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THE SOCIAL COSTS OF MERGERS: RESTORING “LOCAL CONTROL” AS A FACTOR IN MERGER POLICY

RICHARD M. BRUNELL*

As the pace of large corporate mergers has increased recently, so too have the reports of concerns by civic leaders about the negative effects of mergers on communities losing corporate headquarters, including a loss of civic leadership, philanthropy, jobs, and investment. Such adverse social consequences of mergers are not presently relevant to antitrust analysis, which dismisses so-called “noneconomic” values in favor of narrow efficiency or consumer welfare objectives. Yet it is widely accepted, although generally ignored, that preserving “local control” of business, and other supposedly noneconomic values, were the predominant concern of Congress in restricting mergers under the federal antitrust laws.

In a challenge to current antitrust discourse, this Article maintains that the loss of local control should be restored as a factor in merger policy. A review of the legislative history of the 1950 Celler-Kefauver amendments to section 7 of the Clayton Act shows that Congress sought to preserve local control of business because it believed that distantly controlled firms were, in today’s parlance, less socially responsible than local firms. The Article demonstrates that Congress’s historic concern is borne out to a significant extent by modern social science literature. Empirical studies indicate that communities often (but not invariably) face significant social costs from mergers when a major corporate headquarters is lost and control of a firm is transferred from locally based managers to distant or “absentee” managers, a process referred to as “delocalization.” Moreover, the loss of corporate headquarters may impair overall social welfare and efficiency, thus suggesting

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that restoring local control as a consideration in merger analysis is consistent with modern welfare economics. The Article develops a doctrinal argument for considering the loss of local control as a "noncompetitive" factor that would militate against mergers with uncertain competitive effects, outlines various alternatives for incorporating this factor into antitrust merger review, and also offers a proposal for considering the loss of local control as an adverse factor in the analysis of bank mergers under federal banking law.

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“We’re not owned by the citizens of Boston . . . we’re owned by shareholders.”

—Chad Gifford, former CEO of FleetBoston Financial Corp., explaining why he merged his bank with Charlotte-based Bank of America, despite regret over the demise of the largest financial institution based in New England.¹

“Inevitably there are certain adverse consequences in terms of general public interest when corporate headquarters are moved away from a city and State.”

—Justice Lewis Powell, concurring in *Edgar v. Mite Corp.*²

INTRODUCTION

Philanthropic and community leaders in Boston bemoaned Bank of America’s recent takeover of FleetBoston, which eliminated the last of the major banks based in Boston (and New England).³ They predicted a decline in contributions to local charities and nonprofit institutions, a lessened commitment to community and small-business lending needs, a loss of local employment, and a general loss of leadership in the regional economic and social development for which FleetBoston was renowned.⁴ Notwithstanding Bank of America’s public commitments on some of these matters,⁵ these leaders had

1. Tina Cassidy, *The CEOs Explain the Urge to Merge: D’Alessandro, Gifford on Gay Marriage, Big Business Deals*, BOSTON GLOBE, May 18, 2004, at F14.

2. 457 U.S. 624, 646 (1982) (Powell, J., concurring in part).

3. See, e.g., Steve Bailey, *Steve Bailey Downtown: After Chad and David*, BOSTON GLOBE, Oct. 29, 2003, at F1 (lamenting end of “a New England banking tradition” dating to 1784).

4. See *id.*; see also Maureen Dezell, *Fleet Arts Funding to Change Under Bank of America*, BOSTON GLOBE, May 7, 2004, at D25 (Boston philanthropic leader stating that the merger “‘radically removes the last of our hometown honeys,’” adding that “there is no question . . . that FleetBoston is bowing out of a model leadership role that is admired throughout the country and unmatched in Greater Boston”).

5. Bank of America pledged to maintain employment levels in New England, set a goal for charitable giving of \$1.5 billion over ten years, and pledged \$750 billion to community development over ten years. See *Hearing on Banks, Mergers, and the Affected Communities Before the H. Comm. on Fin. Servs.*, 108th Cong. 277–87 (2004) (prepared testimony of Anne Finucane, President, Northeast, Bank of America Corp.) (calling pledges “aspirational goals” but stating that it would be bad business not to honor them). Bank of America asserted that its \$1.5 billion charitable giving goal represented an increase, on an *average* annual basis, of more than forty percent over the combined charitable giving of both banks prior to the merger. See Press Release, Bank of America, Bank of America Announces New \$750 Billion Community Development Goal (Jan. 7, 2004), *available at* http://newsroom.bankofamerica.com/index.php?s=press_releases&item=4566. However, the author calculates that Bank of America could reach that goal merely by increasing its nominal giving by about six percent per year.

reason to be concerned: many community leaders in California contended Bank of America's "civic performance" there had deteriorated after NationsBank acquired it in 1998 and moved its headquarters from San Francisco to Charlotte.⁶

Ironically, the "local control" case against Bank of America's acquisition of FleetBoston had been made forcefully by the chief executives of Fleet Financial and BankBoston when those two New England banks merged to form FleetBoston in 1999. Fleet Financial CEO Terrence Murray, testifying before the Federal Reserve Board in favor of the Fleet/BankBoston deal, argued that "this merger is [a] necessary step to ensure that New England continues to have a major locally based banking presence."⁷ Waxing poetic, Murray explained:

Chad and I both grew up with banks headquartered here in our home region, banks managed by people who cared about New England and its people. I don't want my children or my grandchildren living in a New England whose economic fate is dictated from outside the region. I want them to have local institutions that are strong and sophisticated, but that make decisions locally with New Englanders in mind. So many American cities have lost that.⁸

6. See, e.g., Letter from Rhea L. Serna, Cal. Reinvestment Comm., to A. Linwood Gill III, Fed. Reserve Bank of Richmond (Jan. 21, 2004) (on file with the North Carolina Law Review) ("Bank of America is less responsive on affordable housing, small business, consumer accounts, community contributions, investments, vendor purchasing, and other products and programs than in 1998."); see also Christian Berthelsen, *BOFA Completes Break with S.F. Chief of Key Unit to Charlotte*, S.F. CHRON., Oct. 31, 2001, at B1 (reporting that the move of a major business line to Charlotte broke a promise made by the former CEO of NationsBank to keep the business in San Francisco). But see, e.g., Letter from A. Lee Blitch, S.F. Chamber of Commerce, to A. Linwood Gill III, Fed. Reserve Bank of Richmond (Jan. 6, 2004) (on file with the North Carolina Law Review) (contending that Bank of America remained active in the San Francisco Chamber of Commerce after the NationsBank acquisition and remained a top contributor to nonprofit organizations in the community).

7. 1. FED. RESERVE BD., TRANSCRIPT OF PUBLIC MEETING REGARDING THE PROPOSED MERGER OF FLEET FINANCIAL GROUP, INC. AND BANKBOSTON CORP. 16 (1999) [hereinafter FLEET/BANKBOSTON HEARING].

8. *Id.* at 22. Murray added, "I grew up in New England, went to school here, and I've worked in banking here for almost four decades. This is my home and this is home to Fleet and BankBoston and our tens of thousands of dedicated employees. Our legacy will be a large global institution domiciled in New England with deep community commitments." *Id.* at 22-23. BankBoston CEO Chad Gifford testified that he shared Murray's "passion for preserving the hometown banks in the region, serving the individual cities and communities that make up this great fabric." *Id.* at 24. Echoing Murray's remarks, Gifford added, "I, too, am a New Englander. I'm a son of a former New England bank chairman, so the importance of a strong, locally-based banking organization has been with me for a long, long time" *Id.* at 24-25.

Many local business and community groups had in fact endorsed the Fleet/BankBoston deal because of the importance of maintaining local control of the banks.⁹

The loss of local control has been raised as an issue before banking regulators in many large bank mergers. Indeed, it is a common concern among local commentators and community leaders whenever an important locally based company is taken over by an out-of-state firm and its headquarters removed to a distant locale, as recent headlines confirm.¹⁰ As an initial matter, this Article examines whether these concerns are justified and, in particular, whether the change in the geographic locus of control of a business as a result of a

9. See Fleet Financial Group, Inc., 85 Fed. Res. Bull. 747, 753 n.35 (1999) ("Some commentators supported the proposal because it would result in a large banking organization headquartered in New England, which would provide local jobs and maintain local control over banking and investment decisions relevant to the region."). For instance, the President of the Massachusetts Taxpayers Foundation, a highly regarded business group, testified that "having a corporate headquarters in Boston makes a huge difference in terms of that company's commitment to the community, whether that commitment takes the form of leadership, dollars, volunteer support, or an overall level of energy." FLEET/BANKBOSTON HEARING, *supra* note 7, at 283 (testimony of Michael Widmar). He noted that financial services institutions headquartered in Boston, including both BankBoston and Fleet, "have been particularly conscientious in meeting their public responsibilities," and that, "[i]n contrast, when local corporations are bought out by out-of-state entities, a sharply reduced commitment to this community inevitably follows." *Id.*; see also *id.* at 451-52 (president of New England Legal Foundation, a free-market oriented business group, testified that "the economic well-being of New England, and all the best interests of individuals and companies doing business here . . . are all better served if we can preserve a large, strong, regionally based commercial lender in New England, which is what this merger contemplates").

10. See, e.g., William Ryberg, *Shareholders Agree to Sell 'American Classic'; But Uncertainty Remains: Will Maytag Brands—and Iowa Jobs—Disappear?*, DES MOINES REG., Dec. 23, 2005, at A8 (reporting concerns over effect of merger of Maytag and Whirlpool on town of Newton, Iowa, where Maytag had been headquartered since 1893); Ted Griffith, *MBNA Sale Fuels Job Fears in State; Deal that Cuts 6,000 Jobs Signals End of Era*, NEWS J. (Wilmington, Del.), July 1, 2005, at 1A (reporting that Bank of America's buyout of MBNA, Delaware's largest private employer, "will have a major impact on Delaware's economy and its charitable agencies"); Eric Heisler, *Big Changes in Store*, ST. LOUIS POST-DISPATCH, Mar. 1, 2005, at A1 (reporting concern of St. Louis officials over acquisition of St. Louis-based May Department Stores by Federated Department Stores); William M. Bulkeley & Ryan Chittum, *Boston Again Confronts the Loss of a Big Corporate Headquarters*, WALL ST. J., Jan. 31, 2005, at B7 (reporting concern of Boston civic leaders over Gillette's decision to sell the company to "out-of-towners," the third such sale of a major local company in recent years); Janet Adamy, *Sprint's Move Causes Anxiety in Kansas City*, WALL ST. J., Dec. 17, 2004, at B1 (reporting Kansas City was "likely to feel the pain more than most places after its largest employer, Sprint Corp., relocates its main office" in connection with merger with Nextel).

merger¹¹ has adverse impacts on the community losing a corporate headquarters.

The transfer of control of a business from locally based owners or managers to distant or "absentee" managers is a process referred to as "delocalization." It occurs not only when a national or global firm acquires a smaller company whose markets or operations are local or regional, but also when the acquired company itself is a national or global company.¹² In the latter event, the acquired national or global company is delocalized in the sense that its local headquarters is eliminated and its senior managers are no longer rooted to the local community. A corporate "home town" becomes merely a branch of an ever-larger enterprise. Corporate delocalization does not simply imply that control is being shifted "from one location to another," but rather suggests "the elimination of place as an important variable in the new economy."¹³

A review of the available empirical evidence suggests that the concerns of local community leaders over the loss of a corporate headquarters are justified: delocalization by merger often (but not invariably) involves short- and long-term social costs to the community, including lower civic involvement, philanthropy, employment, and investment. These social costs, which may be significant if the community has been particularly dependent on the firm, arise from several factors, but two are particularly noteworthy. First, distant managers are less likely than locally based managers to be subject to the local community's social norms that otherwise

11. Here and throughout the Article, by "merger" I mean acquisition of a company regardless of the legal form of the acquisition.

12. Occasionally, the firm that is technically the acquirer will be the one to move its corporate headquarters to the locale of the acquired firm, as in the case of the Sprint and Nextel merger. See Adamy, *supra* note 10.

13. Charles H. Heying, *Civic Elites and Corporate Delocalization: An Alternative Explanation for Declining Civic Engagement*, 40 AM. BEHAV. SCIENTIST 657, 666 (1997), available at http://abs.sagepub.com/cgi/search?sortspec=relevance&author1=heyings&fulltext=&pubdate_year=&volume=&firstpage=. This Article does not address policy concerns associated with the relocation of a corporate headquarters unconnected with a merger, notwithstanding that such a relocation may have consequences for the community losing control that are similar to those resulting from a merger. There are two reasons. First, merger law—the focus of this Article—has nothing to say about such a relocation. Second, it is the *elimination* of a place-dependent locus of control of a significant business enterprise that is the focus of concern; a relocation merely substitutes one locus of local control for another and is more likely to have offsetting benefits for the community gaining the new headquarters than in the case of a merger. See *infra* notes 97–102 and accompanying text (discussing state and local incentives for relocating corporate headquarters); *infra* notes 103–10 and accompanying text (discussing the effects of mergers on the headquarters of an acquiring firm).

influence managerial discretionary behavior.¹⁴ Second, to the extent that the acquired firm has operated primarily in a given local community or region and the merged firm operates on a national or multiregional basis, the merged firm will be less dependent on the local community.

Despite the evidence of community harm and the widespread concerns of community leaders, the loss of corporate headquarters by merger is not generally perceived to be a significant issue by policymakers, or at least not one that merits any legal attention.¹⁵ The conventional view is that while perhaps unfortunate for the city or community involved, the loss of a corporate headquarters resulting from a merger is the natural result of a dynamic economy that is dependent on the free flow of capital.¹⁶ Current legal doctrine neither affords relief to communities adversely affected by mergers nor even addresses the issue of the loss of local control of businesses.¹⁷

14. Corporate law scholarship concerning the separation of ownership and control of the corporation posits that managers have significant discretion to make decisions that do not necessarily maximize corporate profits or shareholder value. *See generally* ADOLPH A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932); OLIVER E. WILLIAMSON, *THE ECONOMICS OF DISCRETIONARY BEHAVIOR: MANAGERIAL OBJECTIVES IN A THEORY OF THE FIRM* (1964). Sociology and business scholarship suggests that corporate managers' discretionary conduct will differ depending on the identity of the managers and the social networks of which they are a part. *See generally* Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481 (1985) (elaborating the concept of social embeddedness as a critical factor in economic behavior); Einer Elhauge, *Sacrificing Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005) (discussing the importance of social norms to managerial behavior).

15. *See, e.g.*, William Testa et al., *The Changing Relationship Between Headquarters and Cities*, CHI. FED. LETTER, Mar. 2005, at 1, available at http://www.chicagofed.org/publications/fedletter/cflmarch2005_212a.pdf (summarizing recent Federal Reserve Bank of Chicago conference on "Headquarters and Cities"). Testa and his colleagues conclude:

Many cities have experienced a similar wave of mergers and acquisitions and with it have lost familiar headquarters' names and prestige. Yet, underneath the upheaval, successful cities continue to grow their own companies in several ways so that the occasional loss of a headquarters through a merger or acquisition is often not that significant.

Id. at 4. They suggest that cities can counter the negative effects of a loss of headquarters through merger by "emphasiz[ing] such fundamentals as transportation and communications infrastructure and providing those high-quality public services that serve to create and retain global businesses and their employees." *Id.*

16. *Cf.* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 38–39 (1991) (noting that dislocation is inherent in economic progress and "to try to stop the wrenching shifts of a capitalist economy is to try to stop economic growth").

17. Federal and state worker-notification laws require firms covered under the laws to give advance notice of plant closings or mass layoffs, but such laws do not directly address

Corporate law gives corporate managers free rein to ignore community interests.¹⁸ And private law offers little relief to communities harmed by business relocations.¹⁹ Federal antitrust law governing mergers—section 7 of the Clayton Act—considers only whether a merger may reduce competition and today focuses almost exclusively on whether a merger enhances or facilitates the merged firm's ability to exercise market power.²⁰ While certain industries, such as banking, are subject to regulatory oversight of mergers that is supposed to take into account "public interest" considerations, the loss of local control of banks has not been a concern of federal banking regulators in recent years.²¹

There is also little legal scholarship addressing the issue of delocalization. To be sure, corporate law scholars have written in general about the external effects of corporate behavior on nonshareholder constituencies,²² and in the hostile takeover context in particular.²³ But they have not focused on the significance of the change in the geographic locus of control of the corporation.²⁴

the elimination of a corporate headquarters and, in any event, provide scant protection for workers. See Fran Ansley, *Standing Rusty and Rolling Empty: Law, Poverty, and America's Eroding Industrial Base*, 81 GEO. L.J. 1757, 1866–77 (1993).

18. See ROBERT C. CLARK, CORPORATE LAW 17–18 (1986) (noting that "corporate managers . . . are supposed to make corporate decisions so as to maximize the value of the company's shares," subject to independent legal obligations). However, many states have corporate constituency laws that at least *permit* directors to sacrifice shareholder gain for the welfare of the community. See Elhauge, *supra* note 14, at 763–76 (canvassing legal authority giving directors discretion to sacrifice corporate profits to further public interest goals).

19. See, e.g., Local 1330, United Steel Workers v. U.S. Steel Corp., 631 F.2d 1264, 1266 (6th Cir. 1980) (holding that Youngstown steelworkers and the community had no basis in contract, promissory estoppel, or property to stop company from closing plant and causing economic tragedy for the region); Charter Twp. of Ypsilanti v. Gen. Motors Corp., 506 N.W.2d 556, 561 (Mich. Ct. App. 1993) (holding that a town had no remedy to keep General Motors from moving plant after town had granted tax abatements to GM based on assurances of jobs). But see Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 618–21 (1988) (arguing that courts should recognize property rights that would protect workers' and a community's reliance on long standing relationship with a firm).

20. See *infra* note 155 and accompanying text.

21. See *infra* notes 243–44 and accompanying text.

22. See, e.g., PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995) (collecting essays emphasizing public character of corporations).

23. See, e.g., John Coffee, *The Uncertain Case for Takeover Reform: An Essay on Stockholders, Stakeholders and Bust-Ups*, 1988 WIS. L. REV. 435 (suggesting a legitimate role for state legislation to protect stakeholders in hostile takeovers).

24. Progressive corporate law scholars have focused principally on employee stakeholders, rather than the local community as stakeholder. See, e.g., PROGRESSIVE CORPORATE LAW, *supra* note 22.

Moreover, while there is a substantial legal literature on the “public” aspect of local control, which concerns issues of federalism and local government power,²⁵ there is no comparable literature on the desirability of federalism (or local power) in the “private,” economic sphere. And while antitrust scholars and economists once concerned themselves with the adverse social consequences of large mergers,²⁶ such concerns have been sublimated in the wake of the marginalization in antitrust discourse of so-called “noneconomic” values.²⁷

This Article challenges current antitrust discourse and argues that the social costs of delocalization should be taken into account to a limited extent in the analysis of mergers under section 7 of the

25. See, e.g., David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2257 (2003) (maintaining that reconceived home rule could be effective in combating urban sprawl); John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002) (arguing that devolution of power to state and local governments and civil associations is more responsive to social norms than “centralized democracy”); William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second Best World*, 86 GEO. L.J. 201 (1997) (contesting law-and-economics claims that regulatory power should be devolved to the local level).

26. See, e.g., THE IMPACT OF THE MODERN CORPORATION (Betty Bock et al. eds., 1984) (studies growing out of Columbia Law School conference on the relationship between corporate size and worker alienation, corporate philanthropy, community impact, technological change, and political impact); THE ECONOMICS OF FIRM SIZE, MARKET STRUCTURE, AND SOCIAL PERFORMANCE (John J. Siegfried ed., 1980) [hereinafter ECONOMICS OF FIRM SIZE] (proceedings of a conference sponsored by the Bureau of Economics of the Federal Trade Commission); see also David W. Barnes, *Nonefficiency Goals in the Antitrust Law of Mergers*, 30 WM. & MARY L. REV. 787, 790, 828–35 (1989) (arguing that merger law should incorporate a broad view of social welfare that systematically takes into account certain “nonefficiency” goals, including the protection of community well-being).

27. The leading antitrust treatise criticizes “noneconomic” goals in antitrust as incoherent and indefensible. See 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 111 (2d ed. 2000). There are dissenting voices. See, e.g., Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249, 249 (2001) (arguing that evaluation of media mergers under antitrust laws should consider diversity of ownership and impact of merger on the marketplace of ideas); Brett H. McDonnell & Daniel A. Farber, *Are Efficient Antitrust Rules Always Optimal?*, 48 ANTITRUST BULL. 807, 811 (2003) (suggesting that proper economic evaluation of antitrust regimes should go beyond product market allocative efficiency effects and consider the effects of antitrust policy on political institutions, corporate governance, wealth distribution, and risk bearing); see also C. Edwin Baker, *Commentary, Media Structure, Ownership Policy, and the First Amendment*, 78 S. CAL. L. REV. 733, 738 (2005) (contending that structural change in the nature of the ownership of media companies may have adverse social consequences because high-level executives of large, publicly traded media companies will likely be more responsive to profit maximization imperatives than heads of smaller, more local concerns, who are more likely to be responsive to journalistic considerations and community needs that produce positive externalities).

Clayton Act. The justification for doing so is two-fold. First, the legislative history of the 1950 Celler-Kefauver amendments to section 7 demonstrates that the loss of local control of business was an important concern of Congress in restricting mergers. While this is hardly news, it is a point that has been largely forgotten by courts and scholars alike. Second, taking into account delocalization as a factor in merger analysis can improve social welfare and efficiency.²⁸ The costs of the negative externalities borne by a community losing a corporate headquarters through merger may well exceed the benefits of a merger, including any benefits that accrue to the headquarters city of the acquiring firm and any gains in operating efficiency.²⁹

28. I mean to use the terms "social welfare" and "efficiency" in the sense that law and economics scholars commonly use the terms. Social welfare refers to a normative evaluation based on how legal rules affect individuals' welfare, taking into account the distribution of income, while efficiency refers to wealth maximization, or the Kaldor-Hicks efficiency criterion, which ignores distributional considerations. See LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 18–38 (2002). For purposes of this Article, I ignore the significant normative and methodological objections raised by legal scholars to the use of welfarism and/or efficiency in legal analysis generally. See, e.g., Mark Kelman, *Hedonic Psychology, Political Theory, and Law: Is Welfarism Possible?*, 52 *BUFF. L. REV.* 1 (2004); *Symposium on Efficiency as a Legal Concern*, 8 *HOFSTRA L. REV.* 485 (1980).

29. While some acquisitions improve operating efficiency, many, if not most, do not. See Frederic M. Scherer, *The Merger Puzzle*, in *FUSIONEN* 1, 20 (W. Franz et al. eds., 2002) ("Many mergers, and perhaps the majority, fail to live up to expectations and may indeed may make matters worse rather than better."); Dennis C. Mueller, *Merger Policy in the United States: A Reconsideration*, 12 *REV. OF INDUS. ORG.* 655, 677 (1997) ("The empirical findings on the effects of mergers imply that mergers are actions by managers that are likely to be efficiency reducing, even when they do not worsen competition."). The preponderance of the studies of the effects of mergers in the United States shows no increase in profitability or in other measures of economic performance. See Mueller, *supra*, at 667–69 (reviewing literature); see also F.M. Scherer, *A New Retrospective on Mergers*, 28 *REV. INDUS. ORG.* 327, 340 (2006) (review of historical data on mergers and productivity provides no significant support for the hypothesis that more intense merger activity leads to higher productivity growth at the national level). At the same time, studies of stock market performance show that while target shareholders earn premiums, acquiring firms' returns are negative, and mergers may reduce *net* shareholder wealth. See Sara B. Moeller et al., *Wealth Destruction on a Massive Scale? A Study of Acquiring-Firm Returns in the Recent Merger Wave*, 60 *J. FIN.* 757, 758–59, 762–63 (2005) (finding that in merger wave of 1990s, acquiring-firm shareholders lost an aggregate \$216 billion, which exceeded target shareholder gains by \$90 billion, as measured by change in stock price right after the merger announcement; however, average acquisition created wealth for acquiring-firm shareholders); Dennis C. Mueller, *The Finance Literature on Mergers: A Critical Survey*, in *COMPETITION, MONOPOLY AND CORPORATE GOVERNANCE* 161, 178–83 (M. Waterson ed., 2003) (review of the finance literature shows significant post-acquisition declines in shareholder value of acquiring firms when measured over sustained period after the merger); James A. Fanto, *Breaking the Merger Momentum: Reforming Corporate Law Governing Mega-Mergers*, 49 *BUFF. L. REV.* 249, 280–84 (2001) (canvassing studies showing that large majority of "mega-mergers" tend to decrease shareholder value). There are contrary views. See, e.g., STEPHEN N. KAPLAN, *MERGERS*

Further, the loss of local control itself may be inefficient insofar as the merged firm's lessened commitment to the community inhibits investment by community stakeholders that would benefit the firm and the community in the long run. More generally, reducing the number of corporate headquarters of large public companies in the economy may impair efficiency by limiting the extent to which positive social norms influence managerial behavior.

This Article proceeds in four main Parts. Part I reviews the economics, business, and sociology literature on the relationship between local control on the one hand and civic engagement, philanthropy, employment, and investment on the other, and it explores the efficiency and social welfare implications of delocalization through mergers. Part II reviews the legislative history of the Celler-Kefauver Act of 1950 and argues that preserving local control is a legitimate antitrust concern in merger policy. Insofar as considering delocalization introduces a "noncompetitive" factor into merger law, this Part argues that such an approach is consistent with certain aspects of modern antitrust jurisprudence and makes sense when conventional competitive analysis is uncertain. Part III details alternative ways for incorporating the loss of local control as a factor in merger review within the bounds of section 7 of the Clayton Act, each of which would make merger law somewhat more restrictive. Part IV considers the limitations of using antitrust as a tool to address the social concerns arising from delocalization, and it offers a proposal for considering the loss of local control as a factor in bank mergers under the "convenience and needs" prong of the Bank Merger Act.

I. THE SOCIAL COSTS OF DELOCALIZATION

Observers commonly perceive that the transfer of control of a locally based business to absentee managers has significant adverse effects on the local community.³⁰ Indeed Supreme Court Justices

AND ACQUISITIONS: A FINANCIAL ECONOMICS PERSPECTIVE (2006), *available at* http://www.amc.gov/commission_hearings.pdf/kaplan.statement.pdf (concluding from studies that acquisitions create economic value, although the empirical evidence is not uniform); ROBERT F. BRUNER, DEALS FROM HELL: M&A LESSONS THAT RISE ABOVE THE ASHES 13 (2005) (maintaining that studies show that "shareholders of buyers generally earn the required rate of return on investment"). However, a full review of the economics and finance literature is beyond the scope of this Article.

30. See, e.g., SOPHIA A. MUIRHEAD & AUDRIS D. TILMAN, CONFERENCE BD., THE IMPACT OF MERGERS AND ACQUISITIONS ON CORPORATE CITIZENSHIP 10 (2000) ("Among communities, the perception of the effects of mergers and acquisitions ... is uniformly negative."); see also *supra* note 10 (citing recent news articles).

ranging from William O. Douglas to Lewis Powell have noted these effects. For example, in *United States v. Falstaff Brewing Corp.*,³¹ a case involving the acquisition of a New England brewery by a multi-regional firm in the early 1970s, Justice Douglas observed:

Control of American business is being transferred from local communities to distant cities where men on the 54th floor with only balance sheets and profit and loss statements before them decide the fate of communities with which they have little or no relationship. As a result of mergers and other acquisitions, some States are losing major corporate headquarters and their local communities are becoming satellites of a distant corporate control.³²

Douglas suggested that "the acquisition of local business units by out-of-state companies" was likely to cause "local employment to suffer, local payrolls to drop off, and responsible entrepreneurs in counties and States [to be] replaced by clerks."³³ He cited the city of Goldendale, in his home state of Washington, as an example: "It was a thriving community—an ideal place to raise a family," he lamented, "until the company that owned the sawmill was bought by an out-of-state giant. In a year or so, auditors in faraway New York City, who never knew the glories of Goldendale, decided to close the local mill and truck all the logs to Yakima. Goldendale became greatly crippled."³⁴

If Douglas's concerns appear quaintly sentimental, no such charge can be leveled against Justice Powell, who echoed these concerns a decade later when he matter-of-factly observed the "inevitable" adverse consequences of the loss of local control. In *Edgar v. Mite Corp.*,³⁵ a case in the early 1980s involving a challenge to a state corporate law restricting takeovers, Justice Powell commented:

The corporate headquarters of the great national and multinational corporations tend to be located in the large cities of a few States. When corporate headquarters are transferred out of a city and State into one of these metropolitan centers, the State and locality from which the transfer is made inevitably suffer significantly. Management personnel—many of whom

31. 410 U.S. 526 (1972).

32. *Id.* at 541-42 (Douglas, J., concurring in part).

33. *Id.* at 543.

34. *Id.*

35. 457 U.S. 624 (1982).

have provided community leadership—may move to the new corporate headquarters. Contributions to cultural, charitable, and educational life—both in terms of leadership and financial support—also tend to diminish when there is a move of corporate headquarters.³⁶

A considerable body of empirical and theoretical literature supports the perception of Douglas and Powell that the loss of local control of business has adverse social consequences. The next Sections review this literature.

A. *Participation in Community Affairs*

The significance of local control of business has been the subject of studies by sociologists and others at least since a classic study conducted by C. Wright Mills and Melville Ulmer in 1946 for the Senate Small Business Committee.³⁷ Mills and Ulmer found that civic welfare was lower in what they called “big-business” cities (i.e., those dominated by a few absentee-owned large corporations) than in comparable “small-business” cities (i.e., those with a large number of smaller, locally owned firms). They attributed the difference in civic welfare—as measured by factors related to health, housing, sanitation, incomes, education, and recreation—largely to the fact that the small-business cities had greater “civic spirit,” i.e., “widespread participation in civic affairs on the part of those able to benefit a community by voluntary management of civic enterprises.”³⁸ Mills and Ulmer claimed that civic spirit tended to dry up in big-business cities because “there is no economic incentive for officials of absentee-owned corporations ‘to be someone civically [sic].’”³⁹

Mills and Ulmer’s work has seen something of a renaissance in the sociological literature, with researchers that follow a “civic community perspective” maintaining that “locally oriented capitalism and civic engagement are the foundations of civic institutions that nurture trust and cooperation among citizens.”⁴⁰ Along these lines,

36. *Id.* at 646 n.* (Powell, J., concurring in part).

37. C. WRIGHT MILLS & MELVILLE J. ULMER, SMALL BUSINESS AND CIVIC WELFARE, REPORT OF THE SMALLER WAR PLANTS CORPORATION TO THE SPECIAL COMMITTEE TO STUDY PROBLEMS OF AMERICAN SMALL BUSINESS, S. REP. NO. 79-135 (1946).

38. *Id.* at 22–23.

39. *Id.*

40. Charles M. Tolbert et al., *Civic Community in Small-Town America: How Civic Welfare Is Influenced by Local Capitalism and Civic Engagement*, 67 RURAL SOC’Y 90, 92 (2002) [hereinafter Tolbert et al., *Civic Community*]; see also Charles M. Tolbert et al., *Local Capitalism, Civic Engagement, and Socioeconomic Well-Being*, 77 SOC. FORCES 401,

sociologist Robert Putnam has suggested that the erosion of “social capital” in America may be attributable in part to changes in economic scale, including the “replacement of community-based enterprises by outposts of distant multinational firms.”⁴¹

A number of studies since Mills and Ulmer have shown that managers of locally owned or controlled firms tend to participate in community affairs to a greater extent than executives of “branch” plants of national firms. For example, a Harvard Business School study analyzing the community involvement of 180 companies in Boston, Cleveland, and Miami found that “[l]ocally headquartered companies do most for the community on every measure,” including having “the most active involvement by their leaders in prominent local civic and cultural organizations.”⁴² Another study examined the structure of urban leadership in the Atlanta metropolitan area over a six-decade period and found that “the central core of civic leadership” of the city was overwhelmingly and “consistently dominated by the highest-ranking executives” from locally based firms, notwithstanding the influx of national firms since the 1960s.⁴³ Managers of large branch plants did not participate in local affairs to the extent that their importance to the economy would have suggested.⁴⁴ Yet another study—of a cluster of small cities in Michigan (“Lake Cities”)—reported:

421 (1998) (finding that measures of local capitalism, such as the number of small manufacturing firms and family farms, were associated with higher socioeconomic indicators); Charles M. Tolbert II, *Minding Our Own Business: Local Retail Establishments and the Future of Southern Civic Community*, 83 SOC. FORCES 1309, 1311 (2005) (finding strong correlation between local retail orientation and key quality of life outcomes).

41. Robert D. Putnam, *Democracy in America at the End of the Twentieth Century*, in PARTICIPATION AND DEMOCRACY: EAST AND WEST 233, 256 (D. Rueschemeyer et al. eds., 1998); see also Christopher Marquis & Gerald F. Davis, *Golfing Alone? Local Corporations, Elite Cohesion and Community Social Capital, 1986–1998*, at 10 (Sept. 7, 2004) (unpublished manuscript), available at <http://www.people.hbs.edu/cmarquis/Golfing%20Alone%209-7-04.pdf>. (noting that “research . . . suggests that the presence of local businesses has a significant influence on the vitality of the civic and non-profit sectors that are central to Putnam’s argument”).

42. ROSABETH MOSS KANTER, *WORLD CLASS: THRIVING LOCALLY IN THE GLOBAL ECONOMY* 178–79 (1995). The study categorized firms in terms of headquarters location (local, nonlocal but domestic, and foreign) and compared the twenty largest local employers in each category in each of the three cities. See *id.* at 178.

43. See Heying, *supra* note 13, at 660–61. Moreover, since the 1960s, the level of social cohesion of “elite leaders” (indicating the breadth of civic engagement of elites) reportedly declined significantly, which the author attributed to the increasing delocalization of Atlanta’s businesses. See *id.* at 663.

44. *Id.*

[N]one of the absentee corporations have any local executives serving as members of the boards of any of five local foundations, of school and hospital boards, or of benevolent associations otherwise. Local owners, meanwhile, are generally active in community affairs and in the leadership of most of Lake Cities' foundations and voluntary associations.⁴⁵

The common explanation for the greater civic participation of local owners and managers is that they are more invested in the community personally and financially than "distant" owners and managers.⁴⁶ In contrast to local firms that have managers with strong local roots, branch firms are managed either by "outsiders" with no local ties who are brought in for short-term assignments⁴⁷ or by locals who have less ability to benefit the community because they lack sufficient autonomy or prestige⁴⁸ or have less incentive because their professional advancement will require them to move.⁴⁹

45. Ivar Berg & Janice Shack-Marquez, *Corporations, Human Resources, and the Grass Roots: Community Profiles*, in *THE IMPACT OF THE MODERN CORPORATION*, *supra* note 26, at 219, 249; *see also* TERRY L. BESSER, *THE CONSCIENCE OF CAPITALISM: BUSINESS SOCIAL RESPONSIBILITY TO COMMUNITIES* 78–79 (2002) ("Every piece of evidence we examined on this issue, whether prior research, in-depth interviews, theoretical explanations, or the data from [the author's] Iowa telephone interviews, tells the same story. Local businesses report higher levels of contributions to local social betterment than nonlocal businesses."); Robert Schulze, *The Role of Economic Dominants in Community Power Structure*, 23 *AM. SOC. REV.* 3, 4–7 (1958) (classic study showing that as businesses in a medium-sized midwestern town were absorbed by absentee-owned corporations, the business community withdrew from active and overt participation in the public life of the city).

46. *See* Tolbert et al., *Civic Community*, *supra* note 40, at 92 ("Locally oriented production firms are likely to contribute to the civic culture because the owners and managers are socially and financially invested in the community . . ."); *see also* MILLS & ULMER, *supra* note 37, at 23 (noting that "[m]ere self interest dictates that the businessman in the small-business city should be someone civically [sic]").

47. *See* Robert N. Stern & Howard E. Aldrich, *The Effect of Absentee Firm Control on Local Community Welfare: A Survey*, in *ECONOMICS OF FIRM SIZE*, *supra* note 26, at 162, 163 (suggesting that the advent of the absentee-owned corporation resulted in a decline of commitment to the community because "professional managers sent to run these branch plants were more concerned about their careers in the larger corporation than with the quality of community life"). *But see* Jon M. Shepard & James G. Houghland, Jr., *Organization Size, Managerial Mobility, and Corporate Policy: A Study of the Community Participation of Managers*, in *THE IMPACT OF THE MODERN CORPORATION*, *supra* note 26, at 163, 182 (finding that the mobility of managers did not negatively affect their community participation, which may be due to the fact that companies "transfer executives who are viewed as relatively capable and promising," and therefore may be encouraged by the company or community actors to become involved in community affairs).

48. *See* KANTER, *supra* note 42, at 180 ("Managers far from headquarters are sometimes unable to do things for their business operations, let alone for the community."). In an article about the plight of Dayton, Ohio, after the takeover of

Not all of the sociological literature supports the thesis that absentee control of firms is destructive of civic welfare. As a general matter, insofar as community involvement by business executives is profit-maximizing to the firm, one would not expect the identity (or geographic location) of the firm's managers to make much difference to their degree of community involvement. One study showed that the larger the firm, and especially the larger the plant, the more likely the firm was to *encourage* its production managers to participate in the community and that absentee control of a firm had no significant effect on the degree of participation of such managers.⁵⁰ Another study suggested that the number of local businesses in a community was not associated with the degree of political participation *by others* in the community.⁵¹ Further, one can imagine an absentee-controlled

numerous local firms by large national firms, the author noted that "[t]he entire community . . . has less access to corporate power and money. More of Dayton's top executives are accountable to headquarters somewhere else, and . . . a lot of them aren't even in Dayton half the time; they're on airplanes." Sara Rimer, *A Hometown Feels Less Like Home*, N.Y. TIMES, Mar. 6, 1996, at A1. The president of a large community college lamented, "There used to be more C.E.O.'s who could make immediate decisions on community issues [but now] there is more checking with corporate offices outside Dayton to get those same decisions. And they usually come in at a lower level of interest, and a lower dollar level." *Id.* (internal quotation marks omitted). A study on the loss of locally owned businesses in Shreveport, Louisiana noted that "[i]t goes beyond simple giving. Business leadership sometimes requires a level of commitment that only people with the autonomy of a CEO can provide." Rob Gurwitt, *The Rule of the Absentocracy*, GOVERNING, Sept. 1991, at 52, 56, available at <http://66.23.131.98/archive/1991/sep/cities.txt>.

49. See Tolbert et al., *Civic Community*, *supra* note 40, at 94 (noting that "internal" labor markets for managers and workers at national firms are "national and international in scope; residential movement across communities is required for promotion").

50. See Shepard & Houghland, *supra* note 47, at 182; *id.* at 179 (finding only "slight tendencies for absentee control to reduce likelihood of community participation when effects of size are controlled"). "Participation" in this study meant membership in community organizations ranging from church groups to recreational organizations. See *id.* at 174 & n.25. The study apparently did not focus on the degree to which managers held leadership positions in important community organizations, a chief concern of the civic welfare literature. Moreover, Shepard and Houghland's findings on absentee control are questionable because their proxy for local control was whether more than half of a firm's employees were employed at the local plant, regardless of where the firm's headquarters was located. See *id.* at 179. On the other hand, Shepard and Houghland's finding that larger firms participate more in the community than smaller firms is confirmed by the Harvard Business School study. See KANTER, *supra* note 42, at 176 (reporting that a survey of 2,655 business leaders showed that "level of community service is overwhelmingly a function of number of employees; larger companies do more").

51. See Stan Humphreys, *Who's Afraid of the Big, Bad Firm: The Impact of Economic Scale on Political Participation*, 45 AM. J. POL. SCI. 678, 689 (2001). Humphreys concluded that although self-employed persons are more involved in both political and civic activities, "[t]here is no evidence of a ripple effect of community-wide political apathy caused by a reduction in the number of independent business owners within the

firm that operates in a decentralized fashion, retaining local executives and allowing them substantial discretion to be civic leaders.⁵² But, as Carstensen and Questal noted years ago:

[E]ven where large conglomerates give local managers wide discretion, final authority ultimately rests in the hands of a distant, unknown few. The power to hire and fire the manager inevitably lies in centralized control; even if ostensibly given a free rein, the local manager, conscious of this sanction, will shape his behavior accordingly.⁵³

Moreover, it is clear that in many cases the loss of corporate headquarters has meant a loss of civic leadership.⁵⁴

B. Corporate Philanthropy

Corporate philanthropy makes up a small but significant component of charitable giving in the United States.⁵⁵ Insofar as corporate philanthropy is partly a function of the social context in which managers live and work, as the literature suggests, the transfer

community.” *Id.* at 692. Indeed, it is possible that removal of old elites that dominate a city’s philanthropic activity may in some instances open up civic leadership to “new blood” to the benefit of the community. See Marquis & Davis, *supra* note 41, at 23–24.

52. Alternatively, a locally headquartered firm could be run by a CEO that has no ties to the community and may not even live there. See, e.g., Robert Gavin, *CEO Kilts Drives up Value of Company and Himself*, BOSTON GLOBE, Jan. 29, 2005, at E1 (noting that the CEO of Boston-based Gillette “kept a low profile in Boston” as he “kept his home in Rye, N.Y. and spent his weekends there”).

53. Peter C. Carstensen & Nina H. Questal, *The Use of Section 5 of the Federal Trade Commission Act to Attack Large Conglomerate Mergers*, 63 CORNELL L. REV. 841, 863 (1978); see also *Standard Oil Co. v. United States*, 337 U.S. 293, 318–19 (1949) (Douglas, J., dissenting) (“[W]hen independents are swallowed up by the trusts and entrepreneurs become employees of absentee owners there is a serious loss in citizenship. Local leadership is diluted. He who was a leader in the village becomes dependent on outsiders for his action and policy.”).

54. See KANTER, *supra* note 42, at 183 (“Some cities face a civic leadership crisis with the loss of traditional headquarters.”); see also Gurwitt, *supra* note 48, at 52, 54 (noting that the process of takeovers of local firms in Shreveport “is having a profound impact on political and civic life”); Rimer, *supra* note 48 (noting adverse effect on Dayton).

55. In 2005, corporations gave an estimated \$13.8 billion to charitable organizations, which is approximately 5.3% of the estimated \$260 billion in total charitable contributions in the United States. See GIVING USA FOUND., GIVING USA 2006, at 14 (2006). However, corporate contributions account for a higher percentage of nonreligious giving and an even higher percentage of giving to higher education and cultural institutions. See Joseph Galaskiewicz & Michelle Sinclair Colman, *Collaborations Between Corporations and Nonprofit Organizations*, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 180, 189 (Richard Steinberg & Walter W. Powell eds., 2d ed. 2006) (citing reports showing that corporate contributions supply 18% of all gifts to higher education, 13.2% of gifts to nonprofit theaters, and over 15.6% of donations to symphony orchestras).

of control of a firm's charitable giving to distant managers as a result of a merger is likely to affect the nature of its philanthropy.

It is widely accepted in the scholarly literature on corporate philanthropy that managerial discretion plays a significant role in corporate charitable giving.⁵⁶ While some corporate giving is tied closely to profit maximization (for example, contributions may be a substitute for advertising or employee benefits),⁵⁷ other giving is motivated by management's sense of corporate social responsibility and/or is directed toward generating goodwill on the part of customers, employees, or other stakeholders, and it provides little measurable benefit to the corporation.⁵⁸ Support for the view that a significant component of corporate contributions is attributable to management discretion, rather than profit maximization, can be found in studies demonstrating that firms with a greater degree of managerial control are more generous than shareholder-controlled firms.⁵⁹ The consensus in the literature is that the level of corporate contributions neither helps nor impairs corporate performance.⁶⁰

56. See generally Michelle Sinclair & Joseph Galaskiewicz, *Corporate-Nonprofit Partnerships: Varieties and Covariates*, 41 N.Y.L. SCH. L. REV. 1059 (1997) (reviewing literature).

57. See, e.g., Peter Navarro, *Why Do Corporations Give to Charity?* 61 J. BUS. 65, 90 (1988) (finding that corporate contributions represent a form of advertising or quasi-fringe benefit to employees); see also SOPHIA A. MUIRHEAD, CONFERENCE BD., THE 2005 CORPORATE CONTRIBUTIONS REPORT 16 (2005) ("Strategic philanthropy has led corporations to align their contributions programs more closely with their business missions.").

58. See Galaskiewicz & Colman, *supra* note 55, at 185–86; see also Michael Useem, *Market and Institutional Factors in Corporate Contributions*, CAL. MGMT. REV., Winter 1988, at 77 (arguing that market and institutional considerations both influence corporate giving). Much corporate philanthropy is justified by executives as serving the firm's "enlightened self-interest." See Sinclair & Galaskiewicz, *supra* note 56, at 1064; see also William J. Baumol, *Enlightened Self-Interest and Corporate Philanthropy*, in WILLIAM J. BAUMOL ET AL., A NEW RATIONALE FOR CORPORATE SOCIAL POLICY 3, 16 (1970) ("The term 'enlightened self-interest' is a euphemism which refers to a combination of factors: the public pressures for a 'socially responsible' stance on the part of the firm, the social conscience of management, and its hope that its own contributions will serve as an example to others."). An alternative view is that corporate contributions are simply a wasteful management perk. See, e.g., Jayne W. Barnard, *Corporate Philanthropy, Executives' Pet Charities and the Agency Problem*, 41 N.Y.L. SCH. L. REV. 1147, 1160 (1997) (arguing that corporate giving often amounts to abuse of executive power); see also Milton Friedman, *Making Philanthropy Out of Obscenity*, REASON, Oct. 2005, at 32, 33 (reprising critique of corporate philanthropy made in a 1970 *New York Times Magazine* article and suggesting that the practice only makes sense because of "obscene tax laws").

59. See William O. Brown, Eric Helland, & Janet Kiholm Smith, *Corporate Philanthropic Practices*, 12 J. CORP. FIN. (forthcoming 2006), available at <http://ssrn.com/abstract=472161> (finding that firms with greater agency costs—as indicated by larger boards of directors and lower debt—give more to charity); Bruce Seifert et al., *Having, Giving, and Getting: Slack Resources, Corporate Philanthropy, and Firm Financial*

Several scholars have documented the importance of managerial social context to the *amount* of corporate charitable contributions. For example, in an exhaustive study of philanthropy in the Minneapolis-St. Paul area over a twenty-year period, Joseph Galaskiewicz found that the social ties of business leaders to philanthropic leaders were critically important in explaining the level of charitable contributions of firms, and that companies gave more if their top executives moved in the same social circles as charitable leaders and other executives promoting corporate giving and corporate social responsibility.⁶¹ Another study showed that firms headquartered in cities with tithing clubs⁶² contributed significantly more than those in cities without such clubs, indicating that managers respond to local social expectations concerning giving.⁶³

The evidence suggests that managerial social context is also an important factor in the *location* of corporate philanthropy. Studies show that large companies give disproportionately to nonprofits in their headquarters cities, rather than to operating locations. For example, Katherine McElroy and John Siegfried found that an average of seventy percent of a firm's contributions go to charities in

Performance, 43 BUS. & SOC'Y 135, 150 (2004) (finding that firms with more slack resources, as indicated by relative cash flow, contribute more); Lisa Atkinson & Joseph Galaskiewicz, *Stock Ownership and Company Contributions to Charity*, 33 ADMIN. SCI. Q. 82, 86 (1988) (finding that contributions decrease as stock ownership becomes more concentrated). *But see* Navarro, *supra* note 57, at 90 (finding little relation between the degree of managerial control and giving). Additional support for the managerial discretion theory is said to come from studies demonstrating that corporate giving is sensitive to changes in marginal tax rates. *See* James R. Boatsman & Sanjay Gupta, *Taxes and Corporate Charity: Empirical Evidence from Micro-Level Panel Data*, 49 NAT'L TAX J. 193, 199 (1996) (explaining that if contributions were purely profit-maximizing a change in the marginal tax rate should have no effect on the optimal mix of contributions and other spending).

60. *See* Galaskiewicz & Colman, *supra* note 55, at 186; Sinclair & Galaskiewicz, *supra* note 56, at 1060; *see also* Seifert et al., *supra* note 59, at 141–45 (finding no effect of giving on financial performance, and citing studies to the same effect).

61. *See* JOSEPH GALASKIEWICZ, *SOCIAL ORGANIZATION OF AN URBAN GRANTS ECONOMY: A STUDY OF BUSINESS PHILANTHROPY AND NONPROFIT ORGANIZATIONS* 70 (1985); Joseph Galaskiewicz, *An Urban Grants Economy Revisited: Corporate Charitable Contributions in the Twin Cities, 1979–81, 1987–89*, 42 ADMIN. SCI. Q. 445, 448 (1997) [hereinafter Galaskiewicz, *Urban Grants Economy Revisited*].

62. A tithing club is a local organization that promotes corporate giving by recognizing companies that contribute a certain percentage of income to charity (typically two to five percent). *See* Navarro, *supra* note 57, at 82.

63. *Id.* at 82, 86; *see also* Katherine Maddox McElroy & John J. Siegfried, *The Community Influence on Corporate Contributions*, 14 PUB. FIN. Q. 394, 407 (1986) (finding that executives in study responded favorably to the increased expectations of giving spawned by other firms' giving).

the firm's headquarters city.⁶⁴ According to the authors, "The geographic distribution of contributions roughly corresponds to the location of the executives that control the allocation Executives allocate contributions not only to communities in which the firm operates, but primarily to the communities in which they (the executives) live."⁶⁵

Managers' preference for contributions at headquarters is partly a function of the social networks of which they are a part. McElroy and Siegfried explain:

The relationships among corporate executives in a community frequently constitute an informal social network through which community activities are initiated. Executives shoulder community responsibility by participating in fund-raising drives and serving on the boards of directors for philanthropic agencies, government-business task forces, local chambers of commerce, and school boards.⁶⁶

64. See McElroy & Siegfried, *supra* note 63, at 405. McElroy and Siegfried studied the contributions in the early 1980s of 229 large companies headquartered in fourteen metropolitan areas. *Id.* at 395. The favoritism toward the headquarters city could not be explained by a greater number of employees located there because the ratio of contributions per employee was about five times higher in the headquarters city than in plant locations for firms that operated plants outside their headquarters. *See id.* at 405. McElroy and Siegfried's findings are supported by more recent studies. For example, Marquis and Davis concluded in their 2004 study that "corporate philanthropic giving is [still] largely focused on the headquarters city." Marquis & Davis, *supra* note 41, at 15 (quoting, among others, the president of a corporate foundation for one of the largest corporations in America, who stated that "80% of corporate spending is typically in the headquarters city"); see also Galaskiewicz, *Urban Grants Economy Revisited*, *supra* note 61, at 454 n.4 (finding that in the late 1980s about seventy percent of the contributions of public companies headquartered in the Twin Cities went to Twin Cities nonprofits); Hindy Simons, *Luncheon Address*, 41 N.Y.L. SCH. L. REV. 1013, 1015 (1997) (the head of J.P. Morgan's charitable foundation noted that most of J.P. Morgan's charitable giving was concentrated in New York City, although its business was global). But see Jane Katz, *Get Me Headquarters!*, REGIONAL REV., Q4 2002, at 9, 19 (suggesting that the impact of headquarters on philanthropy may have declined).

65. McElroy & Siegfried, *supra* note 63, at 405. McElroy and Siegfried found that ninety percent of corporate contributions were directed to local, rather than national, philanthropic organizations, and that executives at the headquarters office controlled the allocation of eighty-seven percent of total contributions. *Id.*; see also John J. Siegfried et al., *Management of Corporate Contributions*, 5 RES. IN CORP. PERFORMANCE & POL'Y, 87, 92 (1983) (noting that nearly all firms in survey reported that the relationship of corporate executives to individual charities affects the allocation of funds, and that very high level executives or the board of directors are directly involved; also stating that "strong influence of the chief executive officer is obvious").

66. Katherine McElroy & John Siegfried, *The Effect of Firm Size and Mergers on Corporate Philanthropy*, in THE IMPACT OF THE MODERN CORPORATION, *supra* note 26, at 99, 107-08.

At the same time, headquarters-focused contributions are not without business justification. Indeed, Kanter maintains that favoritism toward the headquarters locale is not just a matter of “sentiment” but also good business:

Companies often have a larger stake in the qualities of their headquarters city than elsewhere above and beyond the numbers employed there (which can be small compared to places housing production facilities) because of who comes in and out of headquarters. . . . [C]ompanies need to make sure that their home city has maximum amenities and minimum problems in order to compete for talent in a global labor market. Civic amenities and services are important for those posted at headquarters, rotating through it, or visiting it for meetings Headquarters is a frequent destination for customers or suppliers, so the home city needs to have attractive facilities, entertainment, and transportation.⁶⁷

One result of this pattern of corporate giving is that local nonprofits receive more contributions from locally based firms than comparably sized absentee firms. Thus, for example, the Harvard Business School study noted above found that locally headquartered companies contributed more to their local United Way than similar nonlocally headquartered firms.⁶⁸ Furthermore, communities with more corporate headquarters rather than branch firms, all else equal, have stronger nonprofit cultural sectors. A recent study of corporate philanthropy found that the number of public companies headquartered in a metropolitan area was a strong and significant predictor of the number of so-called “elite” nonprofit institutions, such as museums and other cultural institutions.⁶⁹ Another recent

67. KANTER, *supra* note 42, at 179. This is a classic “enlightened self-interest” explanation for corporate philanthropy. However, even if civic amenities benefit the firm, it is difficult to defend contributions toward those amenities on profit-maximization grounds because of the public-goods characteristic of the amenities. See Baumol, *supra* note 58, at 16.

68. See KANTER, *supra* note 42, at 178–79. The locally headquartered companies gave more themselves, and their employees gave more (on average). *Id.* More recently, a survey of corporate philanthropy in Massachusetts showed that eight out of the top ten most generous contributors of significance (measured in terms of giving per employee) were headquartered in Massachusetts. See Patrick Lawlor, *Trends: Companies with the Highest Per-Employee Contributions*, BOSTON BUS. J., Sept. 8–14, 2006, Supp. at 23.

69. See Marquis & Davis, *supra* note 41, at 33. The authors reviewed data from sixty-two metropolitan areas between 1986 and 1998, and controlled for population, socioeconomic, and other factors. See *id.* at 25–30. They found no similar correlation for so-called “community-oriented” nonprofits, such as those devoted to housing, employment,

study similarly concluded that the presence of corporate headquarters leads to higher symphony orchestra budgets.⁷⁰

The “hometown” bias in corporate philanthropy suggests that, as a rule, local charitable contributions are likely to decline when a locally based firm is taken over by a firm headquartered in another city.⁷¹ While anecdotal evidence abounds to support this hypothesis,⁷² the only two known studies of mergers and corporate contributions provide mixed evidence of declines in local post-merger giving.⁷³ A

and homelessness, although only nonprofits with assets over \$10 million were considered. *Id.* at 36.

70. See F.M. Scherer, *Corporate Structure and the Financial Support of U.S. Symphony Orchestras* 18 (Am. Antitrust Inst., Working Paper No. 05-06, 2005), available at <http://www.antitrustinstitute.org/recent2/419.pdf>.

71. See Useem, *supra* note 58, at 84. Baumol observed this thirty-five years ago. See Baumol, *supra* note 58, at 10 (“When a local firm is merged into a company that is national or international in scope, the amount given to local non-profit institutions typically suffers a sharp decline.”). Even if giving is not reduced in absolute terms, it may decline in the sense that it is lower than it would have been absent the merger. Thus, for example, in an era of escalating corporate profits, local post-merger giving may increase, but the increase may fall short of the giving that would have been expected absent the merger. See *infra* note 82.

72. See, e.g., PAUL HIRSCH, *PACK YOUR OWN PARACHUTE: HOW TO SURVIVE MERGERS, TAKEOVERS, AND OTHER CORPORATE DISASTERS* 68 (1987) (noting that after Chevron acquired Pittsburgh-based Gulf Oil, Pittsburgh lost all of Gulf’s local donations); David Greising, *Special ‘Presence’ To Be Lost; Questions Raised on Jobs, Philanthropy*, CHI. TRIB., Jan. 15, 2004, at B1 (reporting declines in Chicago-area contributions by BP, after acquiring Chicago-based Amoco, and by SBC, after acquiring Chicago-based Ameritech); Michael A. Hiltzik, *Charities Among Victims of L.A. Corporate Pullouts; Business Firms’ Headquarters Tend To Focus Locally*, L.A. TIMES, Oct. 24, 1995, at A1 (reporting significant loss of local contributions as a result of Texaco’s acquisition of Los Angeles-based Getty Oil and Bank of America’s acquisition of Los Angeles-based Security Pacific Bank).

73. Studies of mergers and corporate giving are rare apparently because data on individual company giving are generally not publicly available. Data on giving by corporate foundations are public, and a recent study found that acquisitions within similar industries were correlated with increased foundation giving. See Jennifer J. Griffin, *Corporate Restructurings: Ripple Effects on Corporate Philanthropy*, 4 J. PUB. AFF. 27, 35 (2004). However, the value of this study is questionable because corporate foundation giving represents only a small portion of overall corporate giving, even among most firms that have corporate foundations. See GIVING USA FOUND., *supra* note 55, at 217 (foundation giving in 2005 estimated to be less than thirty percent of total corporate giving); MUIRHEAD, *supra* note 57, at 15, 32 (large company survey respondents, seventy-eight percent of which had foundations, made only twenty-three percent of gifts through foundation). Moreover, it is not clear whether the correlation found by the author means that post-merger foundation giving for mergers in the same industry actually increased or merely that such giving was higher for same-industry mergers than for other mergers. Finally, the baseline for the study (1997) was the high-water mark for corporate profits in the 1990s, so a subsequent increase in foundation giving would be no surprise, as changes in foundation giving tend to lag behind changes in corporate profits. See GIVING USA FOUND., *supra* note 55, at 87, 202.

study by the Conference Board of twenty-six mergers that were among the most highly valued transactions of the 1990s found that the total contributions budgets of the merged firms generally declined post-merger.⁷⁴ And while there were some instances of increased giving (mostly in the financial services industry where maintaining community goodwill seems particularly important)⁷⁵ those increases may not have been sustained over time.⁷⁶ On the other hand, in the McElroy and Siegfried study in the early 1980s, forty-one percent of the firms interviewed that had recently undergone a merger surprisingly reported that the acquisition increased contributions in the previous headquarters city.⁷⁷ While headquarters bias generally suggests reduced local post-merger giving, there may be other factors at work that can result in increased local giving in some mergers. According to McElroy and Siegfried, the reason for the increased giving reported in their survey is that “most mergers involve a large firm with a substantial, systematic contributions program that acquires a smaller firm with a small, unstructured contributions history.”⁷⁸ A smaller, acquired firm may have a less generous contributions policy toward its home community than a larger,

74. See MUIRHEAD & TILMAN, *supra* note 30, at 12; see also *id.* at 36 (noting a “national trend of reduced post-merger giving”). While the study does not explicitly address where the budget cuts were made, it seems implicit that cuts were made in the giving by the acquired company although the merged firm may rationalize its entire giving program.

75. See *id.* at 12 (noting that banks and other financial institutions depend heavily on consumers in local communities).

76. The Conference Board study did not examine whether any of the increases in giving persisted. Press reports suggest that at least some of the instances of increased (or stable) giving were not sustained. See Greising, *supra* note 72 (reporting that BP and SBC failed to deliver on early promises to sustain pre-merger levels of local giving); Holly Hall, *Globalization Could Erode Corporate Giving in U.S., Expert Warns*, CHRON. PHILANTHROPY, July 22, 2004, at 17, 18 (president of the Lucent Technologies Foundation stated that, after a merger, “overall giving stays flat or goes down. Even when they promise the same or more money, it’s only for the short term,” citing Honeywell’s performance after merger with Allied Signal and relocation of headquarters from Minneapolis to New Jersey); see also Bailey, *supra* note 3 (former CEO of State Street Bank, commenting on sale of FleetBoston to Bank of America, stated that “[o]ver time, these kind of things have a devastating effect on a community, even though they make commitments to maintain things in the short term”).

77. McElroy & Siegfried, *supra* note 66, at 126. The authors received an evaluation for 115 merger cases; twenty-one percent reported decreased contributions, and thirty-eight percent reported no change in contributions. *Id.* No specific data were provided by the interview subjects, nor did the authors attempt to verify the reports, although they had no reason to doubt the information. See E-mail from John Siegfried, Professor of Economics, Vanderbilt University, to Richard Brunell (Aug. 16, 2004) (on file with the North Carolina Law Review).

78. McElroy & Siegfried, *supra* note 66, at 126.

acquiring firm has toward its operating locations because, for example, the larger firm may contribute a higher percentage of its profits to charity or may simply be more profitable.⁷⁹

Still, additional evidence points generally toward lower post-merger giving. Studies have uniformly found that the amount of corporate giving varies with profits, but that the income elasticity of large-firm giving is less than one.⁸⁰ In other words, giving tends not to increase (or decrease) proportionately with changes in profits. All else equal, this suggests that mergers of equally generous firms are likely to result in lower overall giving⁸¹ and thus supports the conclusion that mergers on balance are likely to reduce corporate contributions to the acquired firm's community.⁸² To be sure, even if

79. See *id.* at 129.

80. See McElroy & Siegfried, *supra* note 63, at 403 (finding that contributions of large firms increase or decrease by about 0.75% when profits increase or decrease by one percent); Boatsman & Gupta, *supra* note 59, at 206 (finding relatively low income-elasticity of contributions); Robert Carroll & David Joulfaian, *Taxes and Corporate Giving to Charity*, 33 PUB. FIN. REV. 300, 311 (2005) (finding income elasticity of 0.65); Peter Navarro, *The Income Elasticity of Corporate Contributions*, 28 Q. REV. ECON. & BUS. 66 (1988) (finding that contributions are moderately income-inelastic); see also McElroy & Siegfried, *supra* note 66, at 101 (showing that medium-sized firms, measured in terms of asset size, tend to contribute a higher percentage of their net income than either small firms or large firms).

81. See McElroy & Siegfried, *supra* note 66, at 132. This would not apply to acquiring firms that are committed to contributing a fixed percentage of profits to charity, as some are. See, e.g., Whole Foods Market, Community Giving, <http://www.wholefoodsmarket.com/company/communitygiving.html> (last visited Nov. 6, 2006) (explaining company's commitment to contribute at least five percent of annual net profits to charity).

82. Consider the scenario in which the acquiring and acquired firms each have income before taxes of \$100 million and each contributes \$1 million (one percent of pretax income) to charity, for a combined total of \$2 million. If the income elasticity of giving is 0.75, then the merged firm will contribute only \$1.75 million after the merger. If one assumes for purposes of illustration that half of the merged firm's contributions are allocated to the acquired firm's home community (ignoring the hometown-bias factor), then contributions to the acquired firm's community will decline post-merger from \$1 million to \$875,000. To be sure, if profits increase following the merger, then post-merger giving could increase, even as giving as a percentage income declines. Thus, in the example, if income after the merger grows by twenty percent (from \$200 to \$240 million), post-merger giving would thereby increase to \$2.05 million (with the acquiring firm's community receiving an assumed half of the contributions, or \$1.025 million), while the merged firm's contributions as a percentage of income would decline from 1% to 0.85%. However, if the acquired firm's earnings would have increased by twenty percent without the merger, then it would have contributed even more (\$1.15 million) had it not been acquired. Interestingly, Bank of America's charitable giving following its acquisition of FleetBoston is consistent with this pattern. Prior to the merger (between 1999 and 2003), each bank contributed about 0.7% of its pretax income to charity, with the combined giving reaching roughly \$105 million in 2003, according to annual surveys conducted by the *Chronicle of Philanthropy* and the firms' annual reports. See *Chronicle of Philanthropy*, Gifts and Grants: Charitable Giving at Major Corporations, <http://philanthropy.com/2006>

contributions by the merged firm to the acquired firm's community decline, it is possible that such a decline could be offset by increased personal contributions of local owners who have sold out.⁸³ But this does not appear to be a common scenario.

C. Employment, Investment, and Plant Closings

Corporate headquarters have been described as the "prized pelts" of city economic development.⁸⁴ Bill Testa, an economist with the Federal Reserve Bank of Chicago, and his colleagues explain why this is so:

For one, [headquarters] enhance a city's economic strength and image. A city that is the location of big name corporations will find it easier to attract potential investors. For another, [headquarters] often rely on high level business services—many of which may be purchased locally, thereby creating jobs and income. In addition, the jobs of [headquarters] workers are typically of the highly skilled and highly compensated variety. [And headquarters] employees may be corporate leaders who are active in civic and philanthropic affairs.⁸⁵

The literature suggests that the loss of a corporate headquarters has both short- and long-run adverse effects on employment levels in the local community. In the short run, of course, headquarters jobs are lost, and local firms that provided services to the headquarters (e.g., lawyers, accountants, and consultants) commonly lose business. In the long run, the loss of local control may also reduce employment

(last visited Nov. 12, 2006) (subscription required) (on file with North Carolina Law Review). In the first full year after the merger (2005), contributions had climbed in absolute terms to \$130 million but dropped to 0.53% of pretax income. See BANK OF AM. CORP., 2005 SUMMARY ANNUAL REPORT 7 (2005); Bank of Am. Corp., Annual Report (Form 10-K), at 14 (Dec. 31, 2005); cf. Sasha Talcott, *Bank of America Corp. Increases N.E. Donations*, BOSTON GLOBE, July 2, 2006, at A1 (reporting that Bank of America's donations in Massachusetts and New England increased between 2003 and 2005, but that other big banks in Massachusetts had comparable or greater percentage increases in their Massachusetts donations).

83. See Alan J. Borsuk, *Sales of Businesses a Boon for Giving; State Foundations' Assets Jump 16% in One Year*, MILWAUKEE J. SENTINEL, Nov. 26, 2000, at B1 (noting gains in Milwaukee philanthropy as a result of sales of privately held local companies, such as the sale of the Allen-Bradley Co. to Rockwell International); Scherer, *supra* note 70, at 10. Furthermore, it should be noted that the income-elasticity data suggest that mergers of firms whose headquarters are in the same city may also lead to a reduction in local giving. Cf. MUIRHEAD & TILMAN, *supra* note 30, at 8 (noting that "merging companies in the same region often support the same organizations, and so are likely to trim any overlap").

84. Testa et al., *supra* note 15, at 1.

85. *Id.*

at local production facilities, lower investment in new facilities, or make disinvestment by the firm more likely.⁸⁶ Stern and Aldrich surveyed the literature some twenty-five years ago and concluded that "explicit studies of the effects of absentee ownership on plant closures and job creation provide relatively clear results," namely, that absentee ownership results in reduced employment.⁸⁷ For example, two studies (in different states) showed that mergers between locally owned and conglomerate corporations significantly decreased (on average) the rates of growth in employment and payroll of the acquired local firms and that use of nonlocal financial, legal, and accounting services produced direct revenue losses to the community.⁸⁸ Two other studies cited by Stern and Aldrich, not involving mergers, showed higher rates of employment growth among locally owned firms than at comparable absentee-owned firms.⁸⁹ More recent studies examining the effects of mergers on employment are suggestive, but they do not focus explicitly on the issue of local control.⁹⁰

86. The loss of a corporate headquarters not only has a direct and indirect effect on employment levels in a community but also may impair the productivity of remaining firms as a result of the loss of "agglomeration economies"—that is, spillovers that result from the presence of multiple corporate headquarters in the same geographic region. See, e.g., Teresa Garcia-Milà & Therese J. McGuire, *Tax Incentives and the City*, 2002 BROOKINGS-WHARTON PAPERS ON URBAN AFF. 95, 114 (suggesting that communities desire headquarters because they increase productivity of existing firms). See generally Stuart S. Rosenthal & William C. Strange, *Evidence on the Nature and Source of Agglomeration Economies*, in 4 HANDBOOK OF URBAN AND REGIONAL ECONOMICS: CITIES AND GEOGRAPHY 2119 (J. Vernon Henderson & Jacques F. Thisse eds., 2004) (reviewing empirical literature on agglomeration economies).

87. Stern & Aldrich, *supra* note 47, at 168.

88. See *id.* (discussing Wisconsin and Nebraska studies).

89. See *id.* The evidence is somewhat equivocal as to whether national, multi-plant firms invest more in their headquarters locale than elsewhere. See Roger W. Schmenner, *Aspects of Industrial Plant Openings and Closings*, in THE IMPACT OF THE MODERN CORPORATION, *supra* note 26, at 191, 206 (concluding from a study of large manufacturers in the 1970s that data did not support the hypothesis that a corporation favors communities around its home base in terms of production capacity increases or decreases, but smaller companies with fewer plants were less likely than larger companies to close a plant near headquarters).

90. For example, Lichtenberg and Siegel, reviewing census data from 1977 to 1982, found that "auxiliary establishments" (nonproduction facilities) that changed ownership had significantly lower employment growth (indeed sharp employment declines) and lower wage growth than those that had not changed control. Frank R. Lichtenberg & Donald Siegel, *The Effect of Ownership Changes on the Employment and Wages of Central Office and Other Personnel*, 33 J.L. & ECON. 383, 395 (1990). A different study of the period from 1977 to 1987 found that production facilities of average size that had been acquired had *higher* employment growth and wages, although large plants (which account for most production workers) that had been acquired had lower wages and employment growth than plants that did not change ownership. Robert H. McGuckin & Sang V.

A firm may favor investment, employment, or service providers located at its headquarters, rather than at distant locales, for a number of reasons. Monitoring costs may be lower for operations near headquarters, or there may be other economies of scope between headquarters and local operations.⁹¹ Headquarters' proximity to local services (or other suppliers) has obvious advantages.⁹² For firms that operate principally in a single locale or region, there are additional reasons that make it more likely to add production capacity and less likely to disinvest locally than would a branch of a multi-location firm. The multi-location firm is more mobile and less dependent on any single location; its investment horizon will be geographically wider. It is less likely to add capacity to any particular location than a single-locale firm, which presumably will add capacity locally until it faces significant diseconomies of scale.⁹³ A single-locale firm is also less likely to close its plant(s) than a firm operating in multiple locales insofar as disinvestment amounts to closure of the firm (and inability to recover costs) and is less likely to relocate its plants because of its greater dependence on the locality and higher transaction costs of relocating.⁹⁴ As a result of its lessened

Nguyen, *The Impact of Ownership Changes: A View from Labor Markets*, 19 INT'L J. INDUS. ORG. 739, 757–60 (2001); see also Klaus Gugler & B. Burcin Yurtoglu, *The Effects of Mergers on Company Employment in the USA and Europe*, 22 INT'L J. INDUS. ORG. 481, 498 (2004) (study of mergers between 1981 and 1998 found no significant adverse effects of mergers on labor demand in the U.S., on average, but found lower employment when the merger was accomplished by tender offer).

91. See Testa et al., *supra* note 15, at 2 (noting the importance of headquarters proximity to production activities “for the purposes of monitoring, evaluating, and coordinating these activities”).

92. See *id.* at 3 (noting that contact with providers of support services often needs to be face to face).

93. See KANTER, *supra* note 42, at 180 (“Employment growth begins first at home, then other sites are established.”).

94. See Clifford Kono et al., *Lost in Space: The Geography of Corporate Interlocking Directorates*, 4 AM. J. SOC. 863, 872 (1998) (“Corporations embedded in geographically expansive financial and non-financial markets possess locational flexibility.... In particular, the more locations in which corporations produce, the better positioned they are to shift production outside their headquarters location, either by downsizing and transferring personnel or by closing and relocating entire plants.”). There may be countervailing factors that would lead a diversified firm to be *more* likely to keep an unprofitable plant open than a local firm. For example, if the product produced at a local plant is a complement to the firm's other business, it may be more costly for the diversified firm to shut the plant down. See Richard E. Caves & Michael E. Porter, *Barriers to Exit*, in *ESSAYS ON INDUSTRIAL ORGANIZATION IN HONOR OF JOE S. BAIN* 39, 41–42 (Robert T. Masson & P. David Qualls eds., 1976).

mobility, the single-locale firm also may be less able to extract tax and other concessions from local communities.⁹⁵

The tendency toward greater long-run investment and employment by locally controlled firms may also be explained in part by a managerial discretion theory. The same personal attachment that leads managers to become civic leaders and direct corporate charitable contributions to their communities suggests that, insofar as managers have discretionary authority with respect to investment and employment decisions, they will favor their local communities over distant ones. At the margin, managers will prefer to direct the spillover benefits (or avoid the spillover costs) of employment and investment decisions to their home communities. Moreover, managers' personal stakes and social relationships in the community may lead them to sacrifice some degree of corporate profits to benefit (or avoid harming) that community, for example by keeping a marginally profitable plant open.⁹⁶

In sum, the literature suggests that mergers that involve the loss of local control are likely to have adverse economic effects on the community losing the corporate headquarters not merely because of immediate job cuts associated with the elimination of the headquarters, but also over the long term as a result of the change in the locus of control of the corporation. Can the losses be quantified?

Perhaps some indication of the value of a corporate headquarters can be gleaned from the tax incentives and other subsidies that some state and local governments have provided to companies to relocate their headquarters.⁹⁷ In the most prominent example, Boeing moved its corporate headquarters from Seattle to Chicago in 2001 after

95. See Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 397 (1996) (criticizing interstate competition to reduce taxes on mobile businesses); cf. Brett Arneds, *Whiny Kilts Puts Boston on Notice*, BOSTON HERALD, Sept. 9, 2005, at 5 (reporting that James Kilts, outgoing CEO of Boston-based Gillette who engineered takeover by Procter & Gamble, warned that Massachusetts needed to change its attitude now that Procter & Gamble "is trying to decide if Massachusetts is a place where they want to expand and invest" (internal quotation marks omitted)).

96. See, e.g., Tolbert et al., *Civic Community*, *supra* note 40, at 93 ("As a result of their strong and enduring community ties, [small, local firms] may be less likely to pull out of the community during an economic downturn . . ."); Berg & Shack-Marquez, *supra* note 45, at 220 (same).

97. Of course, such subsidies only reflect the actual public benefits of a corporate headquarters to the extent that public officials accurately assess those benefits and are motivated by a desire to advance the public interest, which may not always be the case. See Enrich, *supra* note 95, at 393-96 (suggesting that business location tax incentives are driven more by politics than a cost-benefit analysis).

receiving a package of \$56 million in subsidies from the State of Illinois and the city of Chicago.⁹⁸ Other recent examples include Tennessee providing \$197 million in incentives to lure Nissan's North American headquarters to the Nashville area from California⁹⁹ and \$15 million in tax breaks to attract International Paper's international headquarters to Memphis from Connecticut.¹⁰⁰ In fact, these figures represent only a small fraction of the economic gain anticipated by state and local officials.¹⁰¹ All other things being equal, one would expect that the economic loss to a community from losing a headquarters would be at least as high as the gains from acquiring one.¹⁰²

98. See JEFF MCCOURT ET AL., *GOOD JOBS FIRST: A BETTER DEAL FOR ILLINOIS: IMPROVING ECONOMIC DEVELOPMENT POLICY* 57–58 (2003), available at <http://www.goodjobsfirst.org/pdf/il.pdf>. About \$30 million of the package consisted of tax breaks and grants provided by the State of Illinois, and the rest was provided by the city of Chicago; most of the tax breaks were to be paid over time. *Id.* Chicago beat out Denver and Dallas-Fort Worth as finalists in an unusually public site-location auction after Boeing had decided to move from Seattle. *Id.* Interestingly, many local leaders that supported the subsidy did not focus on the direct employment gains, which were expected to be modest (400 to 500 jobs, most of which were not expected to be filled locally). See Mellisa Allison, *Despite Tough Year, Boeing, City Blend Well*, CHI. TRIB., Sept. 22, 2002, at C1. Rather, local leaders were interested in the more intangible benefits, such as prestige, philanthropy, and lure for other investment. See John Smeltzer, *Aerospace Giant Wraps Up 3-City Spectacle; Move Set for Summer*, CHI. TRIB., May 11, 2001, at N1; Editorial, *What Boeing Gives—And Gets*, CHI. TRIB., May 11, 2001, at N28; see also Corporate Headquarters Relocation Act, 20 ILL. COMP. STAT. ANN. 611/5 (West 2006) (purpose of statute authorizing subsidies is that relocations of corporate headquarters to Illinois “will foster a positive image of the State of Illinois and its human and natural resources throughout the United States and the world; contribute to a strong residential housing market; directly and indirectly create jobs and additional taxes within the State; encourage the relocation of other similar businesses to the State; and otherwise foster the development of commerce and industry within the State of Illinois”).

99. See Alan Ohnsman, *Nissan To Get \$197 Mln in Incentives from Tennessee*, BLOOMBERG NEWS, Dec. 7, 2005, <http://www.bloomberg.com/apps/news?pid=10000101&sid=aaPsSYRM78K4&refer=japan> (quoting director of research center at University of Tennessee as stating that the “opportunity to get a large, very well-paying, visible headquarters helps the state’s image”).

100. Amos Maki, *IP To Make It Official: HQ Coming—94 Executive Jobs ‘Huge for City,’* COM. APPEAL (Memphis, Tenn.), Aug. 16, 2005, at A1 (reporting that although headquarters would bring only ninety-four executive jobs, the “relocation could become a marketing and recruiting bonanza for the city, signaling to the nation’s top executives that Memphis is a place to do business”).

101. See, e.g., MCCOURT ET AL., *supra* note 98, at 63–64 (reporting that Illinois officials relied on Arthur Anderson study that claimed the area economy would gain \$4.5 billion over twenty years from Boeing relocation, but arguing that such claims were inflated); Ohnsman, *supra* note 99 (stating Tennessee officials expected a payoff of several times the investment).

102. See *infra* notes 111–12 and accompanying text (discussing endowment effect). Of course, the costs and benefits of losing or acquiring a major corporate headquarters in a relocation may vary depending on the needs of the affected communities. In the examples

D. Local Control and Social Welfare

Even if one is convinced that the loss of local control has adverse effects on a community losing a corporate headquarters, one might ask whether the transfer of control to distant management “merely” transfers wealth from the local community to the headquarters city of the acquiring firm (or from the local community to shareholders) and, if so, whether such wealth transfers harm social welfare. The short answer is that while the relocation of a corporate headquarters (as in the Boeing example) may amount to a pure transfer between cities, the elimination of a headquarters through merger is likely to be less than a zero-sum game.

The empirical evidence on the effect of mergers on the headquarters city of the *acquiring* firm is sparse, so the analysis must necessarily be somewhat tentative, but there are reasons to believe that, in significant respects, the losses to the community losing its corporate headquarters are not likely to be offset by gains to the acquiring company’s headquarters city. In terms of civic leadership, for example, the managers of the acquiring firm are unlikely to become more engaged in their own headquarters community as a result of acquiring a distant firm; on the contrary, their local engagement may decline as their corporate empire expands to new lands.¹⁰³ Insofar as the managers of the acquired local firm who are active civic leaders in the community are transferred to the new headquarters, their transfer is unlikely to benefit their new community much, at least in the short run, because their attachment to the new locale will be weak and, as newcomers, they will lack local clout.¹⁰⁴

cited, the states losing the headquarters either did not participate in the bidding process at all (in the case of Boeing and International Paper) or bowed out (in the case of Nissan) because the company had made the decision to relocate elsewhere. See *supra* notes 98–101 and accompanying text; Michael Gardner, *Governor Offered Nissan Incentives*, DAILY BREEZE (L.A., Cal.), Nov. 11, 2005, at A13.

103. See MICHAEL J. PIORE & CHARLES F. SABEL, *THE SECOND INDUSTRIAL DIVIDE* 289 (1984) (“[T]he existence of distant subsidiaries will weaken management’s attachment to the home base—and its commitment to it and its work force in times of economic adversity.”).

104. Of course, the more deeply rooted the managers of the acquired company are in their local community, the less likely they are to move to the headquarters of the acquired firm. And it is not uncommon for such moves to be temporary in any event. See Jay C. Hartzell et al., *What’s in It for Me? CEOs Whose Firms Are Acquired*, 17 REV. FIN. STUD. 37, 49 (2004) (presenting study of several hundred mergers in late 1990s that shows “extremely high” turnover rate for CEOs of a target company who become executives of the parent after the merger).

It is more plausible perhaps that the acquiring firm's headquarters city would experience some gain in charitable donations as a result of a merger. If the level of corporate charitable giving is largely a function of profits, and firms allocate a disproportionate share of their donations to their headquarters city, as indicated above,¹⁰⁵ then one might expect an acquisition to lead to greater donations in the acquiring firm's headquarters city while reducing contributions in the headquarters city of the acquired firm—a net wash if the merging firms were equally generous pre-merger. However, as noted above, data on the income-elasticity of giving suggest that a merger of equally generous firms would likely lead to a reduction in overall giving, all other things being equal.¹⁰⁶ Further, since large firms contribute a lower percentage of their income than medium-sized firms,¹⁰⁷ one would expect that the acquisition of a medium-sized firm by a large firm would also tend to reduce the overall amount given.¹⁰⁸ Of course, a reduction in corporate philanthropy may well benefit shareholders, as opponents of corporate philanthropy contend,¹⁰⁹ but such a transfer seems unlikely to enhance social welfare.¹¹⁰

105. See *supra* notes 64–66 and accompanying text.

106. See *supra* notes 80–83 and accompanying text.

107. See McElroy & Siegfried, *supra* note 66, at 101.

108. Two caveats on the general tendency of mergers to reduce corporate charitable giving deserve mention. First, to the extent that a merger enables the firms to increase their profitability, post-merger giving could increase even if the rate of giving (as a percentage of profits) declines. See *supra* note 82 (providing a numerical example). Second, a reduction in corporate giving could be offset to some extent by increased individual giving not only, as noted above, when the acquired firm is privately held and the acquisition provides the selling owners with the opportunity to make large personal gifts, see *supra* note 83 and accompanying text, but also when widely dispersed shareholders of the acquired company respond to their increased wealth by increasing their individual charitable donations. See, e.g., Partha Deb et al., *Estimating Charitable Deductions in Giving USA*, 32 NONPROFIT & VOLUNTARY SECTOR Q. 548, 554 (2003) (finding that individual giving is responsive to changes in stock market wealth). But these possibilities would seem to be particularly exceptional in light of the evidence that mergers on the whole do not tend to increase firm profitability or net shareholder wealth. See *supra* note 29.

109. See Friedman, *supra* note 58, at 33. Indeed, the premium paid to the acquired company's shareholders may reflect, in part, the capitalized value of an anticipated reduction in contributions. On the other hand, there is no evidence that the level of charitable giving affects firm performance. See *supra* note 60 and accompanying text.

110. A transfer of wealth from charitable organizations to shareholders presumably would reduce social welfare on distributive grounds or on the premise that the services or benefits supported by the contributions are public goods that are underproduced. See Baumol, *supra* note 58, at 15–18; see also Elhauge, *supra* note 14, at 838 (arguing that corporate donations improve social welfare because managers are subject to social and

In terms of employment and investment, it seems clear that some types of job losses that the acquired firm's community experiences will be offset by job gains for the headquarters city of the acquiring firm. For example, the service providers and other vendors that previously serviced the acquired firm may simply be replaced by the acquiring firm's service providers and vendors. To the extent that internal overhead functions of the acquired firm are switched to the acquiring firm's headquarters, the new headquarters city will gain. Or, if such functions are eliminated (because duplicative), then costs will be lowered, which presumably benefits shareholders, consumers, or both. Similarly, if production is shifted away from the acquired firm's headquarters to other locales, the other locales benefit. And if production is not shifted but is eliminated entirely, and a plant is closed that would have remained open under local control, then shareholders, if not consumers, presumably gain. However, some of the indirect economic costs of losing a corporate headquarters—such as the loss of prestige for the city and the spillovers enjoyed by other firms—are not likely to be offset. It seems implausible that the acquiring firm's headquarters city improves its image much or obtains additional spillovers when the firm makes an acquisition.

Moreover, even if the costs to the community losing a headquarters were offset by equivalent gains to the headquarters community of the acquiring firm, there is reason to think that the transfer of such wealth may reduce social welfare, assuming no productive efficiency gains from the acquisition. The simple reason is that people are loss-averse; that is, they are more sensitive to losses in wealth than they are to gains.¹¹¹ Therefore, the social value of existing jobs or philanthropic programs to the community losing a headquarters is likely "worth more" than the value of new jobs or programs created elsewhere, all other things being equal.¹¹² This

moral processes connected to the business operation from which shareholders are insulated).

111. See generally Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990) (offering a seminal analysis of the endowment effect); Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227 (2003) (demonstrating how endowment effect can be incorporated into legal policy analysis in a variety of areas).

112. See Korobkin, *supra* note 111, at 1277 ("The endowment effect suggests that an employee will probably value a job that she has more than a job that she does not have."). Of course, if the acquiring firm were headquartered in a depressed area and the acquired firm were located in a thriving area, then social welfare may be advanced by a transfer of wealth to the depressed community. However, the movement of corporate headquarters seems to be in the opposite direction. See generally Thomas Klier & William Testa, *Location Trends of Large Company Headquarters During the 1990s*, ECON. PERSP.,

phenomenon is compounded by the dislocation effects of losses, e.g., the costs of unemployment or the costs of replacing a big client or donor (if replaceable at all). Indeed, if the local community is particularly dependent on the local firm—for example because the firm is large and the community small—then the dislocation effects can be substantial, as studies of plant closings have demonstrated.¹¹³

In sum, even if the loss of local control “merely” transfers wealth from one community to another, it seems likely to reduce social welfare—at least absent other gains in efficiency from the acquisition. But the analysis here suggests that the loss of local control may destroy social wealth. At the very least, given the potential negative external effects on local communities, one could not conclude that merely because a merger increases shareholder value, if it does,¹¹⁴ it advances social welfare.¹¹⁵ On the contrary, the external effects suggest a potential classic market failure.¹¹⁶

2Q/2000, at 12, 20 (noting that during the 1990s the Northeast and Midwest regions lost headquarters while the South gained).

113. See, e.g., BENNETT HARRISON & BARRY BLUESTONE, *THE DEINDUSTRIALIZATION OF AMERICA* 67 (1982) (explaining that effects of plant closing can include: direct losses to the employees that lose jobs, suppliers that lose contracts, and governments that lose corporate income and property tax revenue; secondary shocks including decreased retail purchases in a community, reduction of earnings at supplier plants, and increased unemployment in other sectors; and tertiary effects, including increased demand for public services, reduced personal tax receipts, and layoffs in other industries).

114. See *supra* note 29 (citing studies showing that mergers in the aggregate may reduce net shareholder value).

115. During the era of hostile takeovers in the 1980s, some economists and corporate law scholars emphasized that takeover premiums may not reflect real gains in social wealth in part because of the negative externalities associated with such takeovers. See Coffee, *supra* note 23, at 447–48 (exploring a possible divergence between shareholder wealth and social wealth in hostile takeovers); Andrei Schleifer & Lawrence H. Summers, *Breach of Trust in Hostile Takeovers*, in *CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES* 33, 44 (Alan J. Auerbach ed., 1988) (arguing that hostile takeovers may be inefficient ex post insofar as the takeover premium reflects redistribution of wealth from stakeholders to shareholders and fails to account for other external effects). More generally, critics of the “efficient market hypothesis” have explored myriad ways that takeover premiums may not reflect real gains. See generally Lynn A. Stout, *Takeovers in the Ivory Tower: How Academics Are Learning That Martin Lipton May Be Right*, 60 *BUS. LAW.* 1435, 1439–44 (2005).

116. See ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* 183 (4th ed. 1962) (providing a classic definition of externality). Because the external effects on the community losing control are diffuse and widespread, bargaining is not feasible and the unregulated market will not necessarily lead to an efficient result. See Schleifer & Summers, *supra* note 115, at 44 (noting the collective action problem of a community bargaining with a firm not to shut down a plant); Jonathan R. Macey, *Externalities, Firm-Specific Capital Investments, and the Legal Treatment of Fundamental Corporate Changes*, 1989 *DUKE L.J.* 173, 197 (recognizing that “[t]hose outside the web of contracts that make

The legal and economic scholarship that emphasizes the significance of trust in enhancing economic efficiency suggests an additional reason why the loss of local control may be inefficient.¹¹⁷ The commitment of a locally controlled firm to the community builds trust among community stakeholders, which can have important benefits to the firm. For example, it may lead state and local public officials to use their political and regulatory influence on behalf of the firm, perhaps by supporting a desired merger¹¹⁸ or fending off a hostile one.¹¹⁹ Or, by indicating that the firm is less likely to pull up stakes in times of economic adversity, local control may lead community stakeholders to make investments that they would otherwise be reluctant to make. Suppliers or other vendors may be more willing to build facilities to serve the firm, or employees may be more willing to develop firm-specific skills that could not be recovered if the firm were to move operations out of town. Other companies that have no direct economic relationship at all with the firm may be more willing to invest in the community (and thereby indirectly benefit the firm and its employees) if they believe that the firm is committed to the community for the long haul. In short, local control may signal that the firm will not act opportunistically and take advantage of stakeholders' investments when it no longer suits the firm; it engenders trust, which brings forth investment that benefits all concerned.¹²⁰

up modern, publicly held firms," such as community groups, "may be in a weaker position to protect themselves from exploitation than" employees and other stakeholders). To be sure, state and local governments might stand in for the community and try to bribe a local firm not to sell out, just as they sometimes offer tax breaks to firms to attract a corporate headquarters. See *supra* notes 98–100 and accompanying text. However, political and social constraints would likely limit the ability of state and local governments to pay a firm not to engage in what many would consider to be a breach of trust with community stakeholders. See *infra* note 121.

117. See, e.g., Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1753–54 (2001) (arguing that internalized trust plays a critical, but underappreciated, role in the business corporation); Shleifer & Summers, *supra* note 115, at 38.

118. See, e.g., FLEET/BANKBOSTON HEARING, *supra* note 7, at 65 (Massachusetts Senator John Kerry, a member of the Senate Banking Committee, testifying in support of the Fleet/BankBoston merger so that "Boston remains a hub of financial services in the new century and that New England-based banks continue to be available to depositors in New England").

119. See *infra* note 208 (discussing State efforts to prevent the hostile takeover of Stanley Works).

120. This notion is similar to the idea behind the "team production model" of corporate law, which posits that efficiency is enhanced when a public corporation (more specifically, its board of directors) is viewed as a "mediating hierarchy" that maximizes the collective interests of all stakeholders, not merely shareholders. See Margaret M. Blair &

The loss, then, when a locally controlled firm is acquired by a distant firm includes the loss of trust of community stakeholders engendered by local control and the loss of investment and other benefits that accrue to a firm that has built up trust in the community.¹²¹ The acquiring firm may not recognize community trust as a valuable asset, or it may be prepared to jettison this asset in pursuit of other objectives, but it does so at a cost. To be sure, the acquiring firm could seek to demonstrate its commitment to the community in other ways—for example, by maintaining or even boosting its local philanthropy for a period of time.¹²² But such gestures are unlikely to be able to substitute for the active presence in the community of top corporate managers over many years.¹²³

Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 250–51 (1999). This conception of the board encourages stakeholders to make firm-specific investments that otherwise would not be made (or that would be more costly for the firm to obtain) because of the stakeholders' fear of opportunistic behavior by shareholders to capture rents enabled by such investments. The key to this theory is the difficulty or impossibility of generating the optimal level of firm-specific investments by stakeholders through explicit contracts. Notably, the stakeholder least able to contract with the firm is probably the community. *See supra* note 116. Through the lens of the team production model, one might view local control as demonstrating a commitment by the firm to advance community stakeholder interests at the possible expense of short-term shareholder gain.

121. Hirsch notes that takeovers have reduced the loyalty ties between corporations and the communities in which they do business. *See HIRSCH, supra* note 72, at 66. For example, he describes the consequences when United Technologies acquired Otis Elevator Corp. in 1982 and a “century-long relationship based on mutual trust, traditional goodwill, and a handshake was destroyed.” *Id.* at 67. According to Hirsch:

Otis had been based in Yonkers since 1853, but after the takeover, United Technologies announced Otis would leave Yonkers. The recently opened Otis plant, built on land bought with public money and employing 1,800 workers, was shut down. The city's mayor, naturally concerned about the community impact of the surprise relocation, was indignant about the decision and still told interviewers three years later of the city's “rape” and “absolute betrayal” by the company's takeover and disappearance.

Id.

122. Of course, insofar as a company increases its charitable giving post-merger in order to maintain community goodwill, the increased giving itself may be considered a cost of eliminating local control.

123. Two apparent paradoxes in a friendly takeover deserve comment. First, if the locally controlled firm voluntarily cedes local control, how can local control be viewed *ex ante* as a commitment to the community? The answer is that local control is not an absolute guarantee of community commitment but is rather a strong indicator, and the fact that the indicator is losing its force may itself be a social loss. *Cf. Schleifer & Summers, supra* note 115, at 46 (noting that widespread breach of implicit contracts may undermine trust and the ability of firms generally to engage in implicit contracting). Second, if managers—because they are embedded in a local social network—use their managerial discretion to benefit the local community, then why, one might ask, don't they refuse to

Finally, the burgeoning legal literature on efficiency and social norms offers a broader rationale for thinking that the loss of local control may impair efficiency.¹²⁴ A number of scholars have emphasized that social and moral sanctions are important in promoting efficiency because of the limitations of legal and economic sanctions in controlling behavior.¹²⁵ Following this premise, Professor Elhauge has recently defended the notion that corporate managers should be free to respond to social norms, even at the expense of maximizing profits for shareholders, because responsiveness to social norms enhances social efficiency.¹²⁶ If corporate headquarters are the incubators and transmitters of positive social norms to managers (because that is where top managers may be embedded in social networks)¹²⁷ it follows that reducing the number of corporate headquarters from which control of business is exercised (i.e.,

sell their company to a distant firm in a friendly takeover? The answer, at least as to public companies, is that managerial discretion is not unlimited, and shareholder primacy may come to the fore when shareholders are offered a substantial premium for their shares. See Elhauge, *supra* note 14, at 808–10 (discussing ways in which various market forces limit the ability of managers to sacrifice profits in the public interest); see also Cassidy, *supra* note 1 and accompanying text. Moreover, managerial regard for community welfare may be sublimated in the face of large personal payoffs. See Hartzell et al., *supra* note 104, at 38–39 (finding that target CEOs earned an average of \$8 to \$12 million from large acquisitions in the late 1990s, not including benefits from any post-merger position at the acquiring company); Gretchen Morgenson, *No Wonder C.E.O.'s Love Those Mergers*, N.Y. TIMES, July 18, 2004, at 3 (reporting that chief executives of acquired firms like mergers because their severance agreements kick in, and “that means they can become truly, titanically, stupefyingly rich”); see also Charles Forelle & Mark Maremont, *Gillette CEO Payday May Be Richer*, WALL ST. J., Feb. 3, 2005, at B2 (reporting that the CEO of Gillette, James Kilts, was to receive an estimated \$185 million upon Procter & Gamble’s acquisition of Gillette).

124. See generally Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEG. STUD. 537 (1998) (reviewing literature).

125. See Elhauge, *supra* note 14, at 754 (“Social and moral sanctions have a regulatory advantage when those imposing them are better informed about the situation and particular actors can act in a more contextual way with lower procedural costs.”); see also STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 630–32 (2004) (asserting a similar proposition).

126. See Elhauge, *supra* note 14, at 797–805. Elhauge argues that if managers were relegated simply to maximizing shareholder welfare, they would be less responsive to social norms than noncorporate actors because shareholders themselves (particularly in public corporations) are relatively immune from social pressures, lack information about the effect of corporate actions on third parties, and face collective action problems in acting on their social or moral impulses. See *id.* at 798–801. Elhauge thus refutes the arguments of advocates of shareholder primacy who maintain that corporations should stick to maximizing shareholder gain subject only to constraints imposed by (noncorporate) law.

127. See *supra* note 66 and accompanying text.

increasing economic concentration)¹²⁸ may limit the extent to which positive social norms influence managerial behavior and thus impair social efficiency. From the perspective of corporate social responsibility, reducing the number of corporate headquarters may be harmful because it reduces the extent to which managers' roots to local communities may leaven managers' drive to maximize profits at the expense of stakeholders.¹²⁹

II. IS THE LOSS OF LOCAL CONTROL A LEGITIMATE ANTITRUST CONSIDERATION?

The loss of local control of a firm through merger, and its potential deleterious effects on local communities, is not currently considered a relevant consideration in merger analysis. Rather, local control is supposedly a "noneconomic" value, which has no place in modern antitrust doctrine.¹³⁰ However, the loss of local control of

128. Whether there is presently a trend toward increased concentration in the economy is not entirely clear. While large-company headquarters are lost through mergers, significant headquarters may be created by divestitures or the growth of small firms. Data indicate that there has been an increase in concentration of manufacturing in the United States in the last twenty-five years, as measured by the share of manufacturing assets controlled by the largest firms. See Paul A. Pautler, *Evidence on Mergers and Acquisitions*, 48 ANTITRUST BULL. 119, 214 (2003) (indicating that top 200 firms accounted for 56.7% of assets in 1974 and 63.5% of assets in 2001); E-mail from F.M. Scherer, Professor of Public Policy Emeritus, Harvard University, to Richard M. Brunell (Aug. 7, 2005) (on file with the North Carolina Law Review) (share of manufacturing assets accounted for by Fortune 500 manufacturers rose from 75.6% in 1982 to 93.1% in 2002). Other measures of concentration show declines, at least through the late 1990s. See Pautler, *supra*, at 215 (showing that the aggregate concentration of top manufacturers as measured by value added declined slightly between 1977 and 1997); Lawrence J. White, *Trends in Aggregate Concentration in the United States*, 16 J. ECON. PERSP. 137, 155–56 (2002) (finding declines in aggregate concentration between the early 1980s and late 1990s, using various measures).

129. The idea here is not merely that the social norms that influence management behavior will be less geographically diverse, but that the influence of positive norms will be more attenuated because of management's increased distance from the communities where the firm operates and the social pressures that may be brought to bear. See LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY* 39 (2001) (observing that detachment of corporate executives from people who are affected by their decisions undercuts the executives' "caring impulse"); Elhauge, *supra* note 14, at 838 ("The manager who has operated in a local community and seen first hand the sundry ways in which the corporation has impacted or benefited from that community will be more likely to want to make donations to benefit that local community.").

130. See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 203 (1978) (describing the goal of retaining local control over industry as part of an "ancient and disreputable 'social purpose' theory of antitrust"); see also Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105, 112 (2002) (claiming that the objection to an exclusive focus on economics "has simply vanished from the mainstream debate over antitrust policy").

business was an important concern of Congress when it passed the Celler-Kefauver Act of 1950,¹³¹ strengthening section 7 of the Clayton Act.

A. Legislative History

The Supreme Court exhaustively reviewed the legislative history of the Celler-Kefauver Act in the landmark *Brown Shoe* case.¹³² The Court explained that “[t]he dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy.”¹³³ Congress sought to avoid lessened competition and further increases in economic concentration¹³⁴ not

131. Pub. L. No. 81-899, 64 Stat. 1125 (1950). The Celler-Kefauver Act enacted the current language of section 7 of the Clayton Act, which bars any acquisition whose effect “may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18 (2005). The original section 7, enacted in 1914, was “directed primarily at the development of holding companies and at the secret acquisition of competitors through the purchase of all or parts of such competitors’ stock.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 314 (1962). Because the original act did not apply to asset acquisitions, mergers, or consolidations, it “became largely a dead letter.” *United States v. Phil. Nat’l Bank*, 374 U.S. 321, 339–40 (1963). The Celler-Kefauver Act “was intended not only to enlarge the number of transactions covered by § 7 but also to change the test of illegality.” *Id.* at 340 n.18; see also Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1, 24 (1982) (“The Congress that amended section 7 of the Clayton Act in 1950 believed that it was virtually rewriting the anti-merger statute to make it effective where it had formerly been impotent.”).

132. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). The conventional approaches to statutory interpretation continue to give significant weight to legislative history to shed light on the purposes of a statute. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 85–101 (2005) (arguing that a purposive approach to statutory interpretation, based on legislative history, is more consistent with democratic values and sound policy than a textualist approach); William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2054 n.43 (2006) (reviewing ADRIAN VERMULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006)) (“Since the New Deal, legislative history has been an essential source of statutory meaning.”). Legislative history has also been a traditional normative anchor in antitrust scholarship, even among conservative scholars. See, e.g., BORK, *supra* note 130, at 61–63 (contending that the legislative history of the Sherman Act “displays the clear and exclusive policy intention of promoting consumer welfare”); Timothy J. Muris, *The Efficiency Defense Under Section 7 of the Clayton Act*, 30 CASE W. RES. L. REV. 381, 396 (1980) (contending that a “close reading of the legislative history” of the Celler-Kefauver Act “supports the conclusion that the new law was not meant to preclude efficiency as a justification for merger”). Its importance has waned in recent years, however. See generally David F. Shores, *Antitrust Decisions and Legislative Intent*, 66 MO. L. REV. 725 (2001) (discussing judicial and academic stances toward legislative history).

133. *Brown Shoe*, 370 U.S. at 315.

134. See S. REP. NO. 81-1775, at 3 (1950) (“The purpose of the proposed bill . . . is to limit future increases in the level of economic concentration resulting from corporate

merely—or even predominantly—because of the adverse “economic” effects of concentration, but also because of its “social” or “political” consequences.¹³⁵ As the Court observed, “Throughout the recorded discussion may be found examples of Congress’ fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose.”¹³⁶ According to the Court, such values included, in particular, “the desirability of retaining ‘local control’ over industry and the protection of small businesses.”¹³⁷

Congress’s concern over the loss of local control of business is reflected in part in the comments of the sponsors of the bill, Senator Estes Kefauver and Representative Emmanuel Celler, among others.¹³⁸ During the Senate debate on the bill, Kefauver stated:

mergers and acquisitions. The bill would accomplish this purpose by enabling the Federal Trade Commission to prevent those acquisitions which substantially lessen competition or tend to create a monopoly.”); H. REP. NO. 81-1191, at 3 (1949) (stating that the legislation is concerned with “the broad economic problem of high and increasing [economic] concentration”); *see also* Statement by the President upon Signing Bill Amending the Clayton Act, PUB. PAPERS 763 (Dec. 29, 1950) (“I have repeatedly recommended the enactment of this legislation to the Congress, as a major element in the program of this administration to prevent the growth of monopoly and greater concentration of economic power and to create conditions favorable to small and independent business.”).

135. In his seminal article on section 7 of the Clayton Act, Derek Bok observed:

To anyone used to the preoccupation of professors and administrators with the economic consequences of monopoly power, the curious aspect of the debates is the paucity of remarks having to do with the effects of concentration on prices, innovation, distribution, and efficiency. To be sure, there were allusions to the need for preserving competition. But competition appeared to possess a strong socio-political connotation which centered on the virtues of the small entrepreneur to an extent seldom duplicated in economic literature.

Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 236 (1960); *see id.* at 248 (“[I]t seems abundantly clear that ‘competition’ meant far more to Congress than prices, costs, and product innovations.”).

136. *Brown Shoe*, 370 U.S. at 316.

137. *Id.* at 315–16; *see also id.* at 333 (“Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon local control of industry and upon small business.”); *id.* at 344 (“[W]e cannot fail to recognize Congress’ desire to promote competition through the protection of viable, small, locally owned businesses.”); *United States v. Von’s Grocery Co.*, 384 U.S. 270, 283 (1966) (Stewart, J., dissenting) (“A major aspect of [Congress’s fear of large corporations buying out small corporations] was the perceived trend toward absentee ownership of local business.”).

138. The statements of a bill’s sponsors are traditionally afforded great weight in determining legislative intent. *See, e.g., Rice v. Rehner*, 463 U.S. 713, 728 (1983) (noting that the statement of a bill sponsor is an “authoritative guide to the statute’s construction” (internal quotations omitted)). *See generally* WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 302–04 (2000) (maintaining that sponsor statements rank just below committee reports in hierarchy of legislative history sources).

I think that we are approaching a point where a fundamental decision must be made in regard to this problem of economic concentration. Shall we permit the economy of the country to gravitate into the hands of a few corporations . . . with central-office managers remote from the places where their products are made, and the destiny of the people determined by the decisions of persons whom they never see, or even know of? Or on the other hand are we going to preserve small business, local operations, and free enterprise?¹³⁹

Kefauver argued, "Local economic independence cannot be preserved in the face of consolidations such as we have had during the past few years," adding:

The control of American business is steadily being transferred . . . from local communities to a few large cities in which central managers decide the policies and the fate of the far-flung enterprises they control. Millions of people depend helplessly on their judgment. Through monopolistic mergers the people are losing power to direct their own economic welfare.¹⁴⁰

Representative Celler expressed similar sentiments. At a hearing on the bill, he told a subcommittee of the House Judiciary Committee, "The bills offered you are not a complete remedy, but they will help to the extent that they will put the brakes upon . . . the evil tendency of the big fellows to swallow up the little fellows."¹⁴¹ He added:

As the Senator [Kefauver] pointed out, and as I wish to emphasize same, the swallowing up of these small-business entities transfers control from small communities to a few cities where large companies control local destinies. Local people lose their power to control their own local economic affairs. Local matters are within remote control.¹⁴²

139. 96 CONG. REC. 16,450 (1950).

140. *Id.* at 16,452. During the House Judiciary Committee hearing on the bill, Kefauver explained that he "became interested in this matter" when shown "statistics indicating how locally owned corporations in the State of Tennessee, year by year, had been acquired by the large national companies and placed under national management, with the directors being in distant cities." *Amending Sections 7 and 11 of the Clayton Act: Hearing on H.R. 988, et al. Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 81st Cong. 12 (1949) [hereinafter *Hearing*]. Kefauver added, "When the destiny of people over the land is dependent upon the decision of two or three people in a central office somewhere, then the people are going to demand that the Government do something about it." *Id.*

141. *Hearing, supra* note 140 at 15.

142. *Id.* at 16.

During the debate on the House floor, Representative Joseph Bryson of South Carolina spoke extensively about the “problem of outside control of local enterprises,”¹⁴³ with particular reference to the textile industry in the South. Bryson, a member of the House Judiciary Committee, which favorably reported the bill, identified “three important advantages of local ownership, both to the communities involved and the Nation as a whole.”¹⁴⁴ First, he cited better labor management relations, because “[u]nder local ownership, there is common knowledge and acquaintanceship between workers on the one hand and the mill owners on the other.”¹⁴⁵ By contrast, the outside owner of the mill “does not know the workers and they do not know him; he may never even visit the properties to which he holds title; to the workers, ownership is impersonalized, distant, and unapproachable.”¹⁴⁶ Second, he noted that “under local management the legitimate profits of industry tend to remain at home and promote the well-being of the home town. In contrast, under the new outside ownership, the profits are siphoned off to distant areas” and may be used for nonproductive purposes.¹⁴⁷

Third, Bryson observed that local ownership promoted civic welfare, referring to the findings of the Mills and Ulmer report to the Senate Small Business Committee. Bryson stated:

Under local ownership, there are strong social and civic ties that bind the community together. Under outside ownership, these ties are weakened and broken. Merchants and manufacturers do not get together in local organizations for the obvious reason that the owners of the manufacturing firms live elsewhere. Hence the drive for civic improvements of one kind or another generally tends to disappear in towns which have become the victims of outside ownership.¹⁴⁸

143. 95 CONG. REC. 11,494 (1949).

144. *Id.* at 11,495.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* Bryson said, “If anyone has any doubts on this point, I would like to refer him to a report of the Senate Small Business Committee of the Seventy-ninth Congress entitled ‘Small Business and Civic Welfare,’ ” and then highlighted the findings of the report. *Id.*; see also 96 CONG. REC. 16,444 (1950) (Senator Murray, in Senate floor debate, noted that Butte, Montana, which had once been prosperous, “has come to the point where today there is only one single corporation operating there, and that through absentee management,” and that its experience demonstrates “what happens to a community when consolidations are permitted to wipe out independent concerns”).

B. Local Control and "Competition"

As the legislative history demonstrates, there is little doubt that in enacting the Celler-Kefauver amendments Congress was concerned with the loss of local control of industry.¹⁴⁹ However, Congress did not bar mergers that result in the loss of local control; rather, it barred mergers that may substantially lessen competition. While the meaning of "competition" in section 7 is vague and contested,¹⁵⁰ it would be a stretch to equate the loss of local control with a lessening of competition without reference to a merger's effect on product markets.¹⁵¹ Insofar as "competition" involves some notion of business rivalry,¹⁵² promoting local control may be viewed as a

149. Leading antitrust scholars concur. See 4 PHILLIP E. AREEDA ET AL., *ANTITRUST LAW* ¶ 904, at 27 (2d ed. 2006) ("Congress was concerned not merely with the fate of small business, but also with the separation of ownership and control that was seen as attending the large corporation and making its actions socially irresponsible."); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1064 (1979) ("Virtually all proponents of the bill who spoke asserted that the merger trend must be blocked because . . . absentee ownership by large corporations would diminish local initiative and civic responsibility.").

150. See, e.g., Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs*, 98 MICH. L. REV. 849, 910 (2000) (maintaining that "there is no rigid or even clear vision of 'competition' embedded in the text of the antitrust laws"). Compare 4 AREEDA ET AL., *supra* note 149, ¶ 903, at 25 ("['C]ompetition' has a clearly defined meaning. It refers to a situation in which prices are driven to cost and firms are forced to match wits with each other to create and distribute products and services that are most pleasing to consumers."), with Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 254 (1985) ("'Competition' within the meaning of the statute does not refer to a state of affairs in which prices are driven to marginal cost and firms are encouraged to pursue all economies in production and distribution. Rather it refers to a regime in which small businesses have a chance to compete against larger, more efficient rivals.").

151. It is possible to argue that the elimination of a significant locally controlled firm constitutes an injury to "competition" apart from a merger's effect on product markets, to the extent that "competition" refers to a particular vision of the competitive system. See Harlan M. Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555, 585 (1973) (arguing that Congress was concerned with injury to the "competitive system," not just concentration in particular markets, and thus pure conglomerate mergers involving large firms could be reached under section 7); RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA 1888-1992*, at 214 (1996) (maintaining that Congress's "concerns about 'economic concentration' bore on the larger sphere of a competitive economy rather than the microeconomic model of a competitive market"). But even the Court in *Brown Shoe* suggested that the starting point in the analysis of competitive effects was on product markets, although the ultimate concerns may have been "noneconomic." See *Brown Shoe Co. v. United States*, 370 U.S. 294, 333 (1962) ("[N]ot only must we consider the probable effects of the merger upon the economics of the particular markets affected but also we must consider its probable effects upon the economic way of life sought to be preserved by Congress.").

152. See Harry S. Gerla, *Restoring Rivalry as a Central Concept in Antitrust Law*, 75 NEB. L. REV. 209 *passim* (1996) (arguing that "competition" under antitrust laws means

secondary goal or byproduct of preventing mergers that lessen competition.¹⁵³ Not all mergers involving a loss of local control lessen competition (e.g., a pure conglomerate merger between companies headquartered in different regions). And not all mergers that lessen competition involve a loss of local control; indeed an anticompetitive merger arguably might enhance local control (e.g., two competing local firms may merge to form a monopoly to prevent acquisition by an outsider).

But the fact that local control is largely independent of the degree to which a merger lessens competition does not preclude it from playing a role in evaluating the lawfulness of a merger.¹⁵⁴ Because of the very ambiguity of the term “competition,” it is necessary to consider the objectives of Congress in interpreting and applying the term in practice. Moreover, even if one accepts the

rivalry); accord Louis Kaplow, *Antitrust, Law & Economics, and the Courts*, 50 LAW & CONTEMP. PROBS. 181, 209–10 (1987). Blake argued that “competition” in the Celler-Kefauver Act must mean something broader than “rivalry” because the Act was clearly intended to cover conglomerate and vertical mergers. See Blake, *supra* note 151, at 582–83. Indeed, whereas the original section 7 barred stock acquisitions where the effect may be to “substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition,” the Celler-Kefauver Act barred acquisitions where the effect may be “substantially to lessen competition,” without qualification. See *Brown Shoe Co.*, 370 U.S. at 311 n.18 (identifying changes in language).

153. Cf. BORK, *supra* note 130, at 202 (“A policy of preserving competition in particular markets would have *as side effects* the tendencies to lessen the supposed pace of overall concentration in the economy, maintain local control over some firms that would otherwise be acquired, and preserve some small business.”).

154. I say “largely” independent to emphasize the qualification noted above that insofar as competition refers to the nature of the competitive system sought to be promoted by Congress, local control may be viewed as a “meta-competitive” value. Cf. Bok, *supra* note 135, at 305 (“In amending section 7 . . . Congress sketched a rather clear image of the ‘kind of an economy’ it desired to encourage.”). Moreover, local control could be viewed in conventional competitive terms as a quality of the goods or services provided by firms as to which firms compete. See, e.g., Janet H. Cho, *Buying Local: Merchants Boast of Better Service than Their Big Box Competitors; Loyal Shoppers Celebrate Independents*, PLAIN DEALER (Cleveland, Ohio), Dec. 5, 2005, at E1 (discussing “buy local” campaigns in various cities); see also Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 526 (2004) (reviewing evidence that consumers have preferences for the way in which goods and services are produced and arguing that such “process” preferences should be given more weight in legal and regulatory analysis); Neil W. Averitt & Robert H. Lande, *Implementing the “Consumer Choice” Approach to Antitrust Law*, 74 ANTITRUST L.J. (forthcoming 2006) (maintaining that nonprice competition should have a greater role in antitrust analysis). Indeed, in certain industries such as banking, local control appears to have some direct effects on the nature of the services provided. See *infra* notes 240–41 and accompanying text. Nonetheless, for purposes of argument, I am willing to concede that local control is a noncompetitive factor in the sense that the primary effect at issue is not on the rivalry of firms nor on consumers as purchasers of goods and services.

modern construction that lessening of competition means the creation of market power or, perhaps, the elevation of prices,¹⁵⁵ it is often highly uncertain whether a merger will be anticompetitive.¹⁵⁶ Thus, accepting the primacy of modern competitive concerns should not rule out consideration of other values implicit in the statute, at least where the competitive effects of a merger are ambiguous.¹⁵⁷

Moreover, merger doctrine sometimes takes “noncompetitive” concerns into account.¹⁵⁸ The clearest example is the failing-firm

155. This is essentially the perspective of the federal agencies’ Horizontal Merger Guidelines. See U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 0.1 (1997) [hereinafter HORIZONTAL MERGER GUIDELINES], available at http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html (“The unifying theme of the guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise.”).

156. See 4 AREEDA ET AL., *supra* note 149, ¶ 905c, at 32 (noting that “economic theory, except in the more obvious cases, does not permit confident judgments [as to a merger’s competitive effects] even when all the economically relevant facts can be assembled”).

157. Other scholars have pointed to the indeterminacy of conventional competitive analysis as grounds for taking into account “noneconomic” values in merger and nonmerger cases. See Pitofsky, *supra* note 149, at 1060 (arguing that an “exclusively economic approach [to mergers] reflects an unrealistically optimistic view of the certainty introduced by that kind of analysis”); Joseph Brodley, *Potential Competition Mergers: A Structural Synthesis*, 87 YALE L.J. 1, 40 (1977) (arguing that nonefficiency goals may be a factor in potential competition doctrine as “an additional effect to be considered in a merger suspect on other grounds, [but] not an independent justification for policy”); Daniel A. Farber & Brett H. McDonald, *Why (and How) Fairness Matters at the IP/Antitrust Interface*, 87 MINN. L. REV. 1817, 1818–19 (2003) (proposing a rule for analyzing intellectual property/antitrust issues that would give consumers a fair share of the surplus when direct evidence of efficiency is inconclusive); Stephen F. Ross, *Network Effects and the Limits of GTE Sylvania’s Efficiency Analysis*, 68 ANTITRUST L.J. 945, 947 (2001) (arguing that when courts cannot practically determine net welfare effects of the conduct at issue, they should employ “Jacksonian value of equal economic opportunity” in specified circumstances); see also Richard M. Brunell, *Appropriability in Antitrust: How Much is Enough?*, 69 ANTITRUST L.J. 1, 39–40 (2001) (arguing that the indeterminacy of dynamic efficiency arguments in antitrust should open the door to consideration of so-called “noneconomic” values).

158. Indeed, the Antitrust Division has taken “local control” into account to a limited extent in connection with merger remedies. For example, in the Fleet/BankBoston merger, which involved the largest bank divestiture in history, the Justice Department required the bulk of the divestitures to go to a primary out-of-state buyer, but a portion of the divested deposits and branches under the settlement were to be sold to Massachusetts community banks. See Press Release, U.S. Dep’t of Justice, Justice Department Requires Fleet Financial and BankBoston to Divest 306 Branches in Four New England States (Sept. 2, 1999) (reporting that \$810 million, or about six percent of the divested deposits, would be sold to community banks). The Department’s usual bank-merger divestiture policy is to insist that the parties divest assets within a geographic market to a single buyer on the theory that such a buyer will compete more effectively against the merged firm than multiple smaller competitors. See ABA SECTION OF ANTITRUST LAW, BANK MERGERS AND ACQUISITIONS HANDBOOK 80 (2006). Its limited exception in the

defense, which recognizes Congress's concern with the welfare of local communities. Under the failing-firm defense, the acquisition by a competitor of a firm "with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure" is exempt from section 7, regardless of its anticompetitive effect.¹⁵⁹ Originally articulated by the Supreme Court in *International Shoe Co. v. FTC*,¹⁶⁰ the failing-firm defense was endorsed by Congress in adopting the Celler-Kefauver amendments, notwithstanding that the language of section 7 (both before and after the amendments) expressly barred anticompetitive mergers without exception. Congress was concerned, as the committee reports make clear, that a business failure would result in "loss to its stockholders and injury to the communities where its plants were operated."¹⁶¹ Even today, leading commentators acknowledge that the failing-firm

Fleet/BankBoston case appears to reflect the value that local congressional leaders placed on community banking. See Joan Vennochi, *Unknowns in the Fleet-BankBoston Merger Formula*, BOSTON GLOBE, June 22, 1999, at A15 (reporting that the Antitrust Division changed its position on the divestiture package after meeting with Massachusetts congressional delegation); Letter from Mass. Cong. Delegation to Robert Brady, Vice President, Fed. Reserve Bank of Boston (July 7, 1999) (on file with the North Carolina Law Review) (stressing the position that regulators should create a divestiture package suitable for bidding for community banks because of the important role that such institutions play in communities). More generally, Pitofsky has suggested that courts sometimes take "noncompetitive" concerns into account as a factor in the remedy phase of a merger proceeding or in determining whether to issue a preliminary injunction under a "public interest" standard. See Robert Pitofsky, *Antitrust Modified: Education, Defense, and Other Worthy Enterprises*, ANTITRUST, Spring 1995, at 23, 24 (citing defense and steel mergers). But see *Pennsylvania v. Russell Stover Candies, Inc.*, No. CIV. A. 93-1972, 1993 WL 145264, at *12 (E.D. Pa. May 6, 1993) (in evaluating irreparable harm, court refused to consider harm from plant closing unrelated to anticompetitive effect of merger).

159. *Int'l Shoe Co. v. FTC*, 280 U.S. 291, 302 (1930); see *Citizen's Publ'g Co. v. United States*, 394 U.S. 131, 137-38 (1969) (stating requirements of defense).

160. *Int'l Shoe*, 280 U.S. at 302-03 (holding that the acquisition of stock of a failing firm "does not substantially lessen competition or restrain commerce within the intent of the Clayton Act").

161. S. REP. NO. 81-1775, at 7 (1950) (emphasis added) (quoting *Int'l Shoe*, 280 U.S. at 302); H.R. REP. NO. 81-1191, at 6 (1949) (same); see also Bok, *supra* note 135, at 340 (stating that the strongest reasons for the failing-firm defense "stemmed from a legislative concern over the various interests involved in the life of a failing enterprise"). The Supreme Court has explained the rationale for the failing-firm defense in terms of noncompetitive concerns, at least in part. See *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 507 (1974) ("The failing-firm defense presupposes that the effect on competition and the 'loss to [the company's] stockholders and injury to the communities where its plants were operated' . . . will be less if a company continues to exist even as a party to a merger than if it disappears entirely from the market. It is, in a sense, a 'lesser of two evils' approach, in which the possible threat to competition resulting from an acquisition is deemed preferable to the adverse impact on competition and other losses if the company goes out of business." (quoting *Int'l Shoe*, 280 U.S. at 302)).

defense reflects a concern for noncompetitive “social” costs.¹⁶² In any event, Congress’s intent, not expressed in the language of the Act, to protect communities from plant closings and other injury that may result from the failure of a firm—at the possible *expense* of “competition”—provides some support for recognizing Congress’s intent to protect communities from the loss of local control in mergers that arguably *lessen* competition.

The efficiencies defense also arguably involves noncompetitive concerns.¹⁶³ Under the “total welfare” version of the efficiencies defense, a merger that is *prima facie* anticompetitive (say, because it significantly increases market concentration) should be permitted if the efficiencies (i.e., cost savings) from the merger are greater than the increase in market power (deadweight loss),¹⁶⁴ under the “consumer welfare” version favored by the federal agencies,¹⁶⁵ such a

162. See 4 AREEDA ET AL., *supra* note 149, ¶ 952c2, at 251 (“[C]ongressional adoption of International Shoe and the ‘failing company’ defense seem clearly to require that private interests be given some recognition, and it would not be responsive to that legislative history to confine the defense solely to cases where the tribunal can additionally conclude that, as a result of failure, the merger is not likely to have the requisite anticompetitive effects.”); RICHARD A. POSNER, *ANTITRUST LAW* 27 (2d ed. 2001) (“If the sole concern of the Clayton Act were with competition and efficiency, there would be no need for a failing-company defense.”). But see HORIZONTAL MERGER GUIDELINES, *supra* note 155, § 5 (treating the failing-firm “defense” not as a defense at all, but simply as an instance when “a merger is not likely to create or enhance market power or facilitate its exercise”). The failing-firm defense may conflict with a purely competitive analysis when, for example, the acquisition by a dominant firm of assets that would otherwise exit the market would entrench the dominant firm’s position, see 4 AREEDA ET AL., *supra* note 149, ¶ 952b, at 247, or when the prospect of the failure of the acquired firm is less than certain, see Edward O. Correia, *Re-Examining the Failing Company Defense*, 64 ANTITRUST L.J. 683, 690 (1996).

163. It is also worth noting that courts sometimes take into account “noncompetitive” factors under section 1 of the Sherman Act, even though the Supreme Court’s section 1 jurisprudence is less hospitable to such concerns than its section 7 precedent. See Pitofsky, *supra* note 158, at 25 (noting that “[l]ower courts, despite the apparently absolute rule of *Professional Engineers*, often do take noncompetitive considerations into account”); see, e.g., *United States v. Brown Univ.*, 5 F.3d 658, 678 (3d Cir. 1993) (holding that the lower court should have considered “noneconomic” or “social welfare” justifications for restraint under the rule of reason).

164. See generally Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968) (offering a seminal analysis of the welfare tradeoff model).

165. A “total welfare” standard assesses welfare in terms of maximizing producer and consumer surplus without regard to distribution. It is largely synonymous with “wealth maximization” and the Kaldor-Hicks criterion of efficiency, although it focuses on a narrow range of effects (i.e., a “partial equilibrium” analysis). See *infra* note 197 and accompanying text. By contrast, “consumer welfare” ordinarily refers to the welfare of consumers as purchasers of goods and services, and it assesses welfare in terms of maximizing consumer surplus. For a concise description of the welfare standard debate in

merger is permitted if the efficiencies are sufficient to ensure that prices will not rise.¹⁶⁶ While efficiencies are often characterized as “procompetitive,” this modern convention is surely not what Congress had in mind. As Professor Hammer concludes, “The fiction that . . . increases in efficiency and total welfare are ‘pro-competitive,’ while alluring, is difficult to reconcile with either economic or legislative understandings of ‘competition.’”¹⁶⁷ Indeed, Supreme Court precedent quite clearly suggests that whether a merger is anticompetitive and whether it promotes efficiency are separate matters and that gains in efficiency cannot justify a significant

antitrust, see Jonathan B. Baker, *Competition Policy as a Political Bargain*, 73 ANTITRUST L.J. 483, 515–18 (2006).

166. See HORIZONTAL MERGER GUIDELINES, *supra* note 155, § 4 (“[T]he Agency considers whether cognizable efficiencies likely would be sufficient to reverse the merger’s potential to harm consumers in the relevant market, e.g., by preventing price increases in that market.”).

167. Hammer, *supra* note 150, at 913; see also Daniel A. Farber & Brett H. McDonnell, *Is There a Text in This Class?: The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619, 645–47 (2005) (maintaining that the efficiency defense is not consistent with a textualist reading of the word “competition” insofar as the defense would permit firms in oligopolistic industry to merge). To be sure, the consumer welfare version of the efficiencies defense adopted by the federal agencies (which deems efficiencies pro-competitive when they lead to lower prices) is more defensible from a textualist point of view, but it stretches the term “competition” to the breaking point when concentration is significantly increased. See *id.* Either version of the efficiencies defense seems inconsistent with congressional understanding of “competition.” See Bok, *supra* note 135, at 318 (“The possibility of lower costs was brushed aside in the legislative deliberations and there is every reason to believe that Congress preferred the noneconomic advantages of deconcentrated markets to limited reductions in the cost of operations.”). But see 4A PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 970d, at 32 (2d ed. 2006) (maintaining that the efficiencies defense “is not seriously inconsistent with either the language of § 7 or its legislative history”); Muris, *supra* note 132, at 393–402. Advocates of an efficiencies defense point to portions of the legislative history of the Celler-Kefauver Act that indicate Congress did not intend to prevent small firms from merging to compete more effectively against large companies, which supposedly assumes a recognition of efficiencies. See, e.g., 4A AREEDA ET AL., *supra* note 167, ¶ 970c2, at 29–30 (citing H.R. REP. NO. 81-1191, at 8 (1949)). However, the principal explanation offered for why the merger of small competitors did not violate the Act was that such a merger would not *substantially* lessen competition. See H.R. REP. NO. 81-1191, at 7 (1949) (quoting *Int’l Shoe*, 280 U.S. at 298, which distinguished between an acquisition that results in “some” lessening of competition and one that results in lessening competition “to a substantial degree”). In any event, the fact that Congress contemplated that the merger of *small* companies might stimulate competition against larger firms dominating the market is entirely consistent with a structural view of competition that focuses on economic concentration, not efficiency. Cf. Bok, *supra* note 135, at 320 (noting that Congress “was concerned not merely with the enhancement of commercial rivalry, but with many other interests which it was thought would be protected by the prevention of further concentration”).

impairment of competition.¹⁶⁸ To be sure, as Professor Fox states, although “[t]he U.S. antitrust laws protect competition, not efficiencies, . . . efficient markets and efficient competitors are expected products of the system.”¹⁶⁹ In other words, promoting efficiency might be seen as one of the secondary goals or byproducts of restricting anticompetitive mergers.¹⁷⁰ Yet insofar as Congress was interested in promoting efficiency, both the legislative history of the Celler-Kefauver Act and the Supreme Court decisions interpreting the act suggest that such a goal was less important than promoting decentralized, local control of business. Thus, in terms of the statutory language, legislative intent, and Supreme Court precedent, the case for giving consideration to local control as a noncompetitive factor in merger analysis is at least as strong as the case for an efficiencies defense.

C. *Local Control and Modern Antitrust*

A critic might accept that when Congress amended the Clayton Act in 1950 it was concerned about the effect of mergers on local control and other so-called “noneconomic” values and that the Supreme Court in the 1960s validated these concerns. But the critic might argue that antitrust has changed profoundly since then to the point where such concerns are merely historical relics in the evolution of a more advanced antitrust policy that focuses exclusively on “economic” concerns, expressed in terms of consumer welfare or total welfare.¹⁷¹ The critic might justify a revisionist approach to section 7

168. See *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967) (“Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.”); *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) (“Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.”). But cf. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720 n.18 (D.C. Cir. 2001) (noting that whether there is an efficiencies defense is “not a closed book,” and quoting Areeda and Turner’s attempt to distinguish *Procter & Gamble* by the fact that the Supreme Court “referred only to ‘possible’ economies and to economies that ‘may’ result from mergers that lessen competition. To reject an economies defense based on mere possibilities does not mean that one should reject such a defense based on more convincing proof.” (citations omitted)).

169. Eleanor M. Fox, *Antitrust, Competitiveness, and the World Arena: Efficiencies and Failing Firms in Perspective*, 64 ANTITRUST L.J. 725, 728 (1996).

170. See Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CAL. L. REV. 1580, 1589–90 (1983) (maintaining that Congress believed that restricting large mergers would promote productive efficiency).

171. See HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 208 (2005) (stating that “the fundamental ideology of mergers has shifted dramatically over the last three decades and now embodies values that are inconsistent at

not by reference to the intent of the 1950 Congress nor new Supreme Court interpretations of the statute, but rather by appealing to an “organic” or dynamic methodology of statutory interpretation based on professional consensus,¹⁷² lower-court decisions, and the acquiescence of Congress to the change in approach.¹⁷³ The critic would be mistaken, however.¹⁷⁴

As an initial matter, modern merger law takes into account concerns that are said to be “noneconomic.” For example, distributional fairness remains an important goal of modern merger law (and the Sherman Act as well).¹⁷⁵ Indeed, distributional fairness

the most fundamental level with those that the Supreme Court last articulated”); ABA SECTION OF ANTITRUST LAW, THE STATE OF FEDERAL ANTITRUST ENFORCEMENT—2004, at 7 (2005) (arguing that “during the last third of the 20th century, the U.S. witnessed profound changes to the nature of antitrust enforcement,” away from the 1960s’ emphasis on “populist values,” and that there is now a bipartisan consensus that the primary concern of antitrust enforcement is “the welfare of consumers”). For a discussion of consumer welfare and total welfare standards, see *supra* note 165.

172. See POSNER, *supra* note 162, at ix (“Almost everyone professionally involved in antitrust today . . . not only agrees that the only goal of the antitrust laws should be to promote economic welfare, but also agrees . . . that economic welfare should be understood in terms of the economist’s concept of efficiency . . .”).

173. See Hammer, *supra* note 150, at 917 (arguing that changes in modern merger policy “obtain their legitimacy through the persuasiveness of their underlying justifications, the length of time they endure, and the acquiescence of the legislative branch”).

174. In his new book, Professor Hovenkamp acknowledges that *Brown Shoe* “more or less accurately” reported the legislative history of the Cellar-Kefauver Act, HOVENKAMP, *supra* note 171, at 210, but argues that the intent of Congress should be ignored notwithstanding the ambiguity of the statutory language, see *id.* at 43. Characterizing the intent of Congress as “protectionist” of small business, see *id.* at 42 (“[T]he protected class in Congress’s collective minds in 1950 when the merger statute was amended were small businesses injured by mergers that streamlined production and distribution, creating large vertically integrated firms that undersold their rivals.”), Professor Hovenkamp suggests that taking that intent seriously leads to indefensible conclusions, namely that a larger, more efficient firm is an affirmative evil, and that mergers should be condemned at very low concentration levels, see *id.* at 208–10. However, it is not clear why Congress’s preference for less concentrated market structures amounts to “special interest” legislation or why that preference leads to deconcentration at all costs. Certainly, the Court in *Brown Shoe* did not see it that way. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) (acknowledging that the Clayton Act protects competition, not competitors, but stating that Congress was willing to accept occasional higher costs and prices that resulted from fragmented industries and markets); cf. Hovenkamp, *supra* note 131, at 23, 30 (contending that Congress’s intent to protect small business may have been wealth-maximizing; “[a]ntitrust policy must come to grips with the fact that people may sometimes be willing to pay higher consumer prices to realize certain values, and that these values cannot always be determined in the voluntary market”).

175. See HORIZONTAL MERGER GUIDELINES, *supra* note 155, § 0.1 (explaining that the exercise of market power, which is a main concern of the guidelines, results in “a transfer of wealth from buyers to sellers or a misallocation of resources” (emphasis added)). The seminal article making the case that the antitrust laws were designed

is a hallmark of the dominant “consumer welfare” approach insofar as that approach condemns mergers that transfer wealth from consumers to producers even when the mergers would increase efficiency and total welfare.¹⁷⁶ But distributional considerations may sometimes run in favor of producers, as in the case of mergers that create monopsony (i.e., buyer) power, which may be condemned regardless of their effect on consumers.¹⁷⁷ Moreover, modern merger law continues to resonate with entrepreneurial-freedom objectives, particularly in the case of vertical mergers. Thus, courts still cite *Brown Shoe*’s formulation that the “primary vice” of vertical mergers is that of “foreclosing the competitors of either [merging] party from a segment of the market otherwise open to them” because such foreclosure may act as a “clog on competition” and “deprive rivals of a fair opportunity to compete.”¹⁷⁸ Also, the continued reliance by

principally to prevent unfair wealth transfers is Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982). See also Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1032–39 (1987) (articulating antitrust’s concern with the welfare of consumers).

176. See Baker, *supra* note 165, at 516–18.

177. For example, in a recent case, the Justice Department challenged the merger of the second and third largest grain traders in North America, alleging that in certain geographic markets the merged firm would depress the prices paid to farmers. See Complaint at ¶ 34, *United States v. Cargill, Inc.*, No. 99:CV01875 (D.D.C. July 8, 1999). There was no claim that the firm’s exercise of monopsony power would result in increased prices to consumers, nor did the government’s competitive analysis suggest any such harm. See *United States v. Cargill, Inc.*, Public Comment and Plaintiff’s Response, 65 Fed. Reg. 15,982, 15,986–87 (Mar. 24, 2000). Indeed, it is sometimes thought that monopsony power, by lowering a firm’s costs, leads to lower consumer prices. See, e.g., *Kartell v. Blue Shield*, 749 F.2d 922, 930–31 (1st Cir. 1984). To be sure, to the extent that a monopsonist reduces its input purchases, then preventing monopsony power may increase total welfare, or even consumer welfare if the monopsonist reduces output in the downstream market as a result of purchasing fewer inputs. See, e.g., Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 315–20 (1991). However, monopsony mergers may be suspect when they merely transfer wealth from atomistic sellers. See Warren S. Grimes, *Buyer Power and Retail Gatekeeper Power: Protecting Competition and the Atomistic Seller*, 72 ANTITRUST L.J. 563, 573–75 (2005) (arguing that atomistic sellers deserve protection from monopsonistic wealth transfers); see also *Todd v. Exxon Corp.*, 275 F.3d 191, 214 (2d Cir. 2001) (reversing the dismissal of a complaint by workers alleging that an information exchange among employers violated the rule of reason, without harm to consumers; “[i]n an oligopsony, the risk is that buyers will collude to depress prices, causing harm to sellers”); *United States v. Pook, Crim. No. 87-274*, 1988 U.S. Dist. LEXIS 3398, at *9 (E.D. Pa. Apr. 18, 1988) (upholding a conviction for bid rigging by antiques buyers that lowered prices at public auctions for consigned antiques and deprived sellers of “the proper share of ultimate sales prices”).

178. *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 511 (2d Cir. 2004) (quoting *Brown Shoe*, 370 U.S. at 324); see also *Yankees Entm’t & Sports Network, LLC v. Cablevision Sys. Corp.*, 224 F. Supp. 2d 657, 673 (S.D.N.Y. 2002) (quoting *Brown Shoe* formulation and concluding that the plaintiff had “standing to assert that the acquisition

courts on the structural presumption of anticompetitive effects based on market concentration¹⁷⁹ may be interpreted as reflecting “noneconomic” concerns in light of what many economists view as a relatively modest relationship between market concentration and prices.¹⁸⁰ So, too, the Second Circuit case law holding that targets have standing to challenge unwanted takeovers recognizes the “noneconomic” value of preserving the independent existence of a competitor.¹⁸¹

Second, the legitimacy of completely ignoring Congress’s “social” or “political” objectives is open to question.¹⁸² To be sure,

has deprived it of a fair opportunity to compete”). The FTC’s treatment of the AOL/Time Warner merger evoked similar concerns. Chairman Pitofsky stated,

In the broad sense, our concern was that the merger of these two powerful companies would deny to competitors access to this amazing new broadband technology. . . . This order is intended to ensure that this new medium, characterized by openness, diversity and freedom, will not be closed down as a result of this merger.

Press Release, FTC, FTC Approves AOL/Time Warner Merger with Conditions (Dec. 14, 2000), available at <http://www.ftc.gov/opa/2000/12/aol.htm>.

179. See *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 363 (1963) (adopting structural presumption based on the congressional concern with concentration); *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001) (applying a strong version of presumption in a proposed merger between the second and third largest firms in a three-firm market).

180. See Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U. L. REV. 135, 152–55 (2002) (noting the limitations of empirical evidence on relationship between market concentration and prices and seeking to put structural presumption on firmer economic footing); Pitofsky, *supra* note 149, at 1069–71 (arguing that “political” rather than “economic” factors justify a presumption at relatively low levels of market concentration); LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 15–16 (2000) (contending that the incipency standard of section 7 partly reflects a “Jeffersonian ideal of dispersed economic power”).

181. See *Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 258–59 (2d Cir. 1989) (holding that a target has standing to challenge a hostile takeover on the theory that the elimination of the independent existence of a major competitor is the “type of injury the antitrust laws were designed to prevent”). *But see* *Anago, Inc. v. Tecnol Med. Prods., Inc.*, 976 F.2d 248 (5th Cir. 1992) (disagreeing with *Gold Fields* and holding that targets lack standing to challenge merger). Professor Brodley maintains recognition of loss of independence as a measure of antitrust injury validates a key congressional goal in enacting the Celler-Kefauver Act, namely preserving the independence of business firms threatened by a perceived “rising tide” of concentration. Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1, 94 (1995). Brodley also points out that a merger-induced output reduction injures the target firm “in fact” because the welfare of the firm under corporate law includes the interests of nonshareholder constituencies, such as workers and the communities in which the firm operates, who may be harmed by a reduction in output, even if shareholders benefit from higher prices. *Id.* at 84–85.

182. See, e.g., Shores, *supra* note 132, at 725 (questioning the legitimacy of antitrust jurisprudence that ignores intent of Congress); Thomas Arthur, *Farewell to the Sea of*

the Supreme Court has interpreted the Sherman Act dynamically, adapting it to meet “changed circumstances and the lessons of accumulated experience.”¹⁸³ But the Court has done so on the premise that section 1 of the Sherman Act “invokes the common law itself.”¹⁸⁴ The Court has never abandoned legislative intent as a touchstone of interpreting section 7 of the Clayton Act, nor has it repudiated *Brown Shoe*.¹⁸⁵ In any event, even interpreting section 7 dynamically would not ignore legislative intent but rather would apply the statute to new circumstances in conformance with the general principles and purposes declared by the legislature.¹⁸⁶ As for congressional acquiescence to a purely “economic” approach to

Doubt: Jettisoning the Constitutional Sherman Act, 74 CAL. L. REV. 263 (1986) (same, addressing the Sherman Act); see also Farber & McDonnell, *supra* note 167, at 657–68 (arguing that the reigning approach to interpreting antitrust laws as focused on economic efficiency is illegitimate from a textualist perspective); Hovenkamp, *supra* note 131, at 31 (“[W]hen congressional intent in enacting a particular statute, such as the . . . Celler-Kefauver Act, is to recognize values other than low consumer prices, courts must effectuate that intent.”); Kaplow, *supra* note 152, at 212 (“For the courts to proclaim efficiency as the sole objective of antitrust . . . would constitute a substantial political act indeed, and precisely the sort that would be condemned by those who generally counsel judicial restraint and defend the judicial role as being distinct from that of the legislature.”).

183. *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); see also William N. Eskridge & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1234 (2001) (describing the Sherman Act as an example of a “super-statute” that has been applied in a dynamic rather than a text-bounded or originalist way).

184. *State Oil Co.*, 522 U.S. at 21 (internal quotations omitted).

185. Indeed, when the Court liberalized somewhat the standard for liability in *General Dynamics*—its most recent (albeit three decades old) substantive merger case of significance—it indicated that its decision was consistent with *Brown Shoe* and congressional concern over economic concentration. See *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 496–98 (1974); see also Kaplow, *supra* note 152, at 186 (“*General Dynamics* . . . involved no revolution in the use of economics in antitrust decisionmaking.”). Moreover, the Celler-Kefauver Act, like the Clayton Act it amended, was enacted largely because of congressional dissatisfaction with the Court’s “common law” interpretation of the Sherman Act. See POSNER, *supra* note 162, at 122 (“Congress wanted to stiffen the vague and loose legal standard of *Columbia Steel*, in much the same way that the original Clayton Act had been intended to harden the vague ‘Rule of Reason’ laid down in the *Standard Oil* decision.”); Farber & McDonnell, *supra* note 167, at 642–43. *But cf.* *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 126 S. Ct. 860, 872–73 (2006) (construing Robinson Patman Act “consistently with broader policies of the antitrust laws,” whose primary concern is “[i]nterbrand competition” (internal quotes omitted)).

186. See Shores, *supra* note 132, at 740 (quoting Senator Sherman to this effect). One can agree that the vague language of the antitrust statutes, including section 7, gives courts wide discretion to apply them in practice, see HOVENKAMP, *supra* note 171, at 44 (stating that “the very sparseness of the statutes has invited the courts to create a kind of ‘common law’ of antitrust”), without relegating congressional intent to an irrelevance, see Shores, *supra* note 132, at 792 (maintaining that “generality of the statutory text ought to elevate the role of legislative history and congressional intent in proper judicial interpretation”).

mergers, this argument is problematic not only because the jurisprudential basis for relying on post-enactment legislative inaction is highly controversial¹⁸⁷ but also because the evidence of such acquiescence is mixed at best. For example, Congress did not pass the Reagan administration's proposed Merger Modernization Act of 1986, which would have codified the merger guidelines' focus on market power.¹⁸⁸ Certainly, Congress has not signaled that "noneconomic" values should be ruled out when the competitive effects of mergers are ambiguous.¹⁸⁹

Finally, there is no reason to consider the preservation of local control of business to be a value outside the realm of economics or efficiency analysis. On a theoretical level, a preference for local control expressed by Congress, rather than the marketplace, deserves weight in an efficiency calculus, even if it may be difficult to quantify.

187. See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 1020–37 (3d ed. 2001) (reviewing the acquiescence doctrine and its critics); see, e.g., *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994) (rejecting an implied right of action for aiding and abetting under section 10b of Securities Exchange Act, notwithstanding contrary view of all eleven federal appeals courts that had considered the matter and that actions of Congress since 1934 indicated congressional acquiescence); *id.* at 192 (Stevens, J., dissenting).

188. See H.R. 4247, 99th Cong. (1986) (modifying section 7 to prohibit mergers only when "there is a significant probability" that the merger "will . . . increase the ability to exercise market power," and abrogating structural presumption in favor of a multi-factored approach); *Reagan Administration Unveils Antitrust Reform Package; Rodino Attacks Proposals*, 50 Antitrust & Trade Reg. Rep. (BNA) No. 1253, at 307 (Feb. 20, 1986) (stating that the purpose of the proposed Act was to "lay[] to rest outmoded economic and legal analysis of mergers that can be found in older court decisions" and that current language of section 7 "carries the baggage of decades of inconsistent and economically unsophisticated merger analysis"). On the other hand, in the same era Congress did not pass Representative Rodino's bill that would have barred any merger of a large company "if it is unlikely that such acquisition would serve the public interest." H.R. 3561, 98th Cong. (1983); see *Baxter, Miller Promote New Proposal from Administration, Criticize Rodino Bill*, 45 Antitrust & Trade Reg. Rep. (BNA) No. 1131, at 371 (Sept. 15, 1983).

189. One might interpret recent congressional agitation about foreign acquisition of U.S. companies as a signal that the current Congress does not favor a national merger policy that is limited to efficiency considerations. See Neil King, Jr., *When Security, Foreign Investment Collide—Business Groups Fret over Senate Proposal To Require More Scrutiny of International Deals*, WALL ST. J., Apr. 10, 2006, at A4 (noting that congressional concerns go beyond defense issues). Recent legislation rolling back part of the FCC's attempt to liberalize media ownership restrictions, after a firestorm of public opposition, may also be interpreted as congressional support for taking into account "noneconomic" values (indeed perhaps the value of local control) in merger regulation, at least in the broadcast industry. See Baker, *supra* note 27, at 735; Stephen Labaton, *Senate Votes to Restore Media Limits*, N.Y. TIMES, June 23, 2004, at C1 (reporting that a diverse coalition supported a rollback of FCC rules based on "decline in diversity of voices and coverage of local news and community events").

As Professor Hovenkamp noted some time ago, "The concept of allocative efficiency or wealth maximization must include *everything* to which people assign a value."¹⁹⁰ Indeed, recent law and economics scholarship has emphasized that welfare economics broadly encompasses all effects on the well-being of individuals.¹⁹¹ More concretely, as demonstrated in the first Part of this Article, the loss of local control will often have real adverse economic consequences on communities. Mergers that result in the removal of corporate headquarters to a distant locale may be inefficient because of these externalities or because they impair community trust or diminish the impact of positive social norms on corporate managers.¹⁹²

Ironically, to the extent that the meaning of "competition" has strayed from its original structural understanding,¹⁹³ the case for considering local control as a factor in merger analysis has perhaps become even stronger. If "competition" means nothing more than efficiency,¹⁹⁴ then there is no textual reason to exclude consideration of "noncompetitive" external effects from the analysis.¹⁹⁵ Indeed,

190. Hovenkamp, *supra* note 150, at 242. The observation that many consumers profess concern over the loss of locally owned businesses yet buy from cheaper big-box retailers does not mean that consumers, as citizens, do not prefer local control, given consumers' well-known collective action problems in pursuing "process" objectives in the marketplace. See Hovenkamp, *supra* note 131, at 26 (noting that most people may prefer a society of small businesses but may be tempted to free ride on the preferences of others by buying from the low-cost producer because they see their own transactions as too insignificant to have any effect on preserving small competitors); Kysar, *supra* note 154, at 601-03 (seeking to explain evidence that consumers often do pay a premium for the same products derived from socially-preferred production processes, notwithstanding a free-rider problem).

191. See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 968 (2001) ("The welfare economic conception of individuals' well-being is a comprehensive one. It recognizes not only individuals' levels of material comfort, but also their degree of aesthetic fulfillment, their feelings for others, and anything else that they might value, however intangible."); see also McDonnell & Farber, *supra* note 27, at 811 (maintaining that consideration of the effects of antitrust policy on political life is fully consistent with welfare economics, which generally insists on tracing out the effect of a policy throughout the many areas in which it may have notable effects).

192. See *supra* notes 114-29 and accompanying text.

193. See Hammer, *supra* note 150, at 912 (claiming that "evolution of the 'efficiency' defense under section 7 in the lower courts reveals that structural understandings of competition are increasingly being subordinated to broader understandings of social welfare").

194. See, e.g., BORK, *supra* note 130, at 61; cf. 4A AREEDA ET AL., *supra* note 167, ¶ 970c1, at 27 (maintaining that "concentration is important not in itself but because of its implications for economic performance").

195. Professor Barnes argues persuasively that "[c]ontrolling external effects of discretionary power by forcing absentee managers' firms to bear the local costs of their decisions" is not "analytically different from any regulation of the external effects of corporate activity such as internalizing the environmental costs of pollution," and that

some scholars have proposed exactly that.¹⁹⁶ To be sure, considering the effects of delocalization may complicate antitrust economists' conventional partial equilibrium analysis, which focuses on prices and quantities in isolated product (or input) markets and ignores other effects of mergers.¹⁹⁷ But it is not economics that rules out consideration of the effects of the loss of local control.¹⁹⁸ Rather, the prevailing view that local control should be ignored in antitrust merger policy is based either on a political choice that the effects do not merit consideration or is based on administrability concerns. As to the former, the political choice to ignore local control is inconsistent with the goals of Congress. As to the latter, the next Part of this Article addresses administrability concerns by sketching a number of simple ways that local control may be taken into account in merger review.¹⁹⁹

such externalities are relevant to antitrust law under "Bork's broadened definition of competition [which] opens the policies of antitrust law to the protection of all things desirable about competition, that is, to all desirable properties that result from decentralized market structures." Barnes, *supra* note 26, at 841, 853.

196. Professor Hammer, for example, maintains that a total welfare standard should allow courts to consider not only productive efficiencies in merger analysis, but any "intramarket" market failures, such as negative externalities or "wasteful" nonprice competition. See Hammer, *supra* note 150, at 859–67. Thus, a merger of cigarette companies that would result in increased market power and higher prices might be permitted if the social costs of smoking exceeded the private costs of cigarettes to consumers given pre-merger prices and taxes. *Id.* at 862–63, 887–88. Others have made similar arguments for a market-failure defense to horizontal restraints under section 1. See Jonathan H. Adler, *Conservation Through Collusion: Antitrust as an Obstacle to Marine Resource Conservation*, 61 WASH. & LEE L. REV. 3, 23–24 (2004) (arguing that agreements to restrict output of depletable natural resources should be lawful because they help overcome free-rider problems and enhance long-run consumer welfare); Christopher R. Leslie, *Achieving Efficiency Through Collusion: A Market Failure Defense to Horizontal Price-Fixing*, 81 CAL. L. REV. 243 (1993) (arguing for a market-failure defense to price-fixing agreements on efficiency grounds where negative externalities are high); see also 7 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1504, at 383 (1978) (contending that "offsetting a 'market failure' promotes competitive results"). It may be objected that there is a difference between using efficiency analysis to exculpate an "anticompetitive" merger and using it to condemn a merger that is not otherwise anticompetitive. However, that is not what is proposed here. Rather, as set forth below, the loss of local control would be taken into account only when a merger otherwise raises conventional competitive concerns.

197. In partial equilibrium analysis, activity in one market is assumed to have little or no effect on other markets; by contrast, general equilibrium analysis evaluates the effects of a change in one market on all other markets. See ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 579–80 (6th ed. 2005).

198. Cf. Hammer, *supra* note 150, at 856 & n.15 (arguing that a proper partial equilibrium analysis should take into account strong economic interactions).

199. This is not to advocate a total welfare standard for antitrust merger analysis, either in its standard "narrow" form or as expanded to take into account all externalities of merger decisions. There may be a good efficiency case for considering all external

III. HOW SHOULD LOCAL CONTROL BE FACTORED INTO ANTITRUST MERGER ANALYSIS?

The loss of local control could be taken into account as a factor in merger analysis in a number of different ways within the bounds of section 7 of the Clayton Act, including: (1) making local control a permissive factor to be considered by the enforcement agencies in the exercise of their prosecutorial discretion; (2) following current merger standards but shifting the burden of proof of competitive effects in cases when local control is lost; (3) lowering the concentration threshold for establishing a *prima facie* case when a merger eliminates local control; and (4) restoring the "incipiency doctrine" generally in recognition of the social costs of mergers, including but not limited to those associated with the loss of local control. The advantages and disadvantages of these alternatives are discussed in the next Section.²⁰⁰

An initial issue that must be addressed, however, is how to identify a merger that involves a loss of local control. Above, I have defined delocalization as the transfer of control of a business from locally based managers to distant or "absentee" managers, which

effects of merger decisions, for example, all job losses in connection with a merger or all harm to communities, regardless of whether there is a loss of local control. However, the legislative history does not appear to provide any more support for such an approach than a narrow total welfare standard. *See supra* notes 133–48 and accompanying text. *But cf.* *Brown Shoe Co. v. United States*, 370 U.S. 294, 345 n.72 (1962) (suggesting that Congress was concerned about jobs insofar as it favored internal expansion, "which is more likely to provide increased investment in plants, more jobs, and greater output" over expansion through merger, which "is more likely to reduce available consumer choice while providing no increase in industry capacity, jobs, or output"). An expanded total welfare standard also would seem to raise significant implementation problems. In contrast, considering local control as a factor in merger analysis is not only consistent with modern efficiency analysis, but also is faithful to the historic concerns of Congress and can be implemented without great difficulty, as the next Part demonstrates.

200. These alternatives assume that local control is treated as a noncompetitive factor in merger review. *See supra* note 154. Insofar as consumers have a preference for goods or services that are produced by local firms, *see id.*, then local control might be incorporated in conventional merger analysis by giving more emphasis to consumer choice, rather than to prices. *See Averitt & Lande, supra* note 154. Thus, for example, a retail merger that eliminates one of the few locally controlled firms in a local geographic market would reduce consumer choice and may be suspect on that ground, even if prices are unaffected (or are lowered). There are difficulties with such an approach, however. Most significantly, it does not capture the main concern of Congress, which was the effect of the loss of local control on communities. *See supra* notes 131–48 and accompanying text. Indeed, it is precisely because the adverse effects of mergers on communities are external to the firm (and the consumers that buy from it, even in a local market) that the marketplace does not accurately reflect the value of preserving local control or the costs of eliminating it. *See supra* note 116.

occurs not only when a national or global firm acquires a small company whose markets or operations are local but also when the acquired company is a national or global company and its headquarters is eliminated.²⁰¹ Although this definition of the loss of local control is probably broader than what Congress had in mind in 1950 when it passed the Celler-Kefauver Act, it is consonant with Congress's overall objectives.²⁰² Congress probably associated local control with small businesses and thus, presumably, businesses that operated on a local, rather than national or international, level.²⁰³ However, given Congress's general goal of preventing further "economic concentration,"²⁰⁴ it would not make sense to define the loss of local control as excluding acquisitions that eliminate the local headquarters of large companies with national and international operations. Another subsidiary issue is identifying the relevant geographic area of control (not to be confused with identifying the relevant geographic market). For example, has New York City lost local control when a multinational firm headquartered in Manhattan is acquired by another multinational headquartered in suburban Connecticut? What if a Boston-based bank that does business throughout New England acquires a bank based in Portland, Maine? As a threshold matter, I would define the relevant geographic area of control to be the metropolitan area in which a company has its corporate headquarters. Thus, any merger in which the pre-merger corporate headquarters of the merging parties are located in different metropolitan areas would involve a loss of local control.²⁰⁵

201. See *supra* text accompanying notes 12–13.

202. Under a purposive approach to statutory interpretation, fidelity to congressional intent does not mean adherence to the specific intent of the framers, but rather to the general goals of the statute. See ESKRIDGE ET AL., *supra* note 138, at 220–21.

203. See, e.g., 96 CONG. REC. 16,450 (1950) (Senator Kefauver asked, "[A]re we going to preserve small business, local operations, and free enterprise?"). Moreover, Congress probably associated local control with local private ownership rather than with public companies. See *supra* note 149.

204. See *supra* notes 132–37 and accompanying text; see also 95 CONG. REC. 11,486 (1950) (statement of Representative Celler) ("Small, independent, decentralized business of the kind that built up our country, of the kind that made our country great, first, is fast disappearing, and second, is being made dependent upon monster concentration.").

205. Some caveats are in order. The locus of control of widely held public companies is assumed to be the corporate headquarters. However, the locus of control of privately held companies, or public companies with a controlling shareholder (including subsidiaries of public companies), is more complicated. For privately held companies or public companies with controlling individual shareholders, a company should be considered "local" to a particular metropolitan area if both the headquarters of the company *and* the controlling shareholders are domiciled there. For subsidiaries of public companies, a

A. *Alternative Approaches*

1. Factor Delocalization into Prosecutorial Discretion

An initial, modest step would be for the federal enforcement agencies to consider the loss of local control as a factor in the agencies' allocation of enforcement resources, i.e., in deciding which mergers to investigate, how thoroughly to investigate a merger, and whether to bring a challenge in close cases.²⁰⁶ Such an approach would mark a change in recent federal enforcement policy²⁰⁷ but would be consistent with the horizontal merger guidelines of the National Association of Attorneys General. Those guidelines provide that the consequences of mergers that are "relevant to the social and political goals of section 7," "may affect the Attorneys General's ultimate prosecutorial discretion and may help the states decide which of the possible challenges that are justified on economic grounds should be instituted."²⁰⁸ The advantage of this approach, besides the fact that it does not require any change in the law, is that it is flexible; where the social costs of the loss of local control are evident, the government could commit more resources to determine the competitive effects of a merger and could consider those social costs in determining whether to bring a challenge.²⁰⁹

company would be local to a metropolitan area only if the headquarters of both the parent and the subsidiary were located there.

206. See William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the 'Common Law' Nature of Antitrust Law*, 60 TEX. L. REV. 661, 688-89 (1982) (noting that because of resource constraints "some selectivity is required in initiating resource-consuming investigations and prosecutions").

207. See Leary, *supra* note 130, at 112 (FTC commissioner asserting that he was not aware of "non-economic" factors playing a part in the final decision of the FTC or Antitrust Division in merger cases in the last twenty years). But see Pitofsky, *supra* note 158, at 23 (stating that the "reality is that as a matter of prosecutorial discretion . . . prosecutors . . . will occasionally take social welfare considerations into account").

208. HORIZONTAL MERGER GUIDELINES OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL § 2 (1993). Thus, for example, Connecticut's decision to challenge (successfully) the takeover of Stanley Works by Newell Co. was influenced by the fact that Stanley was "a Connecticut-based company with a 150 year commitment to the State" and was "an important employer in Connecticut," and "[t]housands of jobs potentially were at stake." Richard Blumenthal et al., *Antitrust Review of Mergers by State Attorneys General: The New Cops on the Beat*, 67 CONN. BAR J. 1, 12-13 (1993) (noting that "the decision to expend resources on a challenge was aided by the fact that a successful challenge would not only maintain competitive markets, but also would preserve an independent Connecticut-based company").

209. To be sure, the social costs would not be easy to quantify, and perhaps the most that could be expected would be that enforcers would consider the effects as a tiebreaker in determining whether to bring a challenge in a close case. Cf. Pitofsky, *supra* note 149, at 1067 n.44 (arguing that certain "political concerns" perhaps could serve as a tiebreaker

2. Shift the Burden of Proof

A somewhat more significant step would be to shift the burden of persuasion in mergers that involve a loss of local control so that the proponents of the merger would have the burden of proving that the merger is not anticompetitive.²¹⁰ The plaintiff (normally the government) would still have the initial burden of production in establishing a *prima facie* case, but the burden of persuasion on all contested issues would be on the merging parties. This alternative is akin to the stance adopted by Justice Douglas when he stated, “The antitrust laws look with suspicion on the acquisition of local business units by out-of-state companies.”²¹¹ Thus, for example, in an actual potential competition case involving a loss of local control, such as *Falstaff Brewing*,²¹² when the question is whether, absent the merger,

in individual merger cases, for example in a merger of very large companies where there are neither significant anticompetitive effects nor significant efficiencies).

210. The rule would apply only to actions for injunctive relief. Shifting the burden of persuasion would require a change in the case law, *cf.* *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 983 (D.C. Cir. 1990) (burden of persuasion remains with the government “at all times,” even after a *prima facie* case is established), but probably not a statutory change, particularly given that section 7 bars mergers “where the effect may be substantially to lessen competition,” *see* 4 AREEDA ET AL., *supra* note 149, ¶ 905b, at 31 (arguing that “in using broad general language, Congress was simply leaving to the courts the task of determining what specifically must be shown to establish a violation of the statute in so complex and variegated a field as mergers”). To the extent that the burden of persuasion in merger cases already allows for something less than a showing that anticompetitive effects are more likely than not, then shifting the burden of persuasion would mean placing the risk of uncertainty about the probability of harm on the defendants. *Cf.* Michael A. Salinger, Dir. of Bureau of Econ., FTC, Four Questions About Horizontal Merger Enforcement, Speech to the ABA Economics Committee of the Antitrust Section Brown Bag Lunch (Sept. 14, 2005), *available at* <http://www.ftc.gov/speeches/salinger/050914ababrownbag.pdf> (stating that “the correct standard from the standpoint of economics should not necessarily require a showing that a merger increases the risk of collusion to more than 50%,” depending on the magnitude of the harm if it occurred).

211. *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 543 (1973) (Douglas, J., concurring).

212. *Falstaff Brewing Corp.* was the fourth-largest producer of beer in the United States, selling beer in most states, but not the Northeast. Narragansett was the largest seller of beer in New England, with approximately twenty percent of the market. *See id.* at 528 (plurality opinion). The government challenged Falstaff’s acquisition of Narragansett on actual potential competition grounds, namely that absent the acquisition, Falstaff would have entered the market *de novo* or by a smaller, toe-hold acquisition. *See id.* at 530. The district court found to the contrary, but the Supreme Court reversed on the ground that the district court failed to consider the perceived potential competition issue, namely whether Falstaff was “so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in that market.” *Id.* at 532–33. Justice Douglas, concurring in the judgment, would have reversed the district court’s actual potential competition holding because “although Falstaff might not have made a *de novo*

the acquiring firm would likely enter a concentrated market *de novo* or through a toehold entry, the burden would be on the merging parties to establish that the acquiring firm likely would *not* enter independently. Or, in a horizontal merger case in which the merging parties contest the plaintiff's proposed market definition, the delocalization factor would shift the burden of proof of market definition from the plaintiff to the merging parties. If the plaintiff proved its *prima facie* case based on market concentration, then the merging parties' burden to rebut that case (say with evidence of entry or efficiencies) would remain largely the same as under current methodology,²¹³ except that the ultimate burden of persuasion would be on the merging parties to show that the merger likely would *not* substantially lessen competition.

This burden-shifting approach is simple and measured. It takes the existing framework of competitive analysis and merely places on the merging parties the risk of uncertainty of the analysis when a merger involves noncompetitive social costs that Congress sought to avoid.²¹⁴ The main difficulty with this approach is that, as discussed above, while mergers involving a loss of local control have a tendency to harm the local community, such harm is not inevitable.²¹⁵ This raises the question of whether some showing of likely community harm should be required before the burden-shifting rule is applied. The familiar tradeoff arises between a general rule and case-by-case analysis. Any case-by-case analysis of community harm would complicate merger litigation and perhaps lead to satellite proceedings over an issue that is not directly related to the main focus, which is the competitive effect of the merger.²¹⁶ On the other hand, absent a

entry if it had not been allowed to acquire Narragansett, we cannot say that it would be unwilling to make such an entry *in the future* when the New England market might be ripe for an infusion of new competition." *Id.* at 544 (Douglas, J., concurring). Justice Douglas did not indicate whether he would adopt this laxer standard for all potential competition cases or merely those involving a loss of local control.

213. However, cognizable efficiencies should not include cost savings that are arguably attributable to the loss of local control (e.g., elimination of headquarters employees or reduction in charitable contributions).

214. Insofar as the merging parties can establish that the merger is not likely to increase market power or facilitate its exercise, the loss of local control would not come into play. The loss of local control factor would tip the outcome only if an increase in market power is indeterminate or if the expected net effect on consumer welfare (considering efficiencies that would be passed on to consumers) is neutral.

215. See *supra* notes 77-79 and accompanying text.

216. Of course, the determination of community harm could be facilitated by the adoption of simple presumptions. For example, one might presume community harm if the firm whose headquarters is to be eliminated is predominantly local in its operations or market or if it is among the top corporate charitable contributors in the metropolitan area.

filter for community harm, some cases would result in burden-shifting when a community losing a headquarters might actually benefit from a merger.²¹⁷ Although a close question, on balance I would not require any showing of community harm from the loss of local control as a prerequisite to shifting the burden of proof. The cost of complicating already complicated merger litigation seems higher than the cost of “mistakenly” shifting the burden of proof. Indeed, the welfare loss from a false positive would seem slight. It would arise when a merger was erroneously barred because of the shift in the burden of proof (i.e., the merger was not anticompetitive but the merging parties were unable to prove it), yet the local community would gain from it.²¹⁸ This scenario would be rare because the instances in which a community losing a corporate headquarters would gain from a merger are likely to be those in which the acquired firm is small or distressed,²¹⁹ and such mergers are not very likely to be challenged as anticompetitive. Moreover, the legislative history suggests that Congress was more concerned about industrial structure than with the particularized consequences of each merger.²²⁰

3. Lower Concentration Thresholds

A third, somewhat more ambitious approach, would employ burden shifting, as above, but also would lower the market concentration thresholds at which a horizontal merger involving the loss of local control is considered presumptively anticompetitive and would permit the merging parties to rebut the plaintiff’s *prima facie* case only by demonstrating that the merger would likely benefit consumers. For example, suppose a national chain with a five percent

The determination could be further simplified by making the presumptions irrebuttable, although obviously at some cost in accuracy.

217. Absent a filter, the vast majority of interstate mergers would be subject to burden shifting. However, only a small fraction of deals actually would be affected because so few raise competitive concerns under current merger standards. See William J. Baer et al., *Taking Stock: Recent Trends in U.S. Merger Enforcement*, ANTITRUST, Spring 2004, at 15 (reporting that second requests for information, “signaling potentially serious antitrust concerns,” were issued in 4.7% of all eligible transactions during the Clinton administration and in even fewer during the subsequent Bush administration).

218. To be sure, false positives would also include blocked mergers that, if permitted, would produce productive efficiency gains and no losses to the community. Such an outcome would be problematic for this analysis if, contrary to the assumption adopted here, most mergers enhanced economic performance. See *supra* note 29.

219. See *supra* notes 78–79 and accompanying text.

220. See *supra* notes 132–48 and accompanying text; cf. *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) (noting that Congress favored decentralization even if it might result in occasional higher costs and prices).

market share in a local market acquires a local firm in the market with a twenty-five percent market share. If the rest of the market is comprised of seven other firms each with a ten percent market share, then the market would not be considered highly concentrated. Under current standards, the acquisition would not be presumptively anticompetitive and, absent unusual circumstances, would not be challenged.²²¹ Thus, the merger would pass muster under the burden-shifting alternative suggested above, even if outside control would demonstrably harm the local community. Yet the merger legitimately might be barred as “substantially lessening competition” within the meaning of the Clayton Act, even if it had no effect on prices.²²² To be sure, the case for blocking such a merger would be weaker if it also involved significant productive efficiencies likely to benefit consumers. To avoid the need to balance the costs of the loss of local control against gains to consumers, a tradeoff that would surely be controversial, the merger would be allowed to proceed if the merging parties could demonstrate *some* net consumer gain.²²³ The advantage of this approach is that it would block more mergers involving the loss of local control that have no offsetting benefits; the disadvantage (from a practical perspective) is that it involves a greater departure from existing doctrine.

221. The agencies use the Hirfindahl Hirshman Index (HHI) as the measure of market concentration and consider a market to be highly concentrated if the post-merger HHI is above 1,800. See HORIZONTAL MERGER GUIDELINES, *supra* note 155, § 1.51. In the example, the post-merger HHI would be 1,600, making the market only “moderately concentrated.” *Id.* While the merger would be subject to further consideration under the guidelines, in actual practice the agencies would rarely if ever challenge such a merger. See FTC & U.S. DEPT OF JUSTICE, MERGER CHALLENGES DATA, FISCAL YEARS 1999–2003 (2003), available at <http://www.ftc.gov/05/2003/12/mdp.pdf> (showing that of the 183 mergers challenged between 1999 and 2003 involving 1,263 relevant markets, only two markets outside of the petroleum industry had a post-merger HHI of less than 1,800).

222. For administrative simplicity in applying this approach, one could perhaps keep the current thresholds under the horizontal merger guidelines but add a certain number of “points” to the post-merger HHI levels to account for the loss of local control, thus effectively shifting the burden of proof to the merging parties at a lower concentration level. As with the second alternative, the question of whether to have a filter for community harm would remain. For the reasons stated above, I would not require a particularized showing of community harm.

223. This is in contrast to the second approach under which the merger would be permitted if the merging parties demonstrate no net consumer loss. Like the second approach, however, any consumer benefit must be net of costs that may be attributable to the loss of local control. See *supra* note 213.

4. Restore Inciency Doctrine

A fourth approach would recognize the loss of local control as one of a number of adverse social consequences of economic concentration that Congress sought to avoid. This approach would support lower market concentration thresholds in general and a greater use of the “incipiency doctrine” to attack mergers with uncertain anticompetitive effects.²²⁴ Several scholars have taken this approach in the past.²²⁵ Such an approach has much to recommend it because, among other reasons, it requires no case-by-case (or category-by-category) analysis of adverse “social” effects.²²⁶ And, in truth, this approach is not far from the second and third proposals, given that those proposals call for burden shifting in the vast majority of interstate mergers without specific proof of adverse community harm. On the other hand, the second and third proposals’ somewhat more nuanced approach may be more persuasive given the public

224. The incipiency doctrine calls for strict anti-merger enforcement. See Robert H. Lande, *Resurrecting Inciency: From Von's Grocery to Consumer Choice*, 68 ANTITRUST L.J. 875, 878 (2001). The incipiency concept was part of the original section 7, see *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 589 (1957) (“Section 7 is designed to arrest in its incipiency . . . the substantial lessening of competition”), and was reinvigorated in the Celler-Kefauver Act, see *Brown Shoe Co. v. United States*, 370 U.S. 294, 317 & nn.32 & 33 (1962) (stating that Congress provided “authority for arresting mergers at a time when the trend to a lessening of competition . . . was still in its incipiency”). While the doctrine can be understood in various ways, the essence seems to be that courts should err on the side of over-enforcement. See Lande, *supra*, at 881. Lande notes that courts and enforcers have usually ignored the doctrine in recent years. See *id.* at 888. But see, e.g., *United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850, 858–59 (6th Cir. 2005) (reversing the district court’s dismissal of a merger challenge to a partial acquisition, citing the incipiency doctrine).

225. See, e.g., Pitofsky, *supra* note 149, at 1069–71 (arguing that a relatively low concentration threshold is an appropriate way to account for Congress’s concern about a myriad of adverse “political” consequences of mergers); Bok, *supra* note 135, at 305–08 (arguing that uncertainties in merger policy should be resolved consistently with basic value premises and broad political and economic objectives of Congress; and that the “burdens of our ignorance [should] fall upon the merging firms and not upon the public interest in maintaining competition and restraining monopoly power”); cf. Louis B. Schwartz, “Justice” and Other Non-Economic Goals of Antitrust, 127 U. PA. L. REV. 1076, 1080–81 (1979) (“[T]he weight of the non-economic and non-quantitative goals of antitrust should shift to anyone seeking to justify a monopoly or a ‘suspect’ anti-competitive practice the burden of persuading the tribunal that the justification is established by clear and convincing evidence.”). Arguably, this was also the approach of the Warren Court in the 1960s, although a restoration of the incipiency doctrine would not require a return to Warren-era standards. See Lande, *supra* note 224, at 875.

226. This approach of ratcheting up enforcement in general to account for adverse social consequences of mergers may be seen as a mirror image of the approach of some conservative legal scholars who have argued that efficiencies in merger analysis should be taken into account by establishing high general thresholds of illegality rather than adopting an efficiencies defense. See, e.g., BORK, *supra* note 130, at 219.

salience of the local control issue, the empirical grounding of the adverse effects, and the particular significance of the issue in the legislative history. On balance, given the practical realities of what is possible, the burden-shifting approach following current merger standards (the second alternative) seems the most promising alternative for those who accept the analysis offered here.

B. Should Preservation of Local Control Be a Defense to an Anticompetitive Merger?

On the one hand, a "local control" defense to an anticompetitive merger might make some sense because a firm's ability to benefit the community may be in some tension with the degree of competition it faces. If benefit to the community is partly a result of managerial slack, and if product-market competition is a constraint on that slack, then one would expect that increased product-market competition would limit the ability of a firm to benefit the community.²²⁷ Indeed, insofar as the level of charitable contributions is largely a function of a firm's profits, monopoly may be a community's best friend.²²⁸ However, while it is clear from the legislative history discussed above that Congress was concerned with local control and the harm to the communities that may result from acquisitions that eliminate it, there is no indication that Congress intended to subordinate the value of "competition" to those concerns, to the extent they conflicted.²²⁹

227. See generally Carl Kaysen, *The Social Significance of the Modern Corporation*, 47 AM. ECON. REV. 311, 315 (1957) ("Only the ability to continue to earn a substantial surplus over costs makes possible a variety of expenditures whose benefits are broad, uncertain, and distant; the enterprise closely constrained by the pressures of market competition does not have that ability."); see also Brown et al., *supra* note 59, at 16-17 (finding that firms that earn more economic rent give more); Katherine E. Maddox & John J. Siegfried, *The Effect of Economic Structure on Corporate Philanthropy*, in ECONOMICS OF FIRM SIZE, *supra* note 26, at 202, 219 (finding a positive impact of market power on giving).

228. Of course, if a merger-to-monopoly leads to a reduction in output as a result of increased market power, then the community might suffer from a loss of employment by the monopolist and its suppliers.

229. Congress did drop language in the original bill that would have barred mergers that substantially lessened competition "in any community," in favor of language referring to "any section of the country," in order to make clear that the Act did not "go so far as to prevent *any* local enterprise in a small town from buying up another local enterprise in the same town." See S. REP. NO. 81-1775, at 4 (1950) (emphasis added). However, that does not suggest that Congress intended to immunize local mergers that actually lessened competition. But cf. *United States v. Von's Grocery Co.*, 384 U.S. 270, 298 (1966) (Stewart, J., dissenting) (arguing that the merger should be permitted in part because it "clearly comported with the desirability of retaining local control over industry that the Court noted in *Brown Shoe*" (internal quotes omitted)).

Thus, at least absent a failing firm, it should be no defense to an anticompetitive merger that the acquisition would preserve local control or otherwise benefit the community. The premise of the proposals offered here is that local control should be a factor in merger analysis when it does not conflict with conventional competitive concerns.²³⁰

IV. LIMITATIONS AND ALTERNATIVES

To the extent that delocalization is a pressing social issue, even the most aggressive proposal offered here would contribute only modestly in redressing it. Because section 7 of the Clayton Act only prohibits mergers that may substantially “lessen competition,” there are obvious limits to the Act’s constraint on mergers that involve a loss of local control. Most mergers involving a loss of local control would likely be unaffected by the proposals because they do not raise substantial competitive concerns. Moreover, mergers that are resolved with partial divestitures would not be affected. Further, in some sectors of the economy the greatest threat to local control of businesses probably does not come from the acquisition of locally based firms by distant ones but rather from the expansion of national firms into markets previously dominated by local firms, for example, as “big box” retailers replace local or regional merchants.²³¹ However, even if the role of the Clayton Act in redressing delocalization is necessarily limited, that does not mean that antitrust should ignore the issue entirely when doing so risks undermining social welfare and the intent of Congress.²³²

230. Thus, the proposals are consistent with the Supreme Court’s admonition in *Philadelphia National Bank* that “a merger the effect of which ‘may be substantially to lessen competition’ is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial.” *Unites States v. Phila. Nat’l Bank*, 374 U.S. 321, 371 (1963) (rejecting the defendant’s argument that the merger was justified because Philadelphia “needs a bank larger than it now has in order to bring business to the area and stimulate its economic development”).

231. See, e.g., Stephan J. Goetz & Hema Swaminathan, *Wal-Mart and County-Wide Poverty* (2004), <http://cecd.aers.psu.edu/pubs/PovertyResearchWm.pdf> (finding that, after controlling for various factors affecting poverty rates, county-level poverty rates increased more in counties that had more Wal-Marts and hypothesizing that the effect may be due in part to Wal-Mart’s adverse impact on local leadership capacity).

232. *But cf.* 1 AREEDA & HOVENKAMP, *supra* note 27, ¶ 111, at 107 (arguing that an antitrust policy that sought to preserve smaller business units would be futile because “so long as growth or diversification by internal expansion is permitted, inefficiently small or undiversified firms must either expand or expire: prohibition on mergers will not preserve them”).

A. *Local Control as a Factor in Bank Mergers*

Industry-specific regulation may offer greater promise in addressing the problems of delocalization in certain industries, such as banking.²³³ While a complete analysis of the issues is beyond the scope of this Article, the outlines of an approach for bank mergers are easy to discern. The issue of delocalization in bank mergers is particularly salient because of the important role banks have played historically in the social and financial development of communities.²³⁴ Moreover, bank mergers are not governed merely by a lessening-of-competition standard. Before approving a bank merger under the Bank Merger Act, federal regulators must consider factors in addition to competitive effects, including “the convenience and needs of the community to be served”²³⁵ and the banks’ record of performance under the Community Reinvestment Act (“CRA”), which imposes on banks a “continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered.”²³⁶

Professor Carstensen stated the case for local control of banks in terms of civic leadership and philanthropy:

233. Broadcast regulation may offer another avenue of addressing these concerns given the FCC’s mandate to promote “localism” in regulating media ownership and its historical favoritism of local owners in broadcast applications. See Paul Cowling, *An Earthy Enigma: The Role of Localism in the Political, Cultural and Economic Dimensions of Media Ownership Regulation*, 27 HASTINGS COMM. & ENT. L.J. 257, 263–66, 354–55 (2005) (describing traditional FCC views of localism and defending the value of local ownership).

234. See, e.g., Richard E. Ratcliff et al., *The Civic Involvement of Bankers: An Analysis of the Influence of Economic Power and Social Prominence in the Command of Civic Policy Positions*, 26 SOC. PROBS. 298 (1979) (detailing high level of civic involvement by bank directors in a major metropolitan area).

235. 12 U.S.C. § 1828(c)(5)(B) (2000). Indeed, an anticompetitive merger is permitted if “the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.” *Id.*; see also *id.* § 1842(c)(1)–(2) (setting the same standards under the Bank Holding Company Act). Considering the loss of local control as a factor under the convenience and needs analysis is not precluded by circuit cases holding that bank regulators may not deny a merger application on the basis of a “competitive standard” more stringent than the Clayton Act and that anticompetitive effects may not be considered under the convenience and needs analysis. See, e.g., *Wash. Mut. Sav. Bank v. FDIC*, 482 F.2d 459, 465 (9th Cir. 1973). Whatever the merits of this case law, it is no impediment because local control is largely a noncompetitive factor, albeit one that is relevant under the Clayton Act as properly understood. See *supra* note 154 and accompanying text.

236. 12 U.S.C. § 2901(a)(3) (congressional finding in preamble to act). See generally Michael S. Barr, *Credit Where it Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513 (2005) (defending the CRA against criticism that has plagued the Act since its inception).

[B]anks and their top executives have historically played vital roles in local social and political activity. Individual bankers make discretionary contributions of their time to the betterment of their communities. Equally important, individual bankers can command the financial resources of their bank to make contributions to the community both by providing charitable donations and by supporting a wide range of community development activities.²³⁷

Carstensen argued:

If the bank ceases to be locally controlled, managers will be less likely to exercise their discretion to expend time on projects which bring local recognition yet lack support or recognition at corporate headquarters. Similarly, direct contributions and other assistance will now rest upon the discretion of corporate managers far removed from the locality, making such assistance less likely to occur. Both of these losses will impoverish society as a whole, even if they do not show up as a direct economic cost of allowing major bank combinations.²³⁸

Beyond the loss of civic leadership and philanthropy, there are reasons to believe that local economic growth may be stunted by the acquisition of local banks by national banks.²³⁹ It is widely accepted that “[l]ocal banks are more likely to meet the credit needs of small businesses, because they are better able than out-of-town banks to evaluate and monitor the performance of local firms to which they lend.”²⁴⁰ And several studies show that small-business lending

237. Peter C. Carstensen, *Public Policy Toward Interstate Bank Mergers: The Case for Concern*, 49 OHIO ST. L.J. 1397, 1425 (1989).

238. *Id.*

239. One recent study concluded that, in metropolitan areas, “out-of-market ownership of bank offices is associated with lower short-run growth rates,” although the magnitude of this effect was economically small, and no negative effects were found in nonmetropolitan areas. Robert N. Collender & Sherrill Shaffer, *Local Bank Office Ownership, Deposit Control, Market Structure, and Economic Growth*, 27 J. BANKING & FIN. 27, 54 (2003) (“[R]esults indicate greater cause for concern about bank ownership patterns in metropolitan areas than in non-metropolitan areas.”).

240. Arthur E. Wilmarth, Jr., *Too Big To Fail, Too Few To Serve? The Potential Risks of Nationwide Banks*, 77 IOWA L. REV. 957, 1038 (1992) [hereinafter Wilmarth, *Too Big to Fail*]; see also Arthur E. Wilmarth, Jr., *The Transformation of the U.S. Financial Services Industry, 1975–2000: Competition, Consolidation, and Increased Risks*, 2002 U. ILL. L. REV. 215, 261–62 (noting that “community-oriented banks continue to provide a majority of the bank credit extended to small firms, notwithstanding their declining share of the industry’s assets,” and offering several reasons for the evident superiority of smaller banks in providing credit to small businesses). Collender and Shaffer note that “[s]mall, local banks may behave differently from larger nonlocal banks for a variety of reasons, including superior access to information, greater commitment to local prosperity, and

declines when local banks are acquired by large nonlocal banks, although such reductions may be mitigated by the creation of new local banks.²⁴¹ Moreover, there is evidence that local banks tend to reinvest more of their locally generated funds in their communities than nationwide banks.²⁴²

In recent years, the issue of the loss of local control has been raised by objectors in numerous large interstate bank mergers, including, for example, Bank of America's acquisition of FleetBoston.²⁴³ The issue has been duly noted by the Federal Reserve Board and then essentially ignored. The Board "weighs" all claims of future community harm against the banks' existing performance under the Community Reinvestment Act, generally concluding in boilerplate language that "considerations relating to the convenience and needs factor, including the CRA performance records of the relevant depository institutions, are consistent with approval of the proposal."²⁴⁴

The issue of the loss of local control deserves more than a glancing nod under the rubric of CRA performance. In the first

differences in technology (cost structure) or risk management related to bank size." Collender & Shaffer, *supra* note 239, at 53.

241. See Rebel A. Cole et al., *Cookie Cutter vs. Character: The Micro Structure of Small Business Lending by Large and Small Banks*, 39 J. FIN. & QUANTITATIVE ANALYSIS 227, 229 (2004) (reviewing studies of effects of mergers on lending to small businesses); see also Allen N. Berger et al., *Does Function Follow Organizational Form? Evidence from the Lending Practices of Large and Small Banks*, 76 J. FIN. ECON. 237, 266 (2005) (concluding that "bank consolidation may raise meaningful concerns for small firms" because "large banks lend primarily to larger firms with good accounting records . . . [,] lend at a greater distance, interact more impersonally with their borrowers, have shorter and less exclusive relationships, and are not as effective at alleviating credit constraints").

242. See Wilmarth, *Too Big To Fail*, *supra* note 240, at 1045. But see Geoffrey Miller, *Legal Restrictions on Bank Consolidation: An Economic Analysis*, 77 IOWA L. REV. 1083, 1109-10 (1992) (questioning the proposition that large banks tend to drain credit from local communities).

243. See Bank of Am. Corp., 2004 WL 474646, at *3 (Fed. Reserve Bd. Mar. 8, 2004) (order approving merger) (noting objections that the merger would "result in the loss of local control over lending and investment decisions" and concern about potential adverse affects that might result from the "loss of a major financial institution headquartered in New England"); see also J.P. Morgan Chase & Co., 2004 WL 1369433, at *2 (Fed Reserve Bd. June 14, 2004) (order approving merger) (noting concerns expressed about "the loss of local control over lending and investment decisions in a merger between two large banks"); NationsBank Corp., 84 Fed. Res. Bull. 858, 867 (1998) (noting concerns "that the merger would result in the loss of local control over lending decisions and the relocation of a major financial institution currently headquartered in San Francisco").

244. Bank of America Corp., 2004 WL 474646, at *22. Numerous other approvals have followed the same formula, generally without substantively addressing the issue of the loss of local control. See, e.g., J.P. Morgan Chase & Co., 2004 WL 1369433, at *24.

place, the loss of local control may be inconsistent with the convenience and needs of the community not only because it may lessen the bank's commitment to meeting the community's credit needs under the CRA, but also because it may impair the bank's role in the leadership and philanthropy of the community and other facets of its performance.²⁴⁵ Secondly, even if meeting local credit and investment needs were the only issue raised by the loss of local control, it would hardly be sufficient to look at the *past* record of the merging banks' CRA performance, as the board does in making its convenience and needs determination,²⁴⁶ when the question raised is whether the *change* in the structure and ultimate management of the acquired bank will have a negative impact on the bank's meeting the convenience and needs of its local community in the future. The fact that past performance of the banks (acquired or acquiring) is generally satisfactory has little bearing on this question. It would be more relevant to the local control issue to compare the acquiring

245. Concerns about philanthropy and leadership would seem to fit comfortably within the meaning of "convenience and needs of the community." See *United States v. Third Nat'l Bank in Nashville*, 390 U.S. 171, 184–85 (1968) (noting that the convenience and needs of the community was made a defense to anticompetitive merger because of Congress's recognition of the importance of "the role of banks in a community's economic life"); see also *Bank of New Bern v. Wachovia Bank & Trust Co.*, 353 F. Supp. 643, 648 (E.D.N.C. 1972) (holding that one factor in the convenience and needs determination is the "extent to which management of existing banks has been active and vigorous as evidenced by the assumption of leadership and participation in economic growth of the community"). To be sure, the Federal Reserve Board has maintained that the convenience and needs factor relates to the quality of banking services in the community, so that, for example, loss of local employment is not a relevant consideration. See, e.g., *Wells Fargo & Co.*, 82 Fed. Res. Bull. 445, 457 (1996). Yet, even if the Board is correct, arguably philanthropy and civic leadership are traditional components of "banking services" provided to the community. But see *Bank of America Corp.*, 2004 WL 474646, at *11 n.46 ("[N]either CRA nor the agencies' implementing rules require that institutions engage in charitable giving.").

246. The board treats the merger approval process as an occasion for assessing past CRA compliance, and denial of approval is essentially a penalty for prior unsatisfactory performance by either party. See *Bank of America Corp.*, 2004 WL 474646, at *20 ("[T]o gain approval of a proposal to acquire an insured depository institution an applicant must demonstrate a satisfactory record of performance under the CRA without reliance on plans or commitments for future action."). This is consistent with the CRA, which requires the banking agencies to consider a bank's "record" of CRA performance in considering merger (and other) applications. See 12 U.S.C. § 2903(a)(2) (2000); see also *id.* § 1831u(3)(B) (providing that in determining whether to approve an interstate bank merger, the agency shall "take into account the most recent written evaluation" of CRA performance). However, nothing in the statute precludes a banking agency from considering whether past satisfactory performance will be maintained in the future. Indeed, insofar as CRA performance is an element of the convenience and needs test, which is forward-looking, then an assessment of future compliance would seem to be required.

bank's CRA performance at its branch outposts, if any, to the performance of the acquired bank in its home community. If the relative performance of the acquired bank is stronger, then it would be difficult to find that the merger is consistent with the convenience and needs of the community, at least absent countervailing considerations.

More generally, given the potential adverse consequences of the loss of local control, it would be appropriate to adopt a presumption that the acquisition of a bank that eliminates local control is not consistent with the convenience and needs of the community, particularly when the bank to be acquired is the last remaining significant locally based bank in a metropolitan area or region. To gain approval by regulators, the merging banks would have to rebut the presumption by establishing either that the loss of local control would not lessen community leadership, philanthropy, or commitment to community lending and investment or that such a loss would be outweighed by other benefits to the community (such as a more competitive banking market) that could not be achieved by less restrictive alternatives.²⁴⁷

At one point in the not-too-distant past, the Board considered local control to be a positive factor in the convenience and needs determination.²⁴⁸ Even in the 1990s, bank regulators in a few merger

247. This proposal is similar to Professor Carstensen's proposal for a general presumption against large interstate bank mergers because of the likelihood of a number of adverse social consequences—including the loss of local control—and the unlikelihood of public benefits. See Carstensen, *supra* note 237, at 1431, 1435 (“[P]roperly understood . . . the convenience and needs criterion itself creates a presumption against bank combinations which have any potential negative effects unless the specific combination also has offsetting positive effects.”). It is worth noting that the evidence for the efficiency of bank mergers (and increased shareholder value) is arguably even weaker than for mergers in general. See David A. Becher et al., *Interstate Banking Deregulation and the Changing Nature of Bank Mergers*, 28 J. FIN. RES. 1, 15 (2005) (finding that bank mergers in the post-deregulation 1990s resulted in more than \$10 billion in wealth destruction); Pautler, *supra* note 128, at 159 (reviewing studies on bank mergers and concluding that “[t]he weakness of the evidence regarding beneficial cost efficiency effects . . . is a bit . . . surprising . . . [g]iven the received wisdom in the literature that banks generally are not very efficient”); see also Valerie Bauerlein & Clint Riley, *Bank of America Seeks a Crown—Once-Small Company May Topple Citigroup as Market-Value King After 128% Growth in Last Five Years*, WALL ST. J., July 28, 2006, at C1 (explaining that the strong performance of Bank of America's stock price was due in part to the fact that future mergers were barred; “fewer investors are spooked by the possibility that Bank of America will make an acquisition with a fat premium” since the bank had reached ten percent regulatory cap on national deposits).

248. See, e.g., Tulsa Commerce Bancshares, Inc., 68 Fed. Res. Bull. 196, 197 (1982) (permitting the formation and acquisition of a bank holding company where the application would solidify local ownership of bank and perpetuate current management,

cases gave more fulsome attention to the local control issue.²⁴⁹ There is no reason that local control may not be given renewed significance today. To be sure, the Riegle-Neal Act of 1994²⁵⁰ eased historical restrictions on interstate bank acquisitions and interstate branching that had been designed to “retain local, community-based control over banking.”²⁵¹ Yet, it would be a mistake to view the Riegle-Neal Act as a repudiation of Congress’s concern about local control in banking. Rather, the Act seems designed to balance Congress’s desire to obtain the efficiency benefits of interstate banking without sacrificing the advantages provided by locally based banks.²⁵² Placing

and recognizing the “general public interest in facilitating local ownership”); Union of Ark. Corp., 66 Fed. Res. Bull. 659, 660 (1980) (“[A]pproval would probably serve to preserve local control of Bank, which the Board finds is generally in the public interest.”); Cont’l Bancor, Inc., 57 Fed. Res. Bull. 676, 676 (1971) (“Considerations relating to the convenience and needs of the communities to be served lend weight toward approval of the application since the proposal involves the substitution of local for non-local ownership and such ownership will be more likely to be aware of and sensitive to the banking needs of the Phoenix area.”).

249. For example, in a merger of two of the four banks in Charlevoix, Michigan, the Federal Reserve Board addressed objections that the elimination of local ownership of the target bank would have a negative impact on the convenience and needs of the community. CB Fin. Corp., 79 Fed. Res. Bull. 118, 121–24 (1993). The Board concluded that “there would be no loss of expertise or knowledge of special credit needs in the communities served” because the board of the merged bank would consist of persons familiar with the Charlevoix area and senior management would be made up of current officers of the merged banks who would continue to reside in the Charlevoix area. *Id.* at 121 n.21. It is rather ironic, to say the least, that the local control issue got more consideration in the Charlevoix merger (summer population: 20,000) than in mega-mergers that leave entire metropolitan areas and regions without any locally based major banks. See also Bank of Am. Ill., 1997 WL 402558, at *6 (Office of the Comptroller of the Currency) (June 25, 1997) (concluding that merger would not negatively affect bank’s responsiveness to local needs based on mechanisms put in place to ensure local input).

250. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (codified in scattered sections of 12 U.S.C. (2000)).

251. *Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 172 (1985). See generally Mark D. Rollinger, *Interstate Banking and Branching Under the Riegle-Neal Act of 1994*, 33 HARV. J. ON LEGIS. 183 (1996) (examining the passage of the Riegle-Neal Act and its scope).

252. The Senate Banking Committee stated that it did “not believe that increasing the opportunities for interstate banking [would] reduce the important role of regional and community banks. These institutions, with special knowledge of their communities, contribute to the vigor of local economies throughout the country.” S. REP. NO. 103-240, at 11 (1994). Further, the Riegle-Neal Act reaffirmed the importance the Community Reinvestment Act. *Id.* at 15 (stating that “banks have an obligation to promote economic growth, including the credit needs of their communities” and thus the bill “ensures that the principles of the Community Reinvestment Act (CRA) will be observed under the system of interstate banking”). And the Act established concentration limits so that a bank could not make an acquisition that would result in it controlling more than ten percent of national deposits. See Pub. L. No. 103-328, § 102, 108 Stat. 2343, 2345 (codified at 12 U.S.C. § 1831(u) (2000)). One commentator has noted that “[t]he statute does not

the onus on the merging parties to demonstrate those benefits when local control is sacrificed in a particular case would serve those purposes.

CONCLUSION

This Article has sought to restore the significance of one of the important historical concerns of Congress in restricting large-company mergers under the Clayton Act, namely the increasing delocalization of the control of business in America. Senator Kefauver's fear of an economy run by corporations "with central office managers remote from the places where their products are made, and the destiny of the people determined by the decisions of persons whom they never see, or even know of" was that such corporations were less socially responsible than local companies. That fear finds support in the modern social science literature. Corporate hometowns tend to fare better than branch towns for both "sentimental" and profit-maximizing reasons. The elimination of corporate headquarters through merger not only may have adverse social consequences for communities but also, as recent law and economics literature suggests, may impair efficiency by undermining the trust of corporate stakeholders and by making corporate managers less responsive to social norms.

Of course, the fact that large-company mergers that eliminate local control may have certain adverse social or economic consequences does not necessarily mean that such mergers impair *net* social welfare or that public policy (antitrust or otherwise) should restrict them. If one believes productive efficiency gains from mergers are large, and the social costs relatively small, then the appropriate policy response would not be to restrict mergers, although compensation for communities for their losses might be justifiable. On the other hand, if one believes the efficiency gains from large mergers are questionable and the social costs significant, then such mergers ought to be restricted at least to the extent of requiring the proponents of a given merger to demonstrate the benefits of the merger before it is permitted to proceed. That is essentially the policy advocated in this Article for large interstate bank mergers under federal banking law.

Antitrust's role in restricting mergers with adverse social consequences is necessarily limited by its focus on competitive effects.

take a wrecking ball to the banking industry, or to traditional notions of the close relationship between banks and their communities." Rollinger, *supra* note 251, at 268.

However, this Article has argued that there is room in modern antitrust doctrine, within the domain of mergers that are plausibly anticompetitive, to take into account the social consequences of delocalization. By raising the bar for permitting mergers that involve the loss of local control, even if only by making delocalization a legitimate factor in the federal agencies' determination of whether to bring close cases, antitrust would be taking a small step doctrinally towards addressing an important social issue but a large step ideologically in going beyond narrowly defined "economic" concerns. Given the evolution in modern law and economics toward broader conceptions of efficiency, it would be a step back to the future.

