thousand new homes found that none were willing to sell to Blacks.”⁸⁸ Many white suburbanites worked hard to keep their neighborhoods nonintegrated, using tactics such as violence, harassment, and intimidation.⁸⁹ These efforts succeeded in segregating Black families into inner-city neighborhoods.⁹⁰

B. *Effects of the White Flight of Supermarkets*

Ultimately, housing discrimination worked in tandem with supermarket exodus to deny many nonwhite people access to healthy, affordable food in urban areas.⁹¹ In many American cities today, food deserts operate as a form and reflection of systemic racial discrimination.⁹² Many minority communities,

86. See Rodney A. Smolla, *Integration Maintenance: The Unconstitutionality of Benign Programs That Discourage Black Entry to Prevent White Flight*, 1981 DUKE L.J. 891, 892 (1981) (“As black entry into traditionally white suburbs has increased, a growing number of communities have adopted or considered ‘integration-maintenance’ plans, programs that seek to limit or channel black entry.”).

87. See Gowder, *supra* note 85, at 363 (noting how real estate agents participated in “blockbusting” by “consciously taking advantage of white fear of black neighbors to concentrate blacks in ghettos”).

88. SCOTT KURASHIGE, *THE SHIFTING GROUNDS OF RACE: BLACK AND JAPANESE AMERICANS IN THE MAKING OF MULTIETHNIC LOS ANGELES* 238 (2010).

89. See Daria Roithmayr, *Locked in Segregation*, 12 VA. J. SOC. POL’Y & L. 197, 204 (2004) (“During the Jim Crow era, white cartel organizations worked together to achieve a monopoly on access to good neighborhoods. These organizations used violence, harassment and coercion to monopolize the advantage of a ‘good neighborhood’—i.e., having neighbors with more wealth, higher property values and a better tax base than in non-white neighborhoods.”); UNSHARED BOUNTY, *supra* note 2, at 13 (“When African American families attempted to move into predominantly white neighborhoods, they suffered violent consequences.”).

90. See Deborah Kenn, *Institutionalized, Legal Racism: Housing Segregation and Beyond*, 11 B.U. PUB. INT. L.J. 35, 39 (2001) (“By the 1930s, through deliberate and state-sanctioned acts of racial zoning, restrictive covenants, and public works projects, the segregation of blacks in inner city neighborhoods was becoming the norm.”).

91. See VER PLOEG ET AL., *supra* note 12, at 86 (“It is also important to note that housing market discrimination could limit the ability of minorities to move to areas that may have better access to food.”); UNSHARED BOUNTY, *supra* note 2, at 15 (“Restrictive covenants, redlining, and housing discrimination made supermarkets located in the suburbs less accessible to predominantly African American neighborhoods.”).

92. See Melanie Pugh, *A Recipe for Justice: Support for a Federal Food Justice Interagency Working Group*, 72 FOOD & DRUG L.J. 341, 343 (2017) (“Food deserts are, themselves, a direct outcome of historical discrimination, as the lack of urban grocery stores, and the grocery store model that requires access to a car, was caused, at least in part, by the redlining policies of the 1960s and 70s.”); Hawkins, *supra* note 16, at 117 (stating that “African-Americans are the group most disadvantaged by food deserts”); DUTKO ET AL., *supra* note 7, at iii (“In all but very dense urban areas, the higher the percentage of minority population, the more likely the area is to be a food desert.”); Larson, *supra* note 52, at 24 (“Given the potential sales in South Central, why are there so few grocery stores? The answer lies in a combination of modern supermarket economics and old-fashioned neglect of minority communities.”); Gallagher, *supra* note 49, at 7 (“Chicago’s food deserts, for the most part, are exclusively African-American.”); Margalynne Armstrong, *African Americans and Property Ownership: Creating Our Own Meanings, Redefining Our Relationships*, 1 AFR.-AM. L. & POL’Y REP. 79, 84 (1994) (“We must also

particularly those with high numbers of relatively poor African American and Latino residents, have insufficient access to nourishing food.⁹³ The same food costs more in poor nonwhite neighborhoods than it does in wealthier white neighborhoods.⁹⁴ The produce available in poor urban areas is less varied, lower quality, and more expensive.⁹⁵ Consequently, African American households are often forced to pay more money for lower-quality food, in large part because of the absence of supermarkets in their neighborhoods.⁹⁶

African American neighborhoods, in particular, have significantly fewer supermarkets than comparable white neighborhoods.⁹⁷ Half of the Black neighborhoods in the country have neither a supermarket nor a full-service grocery store.⁹⁸ In some large cities, like Chicago, African American communities have the lowest access not only to chain supermarkets but to all

develop strategies for attacking forms of discrimination against Black buying power that are not governed by law. The failure to locate supermarkets and discount department stores in African American communities and the resulting higher cost of household goods and food staples are examples of such discrimination.”).

93. See BELL ET AL., *supra* note 11, at 9 (“From 1990 through February 2013, many studies have documented how low-income communities and communities of color have less access to healthy food than higher-income and less diverse communities.”); Nareissa Smith, *Eatin’ Good? Not in This Neighborhood: A Legal Analysis of Disparities in Food Availability and Quality at Chain Supermarkets in Poverty-Stricken Areas*, 14 MICH. J. RACE & L. 197, 208 (2009) (“The poor—in particular poor African Americans and Latinos residing in America’s inner cities—are not equally situated when it comes to food access.”); Latetia Moore & Ana V. Diez Roux, *Associations of Neighborhood Characteristics with the Location and Type of Food Stores*, 96 AM. J. PUB. HEALTH 325, 330 (2006) (“Our results provide empirical support for the often-cited claim that food options differ across neighborhoods and that healthy food options may be reduced in poor and minority areas.”); Raja, Ma & Yadav, *supra* note 26, at 470 (“This redlining of urban neighborhoods by large supermarkets limits the food choices available to residents.”).

94. See Chung & Myers, *supra* note 30, at 278 (noting that “statistical analysis found that prices paid by low-income urban African Americans were significantly higher than any income level of Caucasians”) (citing Michael S. Finke, Wen S. Chern, & Jonathan J. Fox, *Do the Urban Poor Pay More for Food? Issues in Measurement*, 9 ADVANCING CONSUMER INT. 13, 13–17 (Spring 1997)); Armstrong, *supra* note 92, at 83.

95. See Smith, *supra* note 93, at 208–09; Adam Drewnowski & Anne Barratt-Fornell, *Do Healthier Diets Cost More?*, 39 NUTRITION TODAY 161, 166–67 (2004); UNSHARED BOUNTY, *supra* note 2, at 5 (“Area-specific studies have found that minority communities are more likely to have smaller grocery stores carrying higher priced, less varied food products than other neighborhoods.”); *id.* at 6 (“When minority families shop locally for groceries they find a grocery store that is ‘2.5 times smaller than the average grocery store in a higher income neighborhood’ with higher priced food, less fresh produce, and more processed food.”).

96. See Shannon N. Zenk, Amy J Schulz, Barbara A. Israel, Sherman A. James, Shuming Bao & Mark L. Wilson, *Fruit and Vegetable Access Differs by Community Racial Composition and Socioeconomic Position in Detroit, Michigan*, 16 ETHNICITY & DISEASE 275, 275 (2006) (“Communities with higher proportions of African Americans have . . . fewer supermarkets and may have more expensive and lower-quality foods for sale.”).

97. See Zenk, et al., *supra* note 38, at 660; UNSHARED BOUNTY, *supra* note 2, at 5–6 (noting racial disparities in supermarket access in Detroit, Los Angeles, Chicago, and DC); Gallagher, *supra* note 49, at 22 (noting that Chicagoans who live in majority white neighborhoods have significantly greater access to grocery stores than residents of majority Black neighborhoods).

98. Raja, Ma & Yadav, *supra* note 26, at 470 (“Half of all black neighborhoods in the United States are reported to be without full-service grocery stores and supermarkets.”).

grocery stores, including independent and smaller grocers.⁹⁹ Many African American consumers also must travel further than other consumers to shop at grocery stores.¹⁰⁰ For example, in Hartford, Connecticut, African Americans living in low-income neighborhoods must travel an average of 1 to 1.25 miles farther than residents of white neighborhoods to reach the nearest supermarket.¹⁰¹ Although most research on the racial aspects of food deserts involves urban areas,¹⁰² rural food deserts reflect similar racial imbalances.¹⁰³ The problem is longstanding and enduring.¹⁰⁴ And, in many ways, it's getting worse. In recent years, African American neighborhoods and low-income neighborhoods have suffered the greatest losses in grocery stores.¹⁰⁵

The business decisions to remove supermarkets from minority communities resemble the well-documented redlining policies of the banking industry.¹⁰⁶ Experts describe the exodus of major supermarkets from poor inner-city neighborhoods as “supermarket redlining.”¹⁰⁷ Supermarket redlining is a species of retail redlining, defined as “a spatially discriminatory practice among retailers of not serving certain areas, based on their ethnic-minority composition, rather than on economic criteria, such as the potential profitability of operating in those areas.”¹⁰⁸

Indeed, even after controlling for income, Black neighborhoods have less access to healthy food than equivalent white neighborhoods. For example, residents of affluent Black neighborhoods in Atlanta have significantly longer

99. See Gallagher, *supra* note 49, at 16–17.

100. See *id.* at 7 (“African-Americans are the most disadvantaged when it comes to balanced food choices, although other racial groups do suffer as well. African-Americans, on average, travel the farthest distance to any type of grocery store . . .”).

101. Zhang & Debarchana, *supra* note 10, at 82.

102. See UNSHARED BOUNTY, *supra* note 2, at 7 (“[T]he relationship between food deserts and structural racism is clearest in cities.”).

103. See Kelly M. Bower, Roland J. Thorpe, Jr., Charles Rohde & Darrell J. Gaskin, *The Intersection of Neighborhood Racial Segregation, Poverty, and Urbanicity and Its Impact on Food Store Availability in the United States*, 58 AM. J. PREVENTIVE MED. 33, 35 (2014) (“Similar to urban tracts, predominantly black and Hispanic tracts have the fewest supermarkets in rural tracts.”); DUTKO ET AL., *supra* note 7, at 11 (“The proportion of minorities in rural food desert tracts is around 65 percent greater than non-food desert tracts in the most recent two surveys . . .”).

104. See Bruce F. Hall, *Neighborhood Difference in Retail Food Stores: Income Versus Race and Age of Population*, 59 ECON. GEOGRAPHY 282, 294 (1983) (older study noting that “neighborhoods with large black populations will also find, on average, higher prices, worse selection of brands, prices, and sizes, dirtier stores, and worse quality of fresh products”).

105. See BELL ET AL., *supra* note 11, at 10.

106. See, e.g., MEHRSA BARADARAN, HOW THE OTHER HALF BANKS: EXCLUSION, EXPLOITATION, AND THE THREAT TO DEMOCRACY 47 (2015).

107. Eisenhower, *supra* note 23, at 128 (“Several observers, including the US Conference of Mayors, have identified the industry’s practices as ‘supermarket redlining’ and by the mid 1990s (*sic*) its effects were staggering.”) (citation omitted).

108. Denver D’Rozario & Jerome D. Williams, *Retail Redlining: Definition, Theory, Typology, and Measurement*, 25 J. MACROMKTG. 175, 175 (2005).

travel times to food retailers than comparably affluent white households.¹⁰⁹ One study reported that after controlling for differences in neighborhood income, “[t]he availability of chain supermarkets in African American neighborhoods was found to be only 52% that of their counterpart White neighborhoods and only 41% of that in White urban areas.”¹¹⁰ These disparities are racial and not simply economic:¹¹¹ in both urban and rural areas, racial minorities are more likely to live in food deserts even after controlling for income and other factors.¹¹² In sum, like residential redlining and financial redlining, supermarket redlining is driven by racial stereotypes and garden-variety racism that deems certain people and neighborhoods unworthy of investment.¹¹³

Supermarket redlining harms individuals and communities. As discussed in Part I.B, food deserts in Black neighborhoods are correlated with higher rates of negative health outcomes.¹¹⁴ For example, diabetes is much more prevalent in African American and Latino populations partially due to the lack of access to healthy food in neighborhoods where they reside.¹¹⁵ The relatively high obesity rates found in Black and Hispanic populations are, in part, a function of the absence of grocery stores in their neighborhoods.¹¹⁶ These adverse health consequences persist even after controlling for individual socioeconomic status.¹¹⁷ Supermarket redlining thus reduces the ability of residents to make

109. See Raja, Ma & Yadav, *supra* note 26, at 470 (citing Amy Helling & David S. Sawicki, *Race and Residential Accessibility to Shopping and Services*, 14 HOUS. POL’Y DEBATE 69, 69–101 (2003)).

110. Powell et al., *supra* note 28, at 193.

111. Of course, economic differences are often a function of systemic racism.

112. See DUTKO ET AL., *supra* note 7, at 26 (“Tracts that have larger representations from minority groups are more likely to be food deserts in rural, less dense urban, and dense urban areas. This is true even after controlling for income and other tract-level characteristics.”); see also BELL ET AL., *supra* note 11, at 9 (“A national cross-sectional study found that low-income, urban neighborhoods of color have the least availability of grocery stores and supermarkets compared with both low- and high-income white communities”) (citing Andrea S. Richardson, Janne Boone-Heinonen, Barry M. Popkin & Penny Gordon-Larsen, *Are Neighbourhood Food Resources Distributed Inequitably by Income and Race in the USA? Epidemiological Findings Across the Urban Spectrum*, 2 BMJ OPEN 1, 1–9 (2012)).

113. See Eisenhauer, *supra* note 23, at 128.

114. Raja, Ma & Yadav, *supra* note 26, at 470 (“More recently, a study commissioned by LaSalle Bank of Chicago shows the presence of food deserts, measured as the absence of grocery stores, in African American neighborhoods and correlates the presence with a higher incidence of negative health outcomes.”).

115. See Gallagher, *supra* note 49, at 6 (noting that “African American communities will be the most likely to experience the greatest total years of life lost from diabetes” due to food deserts); Carol R. Horowitz, Kathryn A. Colson, Paul L. Hebert & Kristie Lancaster, *Barriers to Buying Healthy Foods for People with Diabetes: Evidence of Environmental Disparities*, 94 AM. J. PUB. HEALTH 1549, 1549 (2004) (“The availability of these and other recommended foods in neighborhood food stores may influence the food choices of African American and Latino adults with diabetes. Evidence exists that foods recommended as part of a healthy diabetic diet are in short supply in low-income, non-White neighborhoods such as East Harlem.”).

116. See Powell et al., *supra* note 28, at 190.

117. See Zenk, et al., *supra* note 38, at 660 (“An extensive body of literature now associates residence in economically disadvantaged neighborhoods, after control for individual socioeconomic status, with a variety of adverse diet-related health outcomes.”).

healthy food choices,¹¹⁸ and minority populations accordingly suffer the brunt of the negative effects.

III.

SUPERMARKET BUSINESS STRATEGIES THAT CREATE FOOD DESERTS

It may be tempting to view food deserts as simply an unintended consequence of supermarkets focusing their attention on wealthier suburban consumers. That view, however, does not reflect reality. Many food deserts actually result from premeditated strategies by supermarket chains to insert restrictions in deeds, leases, and subleases to deprive certain neighborhoods of grocery stores. This Part explains how those strategies create food deserts.

A. Scorched-Earth Covenants

A company that wants to open a supermarket in a food desert faces multiple barriers to entry. These can include issues relating to labor, security, and perceived demand.¹¹⁹ But one of the most substantial barriers to entry for supermarkets in urban food deserts is the need to buy or lease a large retail space or a sizeable parcel of land where a new supermarket could be built.¹²⁰ Beyond the store itself, supermarkets need additional space for unloading trucks.¹²¹ These space requirements can be exceedingly hard to meet in dense urban neighborhoods.

This barrier to entry may seem exogenous, beyond the control of market players, but it's not. In many food deserts, supermarkets helped erect and strengthen this barrier to entry as they abandoned the inner city for the suburbs. For example, major supermarket chains use restrictive covenants to block the most appropriate sites from hosting supermarkets and, thus, preclude other major grocers from serving inner-city consumers. Many large chains own the land upon which their supermarkets are built. When these supermarkets sell the land and

118. See Zhang & Debarchana, *supra* note 10, at 83–84 (“Incidents of supermarket redlining caused due to either closing down of existing supermarkets, relocation of supermarkets in the suburbs, lack of investments to construct new ones, or combination of these scenarios will disproportionately affect neighborhoods with low-income vulnerable residents. It will increase the difficulty of accessibility and availability of healthy food choices.”).

119. See JAMES O’CONNOR & BARBARA ABELL, SUCCESSFUL SUPERMARKETS IN LOW INCOME INNER CITIES, 9–10 (1992), <https://naldc.nal.usda.gov/download/56127/PDF> [<https://perma.cc/X3LQ-S8N6>].

120. See Kameshwari Pothukuchi, *Attracting Supermarkets to Inner-City Neighborhoods: Economic Development Outside the Box*, 19 ECON. DEV. Q., 232, 234 (2005) (noting that appropriate sites for supermarkets within cities are scarce); UNSHARED BOUNTY, *supra* note 2, at 22 (“Land areas required for supermarkets were often unavailable in the city.”); see also *id.* (“The land demands supermarkets have evolved to require are difficult to accommodate within cities. Piecing together parcels of land, sometimes controlled by multiple entities, for a supermarket project within a city can be time consuming and prohibitively expensive.”).

121. See Marie Steele-Adjognon & Dave D. Weatherspoon, *A Theoretical Approach to Supermarket Chain Investment in Urban Food Deserts 3* (2017) (conference paper presented at the Agricultural & Applied Economics Association Annual Meeting, Chicago, Ill., 2017).

exit a location, they often impose a restrictive covenant on the deed of sale that forbids future owners and tenants from using the property as a grocery store for a fixed period of time, frequently measured in decades.¹²² For example, Walmart has sold former store locations subject to the condition that the “Grantee covenants that the land will not be used as a grocery store/supermarket . . . [S]uch restriction shall run with and bind said land and shall inure to the benefit and be enforceable by Grantor . . . [S]uch conditions and restrictions shall remain in effect to said land for fifty (50) years.”¹²³

But these anti-grocery covenants are not the exclusive domain of large chains. Small independent grocers sometimes impose covenants that provide their former storefronts “will not be used as a grocery store or food supermarket without Sellers’ prior written consent.”¹²⁴ These covenants run with the land and bind all future buyers and tenants.¹²⁵

These are scorched-earth covenants. The exiting supermarkets are metaphorically salting the fields as they retreat to the suburbs to make sure that no other supermarket can spring up and sell food at that location to local residents. Because most inner-city neighborhoods have few available parcels of land large enough for a supermarket, when a deed restriction blocks access to the most promising or only feasible plot of land or existing retail space, that restriction can effectively prevent any replacement supermarket from entering the neighborhood.¹²⁶ Scholars have recognized that “[t]he presence of a covenant preventing an otherwise ideal site from being used as a grocery store can contribute to the emergence or continuation of a food desert.”¹²⁷ And the imposition of scorched-earth covenants by exiting supermarkets is unfortunately common.¹²⁸ For example, as of 2010, Walmart had locked up 250 of its former sites with restrictive covenants that precluded competitors from using the space even though Walmart had abandoned these stores.¹²⁹

122. Alternatively, supermarkets that have long-term leases will sometimes put a restrictive-use covenant in its subleases, thus preventing the new tenant from selling groceries.

123. *Bernard Ct., LLC v. Walmart, Inc.*, 598 S.W. 3d 563, 564 (Ark. App. 2020).

124. *Gregory v. Kier Enterprises, Inc.*, 2006 WL 90106, at *1 (Kan. Ct. App. 2006).

125. *See id.*

126. *See 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/F8A3-Y4EC>] (“The restrictions are likely more damaging in certain neighborhoods, such as urban areas that are highly developed and don’t have space to build new stores.”).

127. Bruce Ziff & Ken Jiang, *Scorched Earth: The Use of Restrictive Covenants to Stifle Competition*, 30 WINDSOR Y.B. ON ACCESS TO JUST. 79, 81 (2012).

128. *See Paul A. Diller, Combating Obesity with A Right to Nutrition*, 101 GEO. L.J. 969, 1002 (2013) (noting that “supermarkets frequently use anticompetitive deed restrictions when selling property”); Peters, *supra* note 126 (“[S]imilar deed restrictions are used across the grocery industry . . .”).

129. Jeremy Bowman, *Where Have All the Inner-City Grocery Stores Gone?*, MOTLEY FOOL (Apr. 4, 2012), <https://www.businessinsider.com/where-have-all-the-inner-city-grocery-stores-gone-2012-4> [<https://perma.cc/P2QT-69DA>].

These scorched-earth covenants have created and preserved food deserts across the country. Such restrictions have created food deserts in Chicago's low-income neighborhoods.¹³⁰ In New Jersey, the closing of one supermarket and imposition of a forty-year scorched-earth covenant on the property created a food desert in downtown New Brunswick, an area in which most residents lacked access to cars and no other supermarket remained within walking distance.¹³¹ When Safeway closed its Greeley, Colorado location in 2014, 33,000 people were left without a grocery store in the city's downtown, while Safeway's lingering scorched-earth covenant effectively prevents another supermarket from opening up for twenty years.¹³²

Why would exiting supermarkets impose scorched-earth covenants that deprive inner cities of affordable groceries? The answer is simple: they want to reduce competition for their remaining stores in other locations. Almost half of the residents of food deserts have sufficient access to cars and income that they can drive to wealthier areas to purchase food.¹³³ The departing supermarket uses a scorched-earth covenant to force these customers to drive to the chain's more-distant locations rather than to shop at a competitor's supermarket in its former premises.¹³⁴ The supermarket chain hopes to retain a significant portion of the customers who frequented the location it is closing. To be sure, some people can drive to suburbs to shop for food at a departed supermarket chain's other locations. But for those left behind without the means to reach another supermarket, the scorched-earth covenant means those consumers can neither go to another location nor buy from a new occupant of the departed supermarket's closed location. The supermarket profits by retaining some of its customers, but the abandoned neighborhood bears the harsh burden of the scorched-earth covenant.¹³⁵ And as a result, for millions of lower-income residents of food

130. See Johnathon E. Briggs, *Supermarkets Sit Empty as Deeds Block New Grocers*, CHI. TRIBUNE (May 1, 2005), <https://www.chicagotribune.com/news/ct-xpm-2005-05-02-0505020153-story.html> [<https://perma.cc/P4WE-LHUF>].

131. *Davidson Bros. v. D. Katz & Sons, Inc.*, 643 A.2d 642, 645 (N.J. App. 1994) ("The problem was especially difficult for female heads of household who used to send their children to the store or have their children accompany them.").

132. 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/9KYS-GFE8>]; Steve Holt, *How Leaving Stores Closed for Years Helps Grocery Chains and Hurts Communities*, WORLD (Jan. 29, 2018), <https://www.pri.org/stories/2018-01-29/how-leaving-stores-closed-years-helps-grocery-chains-and-hurts-communities> [<https://perma.cc/HJE2-SLRT>] ("For instance, the 2014 closing of a Safeway in downtown Greeley, Colorado, left an estimated 33,000 residents without a convenient supermarket . . .").

133. VER PLOEG ET AL., *supra* note 12, at 35.

134. See Peters, *supra* note 126 ("The restrictions are typically put in place when a grocery store that owns a particular property decides to sell it, but wants to limit competition—perhaps pushing customers to shop at another branch of its own chain farther away.").

135. Furthermore, deed restrictions facilitate market exit because the supermarket knows that its exit will not create a vacuum that will be quickly or easily filled by a rival.

deserts—including racial minorities and the elderly—living in a food desert means food insecurity.¹³⁶

B. Going Dark

Some food deserts are created or reinforced when supermarkets close a store they own and simply leave the building vacant, a practice known in industry parlance as “going dark.” For example, for thousands of people who lived in the Birchwood neighborhood of Bellingham, Washington, Albertson’s was the only supermarket within walking distance.¹³⁷ Today, however, the neighborhood meets the federal definition of a food desert because the company closed the store when it opened another supermarket three miles outside of town.¹³⁸ Albertson’s refuses to allow any supermarket to move into its old Birchwood location. Instead, the storefront sits empty, a bare shrine that marks Birchwood as a food desert by corporate design.¹³⁹

The going-dark strategy is not limited to situations where the supermarket owns the closed location; supermarkets that lease space can also make the space go dark through an exclusive use covenant in the lease. When a supermarket negotiates a lease with a commercial landlord, the supermarket will often demand an exclusive-use covenant that prohibits the landlord from leasing space in that same shopping center to any other food vendor.¹⁴⁰ Such exclusive-use covenants for supermarkets are common in commercial leases.¹⁴¹

While facially restrictive, supermarket exclusivity provisions can increase competition, on balance, because they encourage supermarkets to open in shopping centers that might not otherwise attract a large grocery store.¹⁴² The

136. See Zhang & Debarchana, *supra* note 10, at 82 (“Typically, residents living in a food desert with limited access to healthy food experience issues of food insecurity but the impact is disproportionately higher among vulnerable populations due to lower socioeconomic status, ethnic minority status, old age, and existing negative health outcomes.”).

137. See Holt, *supra* note 132.

138. *Id.*

139. See *id.*

140. See Halper, *supra* note 57, at 299 (“Typical supermarket exclusive clauses prohibit significant competition for the consumer’s food dollar within the shopping center.”).

141. See Tanya D. Marsh, *Because of Winn-Dixie: The Common Law of Exclusive Use Covenants*, 69 U. MIAMI L. REV. 935, 936 (2015) (“Grocery store tenants, like Winn-Dixie, typically require the landlord to promise that no other tenant will sell more than a de minimus amount of food items intended for off-premises consumption.”).

142. See Diller, *supra* note 128, at 1004 (noting the argument “that the enforcement of exclusivity provisions is essential to attracting and retaining supermarkets that might otherwise not exist”); *Goodman v. Acme Markets, Inc.*, No. CIV. A. 88-6447, 1989 WL 42484, at *6 (E.D. Pa. Apr. 21, 1989), *aff’d*, 893 F.2d 1329 (3d Cir. 1989) (“When a major retailer enters a shopping mall, he is justified in seeking some assurance that he will not spend millions of dollars to open a store only to be undercut when the landlord allows a competitor to move in next door. The public benefits when such covenants are enforced because they promote efficient development and investment.”); *Optivision, Inc. v. Syracuse Shopping Center Assocs.*, 472 F. Supp. 665, 676 (N.D.N.Y. 1979) (noting “it may be necessary to include such a clause in a shopping center lease in order to attract to the center a certain type of store

protection from adjacent competition is particularly important when the shopping center is too small to allow two similar stores to both survive.¹⁴³ Exclusive-use covenants can also foster community development by securing an anchor tenant, which “often then encourag[es] the entry of other, often smaller, merchants” to the shopping center.¹⁴⁴ Given their potential benefits, exclusive-use covenants are generally upheld against legal challenges.¹⁴⁵ But these clauses can also have a dark side.

Although exclusive-use covenants can be beneficial, supermarkets sometimes harness the exclusionary power of these covenants as part of a going-dark scheme. The supermarket achieves this by negotiating an exclusive-use clause in their commercial lease, but then abandoning that shopping center while keeping the lease on the space and enforcing the restrictive clause to forbid other grocery stores from locating there.¹⁴⁶ For example, one South Carolina supermarket, Bi-Lo, leased space in a shopping center but then moved its operations to a competing shopping center, which Kroger’s, a major supermarket chain, had vacated. Bi-Lo, however, continued to pay rent at its abandoned location to prevent its use by a competitor. In evaluating the relocation, Bi-Lo’s

which might be unwilling to commit itself to a lease with high rentals if it knows that a competing store will be present in the center.”).

143. See Halper, *supra* note 57, at 301.

144. *Child World, Inc. v. South Towne Ctr., Ltd.*, 634 F. Supp. 1121, 1129 (S.D. Ohio 1986) (noting that “such [covenants] can induce tenants to establish stores and to enter into a particular marketplace, often then encouraging the entry of other, often smaller, merchants.”).

145. See Marsh, *supra* note 141, at 941–42 (“Common law and statutory law generally disfavor restraints on competition. Exclusive use covenants in commercial leases clearly restrain trade, but they have become an integral part of the retail real estate industry and are typically upheld by courts.”). Courts recognize that supermarket owners “either as lessees or purchasers may be hesitant to invest substantial sums if they have no minimal protection from a competitor starting a business in the near vicinity. Hence, rather than limiting trade, in some instances, restrictive covenants may increase business activity.” *Davidson Bros. v. D. Katz & Sons, Inc.*, 121 N.J. 196, 210, 579 A.2d 288, 295 (1990). Nonetheless, courts still require that such restrictions in shopping center leases and deeds not be “unreasonably broad” in scope or anticompetitive effects. *C.K. & J.K., Inc. v. Fairview Shopping Ctr.*, 63 Ohio St. 2d 201, 17 Ohio Op. 3d 124, 407 N.E. 2d 507 (Oh. 1980); *Goodman v. Acme Mkts., Inc.*, No. CIV. A. 88-6447, 1989 WL 42484, at *f4 (E.D. Pa. Apr. 21, 1989), *aff’d*, 893 F.2d 1329 (3d Cir. 1989) (enforcing supermarket restrictive covenant; “It is well-settled that restrictive covenants are enforceable as long as they do not work an unreasonable restraint of trade. Such covenants must be limited in space, time, and scope as required to protect the party for whom the covenant was made.”). For example, supermarkets sometimes extract concessions from their landlords that prevent the landlord from leasing any space within five miles of the supermarket’s location to any other grocery store. See, e.g., *Sunny Isle Shopping Ctr., Inc. v. Xtra Super Food Ctrs., Inc.*, 237 F. Supp. 2d 606, 614 (D.V.I. 2002). Some courts have used their judicial powers to “blue pencil” such covenants to limit them only to space within a specific shopping center and not to any location in the surrounding environs. *Id.*

146. See, e.g., *Drabant Enterprises, Inc. v. Great Atl. & Pac. Tea Co.*, 688 F. Supp. 1567, 1569 (D. Del. 1988) (“A & P has paid its rent on the leased premises at the Milford Shopping Center but has kept it empty and has insisted on its continued right to enforce the Restrictive Covenant on the premises formerly occupied by the Safeway store.”); cf. *Tippecanoe Assocs. II, LLC v. Kimco Lafayette 671, Inc.*, 829 N.E.2d 512, 513 (Ind. 2005) (holding that “once the tenant or its successor voluntarily relinquishes the original use of the site, the anticompetitive covenant is severed from the occupancy and no longer enforceable to give the tenant or an assignee the right to restrict competition for a location outside the center”).

hired analyst determined that “the biggest advantage of relocation to the vacant Kroger would be ‘eliminating the competitor and preventing a competitor from taking over the Kroger.’”¹⁴⁷ The supermarket effectively precluded its landlord from hosting any supermarket in its shopping center.

C. Scorched-Earth Subleases

Finally, some supermarket lessees that are closing a location fashion scorched-earth subleases to prevent another supermarket from entering that location. For example, some supermarkets enter long-term leases to operate in a large retail space and then, after abandoning that space, they negotiate subleases that forbid the sublessee or any subsequent sublessees from operating a grocery store on the premises.¹⁴⁸

State courts are split on the legality of these subleases. Some state courts have concluded that the duty of good faith obligates the lessee to engage in continued operation of a supermarket, and therefore have held that a supermarket tenant breaches the lease when, despite continuing to pay rent, the tenant ceases to operate a supermarket without subleasing to another supermarket that can serve as an anchor for the shopping center.¹⁴⁹ But other state courts have upheld such restrictive covenants in subleases even though the former supermarket space will not be able to operate as a supermarket for the foreseeable future.¹⁵⁰ Even when commercial leases include continuous-operation clauses,¹⁵¹ courts generally do not grant injunctions to enforce them.¹⁵² Courts have expressed concern that enforcing continuous-use provisions would put judges “in the business of managing a shopping center.”¹⁵³

147. *Columbia E. Assocs. v. Bi-Lo, Inc.*, 299 S.C. 515, 518 (Ct. App. 1989) (“The written analysis itself mentions the elimination of competition twice and reflects this was an important factor in the decision of whether to relocate.”).

148. *See, e.g., Spanish Oaks, Inc. v. Hy-Vee, Inc.*, 655 N.W.2d 390, 395 (Neb. 2003).

149. *See Columbia E. Assocs. v. Bi-Lo, Inc.*, 386 S.E.2d 259 (S.C. App. 1989).

150. *See Spanish Oaks*, 655 N.W. 2d at 395.

151. “A continuous operation clause is [a] . . . covenant requiring the tenant to operate its business in the leased premises continuously throughout the term of the lease.” William L. Patton, Jr. *Fam. Ltd. P’ship, LLLP v. Simon Prop. Grp., Inc.*, 370 F. Supp. 2d 846, 848 (E.D. Ark. 2005) (quoting Austin Hood, *Continuous Operation Clauses and Going Dark*, 36 *Real Prop. Prob. & Tr. J.* 365, 367 (2001)).

152. *See 8600 Assocs., Ltd. v. Wearguard Corp.*, 737 F. Supp. 44, 46 (E.D. Mich. 1990) (collecting cases); *Hamilton W. Dev., Ltd. v. Hills Stores Co.*, 959 F. Supp. 434, 439 (N.D. Ohio 1997) (“Many courts, in many jurisdictions, have refused to specifically enforce obligations of continuous operation in commercial leases, even where those obligations are unambiguously expressed.”); *see also* Francis N. Mastroianni, *Caveat Lessor: Courts’ Unwillingness to Find Implied Covenants of Continuous Use in Commercial Real Estate Leases*, 24 *REAL EST. L.J.* 236, 244 (1996) (discussing cases).

153. *Mayor’s Jewelers, Inc. v. State of Cal. Pub. Employees’ Ret. Sys.*, 685 So. 2d 904, 905 (Fla. Dist. Ct. App. 1996) (“Most of the cases reason that the injunction would involve the court in having to supervise the future performance, thus putting the court ‘in the business of managing a shopping center.’”) (citation omitted). These anti-injunction opinions, however, involve scenarios where a commercial tenant is trying to exit a shopping center altogether, not where the exiting tenant is enforcing a covenant that prevents a rival from occupying the abandoned space. *See, e.g., New Park Forest Assocs.*

Supermarket chains employ the above three schemes—alone or in combination—to block rivals from selling food in the chains’ former locations. All three strategies can create food deserts by legally blocking the entry of food vendors into neighborhoods that lack supermarkets. Although contract law has proven ill-equipped to address this problem, antitrust law may provide a solution.

IV.

FOOD DESERTS AS AN ANTITRUST ISSUE

Although no consensus exists on all of the causes of food deserts,¹⁵⁴ it is clear that food deserts represent a culmination of multiple market failures.¹⁵⁵ Racial discrimination, for example, is a market failure that precludes individuals from purchasing goods and services even though they are willing and able to pay at or above the competitive price.¹⁵⁶ In particular, supermarket redlining represents a market failure because firms decide to abandon locations based on racial stereotypes instead of market realities.¹⁵⁷ This discriminatory redlining by major firms also distorts the relationship between the smaller firms remaining in a food desert and the desert’s residents. When chain supermarkets engage in retail redlining and abandon inner city neighborhoods, they create food deserts, but they also confer market power—the power to charge more than a competitive price—on non-chain grocers, who then exercise that power by charging exorbitant prices.¹⁵⁸ When large chain stores exit a neighborhood, smaller retailers can charge higher prices for inferior goods because large stores are not there to price discipline them.¹⁵⁹ And, compared to suburban dwellers, residents of inner cities lack corresponding or offsetting market power as buyers. While suburbanites can use their cars to chase lower prices, thereby pressuring their local supermarket not to raise prices for fear of losing customers,¹⁶⁰ inner-city

II v. Rogers Enterprises, Inc., 552 N.E.2d 1215, 1220 (Ill. App. 1990). For example, in *Grossman v. Wegman’s Food Markets, Inc.*, 350 N.Y.S.2d 484, 485 (1973), the court refused to require specific performance for a grocery supermarket to operate for its fifteen-year lease when the exiting grocer promised to pay its rent until the landlord re-let the premises.

154. See Bitler & Haider, *supra* note 8, at 172.

155. See Bowman, *supra* note 129 (“[F]ood deserts are also a curious example of the flaws of our relatively free market.”).

156. See D’Rozario & Williams, *supra* note 108, at 177.

157. See *id.* at 175; VER PLOEG ET AL., *supra* note 12, at 86 (“Supermarket ‘redlining,’ which has been suggested as a possible reason some low-income or minority areas lack larger stores, could also constitute a market failure.”).

158. See D’Rozario & Williams, *supra* note 108, at 177 (“Based on what we now know from the previous section, chain stores willingly cede profitable, inner-city locations to independents, while they saturate suburban, less-profitable locations with their stores. This cannot be explained by any economic theory that we aware of”); Chung & Myers, *supra* note 30, at 278–79 (“Poor residents may pay higher prices because stores in their communities are different. These stores may have higher operation costs, more market power, and less availability of items compared to those in nonpoor communities.”).

159. See D’Rozario & Williams, *supra* note 108, at 175.

160. See Larson, *supra* note 52, at 32 (“In a competitive environment, [it] seems logical that large suburban supermarkets would tend to have lower prices than smaller central-city stores. The central-city

residents cannot similarly leverage their collective buying power to shop elsewhere in order to compel or encourage grocery sellers to lower their prices.¹⁶¹ If the competitive market were functioning properly, inner-city neighborhoods would have supermarkets,¹⁶² and if supermarkets were open in food deserts, their presence would put downward pressure on prices.¹⁶³

The market failures that culminate in food deserts are neither natural nor inevitable: a breakdown of antitrust law facilitated their arrival. Some scholars have argued that supermarket mergers contributed to the problem of food deserts because antitrust enforcers allowed a wave of mergers in the 1980s and 1990s that concentrated the market.¹⁶⁴ Often achieved through leveraged buyouts, these mergers resulted in cash-strapped megafirms that needed to maximize their cash flow immediately.¹⁶⁵ This context informed the chains' decisions to close hundreds of inner-city supermarkets, thus creating food deserts in the process.¹⁶⁶ In addition, the restrictive covenants discussed in Part III often reflect the market power of post-merger supermarket chains vis-à-vis commercial landlords and developers.

Weak merger enforcement also allowed supermarket chains to acquire long-term market power.¹⁶⁷ In particular, market concentration meant that chains collectively acquired oligopsony power that they exercised to pay less to farmers and food wholesalers, which in turn meant lower prices for suburban consumers who shopped at supermarkets.¹⁶⁸ But these dynamics contributed to higher prices for inner-city residents. Because supermarket chains squeezed wholesalers and growers on price, these sellers charged more to non-chain and smaller grocery stores, which lack market power as buyers.¹⁶⁹ These stores must in turn pass on their higher input costs to their customers, which they can do because the departure of the supermarkets left the remaining convenience stores with market power in their neighborhoods.

stores tend to be smaller, they are less likely to be part of a major chain, and their customers are less likely to have cars.”).

161. See Chung & Myers, *supra* note 30, at 278 (“This research suggested that supermarket migration to the suburbs, inadequate transportation, and lack of competitively priced food stores restricted low-income consumers’ food buying power.”).

162. See Larson, *supra* note 52, at 27.

163. See Chung & Myers, *supra* note 30, at 293 (“Results indicated that absence of inner-city chain stores was the major explanation for the price disparity.”).

164. See Larson, *supra* note 52, at 28.

165. See *id.*

166. See Eisenhauer, *supra* note 23, at 128 (noting that “between 1978 and 1984, Safeway closed more than 600 stores in inner city neighborhoods. Many of those stores were the primary or only source of reasonably priced (and minimally processed) meat and produce in their neighborhoods”).

167. See Eisenhauer, *supra* note 23, at 127–28.

168. See Larson, *supra* note 52, at 29.

169. See *id.* (noting that when chains negotiate price cuts, this “forces manufacturers to raise prices to other stores—putting smaller stores (those without market power) at an even greater cost disadvantage”).

The problem of food deserts is infused with these issues of market power, in particular the market power that mergers have concentrated in the national and regional supermarket chains that dominate the American food distribution network. This Part explains why food deserts are ripe for antitrust intervention and how courts have not yet risen to the challenge.

A. *Sherman Act Claims and Judicial Resistance*

Many of the supermarket business strategies that create food deserts potentially violate antitrust law. The scorched-earth deed restrictions discussed in Part III are anticompetitive in ways that implicate both Section One and Section Two of the Sherman Act, which proscribe unreasonably anticompetitive agreements and monopolization, respectively. Because supermarket restrictive covenants are agreements, they raise Section One concerns.¹⁷⁰ In some contexts, the covenant may operate as a form of market division that allows the exiting supermarket to charge more at its non-food desert location by preventing a new grocer from occupying its old location and engaging in price competition.¹⁷¹ While the following discussion will focus on Section One, restrictive covenants can also violate Section Two when employed by a monopolist to prevent a competing supermarket from entering the relevant market.¹⁷²

Under Section One of the Sherman Act, courts evaluate whether agreements unreasonably restrain trade under either the per se rule or the rule of reason. Courts generally reserve per se condemnation for conspiracies that “always or almost always tend to restrict competition.”¹⁷³ Under the per se rule, if an agreement falls into a per se category—such as price fixing or market division—courts presume anticompetitive effects and the agreement violates antitrust law as a matter of law.¹⁷⁴ Under the rule of reason, courts will examine

170. See *Acme Markets, Inc. v. Wharton Hardware & Supply Corp.*, 890 F. Supp. 1230, 1239 (D.N.J. 1995) (“The concerted action alleged here arises from the defendants seeking enforcement of a restrictive covenant which prevents the operation of a competing supermarket.”).

171. See *Bowman*, *supra* note 129 (“It only seems logical that if a neighborhood grocery store shuts down, another one should be allowed to move into the abandoned space. But the anti-competitive policy of deed restrictions often prevent that from happening, which leaves the neighborhood without convenient access to groceries. Often, the store that is shutting down is moving to another location, and uses deed restrictions to keep competition at bay [*sic*] so it can charge higher prices. Safeway, (SWY) for example, has used this tactic in areas such as Seattle and Vallejo, Calif., drawing flack from the locals over its behavior.”).

172. See *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 94 (2d Cir. 1998). The scorched-earth covenant operates as a way of raising rivals’ costs. See Christopher R. Leslie, *Patents of Damocles*, 83 IND. L.J. 133, 147 (2008) (“Antitrust law generally views raising rivals’ costs as exclusionary conduct, even if it does not deter market entry altogether, because it can delay entry and render competitors less aggressive price cutters, as they must recoup the unnecessary costs imposed by the dominant firm’s predatory conduct.”); Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power over Price*, 96 YALE L.J. 209, 230–49 (1986).

173. *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289–90 (1985) (quoting *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19–20 (1979)).

174. See ABA SECTION OF ANTITRUST LAW, *ANTITRUST LAW DEVELOPMENTS* 199 n.1259 (7th ed. 2012).

the actual or likely competitive effects of the challenged restraint. This approach generally requires the plaintiff to define the relevant market, to establish that the defendant has market power in that market, and to show that the restraint of trade unreasonably injures competition in that market.¹⁷⁵

Although supermarket restrictive covenants involve agreements and therefore necessarily satisfy the concerted action element of a Section One cause of action,¹⁷⁶ courts have been reluctant to condemn shopping center restrictive covenants as per se illegal. Courts have reasoned that the per se rule “would disregard important distinctions between and among the types of shopping centers involved, the type of store involved and the type of restraint involved.”¹⁷⁷ When evaluating supermarket exclusive-use clauses and restrictive covenants under the rule of reason, courts consider “[t]he purpose of such activity, the structure of the industry, and the strength of competition in the relevant geographic and product markets.”¹⁷⁸ Although case law is sparse, courts have generally upheld supermarket exclusive use restrictions against Section One challenges.¹⁷⁹

The anticompetitive tactics of going-dark schemes and scorched-earth subleases are also subject to antitrust challenge, but such claims have also generally failed.¹⁸⁰ In *Monmouth Real Estate Investment Trust v. Manville Foodland, Inc.*, for example, plaintiffs Monmouth Real Estate Investment owned a shopping center and leased space to Foodarama Supermarkets.¹⁸¹ Mayfair owned a supermarket about half a mile from that Foodarama location. When Foodarama decided to close that location, Mayfair subleased the space from Foodarama to ensure that no supermarket could use the space in the future. The

175. See *Double D Spotting Serv., Inc. v. Supervalu, Inc.*, 136 F.3d 554, 558 (8th Cir. 1998).

176. See *Harold Friedman Inc. v. Thorofare Mkts. Inc.*, 587 F.2d 127, 142 (3d Cir. 1978).

177. *Borman's, Inc. v. Great Scott Super Markets, Inc.*, 433 F. Supp. 343, 349 (E.D. Mich. 1975); *Nat'l Super Markets, Inc. v. Magna Tr. Co.*, 570 N.E.2d 1191, 1194 (Ill. App. 1991) (“The general consensus of the Federal courts which have considered covenants in shopping center leases is that the varying terms, conditions and economic specifications for these covenants render the application of the *per se* doctrine inappropriate.”).

178. *Friedman*, 587 F.2d at 143; *Nat'l Super Markets*, 570 N.E.2d at 1194 (“Some of the factors considered when determining the validity of a restrictive covenant are the impact it has on competition in the relevant market, the availability of alternate sites for the entity excluded by enforcement of the covenant, the scope of the restrictive covenant, and the economic justification for the inclusion of the restrictive covenant in the lease.”); see also *Jetro Cash & Carry Enterprises, Inc. v. Food Distribution Ctr.*, 569 F. Supp. 1404, 1415 (E.D. Pa. 1983) (evaluating restrictive covenants in food distribution under antitrust law’s rule of reason).

179. See, e.g., *Goodman v. Acme Markets, Inc.*, No. CIV. A. 88-6447, 1989 WL 42484, at *6 (E.D. Pa. Apr. 21, 1989), *aff'd*, 893 F.2d 1329 (3d Cir. 1989) (“While broad restrictions on competition have the potential to become anticompetitive, the one-half mile covenant only hurts the plaintiff, not the market. The restrictive covenant does not violate the rule of reason.”).

180. See, e.g., *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 597–98 (7th Cir. 1995); see *infra* notes 331–337 and accompanying text (discussing antitrust standing doctrine as applied to going-dark strategies and scorched-earth subleases).

181. *Monmouth Real Est. Inv. Tr. v. Manville Foodland, Inc.*, 482 A.2d 186, 188 (N.J. App. Div. 1984).

court rejected Monmouth's argument that Foodarama had breached its lease and its duty of good faith and fair dealing through non-occupancy.¹⁸² Furthermore, the court held that taking over a supermarket lease to have it go dark does not violate antitrust law. The court reasoned that "no authority" existed for the proposition "that the purchase of a competitor's business premises in order to shut down its business and thereby to reduce competition is actionable either as a tortious interference with prospective business advantage or as an antitrust law violation, unless amounting to an unreasonable restraint of trade with a significant tendency to reduce competition."¹⁸³ Ultimately, the court decided to "hold that Mayfair's purchase of an assignment of the Foodarama lease, even assuming a predominant purpose to reduce competition by eliminating a competitor," was not "actionable" under antitrust law.¹⁸⁴

Judicial rejection of antitrust claims against supermarket business strategies that create food deserts is misguided. When the restrictive covenants discussed in Part III create or reinforce food deserts, the agreements violate the rule of reason. Scorched-earth covenants unreasonably restrain trade because their sole purpose is to reduce competition. Unlike exclusive-use clauses in supermarket leases, which prevent a shopping center landlord from leasing space to any supermarket *other than* the one signing the lease, scorched-earth covenants do not induce a supermarket to open a store in a shopping center that otherwise might not have one. Quite the opposite. These covenants ensure that the affected property will not have *any* supermarket for the duration of the covenant, which often endures for decades. While exclusive-use clauses have a procompetitive justification, scorched-earth covenants do not.¹⁸⁵ Consumers suffer antitrust injury as they are forced to pay higher prices for inferior products.

A going-dark scheme can also violate Section One of the Sherman Act, depending on how a supermarket implements the scheme. A supermarket's unilateral decision to vacate property that it owns and leaves empty does not violate Section One because there is no agreement. But when a supermarket is a lessee who vacates its premises in a shopping center while preventing the landlord from replacing them, then the lease satisfies Section One's concerted action element.¹⁸⁶ Because going dark has the purpose and effect of reducing competition, reducing output, and reducing consumer choice, courts should find agreements used as part of a larger going-dark strategy violate the rule of

182. *Id.* at 188–89.

183. *Id.* at 190.

184. *Id.* at 191. The court stated that the anticompetitive agreement "was not *per se* actionable . . ." *Id.* But the court's use of the "per se" terminology is confused; the judge did not merely hold that anticompetitive agreements to prevent supermarkets are not *per se* illegal. The judge concluded that there was no antitrust action at all.

185. *See infra* notes 321–328 and accompanying text.

186. The concerted action element is also satisfied if the lessee supermarket enters into a sublease that restricts the sublessee from opening a supermarket, the scorched-earth sublease strategy.

reason.¹⁸⁷ For example, although exclusive-use clauses, in and of themselves, do not violate Section One of the Sherman Act, when used in combination with a going-dark strategy—in which a supermarket abandons a location while enforcing an exclusive-use clause to prevent any other grocers from entering a shopping center—these contract terms can unreasonably injure competition.

Section Two claims challenging supermarket covenants have fared no better than Section One claims. Courts have not been generally amenable to Section Two lawsuits based on supermarkets enforcing restrictive covenants to exclude rivals.¹⁸⁸ Judges seem to treat supermarkets as incapable of monopolizing a relevant geographic market because judges assume that another supermarket chain can easily construct a new store and inject competition into the area.¹⁸⁹ The next Section discusses the flaws in this approach.

B. Food Deserts and Geographic Markets

Most antitrust claims—including those challenging mergers, monopolization, and anticompetitive agreements evaluated under the rule of reason—involve market definition. For example, to block a proposed merger, an antitrust plaintiff must define the relevant market in order to show that the market is concentrated and that the proposed merger would likely have anticompetitive effects.¹⁹⁰ For Section Two monopolization claims, the plaintiff needs to define the relevant product market and relevant geographic market to show that the defendant possessed monopoly power in that properly defined market, and to prove that the defendant acquired or maintained that monopoly through exclusionary conduct. Similarly, for Section One claims based on the rule of reason, courts generally require antitrust plaintiffs to define the relevant market in which the alleged anticompetitive effects are felt.¹⁹¹ Defining the market correctly is critical because this issue is often outcome determinative in antitrust litigation.¹⁹²

The relevant market has two components: the relevant product market and the relevant geographic market. The definition of the relevant product market in

187. See *infra* notes 302–330 and accompanying text.

188. See, e.g., *Acme Markets, Inc. v. Wharton Hardware & Supply Corp.*, 890 F. Supp. 1230, 1242 (D.N.J. 1995).

189. See *infra* notes 231–242 (discussing Second Circuit’s opinion in *Tops Market*).

190. See *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278, 291 (D.D.C. 2020) (“For the FTC to show a likelihood of success on the merits and justify a preliminary injunction blocking the [proposed] merger, it must first meet its prima facie burden by (1) defining a relevant product market, (2) defining a relevant geographic market, and (3) showing undue concentration in that combined market.”); see also 15 U.S.C. § 18 (proscribing mergers “where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly”).

191. See *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380, 388 (8th Cir. 2007).

192. See Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129, 129 (2007) (“Throughout the history of U.S. antitrust litigation, the outcome of more cases has surely turned on market definition than on any other substantive issue.”).

antitrust claims involving food deserts is straightforward: this Article treats supermarkets as the relevant product market, which is consistent with most precedent.¹⁹³ This Section focuses on the less straightforward question of how to define the relevant geographic market in the context of supermarkets.

Courts in general define the relevant geographic market as “the market area in which the seller operates and to which the purchaser can practicably turn for supplies.”¹⁹⁴ Following the Supreme Court’s *Brown Shoe* precedent, federal courts require that “[t]he selected geographic market must ‘both correspond to the commercial realities of the industry and be economically significant.’”¹⁹⁵ These basic principles apply to antitrust cases involving supermarkets¹⁹⁶ by defining the relevant geographic market as “the area in which a potential buyer may rationally look for the goods or services he or she seeks.”¹⁹⁷

Despite the principle that geographic markets should be defined with reference to consumer behavior, courts in supermarket cases decline to treat neighborhoods within a city as the relevant area for antitrust analysis. Some courts recognize that the geographic market for groceries is smaller than for durable goods,¹⁹⁸ but when courts discuss localized competition, they mean competition within an entire metropolitan area, not within particular neighborhoods in that metropolis.

Courts use this approach to define the relevant geographic market in all types of antitrust claims against supermarkets. Merger analysis for supermarkets is performed at the city level or broader.¹⁹⁹ In Section Two litigation involving supermarkets, courts have defined the relevant geographic market as a city or township, sometimes including its surrounding area. For example, in *Inserra Supermarkets, Inc. v. Stop & Shop Supermarket Co.*,²⁰⁰ a supermarket wanting

193. See ABA SECTION ON ANTITRUST, MARKET DEFINITION IN ANTITRUST: THEORY AND CASE STUDIES 367 (2012) (“Wherever the boundaries of the relevant [geographic] market may lie, it is beyond dispute that courts and the federal antitrust authorities generally recognize a separate product market for supermarkets.”); see *id.* at 367–70 (discussing cases).

194. *Apani Sw., Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620, 625 (5th Cir. 2002) (quoting *Tampa Elec. Co. v. Nashville Coal Co.* 365 U.S. 320, 327–28 (1961)).

195. *Mich. Div.-Monument Builders of N. Am. v. Mich. Cemetery Ass’n*, 524 F.3d 726, 733 (6th Cir. 2008) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 336–37 (1962)).

196. See *Acme Mkts., Inc. v. Wharton Hardware & Supply Corp.*, 890 F. Supp. 1230, 1239 (D.N.J. 1995) (“The geographic market used must conform to commercial reality.” (quoting *Brown Shoe*, 370 U.S. at 336)).

197. *Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 183–84 (3d Cir. 2015) (quoting *Eichorn v. AT&T Corp.*, 248 F.3d 131, 147 (3d Cir. 2001)).

198. See *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 726 (3d Cir. 1991) (noting, in a Section One case, “in practical terms, one would comparison shop in a larger geographic market for a tractor, as compared to a grocery item”).

199. See *U.S. v. Von’s Grocery Co.*, 384 U.S. 270, 271–74 (1966) (treating Los Angeles as relevant market); see also ABA SECTION ON ANTITRUST, MARKET DEFINITION IN ANTITRUST: THEORY AND CASE STUDIES 367 (2012) (noting that in the context of supermarkets, defining geographic markets more narrowly than a city or metropolitan area is “more difficult to sustain”).

200. *Inserra Supermarkets, Inc. v. Stop & Shop Supermarket Co., LLC*, 240 F. Supp. 3d 299 (D.N.J. 2017).

to enter the city of Wyckoff, New Jersey sued the defendant supermarket for monopolizing and/or attempting to monopolize “the market for full-service supermarkets in Wyckoff” in violation of the Sherman Act.²⁰¹ The court denied the defendant’s motion to dismiss, holding that Third Circuit precedent provided that a city “and its neighboring communities [can be] a distinct geographic market” for Sherman Act claims involving supermarkets.²⁰² Similarly, courts considering Section One claims challenging a restrictive covenant for a single supermarket often define the relevant geographic market as an entire city and its surrounding unincorporated areas.²⁰³

Courts focus on cities as geographic markets because judges make a series of assumptions—sometimes explicitly, but often implicitly—about the nature of competition among supermarkets. For example, judges assume that the businesses in different shopping centers throughout a city or larger metropolitan area compete against each other.²⁰⁴ In one case challenging a supermarket’s restrictive covenant, the court asserted that “[t]he essence of competition is not within a shopping center but between shopping centers. That is particularly true in urban areas.”²⁰⁵ Indeed, some federal judges mock the notion of neighborhood grocery stores,²⁰⁶ and others have suggested that neighborhoods are not “economically significant.”²⁰⁷ These opinions miss the key distinction between a neighborhood and a city: the former is walkable (for those who are ambulatory) for daily errands and the latter is not. As a result, in antitrust cases involving supermarkets, courts decline to define geographic markets based on walking

201. *Id.* at 305.

202. 240 F. Supp. 3d 299 (D.N.J. 2017) (citing *Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 184 (3d Cir. 2015)).

203. *See, e.g.*, *Nat’l Super Mkts., Inc. v. Magna Tr. Co.*, 212 Ill. App. 3d 358, 364, 570 N.E.2d 1191, 1194 (1991); *Parkview Mkts., Inc. v. Kroger Co.*, No. C-1-76-318, 1978 WL 1447, at *1 (S.D. Ohio 1978) (In a case alleging violations of both Sections One and Two of the Sherman Act because of a restrictive supermarket covenant, the court held that “[t]he relevant geographic market is the Cincinnati Trading Area.”).

204. *See J.C. Penney Co. v. Giant Eagle, Inc.*, 813 F. Supp. 360, 368 n.3 (W.D. Pa. 1992), *aff’d*, 995 F.2d 217 (3d Cir. 1993) (“Such an exclusivity clause, or restrictive covenant, in shopping center leases is occasionally challenged on antitrust grounds, ‘implausibly enough, given the competition among malls . . .’” (quoting *Walgreen Co. v. Sara Creek Property Co.* (B.V.), 966 F.2d 273, 274 (7th Cir. 1992))).

205. *Carm’s Foods, Inc. v. Fred W. Albrecht Grocery Co.*, No. CA-6309, 1984 WL 7490, at *2 (Ohio Ct. App. 1984).

206. The Sixth Circuit, for example, when evaluating an antitrust claim involving hospital supplies, stated that “the antitrust laws will not shelter the out-dated local suppliers any more than it could have prevented supermarkets and discount stores in regional shopping malls from satisfying the demands of mobile suburban buyers who no longer patronized family-operated corner grocery stores within walking distance of individual city neighborhoods.” *White & White, Inc. v. Am. Hosp. Supply Corp.*, 723 F.2d 495, 506 (6th Cir. 1983).

207. *Cates v. Crystal Clear Techs., LLC*, 874 F.3d 530, 539 (6th Cir. 2017) (Batchelder, J., concurring) (“[T]he Neighborhood’ is not a relevant geographic market A geographic market must reflect the commercial realities of the telecommunication-services industry and be economically significant.”).

distance for consumers, resulting in a city or metropolitan area being considered the relevant geographic market, not neighborhoods.²⁰⁸

For over sixty years, courts deciding merger cases have been reluctant to define geographic markets as narrowly as neighborhoods because judges assume that consumers have cars and can therefore easily shop for groceries at locations outside their own neighborhood. From the beginning of the modern era of merger jurisprudence, federal judges have defined the relevant geographic market in antitrust litigation involving supermarkets broadly and in doing so have invoked the significance of cars. In *United States v. Von's Grocery Co.*,²⁰⁹ the Supreme Court struck down a merger between Von's and Shopping Bag, two successful supermarkets in Los Angeles that owned sixty-six grocery stores and whose merger would have created the second largest chain in the market.²¹⁰ The Court treated Los Angeles as the relevant geographic market without analyzing the issue. In his dissent, Justice Stewart focused on the importance of the automobile in defining the geographic market for supermarket mergers. Using retrograde gendered assumptions and noting that supermarkets were “[a]ccessible to the housewife’s automobile from a wide radius,” Stewart accused the majority of “attempt[ing] to make the automobile stand still, to mold the food economy of today into the market pattern of another era.”²¹¹ Much of the case was premised on the assumption that consumers had cars and could drive several miles in search of affordable groceries.²¹² This is an aspect of the phenomenon of what law professor Gregory Shill calls “automobile supremacy,” in which the law systematically encourages everyone to own a car, and even “[a] person who does not own a car is still conscripted into underwriting driving in numerous ways, overpaying for everything from groceries to commuting.”²¹³

For decades, when evaluating supermarket mergers, the Federal Trade Commission (FTC) has defined relevant geographic markets in terms of metropolitan statistical areas, which are larger than cities. At times, the antitrust agency has been amenable to defining geographic markets more narrowly. For example, in 2000, when challenging a merger between Kroger and Winn-Dixie, the FTC defined the market as only Fort Worth, and not the entire Dallas-Fort

208. See, e.g., *Drabant Enterprises, Inc. v. Great Atl. & Pac. Tea Co.*, 688 F. Supp. 1567, 1579 (D. Del. 1988).

209. 384 U.S. 270 (1966).

210. *Id.* at 277–78.

211. *Id.* at 288–89 (Stewart, J., dissenting).

212. See David C. Karp, *A Consumer Oriented Approach to Market Definition Under the Antitrust Laws*, 18 U.S.F. L. REV. 221, 246–47 (1984) (“At trial, an expert indicated his research had shown consumers were willing to travel a maximum of four miles to shop at a supermarket.”).

213. Gregory H. Shill, *Should Law Subsidize Driving?*, 95 N.Y.U. L. REV. 498, 504 (2020); see *id.* at 502 (explaining how “‘automobile supremacy’ . . . is constructed by diverse bodies of law including traffic regulation, land use law, criminal law, torts, insurance law, environmental law, vehicle safety rules, and even tax law, all of which provide incentives to cooperate with the dominant transport mode and punishment for those who defect”).

Worth metropolitan area.²¹⁴ But in subsequent supermarket merger cases, the agency continued to define the relevant geographic market in miles, not blocks or walking distances.²¹⁵ When the FTC challenged Whole Foods' acquisition of the Wild Oats supermarket chain, the district court accepted the agency's definition of the relevant geographic market as competitors "within a distance of three to six miles of their stores—and roughly 16 minutes driving time . . ."²¹⁶

In non-merger antitrust cases as well, courts too often define relevant geographic markets for supermarkets based on the behavior of relatively well-off consumers with cars. For example, in *Acme Markets, Inc. v. Wharton Hardware & Supply Corp.*,²¹⁷ in which the plaintiffs challenged a supermarket restrictive covenant, the court defined the geographic market broadly—beyond the city of Medford, New Jersey—because "50% of the food dollars of the area's residents are spent elsewhere."²¹⁸ By focusing solely on those consumers who could drive for groceries, the judge ignored the plight of poorer consumers without access to transportation and rejected the plaintiffs' narrower market definition as unreasonable.²¹⁹

In antitrust cases involving supermarkets, even geographic market definitions that are narrower than an entire city or metropolitan area assume that consumers have cars.²²⁰ Thus, when commentators define the relevant geographic market for supermarkets as local, they mean within driving distance,

214. Deborah L. Feinstein & Michael B. Bernstein, *All over the Map: Grocery Store Enforcement from Von's to Whole Foods*, 22 ANTITRUST 52, 54 (2007).

215. See *id.* at 55 (noting that in the Whole Foods and Wild Oats merger case, "[t]he FTC argued that the relevant geographic market extended to the range of five to six miles, instead of the three to four miles that it said it had found in recent typical grocery store transactions, ignoring that in the past it had often defined the relevant geographic market as an entire MSA").

216. *F.T.C. v. Whole Foods Mkt., Inc.*, 502 F. Supp. 2d 1, 37 (D.D.C. 2007), *rev'd*, 533 F.3d 869 (D.C. Cir. 2008), *opinion amended and superseded*, 548 F.3d 1028 (D.C. Cir. 2008), and *rev'd*, 548 F.3d 1028 (D.C. Cir. 2008) ("The Court agrees with the FTC that, in the context of this case and the evidence presented, this is a reasonable way to define the relevant geographic market."). The D.C. Circuit reversed on other grounds, focusing on the relevant product market and not discussing the geographic market issues. See *F.T.C. v. Whole Foods Mkt., Inc.*, 592 F. Supp. 2d 107, 109 (D.D.C. 2009) ("[A]ll three judges on the panel agreed with this Court that the case turns almost entirely on the proper definition of the relevant product market.").

217. 890 F. Supp. 1230 (D.N.J. 1995).

218. *Id.* at 1240.

219. See *id.* (holding that "no reasonable fact finder could conclude that the relevant geographic market is as small as plaintiffs suggest").

220. See, e.g., *Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 183–84 (3d Cir. 2015) (defining the relevant geographic market as "greater Morristown, which includes Morristown and its neighboring communities"); see also Feinstein & Bernstein, *supra* note 214, at 58 ("In other cases, such as *Whole Foods*, the FTC has defined the market narrowly, such as a six-mile radius around each of the acquired stores even where there was evidence that pricing and advertising was done across large regional areas to reflect the supermarkets' view that it could not treat consumers in the same market differently.").

not walking distance.²²¹ Once the geographic market is defined so broadly, a restrictive covenant that covers an area of one mile or more will necessarily seem insignificant because the defined market will seem to have plenty of players.²²² But this approach does not inform us of whether actual consumers can access these far-flung stores.

Defining geographic markets too broadly in the supermarket context leads courts to improperly deny antitrust protection to residents of food deserts. If only a subset of consumers living in a food desert can drive to a supermarket with lower prices or better quality, then those distant supermarkets cannot price discipline grocery sellers that are within walking distance of food desert residents.²²³ In *Drabbant Enterprises, Inc. v. Great Atlantic & Pacific Tea Co.*,²²⁴ the plaintiffs sought to prevent enforcement of a supermarket's restrictive covenant as violative of Section Two of the Sherman Act. The parties debated whether the relevant geographic market was the entire town of Milford, Delaware or the neighborhood within walking distance of the defendant's supermarket.²²⁵ The plaintiffs explained that from the perspective of the neighborhood residents, many of whom were elderly and less mobile, Milford's other two supermarkets were inaccessible, being two miles away.²²⁶ The court rejected the plaintiffs' narrow geographic market definition, reasoning that "the distance of only two miles indicates that these locations should be considered as falling into one geographic market."²²⁷ The court assumed that because *some* consumers drive from distances greater than two miles to do their grocery shopping, the relevant geographic market must include the whole city and region.²²⁸ Such reasoning treats all consumers interchangeably, despite the fact that many consumers are less mobile, as indicated by the plaintiffs' affidavits in the case.²²⁹ By defining the market to include the whole city, instead of the neighborhood directly impacted by the defendant's anticompetitive conduct, the

221. See ABA SECTION ON ANTITRUST, MARKET DEFINITION IN ANTITRUST: THEORY AND CASE STUDIES 366 (2012) ("The relevant geographic market for supermarkets is generally local due to consumer convenience and driving time.").

222. See *Nat'l Super Mkts., Inc. v. Magna Tr. Co.*, 570 N.E.2d 1191, 1195 (Ill. App. 1991) (antitrust defendant's expert "stated that the area contained over 25 stores engaged in the sale of grocery products" when the market was defined to include an entire city and beyond).

223. See *Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 184 (3d Cir. 2015) ("If the ShopRite in Morristown raised its prices, it is plausible that only the most diligent and frugal customer would move his or her grocery shopping to a more distant supermarket."). Some commentators have argued, "As long as enough consumers in a local area will move a few miles over to the next local area in response to a price increase, the various local areas are linked and thus the geographic market cannot be limited to a few mile radius around a given store." Feinstein & Bernstein, *supra* note 214, at 58. But this does not take sufficient account of consumers who cannot drive miles to a supermarket.

224. 688 F. Supp. 1567, 1579 (D. Del. 1988).

225. *Id.*

226. *Id.*

227. *Id.* at 1580.

228. See *id.*

229. See *id.*

court calculated the defendant's market share as too low to sustain a Section Two claim for either actual or attempted monopolization.²³⁰

Inappropriately broad definitions of geographic markets can create food deserts. In *Tops Markets, Inc. v. Quality Markets, Inc.*,²³¹ the Second Circuit considered a variety of antitrust claims against Quality Markets, which had owned five of the nine supermarkets in Jamestown, New York before purchasing the other four and shutting them all down in short order.²³² Acquiring competitors to shut them down is quintessential monopoly conduct.²³³ A supermarket chain, Tops Markets, sought to build a new store in Jamestown, New York, but was confronted with exclusionary efforts by the area's dominant player, Quality Markets. When Quality learned that Tops had contracted to purchase parcels upon which to build a new supermarket, Quality sought to interfere with that contract by offering more money and giving the seller a right to repurchase the land "subject to a deed restriction limiting the property to uses other than a supermarket."²³⁴ In fact, Quality "announced at a press conference they would not allow the property to be used by a competing supermarket company."²³⁵ But Quality itself would also never build a supermarket on that land. In other words, Quality sought to scorch the earth before anyone could even start a supermarket.

When Tops sued Quality for violating Sections One and Two of the Sherman Act to recover its losses from the delay in entering the market,²³⁶ the district court granted Quality summary judgment on all antitrust claims. On appeal, the Second Circuit defined the geographic market as a seven-to-ten-mile radius around the city of Jamestown, an area that contained nine supermarkets in 1992.²³⁷ The Second Circuit affirmed summary judgment for Quality on Tops' Section One claim, asserting that Tops had shown no adverse effect on the market or that Quality possessed market power, a decision that flowed inherently from defining the geographic market broadly. The appellate panel also rejected Tops' monopolization claim by assuming that the competitive market in the "Jamestown market area," broadly defined, would prevent Quality from exercising any market power.²³⁸ By defining the geographic market expansively,

230. *See id.* at 1583.

231. 142 F.3d 90 (2d Cir. 1998).

232. *Id.* at 94.

233. *See, e.g.,* *United States v. American Can Co.*, 230 F. 859 (D. Md. 1916).

234. *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d at 94.

235. *Id.* at 101.

236. Tops eventually acquired the land when the city used its power of eminent domain to condemn the land and sell it to Tops. Tops opened its supermarket five years after making its initial contract to purchase the land and more than four years after that contract was quashed. *Id.* at 94.

237. *Id.* at 93–94.

238. *Id.* at 98 ("Kennedy's conclusion expressly assumes, without offering any support, that no other competitors would enter the market were Quality to raise its prices. This proposition suggesting Quality's purported monopoly power is too speculative to create an issue of fact for the jury. It neither

the court assumed that there must have been plentiful land upon which a competing supermarket could be built,²³⁹ and that in response to any supracompetitive pricing by Quality, “new competitors could and would enter the market and, by undercutting those prices, quickly erode Quality’s market share.”²⁴⁰ The Second Circuit allowed only Tops’ attempted monopolization claim to proceed, which the jury later rejected because it defined the geographic market too broadly and incorrectly concluded that “there were plenty of alternative[.]” sites available.²⁴¹ Both the courts and the jury were wrong. Today, twenty years later, Jamestown, New York is a food desert.²⁴²

C. Which Consumers Matter?

The current approach to geographic market definition reflects an implied judgment about which consumers deserve the protection of antitrust law, and which do not. Antitrust law is meant to protect all consumers from anticompetitive conduct, collusion, and mergers—including consumers whose income is below average. Indeed, lower-income consumers are often less equipped to protect themselves and may benefit more from antitrust enforcement than middle-class and wealthy consumers who can drive to neighboring shopping areas or can afford to have groceries delivered.²⁴³ Many residents of food deserts without cars or access to public transit cannot shop for food on the other side of town. Walking distance defines the boundaries of *their* relevant geographic market even if their wealthier neighbors are not similarly constrained.

Too often, however, antitrust analysis assumes that all consumers are middle-class or richer individuals who own cars and can comparison shop across great distances. Defining geographic markets broadly because half of a neighborhood’s residents have the means to make purchases in nearby cities or suburbs does a disservice to those consumers who are locked into their

demonstrates Quality’s present ability to raise prices, nor evidences the exclusion of competition from the Jamestown market area.”).

239. In particular, the court noted that Wegman’s, another supermarket chain, had acquired land in the area and built a supermarket. *Id.* at 97. The fact that Wegmans built a location does not prove that there was any other available land for Tops, which would have been close enough to serve those residents who were in walking distance to the location upon which Quality imposed the scorched-earth covenant.

240. *Id.* at 99.

241. *Tops Mkts., Inc. v. Quality Mkts., Inc.*, No. 93-CV-0302E(F), 2000 WL 1160466, at *3 (W.D.N.Y. Aug. 10, 2000).

242. *Jamestown Mobile Market Reaches 7 Food Dessert Locations, Finishes Season*, POST-J. (Nov. 14, 2019), <https://www.post-journal.com/news/community/2019/11/jamestown-mobile-market-reaches-7-food-dessert-locations-finishes-season/> [<https://perma.cc/8P7C-SGKY>] (“As defined by the U.S. Agriculture Department, food deserts are ‘parts of the country vapid of fresh fruit, vegetables, and other healthful whole foods, usually found in impoverished areas.’ Jamestown is home to a large food desert, spanning from downtown Jamestown up to Jamestown Community College. The areas lack grocery stores, farm stands and other options for fresh produce purchase.”).

243. See *infra* notes 275–277 and accompanying text (discussing grocery delivery).

neighborhood. It is wrong to focus on the so-called average consumers to the exclusion of those consumers who live closer to the margins of poverty.

Some may argue that inner-city neighborhoods do not satisfy the requirement that “a geographic market must be sizeable enough to be ‘economically significant.’”²⁴⁴ But individual food deserts can house thousands of people, and food is a product that people consume every day if they are fortunate.²⁴⁵ Perversely, while several courts refused to recognize neighborhoods as geographic markets in cases involving supermarkets, the Supreme Court treated four mountains that offered downhill skiing in Aspen, Colorado as a relevant geographic market.²⁴⁶ Of course, there are important differences between downhill skiing in Aspen and access to food in an inner city. The main ones are: skiing is a luxury, while food is a necessity; Aspen skiers are relatively wealthy, while residents of food deserts are not; and food deserts are often communities of color, while ski resorts are not. If downhill skiing in Aspen, Colorado is a relevant geographic market, why not the neighborhoods of Detroit, none of which house a single chain supermarket?²⁴⁷ Antitrust law posits that competition produces lower prices, greater quantity, and higher-quality goods and services. But the residents of inner-city neighborhoods enjoy none of the benefits of competitive markets in groceries. That represents a failure of antitrust law.

V.

FASHIONING AN ANTITRUST RESPONSE TO FOOD DESERTS

Interpreted and applied correctly, antitrust law could play a role in alleviating food deserts by bringing supermarkets back to the neighborhoods they abandoned. This Section first explains why the return of supermarkets is a proper policy goal. It then advocates for three ways in which antitrust law could help achieve that goal. It first argues that courts and policymakers should treat food deserts as relevant geographic markets for antitrust purposes, which would facilitate appropriate Sherman Act litigation. In addition, courts should interpret antitrust standing broadly to ensure that appropriate plaintiffs will pursue viable antitrust claims against supermarkets. Finally, antitrust agencies should consider using their leverage during the merger review process to strike down scorched-

244. *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 277 (6th Cir. 2014) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 336–37 (1962)).

245. Moreover, supermarket restrictive covenants substantially affect interstate commerce. Federal courts, therefore, have jurisdiction to hear antitrust claims challenging such covenants. *Harold Friedman Inc. v. Thorofare Mkts. Inc.*, 587 F.2d 127, 136 (3d Cir. 1978) (“[W]hen a large interstate supermarket chain is in the picture, anticompetitive activities directed at an individual store will inevitably have a substantial effect upon the flow of goods across state lines to either the victimized establishment or the firm that is engaged in the anticompetitive practice, if not to both.”); *Drabant Enters., Inc. v. Great Atl. & Pac. Tea Co.*, 688 F. Supp. 1567, 1576 (D. Del. 1988).

246. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 & n.20 (1985).

247. *See Fehn*, *supra* note 17, at 573.

earth covenants and encourage supermarkets to reenter food deserts. This Part concludes by showing how antitrust policy is but one instrument among many to bring healthy food options to communities that currently lack them.

A. Supermarkets as a Goal

This Article advocates using antitrust law to reintroduce supermarkets to areas long abandoned by them. The ultimate goal is to provide access to affordable and healthy food to all consumers, but a focus on supermarkets is appropriate because their reintroduction into food deserts can help achieve several related goals. First, supermarkets bring the benefits of market competition back to the inner city. Large supermarkets generally offer higher quality food at lower prices than convenience stores and even smaller grocery stores.²⁴⁸ The presence of chain supermarkets provides competition for smaller grocers that can cause them to lower their prices and improve the quality of their offerings.²⁴⁹ Even those inner-city residents who can drive to suburban supermarkets can instead shop locally and spend their money in their local community if a local supermarket exists.²⁵⁰

Second, the reintroduction of supermarkets into urban food deserts alters the environment in a manner that can encourage and facilitate healthier choices.²⁵¹ Proximity is key, as research shows that “[l]iving closer to healthy food retail is among the factors associated with better eating habits and decreased risk for obesity and diet-related diseases.”²⁵² The presence of supermarkets is statistically correlated with a lower prevalence of obesity.²⁵³ Access to

248. See Story et al., *supra* note 16, at 259 (“The lack of availability of large supermarkets is of concern because large supermarkets tend to offer food at lower prices and provide a wider variety of and higher-quality food products than do small grocery stores.”).

249. See D’Rozario & Williams, *supra* note 108, at 176 (“The presence of a chain grocery store (even better, a large chain grocery store) in a low-income neighborhood typically has dramatic effects on the prices and quality of goods and services offered at other grocery stores in these neighborhoods.”) (discussing findings of Judith Bell & Bonnie Maria Burlin, *In Urban Areas: Many Poor Still Pay More for Food*, 12 J. PUB. POL’Y & MKTG. 268 (1993)); Larson, *supra* note 52, at 34 (“Because the chain stores are likely more attractive to customers (larger, more variety, more convenient, larger sizes), independents are forced to offer competitive prices, even if profits are lower.”).

250. See BELL ET AL., *supra* note 11, at 16 (“Local access to healthy food retail also prevents ‘leakage’ within the local economy by ensuring dollars spent stay within the community rather than outside of it.”).

251. See *id.* at 4 (“Bringing grocery stores to low-income underserved areas creates a healthier food environment that supports making healthier choices.”); Story et al., *supra* note 16, at 259 (“The presence of food stores, and the availability of healthful products in those stores, are important contributors to healthy eating patterns among neighborhood residents.”).

252. BELL ET AL., *supra* note 11 at 7.

253. See Nicole I. Larson, Mary T. Story & Melissa C. Nelson, *Neighborhood Environments: Disparities in Access to Healthy Foods in the U.S.*, 36 AM. J. PREVENTATIVE MED. 74, 75 (2009) (“Despite some inconsistencies [among studies], several studies have shown that better access to a supermarket is related to reduced risk for obesity, whereas greater access to convenience stores is related to increased risk for obesity.”); Kimberly Morland, Ana V. Diez Roux & Steve Wing, *Supermarkets, Other Food Stores, and Obesity: The Atherosclerosis Risk in Communities Study*, 30 AM. J. PREVENTATIVE MED. 333, 335 (2006).

supermarkets leads to healthier diets and lower rates of nutrition-related diseases.²⁵⁴

Third, supermarkets reentering food deserts create numerous positive externalities for the community. Supermarkets provide important employment opportunities.²⁵⁵ Small independent stores are more likely to locate near supermarkets to take advantage of the foot traffic that a supermarket generates.²⁵⁶ Particularly in the shopping center context, a supermarket can anchor a development that supports over a dozen other retailers.²⁵⁷ As a result, supermarkets can help reduce overall neighborhood unemployment.²⁵⁸ Supermarket reentry can start a snowball effect that leads to meaningful community economic development, benefitting residents regardless of whether they frequent the new supermarket.²⁵⁹ All of this can keep money in the community, increase the local tax base, and spur larger neighborhood revitalization.²⁶⁰ Ultimately, supermarkets can improve the daily quality of life and help build a sense of community.²⁶¹

Finally, these benefits of supermarkets can help reduce some of the consequences of systemic racism in food deserts. Greater access to supermarkets is associated with increased fruit and vegetable consumption and overall diet quality among African Americans, lowering their incidence of unhealthy

254. See VER PLOEG ET AL., *supra* note 12, at 39 (“The food deserts literature suggests that those who have better access to supermarkets tend to have healthier diets and lower levels of obesity and related diseases.”); *id.* at 6 (“People who live in areas with limited access may be more prone to poor diets and have poor health outcomes, such as obesity or diabetes, because they lack access to healthy foods and may have too easy access to less healthy foods.”).

255. See *id.* at 106–07 (“Introduction of a supermarket not only provides new products and services but also creates jobs and helps to keep money in the community.”).

256. See Halper, *supra* note 57, at 299 (“When a supermarket is in a shopping center, consumers visit the shopping center to buy food; and when they do that, they are within strolling distance of the shopping center’s other stores.”); Eisenhauer, *supra* note 23, at 129.

257. See O’Connor & Abell, *supra* note 119, at 4 (“Frequently supermarkets anchor shopping centers of from three to twenty stores, attracting other shops and local entrepreneurial efforts amenable to the community. The supermarket and adjacent commercial enterprises are a source of employment and training for significant numbers of local community residents.”).

258. See Eisenhauer, *supra* note 23, at 129.

259. See Steele-Adjognon & Weatherspoon, *supra* note 121, at 4 (“Supermarket entry can also attract other forms of retail and services into the food desert which will then lead to even further economic community development.”).

260. See Zenk et al., *supra* note 38, at 665 (“Supermarket development can enhance local economic vitality by (1) providing jobs for residents, (2) increasing the local tax base, (3) making foods available at lower prices, thereby increasing the spending power of residents, and (4) attracting other forms of retail.”); BELL ET AL., *supra* note 11, at 6 (“Healthy food retailers can generate significant economic stimulus by serving as anchors for further commercial revitalization, creating local jobs, generating tax revenues, and capturing local dollars within the community, among other economic and community development outcomes.”).

261. See Larson, *supra* note 52, at 26 (“The quality of life is diminished when everyday shopping is hard. Clearly, expanding and strengthening retail businesses in inner-city neighborhoods would help recreate a sense of community.”).

obesity.²⁶² One study found that “fruit and vegetable intake increased with each additional supermarket in a census tract, and that increase was nearly three times as large for African Americans.”²⁶³ Real-world natural experiments “provide[] evidence that supermarkets may improve aspects of residents’ lives beyond diet for low-income African-Americans.”²⁶⁴ The return of supermarkets to inner cities does not undo the myriad effects of decades of racism, but it may prove a necessary step in righting some historical wrongs.

Three main critiques may be leveled against this Article’s focus on supermarkets. First, some researchers suggest that it is wrong to focus on supermarkets to the exclusion of farmers’ markets, small grocery stores, convenience stores, and even restaurants.²⁶⁵ In neighborhoods without supermarkets, residents shop at convenience stores and bodegas.²⁶⁶ Many so-called grocery stores, however, are more appropriately labeled as liquor stores, albeit ones that sell some food items.²⁶⁷ In contrast to the healthy low-cost food offered at supermarkets, local grocery and convenience stores “stock more energy dense, processed, high-fat, sugary, and salty foods.”²⁶⁸ Many smaller

262. Julie Beaulac, Elizabeth Kristjansson & Steven Cummins, *A Systematic Review of Food Deserts, 1966-2007*, 6 PREVENTING CHRONIC DISEASE 1, 4 (2009) (“In the United States, increased access to supermarkets is associated with lower prevalence of overweight and obesity, improved fruit and vegetable consumption, and better diet quality among African Americans, low-income households, and pregnant women.”) (citation omitted).

263. Story et al., *supra* note 16, at 259.

264. Andrea S. Richardson, Madhumita Ghosh-Dastidar, Robin Beckman, Karen R. Flórez, Amy DeSantis, Rebecca L. Collins & Tamara Dubowitz, *Can the Introduction of a Full-Service Supermarket in a Food Desert Improve Residents’ Economic Status and Health?*, 27 ANNALS EPIDEMIOLOGY 771, 774 (2017) (noting that “supermarkets can potentially influence economic outcomes among residents by providing jobs or catalyzing changes that result in increased wages, real estate equity, and social cohesion”).

265. See Raja, Ma & Yadav, *supra* note 26, at 471; see also VER PLOEG ET AL., *supra* note 12, at 2–3 (“But focusing only on supermarkets and larger grocery stores is likely to underestimate the availability of healthy foods since some of these foods are also available at small grocery stores, convenience stores, pharmacies, dollar stores, farmers’ markets, and restaurants.”).

266. UNSHARED BOUNTY, *supra* note 2, at 30–31.

267. See Fehn, *supra* note 17, at 573 n.71 (noting that many so-called grocery stores in Detroit “have the words ‘liquor, beer, and wine’ blazoned on the signs in much larger letters than the words ‘food or groceries’”); see also PAULA TARNAPOL WHITACRE, PEGGY TSAI & JANET MULLIGAN, INST. OF MED. & NAT’L RSCH. COUNCIL, THE PUBLIC HEALTH EFFECTS OF FOOD DESERTS: WORKSHOP SUMMARY 15 (2009) (“In Detroit, the team studied 50,000 blocks and found that very few had mainstream grocery stores. They more likely had various types of convenience or fringe stores, particularly liquor or party stores that sell a few food items along with cigarettes, alcohol, and soft drinks.”).

268. Bower et al., *supra* note 103, at 33; Nathan McClintock, *From Industrial Garden to Food Desert: Demarcated Devaluation in the Flatlands of Oakland, California*, in CULTIVATING FOOD JUST.: RACE, CLASS & SUSTAINABILITY 89 (Alison Hope Alkon & Julian Agyeman eds., 2011) (noting that “fresh and nutritious produce is rarely available at these small stores, and the type of food generally tends to be of poorer quality and less healthy, high in sugars and saturated fats”); Ilan Brat, *Do ‘Food Deserts’ Cause Unhealthy Eating?*, WALL ST. J. (July 12, 2015), <http://www.wsj.com/articles/do-food-deserts-cause-unhealthy-eating-1436757037> [<https://perma.cc/2CX5-2BSR>] (quoting the Food Trust’s Brian Lang as saying, “While low-income neighborhoods may have some small markets that are

stores are unwilling to take the risk of purchasing and reselling perishable produce that may not sell quickly enough.²⁶⁹ In many cases, “small convenience and corner stores lack the refrigeration and equipment necessary to stock and sell a variety of healthy foods.”²⁷⁰ These problems are not easily overcome “because smaller stores ‘have a harder time accommodating equipment or space needed for fresh produce or perishable products.’”²⁷¹ Thus, even when these stores have fresh produce and meat, these items are often in poor condition.²⁷² Moreover, these products have higher prices than the same items sold at supermarkets.²⁷³ Large supermarkets can charge lower prices because they possess buying power vis-à-vis wholesalers, as well as the ability to make their own store brand products that they can sell at relatively low prices.²⁷⁴

Second, and related, it may seem that supermarket location is no longer paramount because, in theory, online sales of groceries could facilitate the delivery of fresh food to consumers and ameliorate the problems discussed in Part I. Some commentators held out hope that Amazon’s acquisition of Whole Foods could help eliminate food deserts.²⁷⁵ To be sure, supermarket delivery services can help improve access for many people, but it is not a panacea. Grocery delivery is not available in all cities or in all neighborhoods of those cities that do have some delivery services. Moreover, online grocery services generally require reliable internet access and credit cards, which poor families are least likely to have. In some locations, grocery delivery is not accessible for

classified as ‘grocery stores,’ they stock mostly snacks, and the fresh food on their shelves is low-quality and expensive.”).

269. See VER PLOEG ET AL., *supra* note 12, at 103.

270. Steele-Adjognon & Weatherspoon, *supra* note 121, at 4.

271. UNSHARED BOUNTY, *supra* note 2, at 23 (quoting Ver Ploeg, *supra* note 8, at 3–4).

272. Eisenhauer, *supra* note 23, at 130 (“[I]n small local stores, fresh vegetables and meat, when available, are often in poor condition . . .”).

273. See Chung & Myers, *supra* note 30, at 278 (“Most studies found, in general, that the residents of inner-city poor communities paid more. These studies indicated that access to food stores for poor residents was limited primarily or even exclusively to small grocers with limited brands and package sizes available and higher prices than chain stores.”); UNSHARED BOUNTY, *supra* note 2, at 26 (“A number of studies have found that supermarkets tend to carry lower priced items relative to smaller grocery stores and convenience stores.”); VER PLOEG ET AL., *supra* note 12, at iv (“Results from these analyses show that when consumers shop at convenience stores, prices paid for similar goods are, on average, higher than at supermarkets.”); Ver Ploeg, *supra* note 8 (“Some neighborhoods lacking supermarkets may be served by smaller grocery or convenience stores which may offer some healthy foods, but often at higher prices than supermarkets. Higher prices at these food retailers compound the problem of limited access to healthy foods.”).

274. See UNSHARED BOUNTY, *supra* note 2, at 22 (“Supermarkets were able to cultivate buying power with manufacturers and obtain large volumes of goods at discounted prices. Sometimes, because they were so large, they were able to produce their own products, selling these at discounted prices.”).

275. See Jack Karsten & Darrell M. West, *How the Amazon-Whole Foods Merger Shrinks Food Deserts*, BROOKINGS (Aug. 29, 2017), <https://www.brookings.edu/blog/techtank/2017/08/29/how-the-amazon-whole-foods-merger-shrinks-food-deserts/> [https://perma.cc/MPM4-V4BR]; Leanna Garfield, *Annie’s President: Amazon’s Acquisition of Whole Foods is a ‘Golden Opportunity’ to Kill America’s Food Deserts*, BUS. INSIDER (June 26, 2017), <https://www.businessinsider.com/amazon-whole-foods-food-deserts-2017-6> [https://perma.cc/DA74-8AYA].

low-income households that use food stamps.²⁷⁶ Even when food stamps are redeemable online, delivered groceries can be relatively expensive and “some deliveries have minimum purchase requirements or added shipping fees, which can be a barrier for low-income customers.”²⁷⁷ Although grocery delivery increases access, it is suboptimal to having supermarkets in walking distance.

Third, some research suggests that supplying healthy food to food deserts will not increase its intake or improve health outcomes because demand is insufficient.²⁷⁸ Conversely, much evidence shows that there is demand for

276. Nathaniel Meyersohn, *Groceries Were Hard to Find for Millions. Now It's Getting Worse*, CNN (June 9, 2020), <https://www.cnn.com/2020/06/09/business/food-deserts-coronavirus-grocery-stores/index.html> [<https://perma.cc/SL94-TRL8>] (noting that “online grocery delivery is out of reach for some customers who use food stamps”).

277. *Id.*

278. See Rosenberg & Cohen, *supra* note 24, at 1092; Scott W. Allard, Maria V. Wathen, H. Luke Shaefer & Sandra K. Danziger, *Neighborhood Food Infrastructure and Food Security in Metropolitan Detroit*, 51 J. CONSUMER AFFS. 566, 566 (2017); Madhumita Ghosh-Dastidar, Gerald Hunter, Rebecca L. Collins, Shannon N. Zenk, Steven Cummins, Robin Beckman, Alvin K. Nugroho, Jennifer C. Sloan, LaVette Wagner & Tamara Dubowitz, *Does Opening a Supermarket in a Food Desert Change the Food Environment?*, 46 HEALTH & PLACE 249, 250 (2017); Deborah N. Archer & Tamara C. Belinfanti, *We Built It and They Did Not Come: Using New Governance Theory in the Fight for Food Justice in Low-Income Communities of Color*, 15 SEATTLE J. FOR SOC. JUST. 307, 313 (2016); Steve Cummins, Ellen Flint & Stephen A. Matthews, *New Neighborhood Grocery Store Increased Awareness of Food Access but Did Not Alter Dietary Habits or Obesity*, 33 HEALTH AFFS. 283, 283 (2016); Allcott et al., *supra* note 40, at 1793; Aiko Hattori, Ruopeng An & Roland Sturm, *Neighborhood Food Outlets, Diet, and Obesity Among California Adults, 2007 and 2009*, 10 PREVENTING CHRONIC DISEASE (2013), no. 120123. Sociologist Ken Kolb recently argued that supermarket entry into food deserts does not improve healthy eating. See KENNETH H. KOLB, RETAIL INEQUALITY: REFRAMING THE FOOD DESERT DEBATE 14 (2022). After noting the conventional wisdom that grocery stores improve consumption of healthier foods, Kolb cites studies denying a correlation between supermarket access and healthier diets. *Id.* at 10, 13, 29–30 (collecting studies); see also *id.* at 57 (“The proximity thesis may not even be wrong, just far more complex than a direct causal relationship would imply.”). While acknowledging that residents of food deserts want grocery stores, Kolb claimed that “health” is just a framing device; poor people don’t actually desire healthy food but want supermarkets in their neighborhoods to address “the longstanding problem of retail inequality in Black neighborhoods.” *Id.* at 152. Kolb argued that poor people want closer grocery stores to easily purchase their current diets at lower prices. *Id.* at 59. (To the extent that Kolb is correct, antitrust law cares about prices.) Kolb based his conclusions on interviews with eighty-five people in Greenville, North Carolina, but he did not report how many of those stated they would buy healthier food if a supermarket were available. *Id.* at 77. Kolb reported that when “pressed on whether a new [grocery] store would change the way they ate,” most predicted it would not. *Id.* at 115. Kolb does not deliberate on the likely accuracy of his respondents’ predictions or whether the change in the food environment would affect other people in the neighborhood, especially children. And while Kolb acknowledged that changes to diets take time, *id.* at 57, he overlooked the role of supermarket proximity in aiding the process of transitioning unhealthy diets into healthier ones. Moreover, Kolb noted that “22 percent of the eighty-five people [he] interviewed told [him]—unprompted—that they wanted a new grocery store because it would help others in their neighborhood access a healthier diet.” *Id.* at 123. Kolb did not consider that people may also want to seem altruistic, not selfish, when demanding that grocery stores return to their neighborhoods, and they might, in fact, improve their own diets as well. Finally, Kolb’s participants are quite dissimilar from the residents of many urban food deserts. Most of his interviewees had cars, some had “easy access to someone else’s” car, and the remainder had the ability to bus, bike, or walk to a grocery store. *Id.* at 79. Almost all his interviewees went to a grocery store at least once a month. *Id.* at 180. Kolb admirably did “not claim [his] sample is

supermarkets in inner cities.²⁷⁹ Moreover, research demonstrates that proximity to supermarkets increases consumption of fruit and vegetables.²⁸⁰ Studies in actual food deserts substantiate that consumers will purchase competitively priced fresh produce, especially as their incomes rise.²⁸¹ Perhaps most important for supermarkets considering entry into food deserts, some econometric research establishes that sufficient demand exists in poor inner-city neighborhoods to make supermarkets profitable.²⁸² Ultimately, the evidence is mixed,²⁸³ but most studies show that supermarket access results in healthier food consumption.²⁸⁴

statistically representative.” *Id.* at 193. But their access to grocery stores makes them meaningfully different than most food desert residents. Given their regular trips to grocery stores, it is not surprising that most of Kolb’s interviewees said that the opening of a closer supermarket would not change their diets: they already have consistent access to grocery stores. It would be wrong to make national policy based on impressionistic interviews with such a small number of atypical food desert residents.

279. See Larson, *supra* note 52, at 23 (“A survey of retail needs provided to Rebuild LA (RLA) showed that South Central residents wanted full-service grocery stores and supermarkets far more than any other business.”).

280. See UNSHARED BOUNTY, *supra* note 2, at 26 (“In summary, studies looking at the relationship of food access, food choice and health have found correlations between food access and food choice. Food choice for low-income minorities has been found to be affected both by prices and by the accessibility of healthy foods. Improving the food environment within minority communities has led to improvements in diet.”); Donald Rose & Rickelle Richards, *Food Store Access and Household Fruit and Vegetable Use Among Participants in the US Food Stamp Program*, 7 PUB. HEALTH NUTRITION 1081, 1084-85 (2004) (showing that easier access to supermarket increases lower-income households’ consumption of fruits and vegetables, though the latter was not statistically significant); see also Dave D. Weatherspoon, James F. Oehmke, Assa Dembélé, Marcus A. Coleman, Thasanee Satimanon & Lorraine J. Weatherspoon, *Price and Expenditure Elasticities for Fresh Fruits in an Urban Food Desert*, 50 URB. STUD. 88, 100-01 (2013) (finding that introducing neighborhood grocery stores with fresh fruit into food deserts increases consumption).

281. See Dave D. Weatherspoon, James F. Oehmke, Marcus A. Coleman, Assa Dembélé & Lorraine J. Weatherspoon, *Will Long Term Food Desert Consumers Purchase Fresh Fruits and Vegetables?*, 27 CHOICES 1, 4 (2012) (“Detroit’s food desert consumers respond to the same economic stimuli in determining FFV consumption as the rest of the nation, even after living in a community largely devoid of quality, competitively priced FFV for several decades. In particular, FFV consumption is very responsive to income, and thus income-based incentives could make a significant difference on purchase and consumption patterns”).

282. See Jane Kolodinsky & Michele Cranwell, *The Poor Pay More? Now They Don’t Even Have a Store to Choose From: Bringing a Supermarket back to the City*, 46 CONSUMER INTS. ANN. 24, 28 (2000).

283. See VER PLOEG ET AL., *supra* note 12, at v (“A few studies have examined food intake before and after healthy food options become available (either within existing stores or because new stores opened). The findings are mixed—some show a small but positive increase in consumption of fruits and vegetables, while others show no effect.”); see also Rosenberg & Cohen, *supra* note 24, at 1115 (“The existence of contradictory evidence creates uncertainty, which, combined with diverse research methods, variable data quality, and different theoretical models, makes interpreting and evaluating research results difficult.”).

284. See Larson, Story & Nelson, *supra* note 253, at 76; see, e.g., Gyoungju Lee & Hyunwoo Lim, *A Spatial Statistical Approach to Identifying Areas with Poor Access to Grocery Foods in the City of Buffalo, New York*, 46 URB. STUD. 1299, 1300 (2009) (discussing a before-and-after study that “concluded that dietary patterns changed significantly such that the proportion consuming healthy foods (such as fresh vegetables, fruit) increased due to the new opening of an easy-access nearby grocery retail supermarket in that food desert”) (citing Neil Wrigley, Daniel Warm & Barrie Margetts, *Deprivation*,

In the face of this mixed evidence, it is somewhat myopic to assert that increasing the availability of affordable, nutritious food in poor neighborhoods is futile because demand is absent.²⁸⁵ Supply and demand work together. Empirically, government efforts to increase demand for nutritious food have floundered because inner-city residents lack access.²⁸⁶ Increasing demand for healthier food is both unlikely and pointless unless supermarkets exist to meet this new demand. Because the market for nutritious food is a function of both supply and demand, looking at each side of the equation in isolation is shortsighted. Any solution to inner-city malnutrition must address both demand and supply. Demand can be increased by education, including about health benefits and how to prepare nutritious foods.²⁸⁷ Also, people develop a taste for more nutritious food over time after increased access to and familiarity with fresh produce.²⁸⁸ Time horizons are important because studies suggesting that improved access did not significantly increase consumption were relatively short term.²⁸⁹ Expanding the supply of nutritious food in food deserts is therefore necessary for changing the tastes and behavior that increase consumer demand for healthier food.²⁹⁰ Ultimately, increasing the supply of fresh produce is necessary but not sufficient; the demand issues must also be addressed.²⁹¹ But increasing supply remains a crucial first step.²⁹²

In sum, supermarkets are key. They offer healthy options that are not available at smaller grocery stores and convenience stores.²⁹³ Shopping at supermarkets, as opposed to independent neighborhood grocers, is correlated

Diet and Food-Retail Access: Findings from the Leeds 'Food Deserts' Study, 35 ENV'T & PLAN. A 151 (2003)).

285. Ultimately, the conventional wisdom is that availability increases consumption of healthy foods. If the conventional wisdom is correct, then this supports this Article's advocacy of antitrust law as a method of bringing supermarkets (back) to urban food deserts. If, however, the conventional wisdom is incorrect, that still does not provide a justification for scorched-earth covenants. Indeed, the fact that exiting supermarkets are imposing scorched-earth covenants provides evidence that they believe the demand is present.

286. See Broad Leib, *supra* note 20, at 324 ("Policy makers at all levels have tried to encourage Americans to eat healthier, but efforts to improve eating habits have been stymied due to a lack of access to fresh, nutritious items in food deserts.").

287. See VER PLOEG ET AL., *supra* note 12, at 112.

288. See *id.*

289. See Cummins, Flint & Matthews, *supra* note 278, at 283. The study was limited to six months. *Id.* at 284, 286.

290. Hawkins, *supra* note 16, at 124 ("Without access to healthy and nutritious food, an individual has a more difficult time changing his or her behavior because only unhealthy food is available, and the individual cannot travel to grocery stores with healthier food.").

291. See Dave D. Weatherspoon, James F. Oehmke, Assa Dembélé, Lorraine J. Weatherspoon, *Fresh Vegetable Demand Behaviour in an Urban Food Desert*, 52 URB. STUD. 960, 973–75 (2015).

292. See Archer & Belinfanti, *supra* note 278, at 316.

293. See Allcott et al, *supra* note 40, at 1807 ("The store types we call "supermarkets"—large grocery stores, supercenters, and club stores—generally offer a wider variety of healthy items and packaged and bulk produce compared with small grocery stores, convenience stores, and drug stores.").

with greater consumption of fruit and vegetables.²⁹⁴ It's precisely this lack of affordable healthy food in small neighborhood grocery stores that leads to unhealthy diets in food deserts.²⁹⁵ As explained in Part II, these effects are often manifested in a racialized manner, with Black consumers who rely on small neighborhood grocers most likely to be denied access to healthy food.²⁹⁶ Ultimately in minority neighborhoods, the availability of fruits and vegetables is a function of supermarket presence.²⁹⁷ Eliminating restrictive contract provisions, such as scorched-earth covenants, can increase the number of supermarkets serving deserted communities.

B. Supermarket Covenants as Antitrust Violations

Removing restrictive covenants can help solve the problem of food deserts by enabling the reintroduction of supermarkets. Where deed restrictions are not a barrier to entry, new grocery stores can take over abandoned space. For example, one Chicago entrepreneur resuscitated two former grocery store spaces in order to serve two of that city's food deserts.²⁹⁸ Further west, when Safeway abandoned its location in Vallejo, California and sold the property, Safeway scorched the earth by imposing a fifteen-year covenant that legally precluded the land from being used to host a supermarket.²⁹⁹ For those fifteen years, a generation of youth was raised on meals from fast food outlets, liquor stores, and convenience stores lacking healthy food. As soon as the covenant expired, a supermarket moved in and began supplying fresh produce and other healthy food to the community.³⁰⁰ This timing suggests that the covenant caused the food desert, and its removal solved the problem. Eliminating scorched-earth

294. See Powell et al., *supra* note 28, at 189 (“Shopping at supermarkets versus independent grocers has been associated with more frequent fruit and vegetable consumption.”).

295. See Jetter & Cassady, *supra* note 35, at 38 (“The lack of availability in small grocery stores located in low-income neighborhoods, and the higher cost of the healthier market basket may be a deterrent to eating healthier among very low-income consumers.”).

296. See Steven Cummins & Sally Macintyre, *Food Environments and Obesity—Neighbourhood or Nation?*, 35 INT'L J. EPIDEMIOLOGY, 100, 100 (2006) (“Grocery stores in black neighborhoods are also less likely to stock healthy food items or healthier versions of standard foods (e.g. low-fat, low-salt).”). See, e.g., Fehn, *supra* note 17, at 573 (discussing Detroit food desert).

297. See Akiko S. Hosler, Deepa T. Rajulu, Bonnie L. Fredrick & Adrienne E. Ronsani, *Assessing Retail Fruit and Vegetable Availability in Urban and Rural Underserved Communities*, 5 PREVENTING CHRONIC DISEASE 1, 5 (2008) (“Our study demonstrated that the urban minority neighborhood was the most disadvantaged in terms of retail F&V availability, as measured by the population density of F&V stores. The low retail availability of fresh F&Vs in this community appears to be largely because of the lack of super produce stores and not the absolute lack of food stores.”); Shannon Zenk, Amy J. Schulz, Teretha Hollis-Neely, Richard T. Campbell, Nellie Holmes, Gloria Watkins, Robin Nwankwo & Angela Odoms-Young, *Fruit and Vegetable Intake in African Americans: Income and Store Characteristics*, 29 AM. J. PREVENTATIVE MED. 1, 7 (2005) (“This study suggests that poor access to supermarkets in African-American neighborhoods, a symptom of economic divestment, may have negative implications for residents’ fruit and vegetable intake.”).

298. Bowman, *supra* note 129.

299. Peters, *supra* note 126.

300. *Id.*; Holt, *supra* note 132.

covenants will not solve the nationwide problem of food deserts, but doing so would be a relatively simple first step in a broader, long-term solution.³⁰¹

Antitrust law can play a key role in eliminating restrictive covenants that keep supermarkets out of food deserts. Although many of the covenants discussed in Part III are inherently anticompetitive, courts are most likely to apply the rule of reason to antitrust claims challenging supermarket covenants. The rule-of-reason test is designed to “distinguish[] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.”³⁰² In applying the rule of reason, the Supreme Court has explained: “Appropriate factors to take into account include specific information about the relevant business and the restraint’s history, nature, and effect. Whether the businesses involved have market power is a further, significant consideration.”³⁰³ This is a fact-specific inquiry, intended to determine the restraint’s actual or probable effects.³⁰⁴

The body of case law that exonerates the use of supermarket restrictive covenants from antitrust liability significantly predates the modern study of food deserts. Incorporating current wisdom about the causes and consequences of food scarcity, and the failures of inner-city markets for food distribution, should inform how courts perform antitrust analysis. This Section applies this new knowledge to the components of rule-of-reason analysis, including market power, the purpose and effects of a challenged restraint, and proffered justifications.

1. Market Power

Although courts often consider the defendants’ market power when performing a rule-of-reason inquiry, the Supreme Court has opined that proof of market definition and market power should not be necessary when the plaintiffs can demonstrate “actual detrimental effects, such as a reduction of output.”³⁰⁵ Restrictive covenants that block supermarket entry and limit access to healthy food clearly reduce output and cause the type of detrimental effects that antitrust

301. See Peters, *supra* note 126 (describing banning supermarket “restrictive covenants in deeds as relatively low-hanging fruit”).

302. *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007).

303. *Id.* at 885–86 (internal quotations and citations omitted).

304. See *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918) (“To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.”).

305. *F.T.C. v. Ind. Fed’n of Dentists*, 476 U.S. 447, 460–61 (1986) (quoting 7 P. Areeda, *Antitrust Law* ¶ 1511, p. 429 (1986)). The Supreme Court has held: “Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, ‘proof of actual detrimental effects, such as a reduction of output,’ can obviate the need for an inquiry into market power, which is but a ‘surrogate for detrimental effects.’” *Id.*

law cares about. Thus, scorched-earth covenants could violate the rule of reason without any analysis of either market definition or market power.

If courts do discuss market power as part of their rule-of-reason inquiry, judges need to define the geographic market in a manner that accurately reflects the commercial realities of food deserts. Courts define geographic markets by consumer behavior, but large groups of consumers in a single neighborhood may behave differently. These differences in behavior may require courts to define different geographic submarkets within a larger geographic area. The Supreme Court recognized the concept of geographic submarkets in *Brown Shoe Co. v. United States*.³⁰⁶ Consequently, a single physical neighborhood can belong to both a relatively large city-based geographic market and a relatively narrow neighborhood-based geographic submarket. For those residents of a food desert who have cars, the relevant geographic market may include the whole city in which the neighborhood is located; but for their neighbors without cars, the commercial realities are different. For those residents of this same food desert who lack transportation—and who are denied access to healthy food because of the defendant’s restrictive covenants—any competition in the larger geographic market is irrelevant.

In many cities, food deserts may be seen as a relevant geographic submarket for antitrust purposes. Courts considering antitrust claims against supermarkets have in some instances recognized that the relevant geographic market can be both a relatively large Metropolitan Statistical Area (“MSA”) and a series of submarkets within that MSA.³⁰⁷ That recognition is important in the antitrust analysis of restrictive covenants. A supermarket may compete in the larger market, often a city or MSA, but it may utilize restrictive covenants in submarkets within that city to distort competition in the larger market. The submarket is both the proper unit of antitrust analysis and the proper place to look for the anticompetitive effects that trigger antitrust liability.

The definition of food deserts should inform how courts define the relevant geographic market or submarket. In the context of some urban food deserts, metropolitan neighborhoods are the relevant geographic markets.³⁰⁸ Food deserts are generally defined as low-income areas in which urban residents are at least one mile away from the nearest supermarket. The millions of individuals who

306. See 370 U.S. 294, 336 (1962). In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), the jury found “the ‘Aspen area’ was a relevant geographic submarket” and the Court accepted this market definition by affirming that the defendant had illegally monopolized that market. *Id.* at 596 n.20.

307. See *Ind. Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1412 (7th Cir. 1989).

308. See Larson, *supra* note 52, at 29 (“The national market-share figures do not suggest the kind of market concentration that is associated with non-competitive behavior. Actual competition takes place at the local level in metropolitan neighborhoods, where markets are even more concentrated.”); see also Comm. on Antitrust & Trade Regul., Ass’n of the Bar of N.Y.C., *Supplement to the 2003 Milton Handler Annual Antitrust Review Proceedings*, 2004 COLUM. BUS. L. REV. 379, 435–36 n.178 (2004) (“In principle, a relevant geographic market could be as small as a neighborhood or as large as the entire global economy.”).

live in food deserts and lack transportation cannot look further afield for groceries and instead must purchase locally despite the fact that convenience stores charge higher prices for lower quality food items. The actual buying behavior of these consumers should define the relevant geographic market for antitrust purposes.³⁰⁹ And for these residents of food deserts, their neighborhood is the relevant geographic market.³¹⁰ Antitrust law requires that geographic markets be defined in light of commercial realities. The commercial reality in urban food deserts is that a substantial percentage of residents cannot purchase healthy food that is offered beyond the boundaries of nearby blocks.

A supermarket does not have to actively do business in a geographic submarket, such as a food desert, to inflict antitrust injury or to incur antitrust liability for the harms that it causes in that underserved market.³¹¹ The scorched-earth covenant, for example, is designed to inflict anticompetitive harm in a neighborhood that the supermarket has deserted. The supermarket chain is blocking competition in that submarket because a new grocery store in the supermarket's old haunt would divert sales from the supermarket chain's nearest stores (which those residents with cars will drive to if their neighborhood lacks a grocery store). Supermarkets shut down competition in the abandoned geographic submarket (which becomes a food desert) in order to increase their sales at their stores in the larger geographic market. That conduct is sufficient to make these supermarkets culpable for the antitrust injury that their covenants inflict on the residents of food deserts.

Courts could avoid the intricacies of markets versus submarkets if they forewent market definition altogether, as some antitrust scholars have persuasively argued.³¹² If courts, however, insist on requiring plaintiffs to define markets when pursuing rule-of-reason claims against supermarkets, then courts should define the geographic component with reference to the commercial realities of those consumers who cannot shop beyond the boundaries of their neighborhoods. In defining the relevant geographic market, courts ask "how far consumers will go to obtain the product or its substitute in response to a given

309. See *Ferguson Med. Grp. v. Mo. Delta Med. Ctr.*, 2006 U.S. Dist. LEXIS 53493, at *6 (E.D. Mo. 2006) ("A geographic market is determined not by where consumers *actually* go for a particular product or service, but rather by where they *could* go should the defendants' prices become anticompetitive.").

310. See Bitler & Haider, *supra* note 8, at 171 ("Food desert research often defines geographic areas as the relevant market, but any definition is unlikely to be uniformly correct across areas or even within areas for different individuals. For example, the relevant geographic area for individuals with limited mobility may be smaller than for others.").

311. By analogy, because antitrust law creates joint and several liability, each member of a conspiracy is liable for damages to every victim of an antitrust violation, even those with whom it had no business. Christopher R. Leslie, *Judgment-Sharing Agreements*, 58 DUKE L.J. 747, 752 (2009). In the same way that a member of a market-division conspiracy would be liable for those overcharged consumers in the market that it did not serve, a supermarket can be liable for the antitrust injuries that it inflicts on the residents of a neighborhood that it has abandoned and burdened with restrictive covenants.

312. See Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437, 517 (2010) (noting that the "the market definition / market share paradigm is incoherent").

price increase and how likely it is that a price increase for the product in a particular location will induce outside suppliers to enter that market and increase supply-side competition in that location.”³¹³ Food deserts are relevant geographic markets because when food prices increase, a significant number of residents do not leave that neighborhood in pursuit of lower prices or higher quality, even though such lower-priced, higher-quality foodstuffs are available in the suburbs.

2. *Purpose and Effect*

Rule-of-reason analysis requires considering the purpose and effect of a challenged restraint. Proper analysis of these aspects of the inquiry will often support finding supermarket restrictive covenants to violate antitrust law. The purpose of many supermarket restrictive covenants is to reduce competition. Scorched-earth covenants are explicitly designed to block competition. That is their sole purpose. Exclusive-use covenants are more nuanced. The contracting parties’ initial reason for *agreeing to* the covenant may be to encourage investment in a new shopping center location. But when a supermarket abandons a leased location while *enforcing* an exclusive-use covenant—the lessee-going-dark strategy—the purpose to is to block competitors and ensure that an entire shopping center will have no food vendors. Recall the South Carolina incident, in which the Bi-Lo supermarket chain enforced its exclusive use covenant as part of a going-dark strategy—leaving its leased store vacant and creating a food desert—for the stated purpose of “preventing a competitor from taking over” the abandoned space.³¹⁴

Restrictive covenants generally have a substantial anticompetitive effect. First, scorched-earth covenants hurt consumers by creating and maintaining food deserts, resulting in consumers paying higher prices for lower-quality food and suffering attendant health consequences.³¹⁵ Second, when supermarkets use their exclusive use covenants as part of a going-dark strategy to block large grocers from entering a food desert, residents are denied the benefits of competition: prices are higher, quality is lower, and quantities are limited.³¹⁶ All of these effects represent classic forms of antitrust injury.³¹⁷

In addition to these traditional concerns, supermarket restrictive covenants deprive consumers of choice. Consumers in a food desert do not have the option of purchasing healthy food; indeed, that is one of the hallmarks of a food

313. *Heerwagen v. Clear Channel Commc’ns*, 435 F.3d 219, 227 (2d Cir. 2006), *overruled on other grounds by* *Teamsters Loc. 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 201 (2d Cir. 2008).

314. *Columbia E. Assocs. v. Bi-Lo, Inc.*, 386 S.E.2d 259, 261 (S.C. App. 1989); *see supra* note 147 and accompanying text (discussing the facts of the case).

315. *See supra* notes 36–54 and accompanying text.

316. *See supra* notes 137–147 and accompanying text.

317. *See Nahas v. Shore Med. Ctr.*, 828 F. App’x 89, 91 (3d Cir. 2020).

desert.³¹⁸ Denial of choice is an important antitrust concern.³¹⁹ Supermarkets offer shoppers “choices of brand, size, quality, and other product attributes,” as well as a wider range of prices for products in a given category, “thereby allowing consumers to choose items whose prices fall within their budgets.”³²⁰

In short, supermarkets have used restrictive covenants for the purpose of restricting competition and with the effects of creating food deserts, raising prices, eliminating choice, and denying people access to affordable, healthy food. Moreover, a covenant is not an ordinary contract; it binds the land, not just the parties, and, therefore, has a more significant anticompetitive effect.

3. *Legitimate Business Justifications*

After an antitrust plaintiff proves that the defendant’s covenant unreasonably restrains trade, the defendant has the burden of “show[ing] a procompetitive rationale for the restraint.”³²¹ Supermarket chains argue that they need an exclusive-use covenant to justify making the large upfront investment necessary to open a store in a shopping center.³²² While this is a solid reason for not condemning exclusive-use covenants as per se illegal, a supermarket chain should only be allowed to justify the enforcement of the exclusive-use covenant as long as it (or a sublessee) is actively operating a supermarket at that location.³²³ Although the supermarket chain may have a right to exit that location, that departure should necessarily void the exclusive-use covenant because going dark is inconsistent with the purpose of such covenants: to protect the first supermarket in a shopping center from a second supermarket in that same center. Thus, even if an exclusive-use covenant does not violate antitrust law when executed, it violates the rule of reason when a dominant supermarket enforces the clause to go dark while excluding all other competitors.

Scorched-earth covenants are not supported by any procompetitive justification. In theory, a defendant could argue that a scorched-earth covenant is permissible because it prevents a rival from free riding on its developed location. But there is no plausible free riding story here.³²⁴ The supermarket did

318. See *supra* notes 36–41 and accompanying text.

319. See Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503 *passim* (2001).

320. VER PLOEG ET AL., *supra* note 12, at 77.

321. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018); see also *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918) (“The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.”).

322. See *supra* notes 140–145 and accompanying text.

323. As a matter of contract law, this version of the going-dark strategy violates the covenant of good faith and fair dealing. But the strategic use of contractual provisions to block competitors from using the abandoned location implicates antitrust law as well.

324. An argument can be constructed that invalidating scorched-earth covenants could reduce the incentive of supermarkets to develop large retail grocery spaces because they may fear having to sell that storefront to a rival should they decide to leave that location. Such concerns are unpersuasive.

not create demand that would not otherwise exist. And although it may have developed or improved the land, the supermarket can charge for those improvements when it sells the property. The purchase of an outgoing firm's property is not free riding. It is the market functioning as intended.

A supermarket chain may argue that it should be able to impose a scorched-earth covenant when selling or leasing its property because if it cannot do so, then it will simply not use the land at all. Deprived of the ability to impose an anticompetitive covenant, the supermarket in this scenario would choose to neither sell nor lease the land. Instead, the property will go unused, which makes the neighborhood worse off than if the storefront were used for non-grocery purposes. This "procompetitive rationale" is essentially extortion: "If you don't let us exclude grocery stores, then we will blight the neighborhood with an empty store for decades." Although the supermarket would certainly lose money with this strategy, the threat is not empty. Monopolists are often willing to incur short-term losses to increase their market power long-term.³²⁵ Moreover, the threat is credible: supermarkets often go dark by either leaving their own property idle or paying rent on vacant stores.³²⁶

This extortionist threat, however, does not warrant antitrust deference.³²⁷ Under this strategy, supermarkets force a choice between suppressing competition to protect their stores within driving distance or burdening the neighborhood with a hollow storefront that will depress the local economy and benefit no one in the community. A supermarket's attempt to hold an entire neighborhood hostage is no defense against antitrust liability. Indeed, such conduct justifies greater antitrust intervention.³²⁸ Ultimately, no *procompetitive* justification exists for dominant supermarket chains using covenants to remove productive property from the market in a manner that creates food deserts.

4. *Serving Consumer Interests*

Finally, to the extent that the ultimate question in rule-of-reason analysis is whether the challenged restraint serves "the consumer's best interest,"³²⁹ the answer is a resounding "no." Scorched-earth covenants and other strategies that block supermarkets and cause food deserts unambiguously hurt consumer

Supermarkets will invest in locations that are expected to be profitable. Rational executives will not cease developing land simply because they may wish to sell the land decades later. If the supermarket has developed the space well, it can charge a premium to any future buyer. Consequently, there is little risk of free riders causing supermarket chains to underinvest in constructing new grocery stores.

325. See Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695, 1753 (2013).

326. See *supra* notes 137–147 and accompanying text; see also Christopher R. Leslie, *Rationality Analysis in Antitrust*, 158 U. PA. L. REV. 261, 297–300 (2010) (explaining the credibility of anticompetitive threats).

327. Modern courts would never bow to homeowners' threats that they will not sell their houses to anyone unless they are allowed to include enforceable racial covenants in their deeds.

328. See *infra* notes 338–347 and accompanying text.

329. *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885–86 (2007).

welfare. They are inherently unreasonable. Even when those restraints are not facially and unequivocally anticompetitive, context can convert seemingly reasonable covenants into unreasonable ones. For example, while an exclusive-use covenant may benefit consumers by facilitating supermarket entry into a shopping center, that same covenant harms consumers when a supermarket goes dark, abandoning a location but enforcing its exclusive-use covenant to prevent that shopping center from having any grocers where consumers can buy food. In short, an exclusive-use covenant that encourages market entry is reasonable, while a covenant that blocks entry in a manner that creates a food desert is unreasonable and violates antitrust law.

Anticompetitive supermarket covenants harm both competition and consumers. Scorched-earth covenants represent an artificial barrier to entry unrelated to efficiency or competition on the merits. Unlike an exclusive-use provision that induces a new supermarket to operate in a shopping center, the scorched-earth covenants operate to exclude all entry even when a neighborhood has no supermarkets. But all covenants hurt consumers and the competitive process if they prevent rivals from entering a geographic market, even if the defendant does not have a store in that specific market.

When supermarket restrictive covenants violate the rule of reason, an antitrust remedy is warranted. Successful antitrust plaintiffs may be entitled to money damages, injunctive relief, or both. The remedy of money damages raises interesting issues of who is entitled to damages and what method of calculation is most appropriate. Regarding injunctive relief, judges are reluctant to require supermarket chains to continue operating a store at a particular location.³³⁰ Nevertheless, courts—at a minimum—should enjoin the enforcement of restrictive covenants that violate the rule of reason. For example, invalidating the restrictive covenants associated with non-operating storefronts is a relatively straightforward intervention that can facilitate providing healthy food options to unserved communities. That remedy is more easily administered and can go a long way toward erasing food deserts and improving the lives of consumers.

C. *The Problem of Antitrust Standing*

Beyond proving liability, plaintiffs must establish that they have antitrust standing. Courts have invoked antitrust standing to blunt the ability of plaintiffs to bring antitrust claims that seek to address the problem of food deserts. To pursue an antitrust claim, a private plaintiff must have antitrust standing; this requirement is a prudential doctrine designed to ensure that the plaintiff is properly situated to vindicate antitrust principles. Antitrust standing involves several factors, including “whether the plaintiff’s alleged injury is of the type for which the antitrust laws were intended to provide redress,” “the directness of the

330. See sources cited *supra* note 152.

injury,” and “the existence of more direct victims of the alleged antitrust violations.”³³¹

Some courts have held that commercial landlords do not have antitrust standing to challenge overly broad non-compete covenants.³³² Although commercial landlords undoubtedly suffer economic losses when the anchor store of their shopping center lies empty or when they are unable to offer customers a major grocer to drive foot traffic to the center, courts do not treat this as antitrust injury. For example, when a supermarket used a restrictive covenant “with intent to destroy [a] site as a present and future location for the operation of a retail grocery outlet,” the Sixth Circuit denied antitrust standing to the commercial landlord because it was “not a consumer, customer, competitor or participant in the relevant market or otherwise inextricably intertwined with any such entity. Its injury is not sufficiently linked to the pro-competitive policy of the antitrust laws.”³³³ Similarly, the Seventh Circuit has opined that the devaluation of a shopping center is not “the type of anticompetitive injury that the antitrust laws were intended to remedy.”³³⁴ This is the dominant view.³³⁵

Courts deny antitrust standing to landlord-developers in this situation by insisting that direct competitors and consumers would make better antitrust plaintiffs.³³⁶ Direct competitors, however, are unlikely to engage in expensive, time-consuming, and uncertain antitrust litigation for the mere hope of opening a grocery store in an economically depressed neighborhood. The residents of food deserts have skin in the game, but it seems wrong—and impractical—to put the litigation burden on low-income consumers. More importantly, courts have also denied antitrust standing to the customers injured by going-dark strategies and scorched-earth leases.³³⁷ The cumulative effect of these standing decisions is to block the most likely antitrust challenges to anticompetitive agreements employed by supermarkets.

A proper application of antitrust standing doctrine in the context of food deserts would recognize that commercial landlords and developers do have standing to challenge the anticompetitive strategies that supermarket chains use

331. *Phila. Taxi Ass’n, Inc v. Uber Techs., Inc.*, 886 F.3d 332, 343 (3d Cir. 2018) (internal quotations omitted).

332. *See, e.g., Sunny Isle Shopping Ctr., Inc. v. Xtra Super Food Ctrs., Inc.*, 237 F. Supp. 2d 606, 614 (D.V.I. 2002); *see also Waterford Parkade, Inc. v. Picardi*, No. CV 940539883S, 1996 WL 151849, at *2 (Conn. Super. Ct. Mar. 11, 1996) (“Numerous federal courts have held that a developer such as the plaintiff has no standing to assert an antitrust claim for activity which affects competition in the business area of the developer’s actual or proposed tenant or customer.”).

333. *Southaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1086–87 (6th Cir. 1983).

334. *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 598 (7th Cir. 1995).

335. *See Sunny Isle Shopping Ctr.*, 237 F. Supp. 2d at 611 (“Many courts have refused to grant standing to commercial landlords who bring antitrust claims against their tenants.”).

336. *See Southaven Land Co.*, 715 F.2d at 1087 (denying antitrust standing to landlord to challenge supermarket’s anticompetitive behavior because “two categories of potential plaintiffs—consumers and participants—are obviously more direct victims”).

337. *See Monmouth Real Est. Inv. Tr. v. Manville Foodland, Inc.*, 482 A.2d 186, 191 (N.J. App. Div. 1984) (“[W]e would also dismiss [the consumer’s] antitrust cause of action for lack of standing.”).

to control whether property can be used for a supermarket. This would enable the plaintiffs who are often best positioned to bring antitrust claims to challenge the anticompetitive strategies to do so.

D. Merger Conditions

Merger law offers another avenue for antitrust law to encourage the entry of supermarkets into food deserts. In addition to the Sherman Act's prohibition on anticompetitive agreements and monopolization, antitrust law also proscribes anticompetitive mergers through Section 7 of the Clayton Act. It is particularly appropriate for merger law to play a role in addressing the problem of food deserts, given that weak merger enforcement has been a factor in creating them.³³⁸ This Section explains how antitrust officials can right that wrong.

When companies attempt to merge, antitrust agencies—the FTC and the Antitrust Division of the Department of Justice (DOJ), as well as State Attorneys General offices—possess leverage during the merger review process. Mergers and acquisitions involving companies and commerce of sufficient value require the parties to file a detailed notification with the federal antitrust agencies, which then decide whether (1) to allow the merger to proceed unchallenged, (2) to challenge the merger and attempt to block it entirely, or (3) to negotiate a consent decree in which the authorities agree not to challenge the merger in exchange for the companies agreeing to certain conditions.³³⁹ Such merger conditions are often structural, such as requiring the merging parties to divest themselves of certain assets.³⁴⁰ Divestitures are designed to ensure competition in markets affected by the merger. In addition to structural conditions, antitrust officials often require behavioral conditions as the price for not challenging a proposed merger. In a study of every merger consent decree entered into between 1996 and 2013, 124 out of 403 total merger consent decrees that the FTC and DOJ negotiated included conduct conditions.³⁴¹ These behavioral merger conditions have included agreements by the merging parties to license their intellectual property, to not discriminate in their business dealings, and to limit certain information exchanges across business units in the merged company.³⁴²

Antitrust officials should consider using merger conditions to pressure supermarket chains to act to help eliminate food deserts. Through restrictive

338. See *supra* notes 164–169.

339. 15 U.S.C. § 18a (2012); *Premerger Notification and the Merger Review Process*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-and-merger> [<https://perma.cc/YWJ8-VV5J>].

340. See ANTITRUST DIV., U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 23–25 (2011), <http://www.justice.gov/atr/public/guidelines/272350.pdf> [<http://perma.cc/DT4K-UWMM>] (discussing structural and behavioral conditions in merger enforcement).

341. Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Merger Approval*, 110 NW. U. L. REV. 1, 51 (2015).

342. *Id.*

deeds, supermarkets help create food deserts, areas in which there is no competitive market for healthy food and where consumers are forced to pay supracompetitive prices for inferior foodstuffs. As a condition for allowing supermarket mergers to proceed unchallenged, antitrust officials should require the merging supermarket owners to formally waive all enforcement of all covenants that restrict the uses of their formerly owned (or occupied) land and buildings. In other words, the merging firms should legally bind themselves to never enforce any form of scorched-earth covenant or sublease. Furthermore, antitrust officials should require supermarket owners to commit that they will not use such restrictive covenants in the future.

One concern among food law scholars is that if scorched-earth covenants are illegal, stores could refuse to sell their property, or they could sublease it to a non-grocery business.³⁴³ Some scholars have proposed requiring exiting supermarkets to replace themselves.³⁴⁴ Merger conditions are a way to solve the underlying problem without requiring regulation. Antitrust officials could negotiate with merging parties an agreement that they will not “go dark,” but will sell or sublease any unused properties in a food desert without any restrictive covenants that could limit using those properties as supermarkets. Officials could also affirmatively require that the former supermarket space be sold to a buyer that would open a viable supermarket. This, in essence, mimics the divestiture remedy so common in mergers.³⁴⁵

Finally, completely independent of the issues of scorched-earth covenants and going-dark strategies, antitrust authorities could try to negotiate a condition on supermarket mergers that the merged entity will open supermarkets in particular food deserts. While this remedy would likely be unavailable in traditional antitrust litigation, “it is well-established that antitrust agencies can include provisions in a consent decree that they could not obtain directly by suit.”³⁴⁶

Using merger conditions to achieve the goals of restoring supermarkets and competition to food deserts has many advantages. First, in contrast to Sherman Act litigation, there are no problems with establishing antitrust standing or defining the geographic market with precision. In particular, the merger condition approach eliminates the risk of courts refusing to recognize food

343. See Diller, *supra* note 128, at 1003–04 (“Specific to the supermarket context, grocery owners aware of the decision might refuse to sell their properties if they could not count on enforcement of anticompetitive clauses in the future. They may instead lease their properties to non-grocery businesses to ensure that no competition arises on these properties.”).

344. See *id.* at 1014–15 (“Rather than allow a supermarket to quit serving a neighborhood entirely, rendering that area a potential food desert, supermarkets might be required to remain in business at least until another provider of adequate nutritious food emerges to serve the area.”).

345. See Lemley & Leslie, *supra* note 341, at 50 (as a condition of merger approval, antitrust officials commonly require “merging parties to divest or sell off certain assets or business units in order to preserve competition in particular markets”).

346. *Id.* at 59.

deserts as geographic markets. Second, using the leverage of merger review may prove faster than litigation, and the negotiated consent decree may be more far-reaching. Third, antitrust intervention, in theory, has teeth. Voluntary public commitments by private actors to open supermarkets in food deserts generally go unfulfilled.³⁴⁷ Agreed-upon merger conditions are legally enforceable.

E. One Tool Among Many

Current responses to the problem of supermarket restrictive covenants are insufficient. Although a couple of state courts have invalidated scorched-earth covenants under state law,³⁴⁸ courts in most states have never considered the issue. And while a couple of cities have banned scorched-earth covenants,³⁴⁹ the vast majority have not. A piecemeal approach will be lengthy, inefficient, and result in a patchwork of laws with many cities uncovered and many people unprotected and unfed. Federal action is more likely to have a positive, permanent effect.

A nationwide antitrust solution has distinct advantages. If courts were to hold that food deserts were relevant geographic markets and that scorched-earth covenants violate antitrust law, that precedent would streamline the process for invalidating such restrictions nationally. If antitrust agencies were to negotiate agreements that particular supermarket chains would not enforce past anticompetitive covenants nor demand such restrictions in future deeds and leases, huge swaths of food deserts would quickly become eligible for supermarket entry. Antitrust policy can be more sweeping and more efficient than dealing with the problem one city or one state at a time.

While advocating a greater role for antitrust policy, it bears noting that antitrust law alone cannot solve the problem of food deserts. The causes of food

347. See Sarah Halzack, *Walmart Is Ending Its Express Concept and Closing 269 Stores*, WASH. POST (Jan. 15, 2016), https://www.washingtonpost.com/news/business/wp/2016/01/15/walmart-is-ending-its-express-concept-and-closing-269-stores/?utm_term=.f99854df2642 [https://perma.cc/TB3Q-DPNB]; Philip Lucas & Mike Schneider, *Wal-Mart's Store Closures Create New Food Desert*, ASSOCIATED PRESS (Jan. 30, 2016), <http://www.columbian.com/news/2016/jan/30/wal-marts-store-closures-create-new-food-deserts/> [https://perma.cc/TXX9-YC3F]; Brigid Sweeney, *Let Them Eat Fresh Food . . . Elsewhere*, CRAIN'S CHI. BUS. (July 14, 2014), <https://www.chicagobusiness.com/article/20140712/ISSUE01/307129981/walgreen-lags-in-promises-to-offer-more-fresh-produce-in-food-deserts> [https://perma.cc/GNW6-A3YP].

348. See, e.g., *Max's Place, LLC v. DJS Realty, LLC*, 1 A.3d 1199, 1201 (Conn. App. 2010) (invalidating restrictive covenant in land conveyance that precluded land from being used "for the operation of a grocery store, supermarket or other business selling food for off-premises consumption"); *Davidson Bros. v. D. Katz & Sons, Inc.*, 643 A.2d 642, 645 (N.J. App. 1994) (invalidating supermarket's scorched-earth covenant, citing expert's testimony that "the 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").

349. See Peters, *supra* note 126 ("Some cities, such as Chicago and Madison, Wisconsin, have ordinances that ban this type of restrictive covenant."); see also Holt, *supra* note 132 (discussing D.C.'s efforts to proscribe supermarket restrictive covenants).

deserts are many and varied. There is no simple solution, no single solution. Scholars and policymakers have promoted a range of approaches. Some proposed solutions encourage supermarkets to reenter food deserts.³⁵⁰ For example, commentators have advocated for loan programs³⁵¹ and tax incentives for opening grocery stores in food deserts and for hiring employees from the local community.³⁵² Others have proposed adjusting zoning rules that make it harder to open grocery stores in urban areas.³⁵³ Other policies to address the supply problem include developing new sources of healthy food, such as encouraging urban agriculture,³⁵⁴ more small neighborhood grocery stores,³⁵⁵ and farmers markets.³⁵⁶ Some policies address the demand side of the problem, such as educational campaigns³⁵⁷ and modifying aspects of welfare programs such as the Supplemental Nutrition Assistance Program (SNAP) to encourage recipients to purchase healthier food.³⁵⁸ Some proposals seek to reduce transportation barriers,³⁵⁹ such as improving public transportation³⁶⁰ or bringing

350. See Steele-Adjognon & Weatherspoon, *supra* note 121, at 2 (“Policymakers are calling for supermarkets to open in food desert areas.”).

351. See VER PLOEG ET AL., *supra* note 12, at 105 (discussing Pennsylvania Fresh Food Financing Initiative).

352. See Hawkins, *supra* note 16, at 126.

353. See Lisa M. Feldstein, *Zoning and Land Use Controls: Beyond Agriculture*, 65 ME. L. REV. 467, 479 (2013); VER PLOEG ET AL., *supra* note 12, at v (“If high development costs serve as a barrier to entry for supermarkets in some areas with low access, then subsidy programs or restructured zoning policies may be effective solutions.”).

354. See Jim Smith, *Encouraging the Growth of Urban Agriculture in Trenton and Newark Through Amendments to the Zoning Codes: A Proven Approach to Addressing the Persistence of Food Deserts*, 14 VT. J. ENV'T. L. 71, 72 (2012); see also Seymour, *supra* note 12, at 447 (“One way entrepreneurs interested in making a difference in food deserts can increase access to healthy food is by starting an urban farm.”); Elizabeth G. Berg, *Bringing Food Back Home: Revitalizing the Postindustrial American City Through State and Local Policies Promoting Urban Agriculture*, 92 OR. L. REV. 783, 784–85 (2014) (“Urban agriculture tends to take shape in many forms, including community gardens, community supported agriculture, food production at public schools or on vacant lots, rooftop gardening, or through backyard gardening, chicken coops, and bee keeping.”).

355. See Raja, Ma & Yadav, *supra* note 26, at 469–70.

356. See VER PLOEG ET AL., *supra* note 12, at 107 (“Desirable alternatives to traditional supermarkets include food cooperatives, urban agriculture, farmers’ markets, public markets, smaller independent stores, and transportation hubs.”). *But see* Justin Schupp, *Wish You Were Here? The Prevalence of Farmers Markets in Food Deserts: An Examination of the United States*, 22 FOOD, CULTURE & SOC’Y 111, 125–26 (2019) (noting that food deserts do not often have farmers markets).

357. See VER PLOEG ET AL., *supra* note 12, at v (“If consumer demand factors, such as inadequate knowledge of the nutritional benefits of specific foods, contribute to differences in access by reducing demand, then a public health campaign may be a preferred strategy.”).

358. See Lee, *supra* note 13, at 244 (Changes to Supplemental Nutrition Assistance Program (SNAP) to encourage healthier eating); see Allcott et al, *supra* note 40, at 1840 (“[O]ur model suggests that a means-tested subsidy for healthy groceries could increase low-income households’ healthy eating to the level of high-income households at an additional cost of only about 15% of the current SNAP budget.”).

359. See Broad Leib, *supra* note 20, at 336; see also VER PLOEG ET AL., *supra* note 12, at 109 (advocating transportation subsidies for SNAP participants).

360. See Zenk, et al., *supra* note 38, at 665 (“Affordable public transportation needs to be improved by integrating transportation routes with supermarket locations.”).

food to residents.³⁶¹ Because unhealthy food is generally cheaper than healthier options and such price disparities encourage consumption of unhealthy food,³⁶² changing the price of healthy food relative to junk food may be necessary.³⁶³ Some commentators advocate adjusting farm subsidies to encourage the growth of healthier crops.³⁶⁴ All of these approaches have potential, but none is a silver bullet. Any solution to food deserts must ultimately be multi-pronged.³⁶⁵ One of those prongs should be a more thoughtful wielding of antitrust tools.

CONCLUSION

Food deserts are a story of failure. Markets have failed. The lack of cars and public transportation have made affordable, healthy food inaccessible to millions of Americans. The competitive markets that suburbanites and other well-off consumers take for granted are unknown to those who live in food deserts.

Supermarket chains failed low-income consumers when supermarkets abandoned largely nonwhite neighborhoods to focus on serving the suburbs. As a parting shot against their former customers, they drafted contract provisions designed to ensure that no other supermarket would sell food to the residents left behind. Racial covenants and their successor strategies kept racial minorities hemmed into certain inner-city neighborhoods, and then anticompetitive covenants kept supermarkets out of these same neighborhoods. Food deserts—and their resultant health and economic consequences—were foreseeable, inevitable, and intentional.

Antitrust law has, in turn, failed the residents of food deserts. Many anticompetitive tactics employed by supermarket chains, such as scorched-earth covenants, are inherently unreasonable, yet escape judicial condemnation. By defining relevant geographic markets as larger than the boundaries of food deserts, judges and antitrust officials hobble antitrust law as a vehicle for providing food desert residents the benefits of functioning markets, including healthy food at competitive prices. If antitrust enforcement can help increase the

361. See Susan Algert, Aditya Agrawal & Douglas Lewis, *Disparities in Access to Fresh Produce in Low-Income Neighborhoods in Los Angeles*, 30 AM. J. PREVENTIVE MED. 365, 369 (2006) (discussing produce trucks for food pantry clients).

362. See Andrea Freeman, *The 2014 Farm Bill: Farm Subsidies and Food Oppression*, 38 SEATTLE U. L. REV. 1271, 1282 (2015) (noting that price correlates to consumption, causing consumption of fruits and vegetables to decline while consumption of fats, oils, and sweeteners increases); Story et al., *supra* note 16, at 259.

363. See Bonnie Ghosh-Dastidar, Deborah Cohen, Gerald Hunter, Shannon N. Zenk, Christina Huang, Robin Beckman & Tamara Dubowitz, *Distance to Store, Food Prices, and Obesity in Urban Food Deserts*, 47 AM. J. PREVENTIVE MED. 587, 587–95 (2014).

364. See Seymour, *supra* note 12, at 427; Freeman, *supra* note 362, at 1281–82.

365. See Story et al., *supra* note 16, at 259 (“In addition, interventions to increase availability, variety, and convenience; pricing; and promotional strategies have been found feasible and modest evidence has demonstrated their efficacy in influencing healthy eating behavior.”); Moore & Diez Roux, *supra* note 93, at 330 (“[C]hanging the local food environment will require intersectorial approaches.”).

supply of healthy food, these proposals could go a long way toward remedying the problem of food deserts.