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REGULATING LOCATION INCENTIVES

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ABSTRACT

In recent years, a growing share of state and local budgetary resources has been diverted to a small number of firms through multibillion-dollar location incentive megadeals, as represented by Amazon's HQ2 search and Wisconsin's Foxconn boondoggle. These companies have become adept at devising new mechanisms for extracting the public resources of local communities to secure a competition advantage over their market rivals. But legal scholarship has not considered the possibility that dominant firms' incentive demands might implicate the statutory protections enacted to protect against unfair methods of competition and corporate dominance more broadly. This Article develops a historical, economic, and institutional case for using latent authority under the Federal Trade Commission Act to study the market consequences of inefficient incentive megadeals—and regulate certain anticompetitive practices that cause cognizable harms.

This Article uses location incentive megadeals to explore how federal regulation could help address a classic concern of state and local governance: structural corporate power over local communities. I demonstrate that the populist movement responsible for the enactment of our initial antimonopoly protections was substantially motivated by opposition to the lavish incentives demanded by private railroad companies, from competing towns, during the late nineteenth century. When Congress later strengthened those protections by

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creating the Federal Trade Commission in 1914, legislators were addressing harms understood to be created by unregulated interstate competition for mobile corporate tax location. Reviewing recent reporting and empirical findings, this Article suggests that contemporary megadeals create harms directly analogous to those of concern to past legislative drafters: to healthy product competition; to consumers of private and public goods; to labor market structure; and to democratic self-governance. Finally, this Article argues that federal market supervision offers various institutional advantages as compared to previous (unsuccessful) attempts to rein in this source of public resource misallocation—accommodating key policy considerations and overcoming the coordination challenges that prevent localities from acting on their own.

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INTRODUCTION

A railroad company approaches a small town as a highwayman approaches his victim. The threat, “If you do not accede to our terms we will leave your town two or three miles to one side!” is as efficacious as the “Stand and deliver,” when backed by a cocked pistol.

Henry George, 1879¹

In September 2017, the tech conglomerate Amazon publicly launched its search for a second North American headquarters.² The company’s press release proclaimed that this “Amazon HQ2” would be a “full equal” to its current base in Seattle, bringing “billions of dollars” in new investments and “as many as 50,000 high-paying jobs” to whichever metropolitan area put together the winning proposal.³ Amazon invited local and state government officials to prepare formal bids, expressly requiring that the winning bid include a lucrative package of location incentives.⁴ The company identified specific tax exemptions and other economic incentives that it expected

1. HENRY GEORGE, *PROGRESS AND POVERTY: AN INQUIRY INTO THE CAUSE OF INDUSTRIAL DEPRESSIONS AND OF INCREASE OF WANT WITH INCREASE OF WEALTH* 192 (Richard F. George, Doubleday, Page & Co., 25th anniversary ed. 1926) (1879).

2. Press Release, Amazon, Amazon Opens Search for Amazon HQ2 – A Second Headquarters City in North America (Sept. 7, 2017), <https://www.businesswire.com/news/home/20170907005717/en/Amazon-Opens-Search-Amazon-HQ2-%E2%80%93-Headquarters> [<https://perma.cc/X8MY-DS6Z>].

3. *Id.*

4. AMAZON, AMAZON HQ2 RFP 5 (2017), https://bit.ly/HQ2_RFP [<https://perma.cc/94NB-JPJH>] [hereinafter AMAZON HQ2 RFP] (“Outline the type of incentive (i.e. land, site preparation, tax credits/exemptions, relocation grants, workforce grants, utility incentives/grants, permitting, and fee reductions) and the amount.”); *see also* Robert Louis Perkins, *The Need for a New Political Playbook Which Mitigates the Public Harm Caused by Tax Incentives*, 38 *MISS. C. L. REV.* 1, 1 (2019) (“When Amazon announced it was seeking a new city to build a second headquarters with the potential for up to 50,000 jobs, the company was explicit that any winning bid would have to have tax incentives.”).

jurisdictions to provide, describing its costs of doing business as “critical decision drivers” influencing its ultimate decision.⁵ Amazon demanded strict secrecy from competing jurisdictions about their promised incentives, which the Request for Proposal (“RFP”) claimed were “confidential, proprietary, and constitute trade secrets.”⁶ “We want to encourage [states] and communities to think creatively,” the company stated.⁷

Over the next five weeks, the government officials behind the 238 submitted proposals—coming from forty-three states, Washington, D.C., and Puerto Rico—more than met this challenge.⁸ Chicago attempted to catch the attention of Amazon’s CEO Jeff Bezos, then the wealthiest person in the world and noted Star Trek fan, with a video narrated by William Shatner, for which the actor reportedly was paid \$50,000.⁹ One Atlanta suburb voted to officially change its name from “Stonecrest” to “Amazon” as a branding opportunity for the tech giant—in addition to providing generous financial incentives—should the city be selected for the new HQ2.¹⁰

Competing jurisdictions’ creativity was not limited to empty branding gimmicks. In addition to commissioning the Shatner clip, Chicago reportedly promised Amazon at least \$2.3 billion in combined

5. Abha Bhattarai, *Amazon Is Seeking a Home for Its HQ2, a \$5 Billion Second Headquarters Somewhere in North America*, WASH. POST (Sept. 7, 2017, 5:20 PM), <https://www.washingtonpost.com/news/business/wp/2017/09/07/amazon-is-looking-for-a-city-to-site-a-second-5-billion-headquarters> [https://perma.cc/LS9K-63XB]; AMAZON HQ2 RFP, *supra* note 4, at 5 (“Incentives offered by the state/province and local communities to offset initial capital outlay and ongoing operational costs will be significant factors in the decision-making process.”). Amazon’s proposal guidelines noted that it “may require special incentive legislation in order for the [state] to achieve a competitive incentive proposal.” *Id.* at 6.

6. AMAZON HQ2 RFP, *supra* note 4, at 7 (“Amazon will deliver a Confidentiality and Non-Disclosure Agreement for execution at the appropriate time.”).

7. *Id.* at 1.

8. Jonathan O’Connell, *Amazon Receives 238 Proposals for Second Headquarters*, WASH. POST (Oct. 23, 2017, 11:40 AM), <https://www.washingtonpost.com/news/business/wp/2017/10/23/amazon-receives-238-proposals-for-second-headquarters> [https://perma.cc/9WQM-NSCP].

9. Jay Koziarz, *Report Sheds New Light on Chicago’s Bid for Amazon HQ2*, CURBED (Dec. 17, 2018, 3:41 PM), <https://chicago.curbed.com/2018/12/17/18145150/chicago-amazon-hq2-bid-incentives-details> [https://perma.cc/HGY4-FT63].

10. Mark Niese, *City of Amazon Proposed to Attract Company’s HQ2 to Georgia*, ATLANTA J. CONST. (Oct. 3, 2017), <https://www.ajc.com/news/local-govt--politics/city-amazon-proposed-attract-company-hq2-georgia/WVuopYRd6WFQE3w7JjcdnO> [https://perma.cc/Q585-VUPE].

state and local tax breaks and other financial incentives, including payroll credits, sales tax exemptions, property tax breaks, and direct investments.¹¹ That promise came just two years after escaping the threat of bankruptcy with the passage of an emergency austerity budget requiring deep service cuts and \$755 million in annual tax and fee increases on its residents.¹² Maryland's Montgomery County offered the largest known subsidy package, totaling \$8.5 billion.¹³ Over half of this amount took the form of an unusual arrangement, whereby every dollar that normally would be paid by Amazon employees in state income taxes (and used for collective public needs) would be diverted from the public fisc and transferred directly from workers to the private company that employs them.¹⁴ Two years later, as Maryland faced a fiscal year shortfall of over \$1.1 billion, Governor Larry Hogan vetoed a bill to increase annual spending for public education by \$3.8 billion by 2030, citing budget pressures.¹⁵ As part of Newark's bid, New Jersey Governor Chris Christie offered Amazon a \$10,000 tax credit per employee.¹⁶ The state's accompanying incentive package ultimately amounted to around \$7 billion in tax breaks for the company—\$2 billion more than Amazon had expected to invest in the new headquarters.¹⁷

11. Fran Spielman, *Chicago's Amazon Bid Includes \$2.25 Billion Incentive Package*, CHI. SUN TIMES (Oct. 23, 2017, 9:02 PM), <https://chicago.suntimes.com/2017/10/23/18331337/chicago-s-amazon-bid-includes-2-25-billion-incentive-package> [https://perma.cc/2VWJ-8TPE].

12. Hal Dardick & Bill Ruthhart, *Emanuel's Tax Hike Tab: \$755 Million*, CHI. TRIB. (Oct. 28, 2015, 6:10 AM), <https://www.chicagotribune.com/politics/ct-rahm-emanuel-city-council-budget-vote-met-1028-20151027-story.html> [https://perma.cc/2VKQ-3UV2].

13. Erin Cox, *Maryland OKs \$8.5 Billion in Incentives to Lure Amazon, Biggest Offer in Nation*, BALT. SUN, <https://www.baltimoresun.com/2018/04/04/maryland-oks-85-billion-in-incentives-to-lure-amazon-biggest-offer-in-nation> [https://perma.cc/7ZWW-29XT].

14. Greg LeRoy, *HQ2 Employees Might Unwittingly Pay Their Taxes to Amazon*, BLOOMBERG CITYLAB (June 15, 2018, 12:44 PM), <https://www.bloomberg.com/news/articles/2018-06-15/an-incentive-that-kicks-hq2-staff-taxes-back-to-amazon> [https://perma.cc/VEK3-X6HF].

15. Holden Wilen, *Maryland Faces Budget Shortfall of \$925 Million to \$1.1 Billion in Current Fiscal Year*, BALT. BUS. J. (May 14, 2020), <https://www.bizjournals.com/baltimore/news/2020/05/14/maryland-billion-dollar-budget-shortfall-in-2020.html> [https://perma.cc/2ZE5-KH3R].

16. Sarah Holder, *How Far Will Cities Go To Win Amazon HQ2?*, BLOOMBERG CITYLAB (Oct. 4, 2017, 4:00 PM), <https://www.bloomberg.com/news/articles/2017-10-04/the-extreme-incentives-a-city-could-offer-for-amazon-hq2> [https://perma.cc/CFR9-7LKN].

17. Leanna Garfield, *Amazon Just Visited New Jersey—and the State Is Offering a \$7 Billion Incentive to Land HQ2*, BUS. INSIDER, <https://www.businessinsider.com/amazon-headquarters-h>

As these examples illustrate, structurally dominant¹⁸ firms like Amazon have become adept at devising new schemes by which state and local governments can act to reduce the firms' business costs and other liabilities in a targeted manner. By one measure, states and local governments now spend nearly \$50 billion annually bidding against each other to entice corporations to locate mobile economic activity within their jurisdiction.¹⁹ This total, estimated to have tripled in magnitude over the past thirty years, represents a great bulk of the \$60 billion that state and local governments in the United States spend annually on local economic development.²⁰ Economists Cailin Slattery and Owen Zidar, who have studied these deals extensively, thus describe state and local business tax incentives as the "primary place-based policy in the United States."²¹ Researchers have persuasively documented that the characteristics of corporate location incentives have changed in recent decades—becoming both more frequently demanded by large firms and larger in size when awarded.²²

In legal scholarship, corporate location incentives tend to be conceptualized and discussed as a matter of subnational tax policy.²³ Accordingly, virtually all accounts presume that firms' demands for, and jurisdictions' awarding of, these location incentives are currently unregulated by any federal statutory source.²⁴ To the extent federal law

q2-new-jersey-economic-incentive-2017-10 [https://perma.cc/J23M-HE7L] (last updated Apr. 13, 2018, 3:05 PM).

18. Elaborated *infra* Part II.C, this Article uses the term "dominant" as shorthand for "structural power" in the interjurisdictional market for mobile corporate investment (rather than dominance within, for example, a given product market). Part III discusses the relationship between structural power and various other distinctive forms of market power.

19. Alan Peters & Peter Fisher, *The Failures of Economic Development Incentives*, 70 J. AM. PLAN. ASS'N 27, 28 (2004).

20. Timothy J. Bartik, *Should Place-Based Jobs Policies Be Used to Help Distressed Communities?* 1 (W.E. Upjohn Inst. Working Paper, Paper No. 19-308, 2019), http://research.upjohn.org/up_workingpapers/308 [https://perma.cc/T5QB-HSZW].

21. Cailin Slattery & Owen Zidar, *Evaluating State and Local Business Incentives*, 34 J. ECON. PERSPS. 90, 90 (2020).

22. See *infra* Part II.B.

23. See *infra* Parts II.A, IV.A.

24. In his influential account of state location incentives as a Commerce Clause concern, Professor Peter D. Enrich highlights the absence of "federal statutory restrictions on state efforts to attract businesses." Enrich concludes that "there is little likelihood of such action" due to current "congressional focus . . . on 'devolution' and restoration of states' rights" and likely

constrains location incentives, the Dormant Commerce Clause is generally understood to provide the *constitutional* protection against states unjustifiably burdening interstate commerce or favoring in-state economic activity.²⁵

This Article argues that this consensus overlooks a potentially powerful—but unexplored and thus currently latent—source of legal protection: federal regulation under statutory authority granted to the Federal Trade Commission (“FTC”) over a century ago. Contemporary legal scholarship has not considered dominant firms’ efforts to extract these regulatory favors and tax incentives as a potential abuse of market power that should be supervised, and could be regulated, by the FTC under existing federal statutory protections against unfair methods of competition. This omission is reflected even in the agency’s own recent characterization of its authority. In a 2010 submission to the European Commission, the FTC reiterated the current academic and policymaking consensus: “The United States does not have a regulatory regime governing state and local aids and subsidies.”²⁶ This statement was offered as contrast to the European Union’s (“EU”) competition policy regime, which is charged with protecting the terms of both fair trade among political jurisdictions as well as fair competition among firms—including through strict regulation of targeted corporate incentives.²⁷

It is true that comprehensive federal regulation of this sort would require legislative reform. But this Article makes the case that current law *already* provides the FTC with unexercised authority to collect

business opposition. Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 405–06 (1996); cf. Mark Taylor, *A Proposal to Prohibit Industrial Relocation Subsidies*, 72 TEX. L. REV. 669, 696–701 (1994) (discussing the “[i]nadequacy of [e]xisting [f]ederal [r]estrictions on [location] [i]ncentives” and considering constitutional law and theories of contractual obligation—but not antitrust law or federal regulation).

25. Enrich, *supra* note 24, at 425–26.

26. FTC, COMPETITION, STATE AIDS AND SUBSIDIES 2 (2010), <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/stateaidftc.pdf> [<https://perma.cc/S6Z9-UFC5>] (noting also that “courts have found certain state assistance to violate the Commerce Clause of the U.S. Constitution”); see also James C. Cooper & William E. Kovacic, *U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition*, 90 B.U. L. REV. 1555, 1584 n.132 (2010) (“Other than weak protections supplied by the Commerce Clause, the United States has no equivalent to the EU’s ban upon state aids.”).

27. See *infra* Part IV.B.

information about—and even, in delimited circumstances, directly regulate—anticompetitive aspects of dominant firms’ incentive demands. This proposed role is consistent with statutory purpose and design. Indeed, early federal protections against corporate dominance were enacted as response to a popular antimonopoly movement, which was motivated in significant part by widespread backlash against the railroad trusts’ receipt of location incentives.²⁸ In addition, many of the harms associated with contemporary location megadeals are analogous to those that concerned the creators of the FTC.²⁹ This Article excavates from this historical context to argue that the FTC’s regulatory authority—to prevent dominant firms from securing an unfair competition advantage—should be understood as reaching anticompetitive aspects of firms’ incentive demands.

Throughout the late nineteenth century, local communities competed to influence the location of railroad routes, much like interjurisdictional competition for corporate activity today. The railroad trusts leveraged their structural dominance by exercising tremendous power over local governments, whose economic futures centrally depended on their connection to regional hubs and transatlantic transit routes. The land grants and other lavish incentives awarded for this purpose were not merely incidental to market competition: They were a primary means by which competing railroad companies secured advantage over their rivals.³⁰ The resulting dynamic fueled some of the most vexing local policy problems of the era—including rampant political corruption; widespread disparities in land ownership; oppressive charges assessed on other taxpayers (to fill budget gaps resulting from the nontaxation of rail assets); and a wave of municipal defaults. The populist backlash that emerged in response transformed the era’s politics, fueling the political movement to enact initial federal regulation over the railroad trusts and other dominant corporations.

28. See *infra* Part I.A.

29. See *infra* Part I.B.

30. Cf. RICHARD WHITE, *THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE, 1865–1896*, at 119 (2017) [hereinafter WHITE, *THE REPUBLIC FOR WHICH IT STANDS*] (“The owners of the Union Pacific, Central Pacific, and Kansas Pacific hoped to make a killing not by running railroads but by gathering subsidies, insider construction contracts, and financial manipulation.”).

When Congress later enacted the Federal Trade Commission Act of 1914 (“FTC Act”) to strengthen antitrust enforcement, it was responding to the consequences of a regulatory race to the bottom created by accelerating interjurisdictional tax competition. Facing a budget crisis created in part by tax exemptions granted to its railroad corporations, New Jersey systematically altered its laws to attract the domestic incorporation of the dominant trusts—directly facilitating the largest merger wave in U.S. history. Federal legislators eventually sought to directly regulate the competition harms presented by the new form of horizontally consolidated industrial organization that emerged (represented by trusts like Standard Oil and U.S. Steel). In granting authority to an independent agency to police unfair methods of competition, Congress was responding to the consequences of unregulated interstate tax competition that parallels key aspects of the current location incentive status quo.

This Article makes the case here that the statutory protections enacted during this historical period are implicated today when dominant firms like Amazon—or Foxconn³¹ or Tesla³² or Panasonic³³ or Samsung³⁴—seek to establish an unfair market advantage by leveraging their structural power over competing states and localities to demand targeted financial support and regulatory forbearance. Responding to harms created by interjurisdictional tax competition, Congress created the FTC to regulate “[u]nfair methods of competition in or affecting commerce,” which § 5 of the FTC Act declared

31. See Danielle Paquette, *Scott Walker Just Approved \$3 Billion Deal for a New Foxconn Factory in Wisconsin*, WASH. POST (Sept. 18, 2017, 6:41 PM), <https://www.washingtonpost.com/news/wonk/wp/2017/09/18/scott-walker-signs-3-billion-foxconn-deal-in-wisconsin> [https://perma.cc/73UE-W6BF]; see also *infra* Part II.B.

32. See Abby Vesoulis, *Elon Musk’s Texas Takeover*, MOTHER JONES (Winter 2024), <https://www.motherjones.com/politics/2024/01/elon-musk-spacex-texas-boca-chica-oligarchy> [https://perma.cc/G4BY-52QW].

33. See Kevin Hardy & Katie Bernard, ‘Shocking.’ *Kansas Secures No Jobs or Pay Commitments in Panasonic’s \$4B Battery Plant*, KAN. CITY STAR (Jan. 4, 2023, 8:00 PM), <https://www.kansascity.com/news/business/development/article263690018.html> [https://perma.cc/J4RS-KB4C].

34. See Bob Sechler, *Incentive Package to Lure Samsung to Taylor Is the Biggest in Texas History*, DALL. MORNING NEWS (Dec. 29, 2021, 9:40 AM), <https://www.dallasnews.com/business/technology/2021/12/29/incentive-package-to-lure-samsung-to-taylor-is-the-biggest-in-texas-history> [https://perma.cc/3M9A-WJTQ].

unlawful.³⁵ As recently summarized in the agency's updated policy statement, legislators intended for this statutory authority to be used to police business conduct that tends "to negatively affect competitive conditions—whether by affecting consumers, workers, or other market participants."³⁶ Drawing from empirical findings and contemporary reporting, this Article argues that aspects of incentive competition present legally cognizable harms covered by this authority: to healthy product market competition, consumers, workers, and the democratic process.

This Article also shows that federal supervision under the FTC Act promises several unique advantages for policymakers aiming to challenge this form of corporate power and misallocated public investment. In addition to being intended to address many of the particular *substantive* harms associated with corporate location megadeals, the FTC was designed to overcome many of the *institutional* challenges that have prevented concerted action to address these harms. Past reformers, in the antimonopoly tradition, understood that the trusts' structural dominance over economically vulnerable localities ultimately required regulation from higher levels of government. Legislative supporters intended for the FTC not only to address problems created by interstate competition for corporate charters, but also to divert decision-making away from the federal courts and toward a responsive and proactive expert agency—granted authority to reach beyond the Sherman and Clayton Acts.

After making a historical and institutional case for regulatory action, this Article concludes by laying out a path forward. Consistent with its intended purpose and statutory design, the FTC should begin collecting information about dominant firms' incentive demands and studying the consequences of location incentive megadeals for market structure. The agency could then use this analysis to devise sound competition policy—including by using its rulemaking and public enforcement authorities to regulate the most harmful business practices. In contrast to constitutional litigation that seeks to apply

35. 15 U.S.C. § 45.

36. FTC, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act 9 (Nov. 10, 2022), https://www.ftc.gov/system/files/tc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf [<https://perma.cc/VSSJ-W4B2>] [hereinafter FTC Policy Statement].

broad and open-ended prohibitions, these actions all could be taken without unnecessarily disrupting the entire system of location incentives.

This proposed *regulatory* approach can be distinguished also from other forms of antitrust *litigation*, the limitations of which this Article acknowledges. Longstanding judicial doctrines broadly immunize state-imposed restraints on competition—as well as the actions of private parties petitioning for such policies—from common forms of antitrust liability.³⁷ These litigation obstacles help explain why the various strategies deployed by the largest firms to secure location incentives have remained entirely absent from the academic scholarship on U.S. antitrust law.³⁸

But space remains for action. This Article charts a path forward for public enforcement under the FTC’s broad regulatory authority against unfair business practices—distinct from private litigation for damages claims under the Sherman Antitrust Act of 1890 (“Sherman Act”) against government actions.³⁹ This Article also makes the case that the right to petition for government action should not prevent scrutiny of business practices that are expressly designed to *prevent* the democratic participation that relevant judicial doctrines are intended to protect.⁴⁰ These business practices include, most notably, dominant firms’ widespread insistence on overbroad nondisclosure agreements (“NDAs”) that prevent timely input from the public—notwithstanding the fact that it is the public’s democratic authority on which costly incentive promises are made.⁴¹

37. See *infra* Part IV.C.

38. A September 2024 search using the HeinOnline database of legal scholarship yielded just eighteen results for the term “antitrust” appearing within twenty-five words of “location incentive(s)” in any field. Specifically, this search was as follows: “(antitrust ~25 “location incentive*)”. Among results connecting antitrust and location incentives, most appear in the context of foreign competition regimes—namely, the European State aid law. See *infra* Part IV.B. Indeed, the most direct result speculates that U.S. antitrust law might constrain jurisdictions’ ability to cooperatively regulate location incentives by entering into agreements not to compete for mobile capital. See Scott J. Ziance, *Making Economic Development Incentives More Efficient*, 30 URB. L. 33, 59 n.136 (1998) (“Whether antitrust laws would apply to such an arrangement [between cities] is beyond the scope of this article.”).

39. This Article does not address whether any anticompetitive aspects of the interjurisdictional market for location incentives might be remediable through private antitrust litigation.

40. See *infra* Part IV.C.

41. See *infra* Parts III.D, IV.

Beyond the specific proposed application of the legal authority for market regulation under the FTC Act, this Article also opens new avenues for academic research by reconceptualizing the nature of the policy problem presented by corporate location incentives. In contrast to the antitrust literature, scholars of fiscal federalism and local government law have extensively studied interjurisdictional competition for mobile capital within a fragmented polity with decentralized policy authority.⁴² But such accounts generally focus on the broader problems of fiscal precarity and efficiency in service delivery, rather than the consequences for market structure; their proposed solutions primarily take the form of aspirational institutional reforms, such as programmatic centralization and regional cooperation.⁴³

This Article demonstrates how an antimonopoly framework helps clarify potential new solutions to various policy problems of persistent concern to scholars of state and local government law. Using location incentives as a case study, this Article shows that central concepts in local government law, urban studies, and political science—like structural power and fiscal fragmentation—have important (and largely unexplored) consequences also for market structure and other areas of traditional antimonopoly concern. This Article also reveals the latent promise of antimonopoly-informed regulation of the various harms associated with structural corporate power over local communities. To do so, this Article draws not only on administrative

42. See generally Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990) (providing a general treatment of state-local relations law and arguing for the proper scope of local autonomy); James M. Buchanan, *Principles of Urban Fiscal Strategy*, 11 PUB. CHOICE 1 (1971) (analyzing how cities can respond to the fiscal problems created by suburban flight); PAUL E. PETERSON, *CITY LIMITS* (1st ed. 1981) (discussing the limits of urban politics); Richard C. Schragger, *Rethinking the Theory and Practice of Local Economic Development*, 77 U. CHI. L. REV. 311 (2010) (exploring the relationship between policy and economic development and accounting for the modern resurgence of cities).

43. See, e.g., WILLIAM T. BOGART, *THE ECONOMICS OF CITIES AND SUBURBS* 237–39 (1998) (discussing as solutions to “destructive competition for firms” regional tax pooling agreements and new state restrictions on local fiscal authority); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1122 (1996) (proposing a “mixed strategy” of regional governance bodies and political decentralization); MARK SCHNEIDER, *THE COMPETITIVE CITY: THE POLITICAL ECONOMY OF SUBURBIA* 209–12 (1989) (discussing “intergovernmental aid” as a potential solution to inefficiencies in the market for local services caused by tax competition); Ziance, *supra* note 38, at 58 (proposing to “improve the efficiency of incentives by making easier the formation of . . . interjurisdictional agreements”).

authority under U.S. antitrust laws, but also on the law of public utilities and regulated industries.⁴⁴ These insights have implications for a wide range of current debates, including legal localism, fiscal federalism, place-based economic development, municipal service privatization, and industrial policy.

This Article proceeds in five parts. Part I contextualizes the historical moment in which Congress enacted U.S. federal antitrust laws, focusing on popular and legislative concerns about problems created by railroad companies' demands for local subsidies and interstate tax competition for corporate charters. Part II draws from social science research to develop an initial account of structural power in the interjurisdictional market for mobile capital. Part III then reviews recent public reporting that provides suggestive evidence about the relationship between this form of structural power and specific categories of legally cognizable antitrust harms. Part IV discusses the many institutional advantages that distinguish federal regulatory enforcement from alternative approaches, including private litigation applying constitutional or antitrust law. Finally, Part V catalogs the various regulatory actions that could protect against unfair and anticompetitive business practices related to location incentive competition. This Article also reviews options for broader legislative reforms—designed to allow local communities to invest in their economic futures without acceding to inefficient and antidemocratic incentive demands—before briefly concluding.

I. INTERJURISDICTIONAL COMPETITION AND ANTIMONOPOLY PROTECTIONS

In the words of legal historian James W. Ely, railroads were “America’s first big business.”⁴⁵ It would be difficult to overstate the degree to which the industry shaped the development of U.S. public law and politics during the nineteenth century. Indeed, Herbert Hovenkamp, an antitrust scholar, observes that “[n]o regulatory issue in the nineteenth century was as controversial or aroused as many

44. See *infra* Part II.D; cf. MORGAN RICKS, GANESH SITARAMAN, SHELLEY WELTON & LEV MENAND, NETWORKS, PLATFORMS, AND UTILITIES: LAW AND POLICY (2022) (studying networks, platforms, and utilities law).

45. JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW vii (2001).

levels and branches of government as the proper relation between the sovereign and the railroads.”⁴⁶

Historical accounts agree that the popular antimonopoly sentiment that swept the country during the 1870s and 1880s was centrally shaped by mass opposition to the railroad trusts’ dominance over public life.⁴⁷ Particularly influential was the midwestern agrarian “Granger” movement that emerged during the late 1860s, whose demands for public control of railroad capitalism have been credited with helping to create the conditions for initial federal antitrust regulation.⁴⁸ Many legislative histories of those antitrust protections have emphasized public anger about extortionate and discriminatory rates charged to farmers and other consumers.⁴⁹ But in this context, it is worth emphasizing: The antimonopoly backlash against the railroads’ power was *also* substantially motivated by problems that resulted directly from state and local governments’ promotion of—and interjurisdictional competition for—railroad development.

46. HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836–1937*, at 131 (2014).

47. See *supra* notes 43–45 and accompanying text.

48. See generally ELIZABETH SANDERS, *ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE, 1877–1917*, at 179–93 (1999) (“Accounts of the struggle for national public control of the railroads normally begin with the Granger movement of the 1870s . . .”); SOLON J. BUCK, *THE GRANGER MOVEMENT: A STUDY OF AGRICULTURAL ORGANIZATION AND ITS POLITICAL, ECONOMIC AND SOCIAL MANIFESTATIONS, 1870–1880*, at 302–12 (1913) (describing how the Granger movement’s efforts to subject railroad corporations to greater public control culminated in other nation-wide reform movements); see also William L. Letwin, *Congress and the Sherman Antitrust Law: 1887–1890*, 23 U. CHI. L. REV. 221, 232 (1956) (“Agitation for anti-monopoly laws was first led by the Grangers or Patrons of Husbandry.”); RICHARD WHITE, *RAILROADED: THE TRANSCONTINENTALS AND THE MAKING OF MODERN AMERICA* 110 (2012) [hereinafter WHITE, *RAILROADED*] (noting that the increased popularity “marked the beginning of postwar antimonopoly politics, but their ideological roots tapped older Jacksonian fears of special privilege, corruption, land monopoly, and tenancy” and that “[t]heir chief target in the 1870s was the railroads”).

49. See, e.g., Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 YALE L.J. 1017, 1018 (1988) (identifying rate discrimination as “the most important and controversial problem of railroad regulatory policy in the Gilded Age”); RICKSET AL., *supra* note 44, at 484 (“Most of all, many farmers objected to rate discrimination.”); Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 26 (1966) (“The language [of the legislative record] is always fully consistent with the view that concern for farmers, laborers, or small businessmen was complementary to concern for consumers and not to override it in case of conflict between the interests of consumers and other groups.”); ELY, JR., *supra* note 45, at 99 (“A product of public alarm over the apparent power of large-scale business to control markets and fix prices, the Sherman Act affirmed the ideals of competition and free markets.”).

Particularly after congressional “anti-subsidy” reformers brought an end to the federal land grant program in 1871,⁵⁰ state and local governments awarded lavish incentives to influence the location of railroad development. Professor Frank Dobbin recounts that “[r]oute planning was influenced directly by state and local governments, which actively sought to win rail service with the aim of regional growth,” including “by offering land and capital to private agents” and “us[ing] financial incentives to spur construction.”⁵¹ Private railroad companies of that era—much like today’s dominant firms—were highly adept at converting their political influence into market advantage through public subsidies and regulatory favors. One historian observed in 1936: “When a promoter made it plain that unless more aid could be furnished by town ‘A’ the [rail]road would be built by way of rival town ‘B,’ town ‘A’ forgot there was a bottom to its municipal purse.”⁵²

The resulting frenzy of local spending—often financed through public debt—has received renewed attention from scholars of local government law, who have documented how this historical episode

50. Throughout the late 1860s, congressional reformers—many representing public land states—in the West introduced numerous “anti-subsidy” (or “anti-grant”) resolutions calling to end the federal practice of making railroad land grants and demanding the forfeiture of unearned and unsold grants. *See, e.g.,* PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 380 (1968) (“By the late sixties . . . [reformers] were striving to halt the policy of making land grants to railroads.”); Darwin P. Roberts, *The Legal History of Federally Granted Railroad Rights-of-Way and the Myth of Congress’s “1871 Shift,”* 82 U. COLO. L. REV. 85, 128 (2011) (“By the second half of the 1860s, much of the public that had once clamored for subsidies to build railroads had become incensed at the results of that policy.”). Another source notes:

By the time the [federal railway] subsidies actually began to become effective, a different state of mind had come into existence. Railway corporations were being assailed as grasping monopolies, especially in the West, and the fact that many of them had been generously endowed from the public domain simply provided an additional source of dissatisfaction.

JOHN BELL RAE, *THE DEVELOPMENT OF RAILWAY LAND SUBSIDY POLICY IN THE UNITED STATES* 124 (1979).

On March 21, 1870, the U.S. House of Representatives adopted a resolution declaring that “the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued” and that the public lands should be held for the “exclusive purpose of securing homesteads to actual settlers.” CONG. GLOBE, 41st Cong., 2d Sess. 2095 (1870). The final federal land grant was made the following year. *See* Roberts, *supra* note 50, at 99 (“[I]t is clear that checkerboard land grants to railroads ended in 1871 . . .”).

51. FRANK DOBBIN, *FORGING INDUSTRIAL POLICY: THE UNITED STATES, BRITAIN, AND FRANCE IN THE RAILWAY AGE* 23–24 (1994).

52. ALBERT MILLER HILLHOUSE, *MUNICIPAL BONDS: A CENTURY OF EXPERIENCE* 149 (1936).

shaped states' constitutional allocation of fiscal authority to municipal governments.⁵³ But this history also offers unexplored lessons for the antimonopoly literature—clarifying the nature of the evil to which the legislative drafters of our landmark federal antitrust protections were responding.⁵⁴ As historian Richard White observes, “transcontinental railroad corporations transformed [the American state] by making the government an arena in which the corporations themselves competed and by making Congress, bureaucracy, and the courts a mechanism for corporate competition.”⁵⁵ This same basic dynamic, through the vehicle of state-granted corporate privileges, also facilitated the rise of the consolidated trusts that motivated the subsequent enactment of the FTC Act.

As this Part describes, landmark federal antitrust protections were shaped by widespread concern about the railroad trusts' dominance over local self-governance—including their ability to extract public subsidies and regulatory privileges from competing (and economically vulnerable) localities. During consideration of the FTC Act, in particular, Congress intended to create a federal authority that could overcome coordination challenges and address new forms of competition harm that had resulted from the interjurisdictional competition for corporate activity. This Article uses this historical context to clarify both the nature of the *policy problem* presented by contemporary location incentives, as well as the broad motivation behind—and specific potential applications of—the *legal authority* for market regulation, as authorized by the FTC Act.

53. See Felipe Ford Cole, *Unshackling Cities*, 90 U. CHI. L. REV. 1365, 1384–1401 (2023) (discussing local spending on railroads as part of the evolution of U.S. public debt and economic development); DAVID SCHLEICHER, IN A BAD STATE: RESPONDING TO STATE AND LOCAL BUDGET CRISES 52 (2023) (“After the railroad bond defaults, states adopted constitutional reforms to limit the ability of local governments to issues debt.”); Noam Maggor, *To Coddle and Caress These Great Capitalists: Eastern Money, Frontier Populism, and the Politics of Market-Making in the American West*, 122 AM. HIST. REV. 55, 66–76 (2017).

54. Cf. Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967 (2021) (reviewing the principle of legislative interpretation that instructs an interpreter to read statutes in light of the “mischief” or “evil” to which they were intended to respond).

55. WHITE, THE REPUBLIC FOR WHICH IT STANDS, *supra* note 30, at 512.

A. *Railroad Subsidies and the Sherman Act*

The scale of state support to private railroads during the 1860s and 1870s remains striking. Over the ten years following passage of the 1862 Pacific Railway Act, Congress and states together awarded, directly to private railroad companies, grants of land whose combined mass exceeded the size of modern-day Texas. The actual state of Texas, by itself, would transfer ownership of some thirty-two million acres—approximately the size of Louisiana—to private railroad companies.⁵⁶ The federal land grant to just one company—Union Pacific—“roughly equaled the acreage of New Hampshire and New Jersey combined.”⁵⁷

One legal historian summarizes the consequences for public life: “Whereas Congress intended the railroad land grants to serve as a means to the end of railroad construction and the settlement of the federal government’s expansive public domain, the railroads came to see them as an end in themselves: as independent sources of wealth and power.”⁵⁸ Popular backlash to the federal program—led by farm groups, labor organizations, and land reformers—came swiftly, as did the political response. In 1870, the House passed an anti-subsidy resolution stating that “the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued.”⁵⁹ By the following year, “popular opinion forced Congress to discontinue the land grant policy.”⁶⁰

But even as the federal government withdrew from direct promotion of railroad development through grants of public land,

56. CARTER GOODRICH, *GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS, 1800–1890*, at 269 (1960). For the size of Louisiana, see *State Area Measurements and Internal Point Coordinates*, U.S. CENSUS BUREAU, <https://www.census.gov/geographies/reference-files/2010/geo/state-area.html> [<https://perma.cc/FJ7Z-M9BP>] (last updated Dec. 16, 2021).

57. WHITE, *THE REPUBLIC FOR WHICH IT STANDS*, *supra* note 30, at 119.

58. Sean M. Kammer, *Railroad Land Grants in an Incongruous Legal System: Corporate Subsidies, Bureaucratic Governance, and Legal Conflict in the United States, 1850–1903*, 35 *LAW & HIST. REV.* 391, 391–92 (2017).

59. *United States v. Union Pac. R.R.*, 353 U.S. 112, 127 (1957) (Frankfurter, J., dissenting) (quoting Cong. Globe, 42d Cong., 2d Sess. 1585 (1872)).

60. David Maldwyn Ellis, *The Forfeiture of Railroad Land Grants, 1867–1894*, 33 *MISS. VALLEY HIST. REV.* 27, 38 (1946).

states and local governments rushed to fill the void.⁶¹ One historian of the era described the “wave of emotional enthusiasm [that] swept over the West” during this period, analogizing the fervor to the leadup to 1837’s financial crisis: “It was anticipated that every railroad would produce large profits on the investment, would convert villages into cities and almost any city into a metropolis and would double and triple the value of land in every county through which it passed.”⁶² A delegate to California’s 1878 convention, arguing in support of constitutional regulation of the railroad trusts, reflected on this period of “railroad excitement”: “There was not a man in the State who would not turn his pockets wrong side out to help build a railroad. The people were willing to give them all they asked and all they did was to take all the people gave them.”⁶³

Nor was state support limited to land grants. Much like the dominant corporations of today, nineteenth-century railroad trusts schemed a multitude of ways to expropriate public resources for their private use.⁶⁴ Even beyond various forms of state support, railroad

61. See ZACHARY CALLEN, *RAILROADS AND AMERICAN POLITICAL DEVELOPMENT* 1 (2016) (“States, counties, and cities stepped into the gap created by federal inaction and contributed land, granted money, directly invested in private rail companies, and offered tax breaks to the very first rail projects.”); HILLHOUSE, *supra* note 52, at 149 (“Towns, townships, counties and young ‘cities’ along the proposed route and at the terminals lavishly gave their aid in financing new railroad projects, either by direct grants or by exchanges of municipal bonds for railroad stock.”); Noam Maggor & Stephen W. Sawyer, *Fiscal Federalism: Local Debt and the Construction of the Modern State in the United States and France*, in *A WORLD OF PUBLIC DEBTS: A POLITICAL HISTORY* 231, 239 (Nicolas Barreyre & Nicolas Delalande eds., 2020) (“Locked in competition against other locales [Galena versus Chicago, Leavenworth versus Kansas City, Sandusky versus Cleveland], municipalities were moved to become extraordinarily proactive.”).

62. HILLHOUSE, *supra* note 52, at 148. Another source from that period recounted:

Local subsidies have been granted in all sections of the country to an extent which is practically impossible of determination. All communities wished to share in the business prosperity which followed the opening of new railroad connections, and cities and towns needed little urging upon the part of promoters to induce them to become financially interested in their projects.

FREDERICK A. CLEVELAND & FRED WILBUR POWELL, *RAILROAD FINANCE* 31 (1912).

63. Debates and Proceedings of the Constitutional Convention of the State of California 488 (1880).

64. State and local governments competed to entice railroad development in a number of ways, including outright donations (such as land or government securities for the express purpose of railroad development); swaps of railroad stock (made by way of general obligation bonds that were then payable from property tax revenue); public loans (made on exceedingly generous terms); guaranteed corporate bonds; tax exemptions; and regulatory favors (such as the private

promoters also “solicited and secured stock subscriptions” directly from local farmers and others residing along the proposed routes, who often “mortgaged their farms and property to buy railroad stock.”⁶⁵ These “unscrupulous promoters . . . profited greatly from a volatile railway bond market, which presented lucrative trading opportunities for knowledgeable insiders.”⁶⁶

Although comprehensive estimates are difficult, and there was significant variation across location, it has been estimated that governmental agencies provided “some 30 percent” of the national investment in railroad building; before the Civil War, public agencies in the southern states “contributed well over 55 percent of the cost of all railroad construction . . . and at least 75 percent of the amount made available in cash.”⁶⁷ Largely as a result of these cumulative transfers, by the 1880s “railroad assets accounted for about 10 percent of American wealth.”⁶⁸ As one historian summarizes, “the major railroad companies of the postbellum period were themselves great financial powers, with resources greater than those of some of the state and territorial governments with which they dealt and certainly greater

use of the state’s eminent domain powers). *See, e.g.*, RICKS ET AL., *supra* note 44, at 476; *see also* GOODRICH, *supra* note 56, at 267 (“Money might be spent directly on a public work, or aid might be granted to a corporation under various terms and conditions—subscription to stock, loan, guarantee of interest or principal or both of the company’s obligations, or simply an outright donation.”); Harry N. Scheiber, *Federalism and the American Economic Order, 1789–1910*, 10 LAW & SOC’Y REV. 57, 95 (1975) (“Most extraordinary of all was the fact that in every state, regardless of variations in the specifics of doctrine, the very large powers of eminent domain—enhanced by cost-reducing doctrines such as offsetting—were transferred wholesale to the private sector.”).

65. HILLHOUSE, *supra* note 52, at 150; *see also* SCHLEICHER, *supra* note 53, at 43 (“Local governments often had more access to capital markets than private companies did (although such [railroad development] projects usually combined both public and private money, often raised from subscriptions by local residents.”); GOODRICH, *supra* note 56, at 292 (“Public meetings and conventions organized to build up sentiment for government action also adopted resolutions urging individual subscriptions and donations. . . . [C]itizens’ committees or boards of trade took over responsibility for raising the sums of money needed to persuade the companies to build through their communities.”).

66. Charles M. Yablon, *The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880–1910*, 32 J. CORP. L. 323, 331 n.32 (2007) (internal citation omitted).

67. GOODRICH, *supra* note 56, at 270–71.

68. HOVENKAMP, *supra* note 46, at 131.

than most of the local governments from which they accepted or demanded aid.”⁶⁹

Railroads thus wielded tremendous power over the local communities competing for economic activity: “[I]n many cases, local government needed the railroad more than the railway company needed local aid.”⁷⁰ This dependence was true even for some of today’s largest cities, many of which emerged as regional transportation hubs during this period: “Omaha, Kansas City, Houston, San Antonio, Austin, Dallas, Denver, and Seattle all became important cities in their regions because of railway connections.”⁷¹ But for the small agrarian communities of the era—particularly in the Western states and territories that would later become wellsprings of the populist antimonopoly movement—the location of railroad development was, not inaccurately, perceived to be a matter of economic life or death.

“For many a prairie settlement,” historian Carter Goodrich writes, “the difference of a few miles in the location of a railroad was decisive for its entire future.”⁷² In a political history of five Kansas cattle towns, author Robert Dykstra describes the overriding importance of railroad location, influenced by the local politics of municipal incentives.⁷³ In 1871, community leaders in Wichita maneuvered to secure voter approval for railroad bonds that rival Park City had previously rejected.⁷⁴ “Bypassed by the railroad,” Dykstra recounts, Park City’s

69. GOODRICH, *supra* note 56, at 258–59; *see also* Scheiber, *supra* note 64, at 99 (“Organized across nearly half a continent, aggregating millions in capital, and controlling bureaucracies much larger than those of any state government, the giant railroad firms outdistanced the objective capacity of the states—if, indeed, a political will was present—to exercise controls over them.”).

70. ALBERTA M. SBRAGIA, *DEBT WISH: ENTREPRENEURIAL CITIES, U.S. FEDERALISM, AND ECONOMIC DEVELOPMENT* 51 (1996); *see also* WHITE, *THE REPUBLIC FOR WHICH IT STANDS*, *supra* note 30, at 156 (“Railroads could bully small towns by threatening to move their shops elsewhere . . .”).

71. SBRAGIA, *supra* note 70, at 48. Moreover, the story of Galena and Park City illustrates the stronghold railroads had over localities:

Perhaps the most extreme costs of losing the race for transportation links are found in the respective fates of Galena and Park City. Galena was not only a serious rival to Chicago, it was the more important city, and most observers assumed it would remain more important than Chicago. However, once Chicago developed superior railway links, Galena faded into obscurity.

Id. at 49.

72. GOODRICH, *supra* note 56, at 260.

73. *See* ROBERT R. DYKSTRA, *THE CATTLE TOWNS* 41–55 (1st ed. 1968).

74. *Id.* at 50–52.

business leaders soon “began packing up to find opportunities elsewhere, and within several years Park City had virtually returned to a state of nature.”⁷⁵ A contemporary account, from James Bryce in 1923, precisely captured the result:

No wonder, then, that the railroads . . . acquired immense power in the districts they traversed. In a new and thinly peopled state the companies were by far the wealthiest bodies, and able by their wealth to exert all sorts of influence. A city or a district of country might depend entirely upon them for its progress. If they ran a line into it or through it, emigrants followed, the value of fixed property rose, trade became brisk; if they passed it by, and bestowed transportation facilities on some other district, it saw itself outstripped and began to languish. . . . That is to say, the great companies held in their hands the fortunes of cities, of counties, even sometimes of states and Territories.⁷⁶

Among other consequences, this form of structural power directly contributed to the railroads’ ability to extract public subsidies from local communities. The title of one resolution, adopted at an 1865 public meeting in North Liberty, Iowa, illustrates the resulting bargaining dynamic: “Resolved, That Johnson County donate half a million dollars rather than this Rail Road [Iowa North Central] should be made twenty miles east or west of us.”⁷⁷

Unfortunately for these aspiring communities, the railroad promoters were much better at making grand assurances—and using them to extract public support—than they were at delivering the promised results.⁷⁸ The typical local aid programs of that era—

75. *Id.* at 52–53.

76. 2 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 1307–08 (1923).

77. Earl S. Beard, *Local Aid to Railroads in Iowa*, 50 *IOWA J. HIST.* 1, 28 (1952). In another case, a railroad contract read: “The builders . . . agree . . . to make Covington a point if she will make a donation of \$80,000, otherwise they will run the road in the direction of Perryville.” GOODRICH, *supra* note 56, at 259–60.

78. LAWRENCE GOODWYN, *THE POPULIST MOMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA* 70 (reprt. ed. 1981). One source highlights, for example, farmers’ reception to new railroads:

Like most nineteenth-century Americans, farmers were enthusiastic about the arrival of each new railroad that promised to further “open up the country” to new towns and new markets. But the farmers’ euphoria at the appearance of a new rail line inevitably turned to bitter resentment.

Id.

“particularly those launched in the boom years from 1868 to 1872” — operated at a loss for the offering jurisdiction.⁷⁹ Many railroad investments during this time were either never constructed or discontinued shortly after their construction, generally due to some combination of fraud, overconstruction, and economic downturns. Indeed, during this period, “railway corporations tended to be severely overcapitalized with much of the money raised never finding its way to the actual construction of railroads.”⁸⁰ One historian wrote in 1936 that “[l]ocalities thus victimized found themselves heavily pressed with debt in payment for a useless roadbed.”⁸¹

In his authoritative history of nineteenth-century railroad aid, Goodrich provides a representative account from upstate New York, where “some 300 municipalities contributed more than \$33,000,000 in support of railroad building, mainly in the form of stock subscriptions”:

[I]nhabitants of communities that had been by-passed by the major routes listened willingly to the persuasive arguments and “flowery speech” of the company’s promoters and particularly of its president, De Witt Littlejohn, speaker of the State Assembly, whose name was “itself a tower of strength in the Midland counties.” [Railroad historian Harry] Pierce describes the railroad as zigzagging across the state in search of the municipal bonds which were its principal source of capital. Syracuse, which refused to subscribe, was left on one side; and the Midland as finally constructed managed to cross the breadth of the state for nearly 250 miles from Cornwall on the Hudson to Oswego on Lake Ontario without passing through a single major city. . . . There were critics and opponents, but most of the voters appeared to favor “anything in the form of a railroad.” . . . The company, however, went into bankruptcy within a few months of the opening; and most of the investment of the towns was wiped out.⁸²

79. GOODRICH, *supra* note 56, at 273.

80. Yablon, *supra* note 66, at 331 n.32.

81. HILLHOUSE, *supra* note 52, at 152; *see also* David Schleicher, Hands On! Part I: The Trilemma Facing the Federal Government During State and Local Budget Crises 22 (July 12, 2022) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3649278 [<https://perma.cc/43F7-VLHT>]) (“In the rush to attract railroads, there was a huge amount of fraud, leaving cities that had offered subsidies holding the bag for rail projects that never emerged.”).

82. GOODRICH, *supra* note 56, at 242.

These rural New York towns' experience was no outlier. In several cases, the resulting financial losses "brought state and local governments to the point of insolvency," ushering in a wave of municipal defaults around the country after the economic downturn that followed the Financial Panic of 1873.⁸³ In Pennsylvania, for example, "more than three quarters of the publicly subsidized railroad mileage of the state went into receivership, [bringing] about a revulsion against railroad aid."⁸⁴ Farmers who had invested directly in the railroads by mortgaging their farms often lost everything. Popular sentiment about the railroads—and the antimonopoly politics of this era—was deeply shaped by this cycle, which played out in communities across the United States during the two decades before the enactment of the Sherman Act in 1890.

During the height of this wave, "more than a hundred railroad aid bond issues were declared void."⁸⁵ Between 1835 and 1930, railroad aid defaults constituted nearly half of *all* bonds held void.⁸⁶ Often, efforts to repudiate these debts were unsuccessful—frequently resulting in court judgments ordering "local officials to levy and collect special taxes in satisfaction" to creditors.⁸⁷ Various forms of (sometimes violent) protest emerged in response. Several counties in Missouri and Kansas required candidates for county court "be willing to go to jail rather than be party to a [tax] levy."⁸⁸ And, in one town, an "organized mob" was reported to have forcibly "seized the tax-books" and expunged a levy placed there by order of a federal court to satisfy a judgment on defaulted rail bonds.⁸⁹ One county attorney referenced such unrest in a letter to bondholders, urging the acceptance of a proposed repayment compromise: "[I]t cannot be overlooked that universal discontent in the public mind and a determined spirit of resistance manifested everywhere in the West against the payment of municipal bonds threaten the practical collection even of judgments of

83. *Id.* at 273 (noting also that the losses "furnish part of the explanation for a large number of cases of repudiation of governmental obligations").

84. *Id.* at 243.

85. HILLHOUSE, *supra* note 52, at 173.

86. *Id.* at 195.

87. *Id.* at 169.

88. *Id.*

89. Letter to the Editor, *Repudiated Municipal Debts*, NATION, Feb. 28, 1878, at 151.

the highest courts.”⁹⁰ As White summarizes, “[t]he effects would reverberate throughout the rest of the century.”⁹¹

Even where default was never considered, these elaborate arrangements of financial support—often done to avoid direct public taxes—had additional “ironic and unintended consequences,” namely that “states and localities . . . [then] could not easily tax railroad lands for the revenue needed to build roads, schools, and the basic infrastructure of local life.”⁹² To make up the budgetary shortfalls, state and local governments frequently imposed new (and deeply unpopular) tax levies on farmers and other residents.⁹³ In addition to the consequences of such preferential tax schemes, long-concluded public programs promoting railroad development continued to shape life in rural communities across the country—particularly through vast land ownership disparities and absentee holdings.⁹⁴ In many communities, railroad companies remained the largest landowner; farmers in such communities might find themselves paying exorbitant charges—to the same private company—not only to ship their crops to market but also for the right to farm the land in the first place.⁹⁵

The ownership patterns, economic transactions, and underlying power relations that characterized such communities were, in this

90. HILLHOUSE, *supra* note 52, at 173.

91. WHITE, RAILROADED, *supra* note 48, at 26.

92. *Id.*

93. For example, western farmers often felt the brunt of these increased taxes:

The eastern sponsored railroads had used diverse techniques to encourage the western farmer to invest whatever capital he could mobilize in railroad shares. . . . [But] dividends often failed to materialize, and furthermore the farmer's taxes were increased to support the indebtedness frequently incurred by the state, county and town as a result of their investments in the same [rail]roads.

HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 58 (1955).

94. One source describes how railroad monopolies impacted rural life:

Antimonopoly feelings were intensified by the emergence of numerous giant “bonanza” farms and by the growth of absentee and, especially, foreign land holdings. . . . The farmer felt that the inhibition of further land grants to railroads at the beginning of the 1870's brought only partial relief from the manifold abuse of natural resources attributed to monopolistic influences.

Id. at 62. Discussed *infra* Part I.B., these past revenue obligations also indirectly contributed to the interjurisdictional competition for corporate charter activity that facilitated the great merger wave.

95. See GATES, *supra* note 50, at 361–67 (describing the rise of land grants for railroads); RAE, *supra* note 50, at 124.

respect, analogous to those that distinguished the “company towns” during the same era.⁹⁶ Legal historian Harry Scheiber describes the politics that emerged in these states and communities as having an “enclave effect,” within the federalist system, that created “‘captive state[s]’ dominated by a major economic interest.”⁹⁷ In addition to the economic consequences described above, political life in such communities was defined by near total capture of democratic processes: “[P]owerful corporate interests took full advantage of federalism’s enclave effects, to gain subsidies from state governments or to exercise virtually total control over policy in certain states,” which ultimately “contributed to the dominance of the economy by giant firms” during this period.⁹⁸

This was the historical context from which emerged the powerful social and political movement against the railroad trusts’ dominance, which would ultimately reshape both American politics and public law. Indeed, political historian Lawrence Goodwyn describes the “agrarian revolt” that developed in the South and West during this period—characterized by “earnest farmer-lecturers setting off on continent-spanning journeys in the late 1880’s to organize the folk” around a populist agenda—as “the most massive organizing drive by any citizen institution of nineteenth-century America.”⁹⁹ Another historian summarizes: “Burdened with [public municipal] debt for that which they did not own or control, forced to deal with representatives of absentee owners, victimized by swindles or oppressive freight rates, it is no wonder that the farmers and localities of the midwestern states were stirred to revolt.”¹⁰⁰

By January of 1886, the Senate Select Committee on Interstate Commerce reported that “upon no public question are the people so

96. See generally Brian Highsmith, *Governing the Company Town*, 77 STAN. L. REV. (forthcoming 2025) (arguing that the “company town” is most accurately understood as an enduring democratic phenomenon: the absence of friction between a company’s governing interests and the various authorities that regulate public life within a given territorial domain).

97. Scheiber, *supra* note 64, at 112–13 (“The enclave phenomenon was especially evident in newer states, as in the mining, lumbering, and grazing states of the West, or where a single railroad interest enjoyed inordinate influence over a state’s policies.”).

98. *Id.* at 117 (emphasis omitted).

99. GOODWYN, *supra* note 78, at 56.

100. HILLHOUSE, *supra* note 52, at 156; see also Kammer, *supra* note 58, at 392 (“It was not only the subsidies of land that had become unpopular by the end of the century, but also railroad companies themselves.”).

nearly unanimous as upon the proposition that Congress should undertake in some way the regulation of interstate commerce.”¹⁰¹ By that year, White recounts, “the passage of federal railroad regulation in some form seemed inevitable.”¹⁰² The following year, Congress enacted the Interstate Commerce Act, “the first comprehensive regulatory measure passed by Congress.”¹⁰³ The Act was meant to govern interstate railroad transportation by regulating rates, prohibiting undue or unreasonable preferences, and barring pooling arrangements among competing railroads.¹⁰⁴ Railroad executive Richard S. Olney assessed that the new regulatory commission “satisfies the popular clamor for a government supervision of the railroads, at the same time that the supervision is almost entirely nominal.”¹⁰⁵ During the 1888 election, both of the major parties adopted platforms supporting regulation of the dominant trusts—a position that “was especially useful for appealing to farmers and laborers who might shift their vote to the third party.”¹⁰⁶ In early 1890, faced with “an increasing number of petitions advocating antitrust legislation,”¹⁰⁷ Congress concluded its work on the new antitrust bill, “the first national law for corporate regulation outside the transport sector,”¹⁰⁸ which became law in July 1890.¹⁰⁹

The complaints, and motivations, of the agrarian populist movement against the railroads during the two decades leading up to the Sherman Act—and the broader political coalition that was

101. REPORT OF THE SENATE SELECT COMMITTEE ON INTERSTATE COMMERCE, S. REP. NO. 49-46, pt. 1, at 175 (1886) [hereinafter SENATE INTERSTATE COMMERCE REPORT].

102. WHITE, THE REPUBLIC FOR WHICH IT STANDS, *supra* note 30, at 579.

103. Hovenkamp, *supra* note 49, at 1019.

104. Cf. HOVENKAMP, *supra* note 46, at 132 (“The Progressive critique of federal railroad regulation was that regulation was necessary to protect the general public from powerful railroad monopolies too large to be reached by state legislation, that Congress had exactly this in mind when it passed the Interstate Commerce Act in 1887 . . .”).

105. ELY, *supra* note 45, at 95.

106. See Letwin, *supra* note 48, at 248.

107. *Id.* at 252.

108. Scheiber, *supra* note 64, at 107.

109. Sherman Act of 1890, Pub. L. 94-435, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1–7).

ultimately assembled¹¹⁰—were diverse, extending far beyond problems that directly related to state aid.¹¹¹ Indeed, by the time Congress enacted the Sherman Act, “the railroad network of the United States was almost completely filled in,”¹¹² and the active subsidy programs that characterized the boom years had concluded in most jurisdictions—having in many states been specifically restricted or prohibited by constitutional amendment.¹¹³

But the initial federal antitrust protections enacted by Congress in 1887 and 1890 should be understood within the historical context of the roughly quarter century of organizing from which they emerged. Understood most broadly, the social and political movement that coalesced during this period was oriented against the inordinate power the railroad trusts wielded over public and private life—a state of affairs that emerged from the elaborate program of public subsidies the railroads had extracted from states and local communities as a method of competition.¹¹⁴ Even other aspects of the railroads’ monopoly

110. See Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act Feature*, 131 YALE L.J. 175, 203 (2021) (“[W]hen legislators undertook to draft and enact antimonopoly legislation, they acted in response to a political constellation with farmers and workers at its center.”). But sources disagree on which constituencies motivated antimonopoly legislation:

Legislators considering railroad legislation had widely different constituencies—those that benefited from low rates for long hauls, such as midwestern shippers, and those that were injured by them, such as New York shippers; those that benefited from price discrimination and those that were injured by it; farmers; easterners; westerners; and the railroads themselves.

HOVENKAMP, *supra* note 46, at 138.

111. See, e.g., Letwin, *supra* note 48, at 235 (“The general disposition of the public was not in doubt. There were numerous objections to the trusts—complaints of a traditional sort as well as newer ones suited to the character of these particular monopolies.”); WHITE, *THE REPUBLIC FOR WHICH IT STANDS*, *supra* note 30, at 578 (“The attacks against western railroad land grants began in the 1870s, but the main focus of antimonopoly reform was on railroad rates. Except for the struggle over the federal land grants, the major legislative efforts to control railroads had been largely left to the states . . .”).

112. GOODRICH, *supra* note 56, at 255.

113. Cf. SBRAGIA, *supra* note 70, at 53 (noting that “in 1890, fifteen states still authorized all local governments to assist railway[]” development).

114. The history discussed in this Part is introduced to make two distinct interventions. The popular opposition to the railroad land grants is intended to support the *policy* case for conceptualizing state aid as a competition problem—and, more broadly, as an antimonopoly concern. This Article does not claim that the initial nineteenth-century federal railroad regulations or antitrust protections—enacted in response to the populist backlash that was fueled

power, including discriminatory rates charged to consumers, were in some way connected to the elaborate competition for local subsidies.¹¹⁵ Popular and intellectual leaders of the movement that secured the first federal antitrust regulations emphasized the public source of this private power: “Antimonopolists focused on the railroads because railroads depended on state and federal aid, because as common carriers railroads had an obligation to offer equal access to all, and because virtually all enterprises depended on railroads.”¹¹⁶

Above all, this history contextualizes the efforts of today’s dominant firms to gain market advantage by extracting public subsidies and regulatory favors from local communities competing for mobile economic activity. Even before considering specific legal authorities under antitrust law, the historical experience reviewed here demonstrates the compelling *policy case* for assessing the exercise of corporate power over local communities—as observed in dominant firms’ demands for location incentives—within an antimonopoly framework. Moreover, the contemporary business practices associated with dominant firms’ incentive demands are directly analogous to abuses that fueled popular demands for railroad and antitrust regulation during the late nineteenth century. From this follows an important conclusion: The observed diversion of state and local public resources for private market gain should be understood not simply as misguided lawmaking (by the state)—but also as reflecting the exercise of *structural power* (by dominant firms).

B. *Chartermongering and the FTC Act*

The same mass antimonopoly movement that reshaped federal law during this period—upending party coalitions and resulting in the

in part by the railroads’ absentee land ownership and other consequences of various state aid policies—were intended to address state and local location incentives. This Article’s claims regarding the *legal case* for federal action—and historical evidence offered as relevant to statutory intent—are specific to the FTC (as developed *infra* Part I.B).

115. See Clyde B. Aitchison, *Evolution of the Interstate Commerce Act: 1887–1937*, 5 GEO. WASH. L. REV. 289, 292 (1936) (“The scramble for sustaining traffic [after the enactment of state restrictions on local spending authority] crippled all who participated, and brought into use the secret rebate and special contract as a means of attracting business and of securing revenue therefrom.”).

116. Richard White, *From Antimonopoly to Antitrust*, in ANTIMONOPOLY AND AMERICAN DEMOCRACY 13 (Daniel A. Crane & William J. Novak eds. 2023).

first federal regulation of the railroad industry, specifically, as well as restraints of trade by other dominant corporations—had similar effects on the politics and public law of the many states. During the initial years following the passage of the Sherman Act, the “more serious and immediate threat” to the trusts came from (often successful) *state* proceedings to dissolve the trusts or revoke their corporate charters through the application of state corporate law.¹¹⁷ Meanwhile, the first successful targets of the Sherman Act—whose meaning and scope would remain uncertain for years—were “loose” combinations in the form of cartels or pools, rather than “tight” combinations in the form of trust or achieved through merger.¹¹⁸ The combination of these two trends created an opportunity for states in search of a tax revenue windfall. By amending their own corporation laws to expressly permit the formal consolidation of competing firms (among other regulatory favors), states could compete for the legal location of mobile corporate activity.

Between 1896 and 1904, a number of states—New Jersey initially being most successful—eagerly accepted the challenge, launching “the greatest merger mania America has ever experienced.”¹¹⁹ Prompted by changes to New Jersey’s corporate charter laws that significantly increased the power of corporations to acquire control of other corporations, the great majority of the nation’s largest trusts—including Standard Oil and U.S. Steel—organized as New Jersey corporations.¹²⁰ One study estimates that between 1895 and 1904, New Jersey was the legal home to half of *all* corporate consolidations.¹²¹ The emergence of new corporate giants quickly transformed entire

117. Yablon, *supra* note 66, at 338.

118. See, e.g., HOVENKAMP, *supra* note 46, at 242 (“This early experience with the Sherman Act sent a clear signal to entrepreneurs: if you want to avoid Sherman Act prosecution, form ‘tight’ combinations rather than cartels.”); Yablon, *supra* note 66, at 356 (“While monopolies and agreements in restraint of trade were ostensibly outlawed by the Sherman Act in 1890, throughout this period, it was uncertain whether monopoly power achieved by consolidation within a single corporate entity permitted under state law was exempt from federal antitrust challenge.”). For a brief introduction to the distinction among these forms of combination, see Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 *FORDHAM L. REV.* 2279, 2292–2334 (2013).

119. HOVENKAMP, *supra* note 46, at 242.

120. See CHRISTOPHER GRANDY, *NEW JERSEY AND THE FISCAL ORIGINS OF MODERN AMERICAN CORPORATION LAW* 13–15 (1993).

121. RALPH L. NELSON, *MERGER MOVEMENTS IN AMERICAN INDUSTRY 1895–1956*, at 67 (1959).

industries.¹²² One study of ninety-three consolidations from this period found that over half resulted in market shares in excess of 40 percent, and at least one-third resulted in shares in excess of 70 percent.¹²³

States desiring to protect their own consumers, workers, and local competitors found themselves severely limited in their legal and practical ability to effectively regulate these nationally consolidated corporate giants.¹²⁴ Professor Frederick Tung has shown that *every one* of the trusts that had faced successful legal challenge under state corporate law had, by 1899, reorganized as a New Jersey corporation.¹²⁵ By 1900, New Jersey had come “under enormous attack from many quarters for its ‘traitorous’ facilitation of big business development”—indeed, it colloquially became known as the “Traitor State”¹²⁶—“and there were increasing calls for federal chartering of corporations.”¹²⁷ A 1902 U.S. Industrial Commission report summarized the beggar-thy-neighbor¹²⁸ regulatory dynamic that prevailed during this period: “It is important to observe that whenever any State has put conservative restrictions upon corporations . . . other States have taken advantage of the situation and enacted such liberal laws that corporations have removed to them from other States.”¹²⁹

122. See Yablon, *supra* note 66, at 337.

123. NAOMI R. LAMOREAUX, *THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904*, at 2 (1985).

124. See Yablon, *supra* note 66, at 372 (“There can be little doubt that charter competition during this period severely impeded states’ ability to regulate monopoly and other negative externalities by limiting the size and powers of corporations.”); GRANDY, *supra* note 120, at 56 (“[T]he enormous size of New Jersey corporations threatened consumers with monopoly prices, challenged local producers for their business, and imperiled the financial well-being of savers.”); *id.* at 71 (“While the Sherman Act attempted the first national resolution of general corporate interstate externalities, New Jersey’s legal innovations undermined that effort.”).

125. Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 81 (2006).

126. LINCOLN STEFFENS, *STRUGGLE FOR SELF-GOVERNMENT: BEING AN ATTEMPT TO TRACE AMERICAN POLITICAL CORRUPTION TO ITS SOURCES IN SIX STATES OF THE UNITED STATES, WITH A DEDICATION TO THE CZAR* 209 (1906).

127. Yablon, *supra* note 66, at 357.

128. Cf. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 82 (1776) (“[N]ations have been taught [by the maxims of tradesmen] that their interest consisted in beggaring all their neighbours. Each nation has been made to look with an invidious eye upon the prosperity of all the nations with which it trades, and to consider their gain as its own loss.”).

129. U.S. INDUS. COMM’N, *FINAL REPORT OF THE INDUSTRIAL COMMISSION* 642–43 (1902).

During this period, numerous states “amended their laws expressly to compete with or at least avoid losing domestic businesses to New Jersey, creating an intense and intentional state competition for corporate charters.”¹³⁰ This race to the bottom¹³¹ in state corporate law—and the wave of industrial consolidations and (effectively unregulated) unfair and anticompetitive practices that it directly enabled—ultimately prompted Congress to enact both the Clayton Act and the FTC Act in 1914. In the years leading up to their passage, “the central political question concerning the trusts was what mode of federal regulation could effectively address the anticompetitive pathologies created by the liberalization of state corporate law.”¹³² Public concerns about the particular form of regulatory spiral that is facilitated by interjurisdictional competition for mobile corporate activity motivated the enactment of the FTC Act—the design of which reflected “a decided congressional preference for a strong federal hand on the reigns [sic] of the interstate economy.”¹³³

Although the general outlines of this story are widely known, it is worth examining in this context the specific political and economic dynamics that shaped New Jersey’s fateful “chartermongering” strategy.¹³⁴ Here again, it goes back to the railroads. Throughout most of the nineteenth century, railroad corporations were generally established by special charter; legislators would write many of these incentives—such as favorable tax treatment and specific guarantees

130. Yablon, *supra* note 66, at 354. Examples include Delaware, New York, Maine, West Virginia, and South Dakota. *Id.* at 359–67.

131. Some contemporary scholars do not view state competition for corporate activity as a race to the bottom (in a normative sense). Instead, they view it as creating incentives to replace inefficient rules with new rules that will increase firm value. *See, e.g.,* ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 14–16 (1993). For present purposes, however, most important is that the drafters and supporters of the Clayton and FTC Acts generally understood this form of interjurisdictional competition as harming competition and consumers by undermining antimonopoly protections—and intended for the FTC to overcome this coordination problem. *See supra* Part I.B.

132. Daniel A. Crane & Adam Hester, *State-Action Immunity and Section 5 of the FTC Act*, 115 MICH. L. REV. 365, 389 (2016) (“In contrast with 1890—when the trust problem was framed in terms of market failures that the states had dutifully, but unsuccessfully, attempted to remedy—the conversation leading up to 1914 was framed in terms of political failures occasioned by the race to the bottom in state corporate law.”).

133. *Id.* at 398.

134. *Cf. Yablon, supra* note 66, at 326 (“[I]t is somewhat surprising that more attention has not been paid to the historical origins of state regulatory competition in its earliest period.”).

against competition—directly into those charters. These provisions represented an important method of competition among market rivals. Professor Charles M. Yablon recounts that “[b]usiness success often hinged on a company’s abilities to obtain appropriate charter amendments and financial aid from the legislature.”¹³⁵

During the 1830s, the New Jersey legislature granted the Camden and Amboy Railroad Company, by special charter, various tax exemptions and monopoly guarantees—including what amounted to a promise not to charter any other railroad along the New York–Philadelphia route¹³⁶—that stood out as outliers even for that period.¹³⁷ (Indeed, before New Jersey’s chartermongering made it the “Traitor State,” it was known by a different epithet: the “State of Camden and Amboy.”)¹³⁸ But, in a now-familiar turn of events, “the tax concessions granted to railroads more than a generation earlier came back to haunt the state” during the years following the Civil War. In particular, those concessions severely limited local government revenue by removing valuable property owned by the railroads—as much as 25 percent of real property in some jurisdictions—from the tax base.¹³⁹

When the state and its local governments sought to fill the resulting budget gaps with new charges on residents,¹⁴⁰ “citizens saw [the special charter] system as the source of the railroad tax concessions responsible for their relatively high tax burdens.”¹⁴¹ This view helped catalyze a “popular reaction against railroads,” which vaulted a reformist governor, Leon Abbett, into office in 1884. He had “made a living and name for himself as legal counsel to municipalities challenging railroad interests” and had “acquired a significant constituency of farmers and local property owners passionately

135. *Id.* at 331 (“In the special charter era, [state competition for corporate charters] took the form of states competing to offer particular corporations the most favorable possible charter terms, including terms that discouraged or disadvantaged competitors. The first great national corporations, the railroads, understood this system and exploited it fully.”).

136. *See* GRANDY, *supra* note 120, at 22.

137. *Cf.* HOVENKAMP, *supra* note 46, at 144 (describing New Jersey as one of the “few early cases [where] states made the expensive mistake of granting railroads exclusive rights to carry cargo or passengers between two named points”).

138. GRANDY, *supra* note 120, at 23.

139. *Id.* at 23–25.

140. *See id.* at 25 (noting a dramatic increase in the state’s property tax burden).

141. *Id.* at 26.

concerned about the ‘railroad problem.’”¹⁴² When he then signed a new law establishing a mechanism for taxing some railroad property, the railroads successfully sued, arguing that concessions granted by special charter could not be unilaterally amended by future legislatures.¹⁴³ An alternative revenue source, imposed on actors who had *not* secured a practically inalterable exemption from taxation, became necessary.¹⁴⁴

This was the context in which “New Jersey legislators rediscovered a [revenue] mechanism that would play a role in the chartermongering episode of the next decade”: the franchise fee charged to corporations upon filing or renewing their charters.¹⁴⁵ But the taxable chartering activity of its own domestic corporations was insufficient to fill the budgetary gaps partially resulting from past concessions to the railroad monopolies. “New Jersey needed a means of reaching firms outside the state.”¹⁴⁶ Through a series of amendments between 1888 and 1896, New Jersey “systematically altered its corporate statutes to appeal to large firms”¹⁴⁷—changes made “specifically to attract incorporation by out-of-state firms.”¹⁴⁸ In 1892, for example, New Jersey repealed its antitrust statute.¹⁴⁹ Although these changes were not the only factor making New Jersey attractive to large corporations seeking refuge from state and federal antitrust challenges during this period, Yablon summarizes: “There is little doubt that New Jersey corporate law in this period was shaped primarily by the needs of the trusts and their lawyers.”¹⁵⁰ In fact, Yablon cites historical evidence that lawyers

142. *Id.* at 26–27.

143. *Id.* at 27–28.

144. *Cf. id.* at 37 (“At least indirectly, the political pressure arising from municipal fiscal problems stimulated the search for revenue from railroads and other corporations on the state level.”).

145. *Id.* at 37–43; *see also* Yablon, *supra* note 66, at 334–35 (describing how New Jersey became more lenient with respect to the purposes for which a corporation could be formed, further entrenching its reputation as a corporation-friendly state).

146. GRANDY, *supra* note 120, at 40 (“Changing the incorporation laws to attract the legal, as opposed to economic, domicile of firms accomplished this task neatly.”).

147. *Id.* at 40.

148. Tung, *supra* note 125, at 74.

149. Edward Q. Keasbey, *New Jersey and the Great Corporations*, 13 HARV. L. REV. 198, 209 (1899) (citing 1892 N.J. Laws 200).

150. Yablon, *supra* note 66, at 336 (evaluating the factors shaping firm location during this period and concluding that the dominant trusts organized under New Jersey law were “based on an implicit understanding, evidenced by the statutory activity, that New Jersey legislators would

representing the trusts personally drafted the legislative text adopted in the key 1889 modification.¹⁵¹

Most consequential among those statutory changes were new provisions allowing any firm under the General Corporation Act to “purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of any securities or evidences of debt created by other corporation or corporations”¹⁵² and a merger statute allowing agreements to contain any “provisions and details . . . [the] directors shall deem necessary to perfect the merger or consolidation.”¹⁵³ These changes, in particular, facilitated the great merger wave, which “threatened to make radical changes in the competitive structure of American industry.”¹⁵⁴ In addition to reshaping U.S. industry, New Jersey’s experience led other states looking to create their own revenue windfall to liberalize their charter statutes.¹⁵⁵

The consequences of the great merger wave—facilitated by this form of interstate competition—were felt immediately and everywhere. Christopher Grandy describes the monopoly harms that New Jersey’s chartermongering imposed on competitors and consumers in other states:

From the economist’s perspective, New Jersey’s externality most obviously threatened consumers. Large firms with New Jersey charters might alter the economic structure of another state’s markets . . . [by] rais[ing] product prices and reduc[ing] output. This would result in transfers of economic benefits away from consumers, and inefficiencies in the form of deadweight losses. Perhaps even more important historically, large foreign corporations threatened local independent producers. Where a state might impose anti-monopoly rules on domestic corporations . . . corporations that brought such

do what they could to encourage and facilitate the new movement toward the rise of big business in the United States”); *cf. id.* at 328 (“New Jersey’s dominance was built slowly, not by the passage of a particular law, but by the incremental development of a relational understanding between New Jersey politicians and the lawyers, promoters, financiers, and businessmen who first created and profited enormously from the development of large industrial corporations . . .”).

151. *Id.* at 340.

152. Act of Mar. 14, 1893, ch. 171, 1893 N.J. Laws 301.

153. Act of Mar. 8, 1893, ch. 67, 1893 N.J. Laws 122.

154. LAMOREAUX, *supra* note 123, at 2.

155. See Yablon, *supra* note 66, at 354 (“Quite a few states amended their laws expressly to compete with or at least avoid losing domestic businesses to New Jersey, creating an intense and intentional state competition for corporate charters.”).

powers with them from the Garden State operated at an advantage. Their economic power could then threaten local companies with practices such as predatory pricing, tying contracts, price discrimination, etc. Congressional debates repeatedly bemoaned the destruction of independent businessmen by trusts.¹⁵⁶

For these reasons, among others, “contemporaries reacted to the great merger movement with alarm—a mood that was reflected in the scholarly literature as well as in the popular press.”¹⁵⁷

State officials attempted coordinated action against the corporate giants. In 1899, for example, representatives from nine states gathered in St. Louis to consider recommendations for interstate cooperation to control dominant corporations.¹⁵⁸ They issued a joint resolution that called for strengthening their respective states’ laws to ensure “the adequate and proper control and regulation of corporations chartered in that state.”¹⁵⁹ But predictably, these efforts failed: “[I]n the absence of an enforcement mechanism, such cooperation was impossible”¹⁶⁰ because too many state legislatures defected to “pursue[] their own parochial interests in imitating New Jersey.”¹⁶¹ As Charles F. Bostwick observed in 1899, a state during this period had to navigate a structural tension between desiring to respond to popular demands by avoiding the consequences of monopoly and wanting to “draw to its jurisdiction as much of these vast fortunes and monopolies as possible to provide itself food upon which the State could continue to live and draw its daily sustenance.”¹⁶² Despite significant public pressure for reform, states found themselves unable to act on their own to address the

156. GRANDY, *supra* note 120, at 58 (internal footnotes omitted); *see also* HOVENKAMP, *supra* note 46, at 259 (“States benefited even from monopoly production, particularly if much of the product was shipped elsewhere. . . . The principal victims of monopoly—consumers—were more widely scattered.”); YABLON, *supra* note 66, at 329 (“[S]tate competition for charters . . . enabled corporate exploitation of negative externalities that required federal intervention.”).

157. LAMOREAUX, *supra* note 123, at 5; *see also* YABLON, *supra* note 66, at 329 (“By removing legal restrictions on corporate activity and fostering the development of market-dominant entities, New Jersey helped create the perceived need for a greater federal role in antitrust.”).

158. Tung, *supra* note 125, at 84 (citing *The St. Louis Anti-trust Conference*, 27 PUB. OP. 387 (1899)).

159. *Id.*

160. GRANDY, *supra* note 120, at 60.

161. Tung, *supra* note 125, at 84.

162. CHARLES F. BOSTWICK, LEGISLATIVE COMPETITION FOR CORPORATE CAPITAL 2 (1899).

antimonopoly harms created by interjurisdictional competition: The institutional dynamics required a federal response.

This problem was what federal legislators sought to address through the creation of the FTC.¹⁶³ To overcome the problem of interstate competition, legislators regularly introduced bills to create a national system for incorporation or licensing from 1900 until the passage of the FTC Act in 1914. Many of these bills also “attacked specific business practices made popular by the state chartermongering phenomenon,” including by “establish[ing] authority at the national level to reform particularly troublesome practices.”¹⁶⁴ One of these national incorporation bills “combined an incorporation requirement with features eventually contained in the Clayton and FTC acts,” including the creation of a new federal commission to oversee mergers and a prohibition on unfair competition and price discrimination.¹⁶⁵ Congress “eventually settled on a behavioral, rather than structural, solution to the problem”¹⁶⁶—leaving in place the state charter system but empowering a new agency to supervise and regulate the most objectionable anticompetitive corporate practices.¹⁶⁷ The full trajectory is striking in this context: The FTC Act was enacted in response to problems created by the great merger wave, which was understood as caused by interjurisdictional competition for mobile corporate activity, which itself was (in the leading state of New Jersey) prompted by the budgetary burden of tax subsidies granted to a small number of dominant railroad corporations.

163. Cf. *GRANDY*, *supra* note 120, at 60 (“Resort to a single political forum promised to blunt the economic and financial threats to consumers and local producers. In supplanting the multiple requirements of state law with a single uniform statute, the uncertainty and transactions costs firms bore in operating across states would also disappear.”).

164. See *id.* at 61, 67 (dividing the proposed legislation from this period into two partly overlapping categories: “a group that saw the main problem of trusts as lack of uniformity of law and a group that sought to directly regulate industry practices”).

165. *Id.* at 65 (citing H.R. 26415, 62d Cong., 2d Sess., Aug. 24, 1912).

166. *Id.* at 71.

167. Sandeep Vaheesan describes the motivations of legislators behind the FTC Act:

The members of Congress involved in drafting and passing the FTC Act wanted to protect consumers from wealth transfers, maintain markets open to all comers, and prevent the concentration of private economic and political power. These goals are remarkably similar to those expressed in the debates leading up to the enactment of the Sherman and Clayton Acts.

Sandeep Vaheesan, *Resurrecting “A Comprehensive Charter of Economic Liberty”: The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 658 (2017).

This history should inform an understanding of the FTC Act's reach today. Although their concerns were broad and diverse, the populist reformers in the late nineteenth and early twentieth century—in mobilizing for federal regulation—were concerned about the specific form of power that allowed the dominant firms of their era to exercise a sovereign-like power over economically vulnerable localities. Through their control over key determinants of economic flourishing, and leveraged through the threat of jurisdictional exit, these corporate giants were able to secure targeted financial incentives and/or regulatory favors—which, in turn, undermined competition in other markets and ultimately gave rise to a wide variety of competition harms.

Landmark federal antimonopoly protections were thus motivated, in substantial part, by public concerns about the consequences of unregulated interjurisdictional competition for mobile capital. Popular opposition to the observed consequences of unregulated interjurisdictional competition for mobile capital centrally shaped these statutory protections—first through financial incentives for railroad development and then later through the terms of corporate chartering. The chartermongering episode, in particular, convinced reformers to embrace the concept of fair competition, enforced through a new federal regulatory agency empowered to monitor and police anticompetitive behavior. This history should inform the interpretation of the current reach of the legal protections that emerged from these past reformers' efforts—and, in particular, the FTC's regulatory authority under § 5.

II. STRUCTURAL POWER IN THE MARKET FOR CORPORATE INVESTMENT

This historical context informs the case for conceptualizing location incentives as being within the proper scope of competition policy. This Part uses contemporary incentive megadeals to illustrate how corporate power—conceptualized as *structural* in nature—affects the interjurisdictional “market” for mobile corporate investment. Economists conceptualize location incentives as reflecting the market-clearing price for private capital, established through a process of competitive bidding from local jurisdictions. Reviewing recent empirical studies, this Part shows that the best available evidence

suggests that structural power distorts the interjurisdictional bidding market for mobile economic activity. This form of market power helps explain the robust relationship researchers have established between firm size and the receipt of generous—and economically unjustified—location incentives.

A. Antimonopoly Concerns About Structural Power

During the Gilded Age and Progressive Era, contemporary reformers concluded that the dominant firms had attained a destructive and undemocratic power over local communities. Writing in 1879, Henry George used the railroads' subsidy demands—made of competing towns—to illustrate the nature of this distinctive power:

But there is another far more insidious . . . form of monopoly. In the aggregation of large masses of capital under a common control there is developed a new and essentially different power . . . which, as aggregation proceeds, rises upon it is destructive. It is a power of the same kind as that which [King] James [I] granted to Buckingham, and it is often exercised with as reckless a disregard . . . For the threat of the railroad company is not merely to deprive the town of the benefits which the railroad might give; it is to put it in a far worse position than if no railroad had been built.¹⁶⁸

As K. Sabeel Rahman recounts, historical antimonopoly thought—and the political movements that reformists supported—were centrally concerned with this form of power. Progressive Era reformers observed that large corporations “had acquired a size and a degree of economic and political power that could affect a wide range of other actors in society—not only [their] own workers, but also small businesses, and governments threatened by competitive pressure and corporate influence.”¹⁶⁹

Concern about the consequences of dominant firms' structural power animated not only antimonopoly thinking but also the legislative reforms described in Part I. Over subsequent decades, comparative political economists have closely studied this form of power by private capital over public governance—conceptualizing it as *structural* in nature. From a classic account:

168. GEORGE, *supra* note 1, at 192.

169. K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* 65 (2016).

This theory [of structural dependence] begins with the hypothesis that the entire society depends on the allocation of resources chosen by owners of capital. Investment decisions have public and long-lasting consequences: they determine the future possibilities of production, employment, and consumption for all. Yet they are private decisions. . . . [B]ecause the entire society depends on the owners of capital, so must the state. Whether particular governments have interests and goals of their own or they act on behalf of a coalition of groups or a class, the pursuit of any objectives that require material resources places governments in the situation of structural dependence.¹⁷⁰

More recent scholarship has emphasized that firms' structural power is contingent on the mobility of private assets in their control as well as the level of jurisdictional fragmentation within the relevant market. As Jacob Hacker and Paul Pierson observe, firms' structural power is particularly heightened where exit threats are both credible and consequential—in particular, where (1) investment capital is highly mobile, (2) political institutions with decision-making authority are spatially fragmented, and (3) fiscal authority is decentralized.¹⁷¹

These features are present across various domains of state and local policymaking, which is one reason why local government scholars have provided a strikingly similar account of structural power (even where not described as such). Classic theories of fiscal federalism, for example, predict that competition among local governments for mobile wealth—held by residents as well as firms—restricts their practical ability to implement redistributive policy, regardless of local preferences.¹⁷² Writing recently with Kathleen Thelen and Alexander

170. Adam Przeworski & Michael Wallerstein, *Structural Dependence of the State on Capital*, 82 AM. POL. SCI. REV. 11, 12 (1988). Another source details why state governments are receptive to this form of private capital:

Because the state relies on firm investment to generate growth, the ability of companies not to invest can cause damage to the economy and thereby to the politicians governing it. . . . Governments are predisposed to adopt policies that promote firm investment, even without business leaders necessarily having to do anything.

Pepper D. Culpepper & Raphael Reinke, *Structural Power and Bank Bailouts in the United Kingdom and the United States*, 42 POL. & SOC'Y 427, 429 (2014).

171. See Jacob S. Hacker & Paul Pierson, *Business Power and Social Policy: Employers and the Formation of the American Welfare State*, 30 POL. & SOC. 277, 278–83 (2002).

172. See generally PETERSON, *supra* note 42 (arguing that capital mobility constrains local redistributive policymaking); cf. Clayton P. Gillette, *Local Redistribution, Living Wage*

Hertel-Fernandez, Hacker and Pierson describe these dynamics as distinctive to the U.S. political economy—“open[ing] possibilities for mobile actors to venue shop, maneuvering across states and localities to find the most favorable structures of political authority, often putting downward pressure on regulations and taxes.”¹⁷³

B. Evidence that Structural Power Shapes Location Incentive Decisions

These literatures explain how large firms, through their private control over highly mobile capital investment, exercise structural control over policymaking—particularly in local jurisdictions characterized by fiscal decentralization. As described in Part I, this form of structural power—leveraged by dominant firms through interjurisdictional competition, first for railroad development and then later for the legal location of taxable corporate activity—contributed to the various harms that ultimately motivated the enactment of our landmark antimonopoly protections. This Section reviews recent evidence that structural power shapes the dynamics of competition in the contemporary interjurisdictional market for corporate investment.

At the time of Amazon’s HQ2 announcement, one site location consultant told *The Washington Post* that the competition represented “the most coveted headquarters project in the country.”¹⁷⁴ But it was not the only major location deal underway. Just three months prior to Amazon’s RFP, Wisconsin Governor Scott Walker announced an agreement to provide Taiwanese manufacturer Foxconn with between \$3 billion and \$4.8 billion in subsidies, in exchange for its building a

Ordinances, and Judicial Intervention, 101 NW. U. L. REV. 1057, 1058 (2007) (“The basis of that orthodoxy, derived from standard theories of fiscal federalism and urban economics, is straightforward: Local governments cannot successfully or efficiently redistribute wealth.” (internal footnotes omitted)); *see also* CLARENCE N. STONE, REGIME POLITICS: GOVERNING ATLANTA, 1946–1988, at xi (1989) (“[T]he idea of systemic power enables us to see how Atlanta’s business elite, despite its electoral weakness, was able to retain a central part in the city’s postwar regime.”). *But see* RICHARD C. SCHRAGGER, CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE 13 (2016) (“The fact that municipalities are making efforts to address economic inequality necessitates a further rethinking of the assumptions underlying the conventional theory of inter-municipal competition.”).

173. Jacob S. Hacker, Alexander Hertel-Fernandez, Paul Pierson & Kathleen Thelen, *The American Political Economy: A Framework and Agenda for Research*, in THE AMERICAN POLITICAL ECONOMY 1, 18 (1st ed. 2022).

174. Bhattarai, *supra* note 5.

large flatscreen panel plant near Racine. The subsidy package was estimated to be the largest, by a significant margin, ever awarded to a foreign firm in U.S. history¹⁷⁵—the equivalent to paying Foxconn a 30 percent wage subsidy for twenty years, over ten times as generous as the current average incentive offer.¹⁷⁶ As *The Atlantic*’s Derek Thompson reported, the consequence is “a state with declining wages for many public school teachers could wind up paying more than \$500,000 per net new Foxconn job—about 10 times the average salary of a Wisconsin teacher.”¹⁷⁷

By 2018, the expected value of the subsidy package grew to almost \$5 billion—over half of which Foxconn would receive directly in cash as a discretionary tax abatement assessed against already-eliminated state tax liability. The state also agreed to make road improvements worth over \$252 million in addition to providing tax breaks for construction worth \$150 million.¹⁷⁸ Local governments also added their own incentives to the state’s offer, including \$1.5 billion through a new tax increment financing district.¹⁷⁹ To fund those promises, Mount Pleasant and Racine County together issued more than \$310 million in debt.¹⁸⁰ For the twenty-eight thousand residents of Mount Pleasant,¹⁸¹ the resulting debt and interest payment obligations amounted to over 500 percent of the village’s annual operating revenue; in August 2018, Moody’s downgraded the village’s credit rating.¹⁸²

175. GREG LEROY, PHILIP MATTERA & KASIA TARCZYNSKA, *ENDING THE ECONOMIC WAR AMONG THE STATES: A STRATEGIC PROPOSAL* 3 (2019).

176. TIMOTHY J. BARTIK, *MAKING SENSE OF INCENTIVES: TAMING BUSINESS INCENTIVES TO PROMOTE PROSPERITY* 12 (2019).

177. Derek Thompson, *Amazon’s HQ2 Spectacle Isn’t Just Shameful—It Should Be Illegal*, ATLANTIC, <https://www.theatlantic.com/ideas/archive/2018/11/amazons-hq2-spectacle-should-be-illegal/575539> [<https://perma.cc/7L9D-RMY3>] (last updated Nov. 16, 2018, 10:10 AM).

178. Cailin Slattery, *Bidding for Firms: Subsidy Competition in the U.S.* 3 (Apr. 23, 2024) (unpublished manuscript) (on file with author).

179. *Id.* at 9.

180. Steff Chávez, *Foxconn in Wisconsin: Tech Mega-Deal Faces Reality Check*, FIN. TIMES (Oct. 6, 2022), <https://www.ft.com/content/7b9b10f0-7b55-4c53-a6fe-5d76833851ba> [<https://perma.cc/Q58D-U66F>].

181. *City and Town Population Totals: 2020–2023*, U.S. CENSUS BUREAU (June 25, 2024), <https://www.census.gov/data/tables/time-series/demo/popest/2020s-total-cities-and-towns.html> [<https://perma.cc/LH3W-WHE3>].

182. MOODY’S INVS. SERV., *MOODY’S DOWNGRADES MOUNT PLEASANT, WI’S GO TO AA3; ASSIGNS NEGATIVE OUTLOOK* (2018).

Wisconsin's enticement package was not limited to direct financial incentives. As part of the recruitment deal, Wisconsin exempted Foxconn from various state environmental regulations.¹⁸³ Governor Walker also offered a statutory provision creating a legal right, exclusive to Foxconn, to appeal any unfavorable judicial or regulatory decision immediately and directly to the state's business-friendly Supreme Court.¹⁸⁴ This provision—later dropped amid public outcry—represents an extreme and unusual form of targeted regulatory relief: made with the clear intention to deliver one company—and only that company—broad exemption from any otherwise binding state policies and legal constraints.

Nearly half a decade later, the deal stands as an example of the precarious nature of the jobs promises that motivate these deals.¹⁸⁵ Although highly secretive about its plans, Foxconn already by 2018 appeared to be building a much smaller factory—less than 5 percent in physical size, at just a fraction of its initial promised investment, and with robots doing much of the assembly work.¹⁸⁶ Wisconsin's current governor later succeeded, over legislative opposition, in renegotiating the terms of the state incentives.¹⁸⁷ But, as reported by the *Financial Times*, “the sprawling complex and 13,000 jobs never came, and the project has become a case study in the gap between dealmaking hype and on-the-ground reality.”¹⁸⁸ Amazon, meanwhile, recently announced it was indefinitely pausing the second phase of its HQ2

183. Associated Press, *Wisconsin Legislators Change Legal Appeal Rules for Foxconn Plant*, CHI. TRIB., <https://www.chicagotribune.com/business/ct-wisconsin-foxconn-court-rules-20170906-story.html> [<https://perma.cc/PS8M-KMMV>] (last updated Aug. 22, 2019, 5:47 AM).

184. *Id.*

185. These debacles demonstrate the dynamics of structural power. Even where dominant firms fail to deliver on the promises used to secure public investments, local officials are often practically constrained from renegotiating incentive awards.

186. Corrinne Hess, Chuck Quirnbach & Laurel White, *Foxconn's Promises Slow To Materialize In Wisconsin*, NPR (Jan. 14, 2020, 5:45 PM), <https://www.wuwm.com/post/foxconn-s-promises-slow-materialize-wisconsin> [<https://perma.cc/C59Y-RFBK>]. For additional information about these robots, see April Glaser, *The New Wisconsin Foxconn Plant Will Probably Be Staffed by Robots—If It Ever Gets Built*, SLATE (July 27, 2017, 4:19 PM), <https://slate.com/technology/2017/07/the-wisconsin-foxconn-plant-will-be-staff-by-robots.html> [<https://perma.cc/24CU-DSZK>].

187. Press Release, Gov. Evers Announces Renegotiated Foxconn Contract to Save Taxpayers \$2.77 Billion (Apr. 20, 2021), <https://content.govdelivery.com/accounts/WIGOV/bulletins/2ce239d> [<https://perma.cc/5EWC-ABV7>].

188. Chávez, *supra* note 180.

project in Arlington, Virginia—“a decision that coincides with the company’s deepest ever job cuts and a reassessment of office needs to account for remote work.”¹⁸⁹

Despite high-profile subsidy failures like Foxconn, state and local governments widely use targeted incentives to entice mobile corporate activity. According to Slattery and Zidar’s estimates, states in 2014 spent between \$5 and \$216 per capita on firm-specific incentives. Evaluating the period from 2002 to 2017, Slattery and Zidar identify total promised discretionary incentives amounting to \$82 billion, or about \$5 billion a year.¹⁹⁰ “[T]hese incentives amounted to nearly 40 percent of state corporate tax revenues for the typical state,” with incentive spending in some states actually exceeding the amounts collected from all firms as corporate tax revenue.¹⁹¹ Researcher Timothy Bartik estimates that for the average firm receiving incentives, the package offsets 30 percent of the “overall state and local business taxes the firm would otherwise pay.”¹⁹²

Many accounts identify the 1970s as an inflection point, during which the overall use of these programs appreciably accelerated.¹⁹³ But the years following the Great Recession have been characterized by the rise of the megadeal.¹⁹⁴ Prior to 2007, state and local governments

189. Matt Day, *Amazon Pauses Construction on Second Headquarters in Virginia as It Cuts Jobs*, BLOOMBERG (Mar. 3, 2023), <https://www.bloomberg.com/news/articles/2023-03-03/amazon-hq2-pauses-construction-amid-layoffs-remote-work> [<https://perma.cc/8W5H-PGX3>].

190. Using Bartik’s alternative—and more expansive—measure, the \$50 billion spent annually on business incentives exceeds, on a nationwide basis, the \$48 billion that companies pay in total state corporate income taxes. For an explanation of the three approaches for measuring the magnitude of state and local business incentives—rules-based, expenditure-based, and narrative-based—see the helpful discussion in Slattery and Zidar, *supra* note 21, at 101–02. Bartik uses a rules-based approach, whereas the Slattery uses an expenditure-based approach, which primarily explains the difference between these estimates. *Id.*

191. *Id.* at 91.

192. BARTIK, *supra* note 176, at 11.

193. Bartik speculates that this shift was related to the national slowdown in wage growth during this period. *Id.* at 7.

194. See Randle B. Pollard, *Was the Deal Worth It: The Dilemma Of States With Ineffective Economic Incentives Programs*, 11 HASTINGS BUS. L.J. 1, 2 (2015); Mary Donegan, T. William Lester & Nichola Lowe, *Striking a Balance: A National Assessment of Economic Development Incentives*, 57 URB. AFFS. REV. 1, 3 (2019) (“In fact, state and local incentive use in the United States has seen a notable uptick in the wake of the 2008–2009 Great Recession . . . reflecting increased desperation for additional jobs.”); Richard Florida, *How Cities and States Can Stop the Incentive Madness*, BLOOMBERG (Nov. 12, 2019, 8:00 AM), <https://www.bloomberg.com/news/art>

entered into fewer than a dozen corporate location deals per year exceeding \$50 million. But after 2008, that rate has more than doubled—to an average of around twenty-five deals annually.¹⁹⁵ These subsidy packages are offered not only to entice new entrants but also to appease domestic corporations threatening to exit the locality.¹⁹⁶ Not only have these multimillion-dollar megadeals become more common during this time, but the typical deal also has become considerably larger: more expensive for the offering jurisdiction, and more lucrative for the locating firm.¹⁹⁷ Citing these trends, as well as the Foxconn and Amazon competitions, the group concluded that “[t]he problem of nine- and ten-figure ‘megadeals’ has become especially acute and persistent since the Great Recession.”¹⁹⁸

And yet, despite the rise of the megadeal, the most widely cited estimate of *overall* public “spending” on corporate location incentives had, as of 2015, shown no appreciable increase since 2001.¹⁹⁹ This fact suggests that, in the years following the Great Recession, a growing share of the United States’ (roughly fixed) location incentive budget is tied up in a handful of giant deals—available only to, and increasingly demanded by, a subset of dominant corporations. In 2017, just twenty firms accounted for \$6 billion in promised tax incentives and

icles/2019-11-12/rethinking-tax-incentives-so-they-actually-work [https://perma.cc/J5S6-XWTC] (“Recent years have seen a startling surge in the use of economic-development incentives by local and state governments.”).

195. Greg LeRoy, *Amazon’s HQ2 and the Rise of Big-Ticket Megadeals*, BLOOMBERG (Sept. 11, 2017, 4:01 PM), <https://www.bloomberg.com/news/articles/2017-09-11/the-problem-for-cities-and-states-with-amazon-s-hq2> [https://perma.cc/WED6-AURP].

196. For example, New Jersey in 2011 offered Panasonic a \$102 million tax credit to keep its North American headquarters within the state, moving to a town only nine miles away rather than across state lines. Charles V. Bagli, *Christie Leaning on Tax Subsidies in Hunt for Jobs*, N.Y. TIMES (Apr. 4, 2012), <https://www.nytimes.com/2012/04/05/nyregion/christie-gives-new-jersey-firms-tax-breaks-for-short-moves.html> [https://perma.cc/N9TU-NV28]; see also Mark Niquette, *States Use Tax Breaks in War for Jobs*, BLOOMBERG BUSINESSWEEK (May 4, 2011, 11:13 PM), <https://www.bloomberg.com/news/articles/2011-05-04/states-use-tax-breaks-in-war-for-jobs> [https://perma.cc/8DDZ-KZGT] (reporting on Ohio governor, John Kasich, offering \$93.5 million in incentives to retain American Greetings Company in the state).

197. See LeRoy, *supra* note 195 (“[T]hese ‘megadeals’ (which we define as \$50 million and above, and most of which are nine or ten figures) show no sign of abating.”).

198. LEROY ET AL, *supra* note 175, at 1.

199. Florida, *supra* note 194 (“[A]round \$50 billion per year [is devoted to incentives]. Almost all of that is in tax incentives. Since 1990, I estimate, incentives have about tripled in the U.S. A lot of that occurred in the 1990s to the early 2000s, and [by] 2001 to 2015, things had roughly stabilized.” (third alteration in original)).

subsidies—*one-third* of states’ economic development budgets.²⁰⁰ By one count, the four major tech companies have collectively received over \$5 billion in recent support from state and local governments.²⁰¹ According to Garofalo, Amazon alone received nearly \$3 billion in location incentives between 2000 and 2020.²⁰²

Recent empirical research confirms that larger firms are more likely to receive generous subsidy packages than their smaller rivals and suggests those deals are least likely to provide the promised economic benefits. Slattery and Zidar’s recent study assesses how firm characteristics affect the ability to secure these subsidies from competing jurisdictions. In a review of 543 firm-specific subsidies between 2002 and 2017, they find that “[l]arge, profitable firms are more likely to receive firm-specific subsidies”—describing the effect as “striking.”²⁰³ Between 80 to 96 percent of incentives go to firms with over 100 employees,²⁰⁴ even though such firms are responsible for two-thirds of private sector employment.²⁰⁵ These findings confirm prior results, which Bartik summarizes as “strongly suggest[ing] that larger firms are much more likely to get incentives, and get larger

200. Slattery, *supra* note 178, at 1.

201. Pat Garofalo, *Your Tax Dollars Built Big Tech*, BOONDOGGLE (July 28, 2020), <https://boondoggle.substack.com/p/your-tax-dollars-built-big-tech> [<https://perma.cc/UEX6-W892>].

202. *Id.*

203. Slattery & Zidar, *supra* note 21, at 104–05. Slattery and Zidar compare subsidy receipts to the full universe of business establishments from the Census Business Dynamics Statistics. They find that more than 30 percent of all establishments with over one thousand employees receive discretionary subsidies. Meanwhile, fewer than 0.2 percent of establishments with under 250 employees benefited from the same. They conclude that “[t]he firms that receive discretionary subsidies not only have larger establishments, but they are also larger than the average public company in terms of employment, profits, revenue, and capital stock.” *Id.*

204. Greg LeRoy, Carolyn Fryberger, Kasia Tarczynska, Thomas Cafcas, Elizabeth Bird & Philip Mattera, *Shortchanging Small Business: How Big Businesses Dominate State Economic Development Incentives*, GOOD JOBS FIRST 7 (2015), <https://goodjobsfirst.org/wp-content/uploads/docs/pdf/shortchanging.pdf> [<https://perma.cc/8KSL-NTCU>].

205. Table F. *Distribution of Private Sector Employment by Firm Size Class*, U.S. BUREAU OF LAB. STATS., https://www.bls.gov/web/cewbd/table_f.txt [<https://perma.cc/E8GU-LPE8>] (last updated July 24, 2024).

incentives.”²⁰⁶ And, as he states elsewhere, “[t]he largest firms benefit most.”²⁰⁷

Not only are the largest firms most likely to get the largest deals (even on a per jobs basis), but recent research also suggests those megadeals may be *least likely* to prove economically beneficial to the offering jurisdiction. The authors of one such study suggest a connection between firms’ dominance (relative to competing state and local jurisdictions) and their ability to extract incentives—observing that “large establishments have greater bargaining power and thus are able to extract incentives, even though they are not producing or promising higher-than-average employment gains.”²⁰⁸ Evaluating 11,276 deals received by 2,486 firms between 1995 and 2010, the authors find that “economic development incentives, on average, fail to produce new employment opportunities.”²⁰⁹ Sorting by firm size shows incentive use for the largest establishments is associated with “starkly negative employment effects,” sufficient to drive the overall result.²¹⁰

C. *Theorizing Structural Power in the Bidding “Market” for Mobile Capital*

The Foxconn and Amazon HQ2 anecdotes above demonstrate some of the high-level parallels between contemporary location incentive megadeals and interjurisdictional competition that helped motivate historical antimonopoly movements. But these more comprehensive studies clarify the specific form of monopoly power that Progressive Era reformers sought to control through the creation

206. Florida, *supra* note 194; see also LEROY ET AL., *supra* note 175, at 1 (“Large, multistate or multinational corporations are grossly favored over small, local and entrepreneurial firms.”); Philip Mattera, *Subsidizing the Corporate One Percent: Subsidy Tracker 2.0 Reveals Big-Business Dominance of State and Local Development Incentives*, GOOD JOBS FIRST 1 (2015), <https://goodjobsfirst.org/wp-content/uploads/docs/pdf/subsidizingthecorporateonepercent.pdf> [<https://perma.cc/NE4V-2WNY>] (“[W]e estimate that at least 75 percent of cumulative disclosed subsidy dollars have gone to just 965 large corporations.”).

207. BARTIK, *supra* note 176, at 13.

208. Donegan et al., *supra* note 194, at 16. One 2019 study tests this question through a “national, time-series, establishment-level study of state and local economic development incentive deals,” which compares “establishments that received an incentive package to a control group of similar, nonincentivized establishments”—breaking out the results by firm size. *Id.* at 2.

209. *Id.* at 2, 7, 9.

210. *Id.* at 3.

of the FTC: the sovereign-like power wielded over local jurisdictions competing for mobile capital resulting from (in Henry George's phrasing) "the aggregation of large masses of capital under a common control."²¹¹ Although not direct evidence, these recent empirical findings suggest that the interjurisdictional "market" for mobile corporate investment is indeed characterized by this distinctive form of monopoly power.

This observation is worth expanding, particularly in the context of competition policy. Across extensive interdisciplinary literatures, corporate location incentives are theorized as the product of an interjurisdictional "market" for mobile capital (and the spillover agglomeration benefits that accompany efficiently allocated private investment).²¹² In these models, location incentives are understood as the market-clearing "price" that results from competition among local jurisdictions participating as buyers in this market.²¹³ Cities putting together incentive packages are understood to be making bids, in something approximating a competitive market, to compensate firms for the jobs and other economic benefits their local investment may provide.²¹⁴

The economic case for location subsidies derives from the theory of allocative efficiency, where subsidies function as a coordinating

211. GEORGE, *supra* note 1, at 192.

212. Many scholars of local government employ a similar model, but they conceptualize the relevant market (and the same "exchange") from the other perspective: as mobile firms "buying" packages of local services from cities competing for residents. *See, e.g.,* Briffault, *supra* note 43, at 1125 ("The possibility of taxpayer exit and, conversely, the possibility of drawing in new taxpayers from other localities provide incentives for local government actions, leading them to vie with each other to retain their taxpayers and attract new ones, just as firms compete for customers."); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1881 (1994) ("Modern economic theory often treats cities not as governments, but as commodities, which are chosen in a municipal marketplace according to their unique combination of tax burdens (price) and services (product)."). These accounts generally extend or modify the foundational Tiebout model. *See generally* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (explaining the foundational model). This Section's analysis is not sensitive to the choice of perspective; firms' market power in the relevant exchange operates to similar effect in both.

213. *See* Ford, *supra* note 212, at 1881 ("The decision to become a resident of a city is analogized to the decision to purchase a product or to invest in a corporation.").

214. *Cf.* Paul Klemperer, *Bidding Markets*, 3 J. COMPETITION L. & ECON. 1, 2 (2007) (challenging certain "myths" behind the "view that antitrust can safely ignore markets conducted through bidding processes").

mechanism that improves the match between firms and locations.²¹⁵ The general idea is that the *same* “unit” of private investment will create economic value for localities in *varying* amounts, depending on local factors. Different jurisdictions then “bid” accordingly in the market for mobile capital.²¹⁶ Under this view, location subsidies can increase welfare by compensating firms for locating where those firms will create comparatively more economic value.²¹⁷ Importantly, this outcome is contingent on local officials’ ability to accurately assess the idiosyncratic economic effects generated by a proposed investment and then limit their bidding accordingly.

The economic rationale for location subsidies thus requires that the “market” (for private investment) function efficiently: free of distortive effects that would de-link jurisdictions’ bids from the magnitude of the discounted spillover benefits that each stands to gain from the investment. There are many such potential distortions, any combination of which help explain the empirical results discussed above. Economists cite, in particular, short-term political calculations—speculated to benefit particularly large and well-known firms seen as prized recruits—as a key reason why the most lucrative

215. Slattery and Zidar summarize that “[i]f providing an additional firm-specific incentive attracts a ‘high-benefit’ firm, the firm’s arrival will lead to higher productivity, more prosperity, and higher tax revenue both from other firms and from higher incomes.” Slattery & Zidar, *supra* note 21, at 96.

216. A well-known 2010 study of agglomeration spillovers connected to plant openings describes this idea:

The main economic rationale for [location] incentives depends on whether the attraction of new plants generates agglomeration externalities. In the absence of positive externalities, it is difficult to justify the use of taxpayer money for subsidies based on economic efficiency grounds. The optimal magnitude of incentives depends on the magnitude of agglomeration spillovers, if they exist.

Michael Greenstone, Richard Hornbeck & Enrico Moretti, *Identifying Agglomeration Spillovers: Evidence from Winners and Losers of Large Plant Openings*, 118 J. POL. ECON. 536, 537–38 (2010).

217. Slattery, *supra* note 178, at 1 (noting also that “[i]f subsidy competition improves matches, allowing states and local governments to offer specialized tax breaks and incentives can increase the allocative efficiency of firm location”); see also Teresa Garcia-Milà & Therese J. McGuire, *Tax Incentives and the City*, BROOKINGS-WHARTON PAPERS ON URB. AFFS. 1, 1 (2002) (arguing that, in some cases, tax competition can be beneficial for the city).

incentive deals, offered almost exclusively to the largest companies, consistently fail to provide the promised benefits.²¹⁸

But an alternative, and complementary, explanation of the same empirical findings might characterize such distortions as representing the effects of *structural power*, as theorized by antimonopoly reformers and later refined by political economy scholars. This form of power helps explain dominant firms' ability to dictate unilaterally the terms of incentive agreements—as observed in contemporary incentive megadeals like the Foxconn boondoggle and in historical experiences like those motivating landmark U.S. antimonopoly protections.

This conceptualization of structural power also clarifies the relevant distinction between distinctive forms of corporate power (1) in product markets, and (2) in the interjurisdictional “market” for mobile corporate investment. Of note, this latter form of (structural) power does not actually require any particular degree of product market concentration; the reference category is the local community (making bids for mobile corporate location), rather than the product market. In certain industries—for example, those characterized by high fixed costs—it would be possible to demonstrate structural dominance over a local community, even absent significant power in product markets.²¹⁹ The same characteristic is true of employer monopsony,

218. BARTIK, *supra* note 176, at 13 (“Why favor large firms? There are bad reasons and good reasons. Among the bad reasons: governors and mayors know that incentives to large firms get the most media attention.”); *see also* Slattery, *supra* note 178, at 2 (finding that states with governors facing reelection are willing to offer locating firms more than their similarly situated—but term-limited—counterparts); Slattery & Zidar, *supra* note 21, at 107–08 (finding that the “interaction between an incumbent governor and an election year is highly correlated with increases in incentive spending, suggesting a strong role for political determinants of incentive provision”).

219. Consider, for example, automobile manufacturers. Within this industry, a given firm's structural power is not determined by its share of cars sold within the relevant product market. Rather, its structural power is controlled by its ability to unilaterally set the terms of agreements with local communities in regional economies where it is considering to invest. Those communities are likely rural, monopsonistic, and opportunity-poor. *Cf.* Shaun Richman, *Company Towns Are Still with Us*, AM. PROSPECT (Mar. 21 2018), <https://prospect.org/economy/company-towns-still-us> [<https://perma.cc/B86C-F5YD>] (“[T]he ever-present threat that factory relocation poses to a one-company town bends the local power structure to the company's will. That's why so many of the newer large factories . . . are located in remote rural areas.”). But note that precisely because this industry is characterized by high fixed costs—and building these facilities, and acquiring land, comprises such a large share of entry costs—firms will gain advantage against their product market rivals based on what share of those costs they can offload to local governments, as discussed *infra* Part III.A.

which can be wielded by a given firm within particular labor markets even as it lacks significant power within the relevant product market.²²⁰

D. Competition Policy and the Spatial Allocation of Economic Investment

This Article makes the case that federal regulation, administered as part of a comprehensive competition policy agenda, can help address some of the economic distortions and other harms created by dominant firms' structural power over state and local governments. As an academic contribution, this argument fits into the emerging literature that seeks to revitalize the field of regulated industries law. In particular, future research should explore how federal policy could incorporate insights from the regulation of markets featuring characteristics of natural monopoly—conceptualizing the spatial allocation of economic investment as akin to essential public utility. This approach could complement the FTC's regulation of unfair business practices envisioned here.

As Hiba Hafiz recently has observed, labor market characteristics in many rural and distressed areas combine to generate significant market power for employers—"present[ing] complex regulatory challenges" that standard antitrust doctrine is ill-suited to remedy.²²¹ To be sure, the interjurisdictional "*market for jobs*"—more precisely, competition for spillover benefits of the economic development that follows mobile investment—is conceptually distinct from the *market for labor*. But large firms making investments in rural and distressed communities that lack significant employment opportunities are likely to possess both market power *over workers* (in thin and monopsonistic labor markets) and structural power *over jurisdictions* (in the market for corporate investment).²²² Remedies that seek to address the former problem—including, as Hafiz proposes, "a public option establishing the federal government as an 'employer of last resort'" in distressed

220. See Hiba Hafiz, *The Law of Geographic Labor Market Inequality*, 172 U. PA. L. REV. 1183, 1210–12 (2024).

221. *Id.* at 1188.

222. *Cf. id.* (observing that "it is most efficient for one employer . . . to supply or purchase services in many rural and distressed areas").

labor markets²²³—would also mitigate structural power in interjurisdictional markets for economic development.

Direct provisioning is a classic response to problems characteristic to natural monopoly.²²⁴ Indeed, the interjurisdictional market for economic investment resembles certain characteristics of others—like the market for railroad infrastructure in the nineteenth century and, more broadly, long-distance transportation infrastructure—where competition policy has been implemented through the law of essential utilities and regulated industry. By contrast to standard antitrust doctrine, this body of law is designed for domains “in which active regulation has been found necessary to compensate for the inability of competition to provide adequate regulation.”²²⁵

As demonstrated above, the existence of structural power in interjurisdictional markets for corporate investment significantly undermines the theorized policy justification for local incentives. But this framework demonstrates how these dynamics also strengthen the case for federal action, which could take various forms, as Part V discusses. Competition policy draws from an expansive toolkit, extending well beyond doctrinal antitrust law.²²⁶ Future research should more thoroughly explore how concepts from the law of essential utilities and regulated industries might be applied to inform

223. *Id.* at 1281.

224. See RICKS ET AL., *supra* note 44, at 43–44 (identifying direct provisioning as a “governmental [power available] to provide . . . infrastructural resources”).

225. *FCC v. RCA Commc’ns., Inc.*, 346 U.S. 86, 92 (1953). Many of its key features—similar to early antitrust statutes—developed in response to problems characteristic to railroad capitalism in the nineteenth century. RICKS ET AL., *supra* note 44, at 475 (“Perhaps more than any other industry, railroads have been formative to [Networks, Platforms, and Utilities] law in the United States.”).

226. This point is worth clarifying. Drawing from the market analogy widely used in social science literatures to capture interjurisdictional competition, this Article does not intend to suggest that traditional doctrines of antitrust law, which aim broadly to promote competition in covered markets, should be applied to competition among local jurisdictions. *Cf.* Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 378 UCLA L. REV. 378, 381 (2020) (“[P]roposals to reform antitrust, or to reconceptualize it, have thus far generally stopped short of questioning the basic premise that its primary function is to promote competition.”). The law of regulated industries demonstrates the wide variety of tools available to policymakers seeking to address the harms of corporate power in markets characterized by similar dynamics.

competition policy in this area.²²⁷ The remainder of this Article focuses on another such mechanism—the FTC’s authority to police the boundary between fair and unfair competition under its § 5 authority.

III. INCENTIVE MEGADEALS AND ANTIMONOPOLY HARMS

Antimonopoly movements during the Gilded Age were substantially motivated by concerns about dominant firms’ structural power over state and local decision-making. Reformers observed that the trusts were able to leverage their structural power over subnational governments competing for mobile corporate activity—whether through lavish railroad subsidies or permissive state corporate charters—to extend their dominance in other domains. The competition harms that followed from their structural power over local decision-making extended well beyond local borders—motivating the conclusion that federal regulation was necessary.

The FTC Act, in particular, was motivated by federal legislative concerns about the spillover consequences of the trusts’ structural power over state and local decision-making. New Jersey’s chartermongering aptly illustrates how unregulated competition in the market for mobile capital will—through the process of leveraging power in one market for advantage in another—tend to undermine fair competition across the economy by creating an artificial market advantage for structurally powerful firms. Indeed, in a recent article evaluating the preemptive authority of the FTC Act’s § 5, which prohibits unfair methods of competition, Professor Daniel A. Crane and practitioner Adam G. Hester recount this same history to develop “an affirmative case for FTC super-preemption power over anticompetitive state laws.”²²⁸

227. One additional advantage of market regulation in this area is the possibility of directly considering place-conscious development goals. See Ganesh Sitaraman, Morgan Ricks & Christopher Serkin, *Regulation and the Geography of Inequality*, 70 DUKE L.J. 1763, 1785 (2020) (“Throughout American history, but particularly in the mid-twentieth century era of geographic convergence, a variety of regulatory policies helped mitigate problems of geographic inequality.”). Such goals could include the sorts of allocative efficiencies that are theorized to be the (aspirational) justification for location incentives.

228. Crane & Hester, *supra* note 132, at 365. This Article’s analysis, like similar literature, focuses on anticompetitive state regulations—listing as examples “restrictive occupational licensing rules, cartel-like limitations on transportation-service providers, product-distribution

Where dominant firms can leverage their structural power over local democratic processes to undermine competition across entire cross-jurisdictional markets, the *policy case* for federal action is most clearly established.²²⁹ As Crane and Hester observe and as Part IV further discusses, the same is generally true regarding the scope of federal *authority* under § 5 of the FTC Act.²³⁰ But even before considering the abstract scope of this regulatory authority, this Part makes the case that corporate location megadeals tend to undermine competition in other markets—creating the types of antimonopoly harms the FTC Act was intended to address.

The FTC Act was enacted to police emerging business practices that tend to have the effect of “injur[ing] consumers, prevent[ing] rivals from competing on the merits, and allow[ing] large corporations to dominate our political system.”²³¹ Recent evidence suggests that corporate location megadeals are indeed undermining healthy channels of competition, with market structure consequences that extend across state and local jurisdictional boundaries. This Part reviews some of the specific categories of legally cognizable antitrust harm that could support FTC action in this area under its § 5 authority: namely, to (1) healthy competition among market rivals, (2) consumers of both private and public goods, (3) workers and labor market competition, and (4) local democratic processes.

rules limiting competition against automobile retailers, restrictions on sharing services like Airbnb, and municipal prohibitions on street-food vendors.” It does not mention location incentives or interjurisdictional competition for tax incentives. *Id.* at 366; *see also* Daniel A. Crane, *Tesla, Dealer Franchise Laws, and the Politics of Crony Capitalism*, 101 IOWA L. REV. 573 (2015) (lacking any mention of local incentives or interjurisdictional competition for tax incentives).

229. *Cf. Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding the Notice of Proposed Rulemaking to Restrict Employers’ Use of Noncompete Clauses Commission File No. P201200*, FED. TRADE COMM’N (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/statement-of-chair-lina-m-khan-joined-by-commrs-slaughter-and-bedoya-on-noncompete-nprm.pdf [<https://perma.cc/4TMM-KHHR>] [hereinafter Statement of Chair Khan] (“Action by federal enforcers is particularly appropriate here given that the harms from [noncompete agreements] flow across state lines.”).

230. *See generally* Crane & Hester, *supra* note 132, at 370–81 (explaining the scope of federal authority under § 5 of the FTC Act).

231. Vaheesan, *supra* note 167, at 650.

A. Harm to Healthy Product Market Competition

During the nineteenth century, rival railroad companies competed for market position through their ability to extract special concessions from state and local governments.²³² Opposition to this form of unfair competition animated the antimonopoly movement, which resulted in the first federal regulation of the railroad industry and, later, other dominant corporations. As White summarizes, “[a]ttacks on special privilege in the form of railroad land grants and unfair railroad rates targeted distortions of competition.”²³³ This Section suggests that contemporary location incentive megadeals—which bear striking resemblance to the forms of state support transferred to private railroad companies—facilitate precisely this form of unfair competition, allowing dominant firms to leverage local jurisdictions’ economic vulnerability to extract generous concessions, further tilting the playing field in their favor.

To date, little empirical work has directly addressed how these megadeals affect the dynamics of market competition. Slattery and Zidar recently identify as “unanswered” the empirical question of whether “targeting subsidies at the largest firms [may] have anticompetitive effects in the product market.”²³⁴ Indeed, it appears no researcher has directly studied the effect of location subsidies on firms’ market power in the United States. But researchers have speculated about how the dominant companies benefitting from these firm-specific incentives might be able to convert this advantage into market power, negatively affecting competitive conditions. Bartik, for

232. RICKS ET AL., *supra* note 44, at 480 (“Early special acts that chartered railroad corporations often conferred temporary monopoly privileges as a means of attracting capital. But even when they didn’t, the special-act regime was itself a barrier to entry: prospective business organizers needed an act of the state legislature, which wasn’t easy to get.”); WHITE, RAILROADED, *supra* note 48, at 98–99 (“[T]here was rarely a single railroad interest. There were multiple competing railroads, and they made Congress and state legislatures places in which to compete.”); *id.* at 103 (“What made the western railroad lobbies different was their evolution into a means for one corporation to fight another corporation. The lobby made politics a realm of economic competition between corporations.”); WHITE, THE REPUBLIC FOR WHICH IT STANDS, *supra* note 30, at 246 (“Jay Gould, like [other railroad magnates], abhorred risk. That is why they sought subsidies, influence over governmental policies, and insider information, which all tipped the playing field in their favor. They used any means, including the corruption of legislatures and judges, to gain such favors.”).

233. WHITE, RAILROADED, *supra* note 48, at 327.

234. Slattery & Zidar, *supra* note 21, at 114.

example, observes that “[b]ecause state and local incentives are disproportionately awarded to large corporations, the market power of such corporations is further strengthened.”²³⁵ And Slattery and Zidar hypothesize that “the fact that only the largest firms receive large discretionary subsidies may facilitate increasing industry concentration.”²³⁶

A consensus has emerged among economists that competition across the domestic economy has notably weakened in recent decades, harming consumers, workers, and overall economic growth.²³⁷ In Part V, this Article shows how the FTC could draw on its economists’ expertise to inform competition policy by investigating whether location incentive megadeals might contribute to this problem within the most affected sectors. In particular, the agency’s Bureau of Economics should study the relationship between the receipt of corporate location incentive megadeals awarded almost exclusively to large firms and cross-jurisdictional distortions to product market structure. But even in the absence of conclusive empirical results, there is extensive suggestive evidence that superior access to state-provided capital—secured through structural power in the market for corporate location—can be leveraged to undermine competition among market rivals.

Location incentives are legal commitments, demanded from competing local jurisdictions, that transfer public resources to specific favored firms—but *not* to their rivals. When structurally powerful firms receive these targeted benefits from states and localities, they secure an artificial market advantage (in the form of access to capital) that is unavailable to their competitors that lack the same bargaining power

235. BARTIK, *supra* note 176, at 110; *see also* Florida, *supra* note 194 (“Does providing the largest incentives to the very largest firms increase the market power of these firms in a way that is damaging to our economy and society?”).

236. Slattery & Zidar, *supra* note 21, at 105.

237. Press Release, White House, The Importance of Competition for the American Economy (July 9, 2021), <https://www.whitehouse.gov/cea/written-materials/2021/07/09/the-importance-of-competition-for-the-american-economy> [<https://perma.cc/R3V9-6RRM>] (“There are numerous studies that show increased concentration across a large number of industries in the economy.”); *see also* Spencer Y. Kwon, Yueran Ma & Kaspar Zimmermann, *100 Years of Rising Corporate Concentration*, 114 AM. ECON. REV. 2111, 2136–37 (2024).

vis-à-vis the state.²³⁸ By conferring to the receiving firm superior access to capital, these preferential forms of state aid may ultimately affect market structure. If the general logic is straightforward, the specific mechanisms by which location incentives can harm market competition are aptly summarized by the European Commission's 2005 State Aid Action Plan:

State aid measures [may] provide unwarranted selected advantages to some firms, preventing or delaying the market forces from rewarding the most competitive firms It may also lead to a build-up of market power in the hands of some firms, for instance when companies that do not receive State aid . . . have to cut down on their market presence, or where State aid is used to erect entry barriers.

Or, as researcher Pat Garofalo more succinctly phrased it, “[e]very dollar granted to [dominant firms] by a state or local government is one more dollar they have to bury the competition, which likely didn’t receive a similar dollar from the public coffers.”²³⁹

Dominant firms receiving megadeals are able to reduce the costs of doing business relative to their smaller competitors; they can then use this financial advantage to increase their market share. Additionally, in order to offset the budget costs of these massive deals, jurisdictions may increase costs on other rival firms, as through higher taxes. As Slaterry and Zidar observe, “[i]f the tax revenue generated from additional employment and economic activity falls short of paying for the incentive, it will need to be financed through higher taxes or lower public service provision, reducing the welfare of local workers.”²⁴⁰ Indeed, they find empirical evidence that “[s]tates with higher per capita incentives tend to have higher state corporate tax rates.”²⁴¹

This general dynamic can take various forms. For example, nontax financial incentives may take the form of “tax increment financing,” whereby local governments divert a portion of future tax revenue

238. Cf. Bhattarai, *supra* note 5 (“‘This is the most coveted headquarters project in the country, and Amazon will use it as a way to grow even faster,’ Boyd said. ‘New infrastructure investments, workforce training programs, tax incentives — all of those will help Amazon down the line.’”).

239. Garofalo, *supra* note 201.

240. Slaterry & Zidar, *supra* note 21, at 95.

241. *Id.* at 91.

collected from others—ostensibly attributable to the marginal private investment—to identified development expenses. Where combined with targeted tax incentives, these vehicles can effectively allow the favored firm to collect a share of the tax obligations incurred by other residents while avoiding any tax payments of its own. Moreover, once these initial concessions are acquired, the incumbents can use their established position—and existing relationships with local officials structurally beholden to the subsidized firm—to grow their influence and expand into new business lines.²⁴²

In addition to those more common forms, some recent location incentives have taken the form of direct interventions in market competition to the advantage of favored firms—namely, by selectively eliminating charges imposed by the state (like sales taxes) onto their consumers. Terming this new and emerging category of subsidy as “customer-based incentives,” Hayes Holderness describes their effects on market competition:

The primary benefits of customer-based incentives—direct or indirect—to the firm are straightforward. Beyond the administrative cost savings that come with not having to collect sales taxes, the firm receives the competitive advantage of being physically present in the state and its customers not having to pay sales taxes on their purchases from it. This competitive advantage may result in both more customers and more profits per customer if the firm also raises its pretax prices to capture some of the tax relief offered by the incentives.²⁴³

242. Alec MacGillis has reported, for example, about how Amazon used its relationship with Prince William County to ensure that they won a request for proposals clearly designed for Amazon. ALEC MACGILLIS, *FULFILLMENT: WINNING AND LOSING IN ONE-CLICK AMERICA* 157 (1st ed. 2021) (“[S]eeking bidders to provide not only office supplies, but a broader ‘online marketplace for the purchases of products . . .’”). After acquiring the contract, Amazon changed it to require that “school districts and public agencies . . . alert Amazon if anyone made a public-records request relating to the contract, giving the company the chance to block a release of information.” *Id.* at 158. Amazon then encouraged schools and local governments to make all purchases through the company, including by routing existing contracts with local suppliers through the marketplace. *Id.* But “[l]eft unmentioned in this was the matter of the roughly 15 percent cut that Amazon would take from any sales that those local suppliers made on the Marketplace”—thus enabling Amazon, “through the fees that it charges sellers, to collect a private tax on their sales.” *Id.* at 158–59.

243. Hayes R. Holderness, *The Unexpected Role of Tax Salience in State Competition for Businesses*, 84 U. CHI. L. REV. 1091, 1100–01 (2017).

This form of state aid has two consequences, both of which distort product market competition. To the extent that the favored firm responds to the incentive by increasing *pretax* prices to match the previous *posttax* price, such incentives effectively transfer public funds (the foregone sales tax revenue) to the favored firm. To the extent that pretax prices are not adjusted, the favored firm receives a competition advantage (relative to its non-favored product market rivals) from the artificial price advantage that the state action creates (rather than competition on the merits).

As Holderness recounts, states have increasingly provided Amazon with such incentives “in exchange for Amazon’s commitment to create and maintain a certain number of jobs in the states and to invest certain amounts in facilities in the states.”²⁴⁴ Perhaps most significantly, “[t]he states do not appear to have provided customer-based incentives (direct or indirect) to any firm other than Amazon.”²⁴⁵ Such recipients are thus able to convert their structural power in these jurisdictions into an artificial market advantage unavailable to smaller competitors—who lack the structural power to negotiate such targeted regulatory favors from the state—ultimately undermining fair competition.

B. Harm to Consumers of Market and Public Goods

The FTC should study whether the superior access to capital provided to structurally dominant firms through incentive megadeals is associated with price or output effects for consumers of market goods. But there is another form of consumer harm that deserves attention in this particular context. During the period when Congress was considering the Sherman and FTC Acts, concerns about consumer welfare—emphasized in the legal scholarship and adopted by courts and antitrust agencies alike—were tied to the public obligations that followed from the privileges the state bestowed onto corporations. Indeed, in public discourse and congressional floor statements, the onerous charges imposed by the railroads onto consumers were

244. *Id.* at 1104.

245. *Id.* at 1104–05.

frequently analogized to unjust “taxes.”²⁴⁶ The 1886 Senate Select Committee on Interstate Commerce, for example, used this language to describe railroads’ delegated rate authority:

The only reason for the existence of railroad corporations, is that they might undertake a duty which the State was unable or unwilling to perform, and to that extent they exercise a public function As the most convenient and equitable method of raising whatever amounts should be needed for these purposes, such corporations have been authorized to . . . place this burden, which must in some way be borne by the people, upon the passengers and freight transported instead of upon the property of the entire community, as other taxes are commonly levied.²⁴⁷

At the same time, as reviewed in Part I, contemporary popular antimonopoly sentiment was driven in part by the new taxes and other charges that local governments imposed to backfill budget shortfalls that had resulted from railroad subsidies.

A full accounting of this legislative history is beyond the scope of this Article. But this historical context suggests that regulatory authorities should consider recognizing the cost and quality of public services that are offered *by the state*, either directly or through private contract, as cognizable consumer harms. Such an inquiry would consider whether particular unfair methods of competition—including dominant firms’ incentive demands—tend to result in increased utility rates, regressive fees charged for public services, or diminished quality of local public goods like education and infrastructure.

Although this relationship would be difficult to establish in the individual instance, the theorized pathway likely operates in practice. In recent years, local governments increasingly are adopting user-fee models that effectively convert residents into consumers of public

246. See, e.g., H.D. Lloyd, *The Story of a Great Monopoly*, ATLANTIC, Mar. 1881, at 318 (“No other system of taxation has borne as heavily on the people as those extortions and inequalities of railroad charges which caused the granger outburst in the West, and the recent uprising in New York.”). White defines how monopolies operate:

An enterprise became a monopoly when it encompassed an activity that citizens could not normally avoid, and so gained an ability to extort what antimonopolists sometimes termed rents but more often a tax. A tax was any taking of a portion of the value of a product that was not the result of an addition of value to that product.

WHITE, RAILROADED, *supra* note 48, at 112.

247. SENATE INTERSTATE COMMERCE REPORT, *supra* note 101, at 41.

goods and services through fiscal cost shifting.²⁴⁸ Authorities seeking to apply an antimonopoly framework might examine whether a government replaced the revenues newly allocated for private purpose by charging “higher prices” to local consumers of public goods—as through new road tolls, bus fares, public defender fees, city ambulance charges, or cost-shifting privatization.

This framework additionally recognizes that—as the Interstate Commerce Committee report notes—many goods and services provided by state and local governments are substitutes with privately provided market goods.²⁴⁹ Bartik observes that “the net financial costs of incentives, after netting out fiscal benefits, must come from somewhere in state and local budgets.”²⁵⁰ Specifically, “[s]ome taxes must be raised or some public spending cut.”²⁵¹ If a jurisdiction looks to recoup those losses through higher prices on services residents consume as alternatives to market options, those economic consequences should be considered under an antimonopoly framework as if private firms provided both options.²⁵²

This basic dynamic can take different forms. Recent reporting established that Google data centers use 29 percent of all water in one Oregon city.²⁵³ The information was revealed even though the tech giant filed a lawsuit to keep such documents secret.²⁵⁴ In his book about Amazon’s fulfillment centers, journalist Alec MacGillis reports on one Virginia jurisdiction’s effort to construct a new 230-kilovolt power line

248. See Brian Highsmith, *Republicans Want You (Not the Rich) to Pay for Infrastructure*, N.Y. TIMES (June 23, 2021), <https://www.nytimes.com/2021/06/23/opinion/infrastructure-plan-ta-x-republicans.html> [https://perma.cc/W8CZ-XQPX].

249. *Id.* Consider a city bus service partially funded by assessed fares. Residents in the jurisdiction might—at a given price point—choose to purchase local travel services from the city, substituting away from their consumption of private alternatives (like a taxi service or ride-sharing applications). But if the city faces new budget pressures, such as those resulting from a corporate location incentive, it will look to generate replacement revenues from other sources.

250. BARTIK, *supra* note 176, at 6.

251. *Id.*

252. Here again is the same dynamic just described. A company’s market power in one domain (the market for “job creation,” where jurisdictions pay companies with subsidies) leads to taxpayer harm in another domain (higher prices for government-funded goods and services).

253. Mike Rogoway, *Google’s Water Use Is Soaring in The Dalles, Records Show, with Two More Data Centers to Come*, OREGONIAN (Feb. 22, 2023, 10:17 AM), <https://www.oregonlive.com/silicon-forest/2022/12/googles-water-use-is-soaring-in-the-dalles-records-show-with-two-more-d-ata-centers-to-come.html> [https://perma.cc/HZE9-25H6].

254. *Id.*

to a substation—built at a public cost of \$65 million to serve Amazon specifically.²⁵⁵ Under state law, an extension intended for a single user must be paid for by that user.²⁵⁶ But the Virginia legislature approved a proposal to pay for the power line with a monthly fee on *all* ratepayers.²⁵⁷ Amazon then filed a seventy-eight-page application to state regulators “seeking a special discounted rate for the power it would be using at its data centers,” which it then insisted be made off limits to public request.²⁵⁸

More broadly, writing in 1984, Clarence Stone observed that “regressive taxes, like sales taxes, have become more prevalent” as local governments have aimed to subsidize and assume some of the risks of economic transformation.²⁵⁹ For example, in 2022, Oklahoma state legislators scrapped plans to eliminate the state’s regressive tax on groceries after a majority agreed to allocate \$698 million for an incentive package aimed to entice an unknown company, rumored to be Panasonic. One state representative who opposed the deal articulated his frustration that residents would pay higher (tax-inclusive) prices as a result of the incentive package: “If the grocery tax [relief] doesn’t pass as a result of having to give three quarters of a billion dollars to an unnamed company, I think that’s pathetic. . . . Oklahomans need help. Panasonic does not.”²⁶⁰

Such an analysis, moreover, might consider not only *price* effects (as through higher charges on government-provided services) but also changes in the *quality* of public goods and services. One national study of corporate location incentives estimated that property tax

255. MACGILLIS, *supra* note 242, at 185.

256. *Id.* at 188.

257. *Id.* at 189.

258. *Id.*

259. Clarence N. Stone, *City Politics and Economic Development: Political Economy Perspectives*, 46 J. POL. 286, 289 (1984). Professor Adolph Reed notes a similar relationship in his classic study of Black urban regimes. Highlighting the “regressive impact” resulting from “the use of public resources to underwrite . . . economic growth,” he observes that “growth [by way of public subsidy] may even increase certain material costs for city residents across the board.” J. ADOLPH REED, *STIRRINGS IN THE JUG: BLACK POLITICS IN THE POST-SEGREGATION ERA* 101–02 (1999).

260. Janelle Stecklein, *Some Lawmakers Want to Cut Taxes Rather than Provide \$698 Million Incentive*, ENID NEWS & EAGLE (Apr. 26, 2022), https://www.enidnews.com/news/business/some-lawmakers-want-to-cut-taxes-rather-than-provide-698-million-incentive/article_6f39e566-c5ac-11ec-b920-53f0b249076d.html [<https://perma.cc/TG3E-ECJJ>].

abatements—selective reductions in the taxation of corporate property—constitute nearly 30 percent of total corporate tax incentives in the average state.²⁶¹ Those incentives directly affect funding for local public schools, which receive, on average, around half of their funding from local tax revenues.²⁶² The cumulative effect is significant. One recent study estimates that “economic development tax abatements given to corporations cost public school districts at least \$2.37 billion in foregone revenue in FY 2019.”²⁶³ In one Missouri school district, for example, this loss totaled around \$2,000 per student.²⁶⁴ Similar consequences can be seen at the state level. Kansas, for example, dramatically scaled back funding for public education—with some schools forced to close early or eliminate instruction days—after historic business income tax cuts reduced state revenues by \$700 million.²⁶⁵

This framework recognizes that residents “consume” goods and services that are provided by the state; it would recognize as legally cognizable the harm associated with dominant corporations leveraging their structural power to reduce their payment of taxes, to the extent that doing so tends to result in higher costs or lower quality for residents (in their capacity as consumers of public goods and services). Although this represents a new way of thinking about antitrust harm—and deserves greater space than is available here—the conceptualization is ultimately still grounded in a notion of consumer welfare that is consistent with legislative history and substantially

261. TIMOTHY J. BARTIK, W.E. UPJOHN INST. FOR EMP. RSCH., A NEW PANEL DATABASE ON BUSINESS INCENTIVES FOR ECONOMIC DEVELOPMENT OFFERED BY STATE AND LOCAL GOVERNMENTS IN THE UNITED STATES 89 (2017).

262. See Phyllis McClure, Ross Wiener, Marguerite Roza & Matt Hill, *Ensuring Equal Opportunity in Public Education: How Local School District Funding Practices Hurt Disadvantaged Students and What Federal Policy Can Do About It*, CTR. FOR AM. PROGRESS 1, 1 (2008).

263. CHRISTINE WEN, KATIE FURTADO & GREG LEROY, GOOD JOBS FIRST, ABATING OUR FUTURE: HOW STUDENTS PAY FOR CORPORATE TAX BREAKS 2 (2021), <https://goodjobsfirst.org/wp-content/uploads/docs/pdfs/Abating%20Our%20Future.pdf> [<https://perma.cc/M8S9-H6NC>].

264. Celisa Calacal, *Tax Breaks for Developers Cost Every KCPS Student \$1,925 in 2019*, FLATLAND (Apr. 28, 2021), <https://flatlandkc.org/news-issues/tax-breaks-for-developers-cost-every-kcps-student-1925-in-2019> [<https://perma.cc/3PK6-2ZL2>].

265. See Michael Leachman, *Timeline: 5 Years of Kansas' Tax-Cut Disaster*, CTR. ON BUDGET & POL'Y PRIORITIES (May 24, 2017), <https://www.cbpp.org/blog/timeline-5-years-of-kansas-tax-cut-disaster> [<https://perma.cc/3FSF-MCG6>].

similar to what courts and antitrust authorities have recognized in other contexts.

C. Harm to Workers and Local Labor Markets

A growing literature has emphasized the role of statutory antitrust protections in protecting fair labor market competition. When Congress passed the Sherman Act almost unanimously in 1890, its sponsors described the law’s purpose as reining in the power of the “trusts” that dominated many industries at the time, including by distributing the economic benefits accruing to powerful monopolies across suppliers of goods and labor. Supporters of the law spoke of the need to restrain predatory business practices that harmed the processes of competition by which economic rewards are distributed—identifying a range of injuries from excessive concentration that could incur not only to consumers but also workers, farmers, and other suppliers. Senator John Sherman, for example, observed that a trust “commands the price of labor . . . for in its field it allows no competitors.”²⁶⁶ And as reviewed in the agency’s recent policy statement regarding its § 5 authority, “[t]he FTC Act’s legislative history makes it clear that Congress intended the statute to protect a broad array of market participants including workers and rival businesses.”²⁶⁷

Although public enforcement efforts have focused on the ways that sellers exercise market power in output markets, firms can also exercise market power as buyers—by lowering prices or altering terms of trade adversely to the sellers of inputs, including labor. In 2016 remarks, Acting Assistant Attorney General Renata Hesse stated that “[t]he ultimate concern of antitrust law has always been protecting competition at all levels of the economy”—including “among employers to attract workers.”²⁶⁸ As Hesse noted, antitrust laws target

266. 21 CONG. REC. 2457 (1890).

267. Fed. Trade Comm’n Pol’y Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Fed. Trade Comm’n Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf [<https://perma.cc/Z75D-TPYH>].

268. Renata Hesse, Assistant Att’y Gen., Antitrust Div., Opening Remarks at 2016 Global Antitrust Enforcement Symposium (Sept. 20, 2016). AAG Hesse also explained that the task of ensuring that workers have meaningful choices when they enter the labor market is fundamental to the government’s obligation to ensure economic fairness because “it yields higher wages, better benefits, and safer working conditions.” *Id.*

any attempt to obtain or keep economic power unfairly by sidestepping the normal competitive process—protecting consumers and “workers, whose wages won’t be driven down by dominant employers with the power to dictate terms of employment.”²⁶⁹ Reflecting this perspective, federal antitrust authorities have in recent years “prioritized competition enforcement and advocacy in labor markets.”²⁷⁰

Congress was motivated to enact statutory antitrust protections in part to ensure that large-scale industry would no longer be in a position to unilaterally dictate employment terms to workers unable to bargain on free and fair terms. Yet precisely this dynamic describes many of the rural communities that entice corporate investment through location incentives. Indeed, the (literal) textbook example of monopsony power in labor economics is a “company town” where a single employer accounts for nearly all of the local demand for labor such that even those who do not work for the company still depend on that employer for wages.²⁷¹ One 2018 report argued that as a result of corporate concentration and the various other market forces that drive regional inequality, “many rural Americans live in modern-day company towns”:

Depressed communities often use economic development subsidies to entice large employers to locate in their town. However, these costly subsidies sometimes leave communities dependent on one employer, which can devolve quickly into a hostage situation in which the employer has the power to persuade local and state governments to make further payouts in order to retain jobs Using the evergreen threat of relocation, these firms can extract rents from

269. *Id.*

270. U.S. DEP’T. TREASURY, THE STATE OF LABOR MARKET COMPETITION 53 (2022); cf. Hiba Hafiz, *Towards a Progressive Labor Antitrust*, 125 COLUM. L. REV. (forthcoming 2025) (manuscript at 35) (on file with author) (“More aggressively than ever, New Labor Antitrust enforcers have taken on employers’ anticompetitive conduct, and in the case of the FTC, perhaps broader worker exploitation and coercion.”).

271. Cf. Suresh Naidu & Arindrajit Dube, *Monopsony Power in Labor Markets*, NAT’L BUREAU OF ECON. RSCH.: THE REPORTER (Apr. 24, 2014), <https://www.nber.org/reporter/2024number1/monopsony-power-labor-markets> [<https://perma.cc/H8QK-CYY6>] (“Concentration refers to having a small number of employers in the market—in the extreme case, a company town.”).

workers and local governments who find their economic viability—and tax base—dependent on one employer.²⁷²

Empirical analyses have identified suggestive evidence of this dynamic. For example, one recent study looks at the economic effects of foreign multinational investment in the United States, which are often shaped by location incentives.²⁷³ The authors identify evidence of a modest wage premium for workers employed directly by such firms that persists after accounting for worker skill composition—but find that those foreign firms “are able to extract a sizable fraction of the [economic] surplus from such investments in the bargaining with local governments for mega-deals.”²⁷⁴ Another study concluded that the arrival of new Amazon²⁷⁵ fulfillment centers is associated with a reduction of retail wages within one hundred miles by 2.5 percent, equivalent to an \$825 decrease in annual income.²⁷⁶

The exercise of monopsony power in these cases is facilitated by the dominant firms’ structural power over the communities in which

272. Caius Z. Willingham & Olugbenga Ajilore, *The Modern Company Town*, CTR. FOR AM. PROGRESS (Sept. 10, 2019), <https://www.americanprogress.org/article/modern-company-town> [https://perma.cc/DWJ4-V3HT].

273. Bradley Setzler & Felix Tintelnot, *The Effects of Foreign Multinationals on Workers and Firms in the United States*, 136 Q.J. ECON. 1943, 1944 (2021).

274. *Id.* at 1947, 1985 (“Since foreign multinationals are mobile in their location choices for large plant openings or expansions, it is intuitive that in the bargaining with local authorities over mega-deals, they typically extract a large fraction of the overall local benefits via subsidy payments.”).

275. The study does not name the “major e-commerce retailer” that it examines, but it can be reasonably presumed to be Amazon based on details in the study discussion and design. *See also* STACY MITCHELL & OLIVIA LAVECCHIA, INST. LOC. SELF-RELIANCE, AMAZON’S STRANGLEHOLD: HOW THE COMPANY’S TIGHTENING GRIP IS STIFLING COMPETITION, ERODING JOBS, AND THREATENING COMMUNITIES 6 (2016), https://cdn.ilsr.org/wp-content/uploads/2020/04/ILSR_AmazonReport_final.pdf [https://perma.cc/R2EC-4JS] (studying the effect of Amazon’s labor model on jobs and wages).

276. Sudheer Chava, Alexander Oettl, Manpreet Singh & Linghang Zeng, *Creative Destruction? Impact Of E-Commerce on the Retail Sector 2* (Nat’l Bureau of Econ. Rsch., Working Paper No. 30077, 2022), <https://www.nber.org/papers/w30077> [https://perma.cc/L9RY-AXSX]. Garofalo summarizes the findings:

Put all of these numbers together and you have a corporation that not only drags down conditions for workers in the exact industry it enters, but also harms those in adjacent industries, as well as local businesses, sucking everything in the local economy into its orbit and leaving the wider community worse off

Pat Garofalo, *Amazon Warehouses Kill Jobs and Wages*, BOONDOGGLE (June 16, 2022), <https://boondoggle.substack.com/p/amazon-warehouses-kill-jobs-and-wages> [https://perma.cc/4JU8-S7DT].

they often locate. As *The Economist* recently reported, “Amazon’s relentless expansion is not just revolutionising shopping . . . [it] is also affecting towns, such as Bessemer, Alabama, that wooed it in the hope of revitalising their economies.”²⁷⁷ This sort of dominance in the labor market represents a distinct form of corporate power, which operates across multiple channels. In addition to their direct power as employers in labor markets where alternative options are scarce, these firms’ dominance can also harm workers by undermining state and local governments’ willingness to enforce legal protections.

In one notable example, a 2020 investigation by the Occupational Safety and Health Administration found merit in allegations that Indiana’s workplace safety agency had—during an elaborate state-led effort to secure Amazon’s second headquarters—taken inappropriate steps to clear Amazon in the 2017 workplace death of one of its Plainfield warehouse employees.²⁷⁸ The official whose complaint triggered the investigation attested that days after a conference call with Amazon officials about the investigation, he was pulled into the office of Indiana’s labor commissioner.²⁷⁹ Standing by the commissioner’s desk was the governor, who “told him how much it would mean to Indiana if the state won the Amazon headquarters deal.”²⁸⁰ The commissioner then “told him to back off on the Amazon case—or resign.”²⁸¹ Or in Iowa, the state economic development authority declined to claw back any of the \$36.4 million in incentives and rebates it had issued to a local pork plant after a federal

277. *What Happens When Amazon Comes to Town*, *ECONOMIST* (Mar. 26, 2022), <https://www.economist.com/united-states/what-happens-when-amazon-comes-to-town/21808308> [<https://perma.cc/RZU6-2AY3>].

278. Will Evans, *Indiana Manipulated Report on Amazon Worker’s Death to Lure HQ2, Investigation Says*, *INDIANAPOLIS STAR* (May 7, 2020), <https://www.indystar.com/story/news/investigations/2020/05/07/indiana-too-quick-clear-amazon-death-federal-agency-says/3087096001> [<https://perma.cc/9GS2-7PND>].

279. Will Evans, *Indiana Manipulated Report on Amazon Worker’s Death to Lure HQ2, Investigation Says*, *INDIANAPOLIS STAR* (Nov. 25, 2019, 12:16 PM), <https://www.indystar.com/story/news/investigations/2019/11/25/amazon-indiana-governor-eric-holcomb-warehouse-accident-hq-2/4282653002> [<https://perma.cc/UM83-MZRF>].

280. *Id.*

281. *Id.*

investigation found that the plant had illegally underpaid hundreds of its workers.²⁸²

In addition to regulatory forbearance, this form of corporate power can also be exercised through affirmative state action. In an effort to forestall a recent union drive in its Bessemer warehouse, for example, Amazon asked local officials to alter traffic light patterns outside its warehouse during shift changes to make it more difficult for organizers to talk to commuting workers.²⁸³ After city officials initially denied the report, Jefferson County later confirmed they had “increased the green light duration in an effort to clear workers off the worksite faster.”²⁸⁴ This sort of enlistment of state power for private ends aptly illustrates the final category of antitrust harm considered here—to the processes and institutions of local democracy.

D. Harm to Local Democratic Self-Governance

When the Senate Select Committee issued its 1886 report, special attention was given to reports of widespread corruption in the process of extracting special concessions from state legislatures and local governments—and to the democratic harms that collectively undermined the ability of local communities to govern themselves. This concern—an articulation of structural power—informed legislators’ conclusion that federal regulation was needed:

But when we consider the imperial influence which these most mighty engines of civilization can exercise upon the development, progress, and commerce of the country, making possible the ruin or prosperity of cities, States, or even larger areas of our territory by the exercise of their power, it becomes evident that the State possesses the right to supervise and regulate the administration of such imperial power upon the broad ground of public policy, in addition to the fact that a

282. Tyler Jett, *No Incentive Clawback for Pork Plant: Agency Says It Considers Matter Closed*, DES MOINES REG. (Mar. 18, 2022), <https://www.desmoinesregister.com/story/money/business/2022/03/17/iowa-agency-wont-take-away-tax-incentives-seaboard-triumph-plant-sioux-city/7049510001> [<https://perma.cc/7DTF-5RHH>].

283. Russell Brandom, *Amazon Changed Traffic Light Timing During Union Drive, County Officials Say*, VERGE (Feb. 17, 2021), <https://www.theverge.com/2021/2/17/22287191/amazon-alabama-warehouse-union-traffic-light-change-bessemer> [<https://perma.cc/VKD9-WWWC>].

284. *Id.*

railroad corporation manages a public highway, exercises a public function, and is in the nature of a monopoly.²⁸⁵

Even as views on the necessary remedy varied widely among contemporaries, Joseph Fishkin and William E. Forbath recount that “radical, reform-minded, mainstream, and conservative analysts agreed that ‘the modern corporation and association of incorporations called trusts’ put both republican self-rule and equal opportunity in peril.”²⁸⁶

Such concern about the democratic implications of concentrated economic power helped motivate the enactment of our federal antitrust laws. Rahman describes that “[t]he goal of antitrust reform was to prevent the concentration of economic power by trusts and to enhance individual freedom by protecting against economic—and potentially political—domination.”²⁸⁷ Senator John Sherman described his legislation as “a bill of rights, a charter of liberty.”²⁸⁸ Another senator warned that monopolies were “a menace to republican institutions themselves.”²⁸⁹ Animating this vision was a belief that concentration of economic power also necessarily consolidates political power. Decades later, during debates on the FTC Act, “fears about concentrated economic and political power and indeed private autocracy were another important theme in the legislative debates.”²⁹⁰

Part II reviewed the empirical evidence that location incentive awards are distorted by dominant firms’ structural power over state and local decision-making. Researchers have also found that higher corporate subsidy spending in a state is associated with increased campaign contributions for incumbent politicians. Specifically, when a state starts awarding “large” subsidies—defined as a big jump from the historical baseline—annual campaign contributions increase by “20.5% (or \$158,600) from lobbyists and lawyers who represent large

285. SENATE INTERSTATE COMMERCE REPORT, *supra* note 101, at 42.

286. JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY* 210 (2022); *see also* TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* 54 (2018) (describing the Sherman Act “as a new kind of limit: a check on . . . the growth of monopoly corporations into something that might transcend the power of elected government to control”).

287. K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* 72 (2016).

288. 21 CONG. REC. 2461 (1890) (statement of Sen. John Sherman).

289. 21 CONG. REC. 3146 (1890) (statement of Sen. George F. Hoar).

290. Vaheesan, *supra* note 167, at 660.

firms in the political process, and 106.8% (or \$122,000) from large business advocacy and trade organizations.”²⁹¹ Corporations that make state-level campaign contributions are almost four times more likely to receive subsidies—and when they do, “the award is 63 percent larger.”²⁹² One 2016 study of state economies finds “that a greater number of lobbyists and campaign contributions from businesses leads to more subsidy spending, all else equal.”²⁹³ These ulterior motives can take the form of outright corruption, facilitated by the lack of transparency and magnitude of the dollars at stake. A task force investigating New Jersey’s state economic development agency, for example, found that extensive lobbying and insider dealing had significantly inflated the cost of awarded subsidy deals.²⁹⁴ Indeed, according to a study by the Kansas City Federal Reserve, locations with more “troubled political cultures” spend more on corporate subsidies.²⁹⁵

This assertion is not merely abstract—many dominant firms now demand, as a condition of their location within a jurisdiction, broad exemption from open records laws designed to ensure public accountability. The widespread—and growing—use of NDAs to prevent government officials from disclosing proposals to allocate public money to private use also harms the democratic process. As

291. Russell S. Sobel, Gary A. Wagner & Peter T. Calcagno, *The Political Economy of State Economic Development Incentives: A Case of Rent Extraction*, 31 ECON. & POL. 104, 105 (2024).

292. Daniel Aobdia, Allison Koester & Reining Petacchi, *The Politics of Government Resource Allocation: Evidence from U.S. State Government Awarded Economic Incentives* 4 (Working Paper, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3127038 [<https://perma.cc/4PY3-R38X>].

293. Joshua M. Jansa & Virginia Gray, *Captured Development: Industry Influence and State Economic Development Subsidies in the Great Recession Era*, 31 ECON. DEV. Q. 50, 50 (2017).

294. See Nancy Solomon, *New Jersey Puts \$578 Million in Controversial Tax Breaks on Hold After Investigation*, PROPUBLICA (July 13, 2020, 1:15 PM), <https://www.propublica.org/article/new-jersey-puts-578-million-in-controversial-tax-breaks-on-hold-after-investigation> [<https://perma.cc/CN4V-8XMQ>]; Nick Corasaniti & Matthew Haag, *The Tax Break Was \$260 Million. Benefit to the State Was Tiny: \$155,520*, N.Y. TIMES (May 1, 2019), <https://www.nytimes.com/2019/05/01/nyregion/nj-tax-break-kevin-sheehan.html> [<https://perma.cc/7SVS-947G>].

295. Specifically, the study finds that “increasing the rate at which government officials are convicted of federal corruption crimes by 1 per 100,000 residents over a 13 year period is associated with a 2.9 percent greater chance that a community will offer business incentives.” See R. Alison Felix & James R. Hines, Jr., *Who Offers Tax-Based Business Development Incentives?* 2 (Bureau of Econ. Rsch., Working Paper No. 17466, 2011), https://www.nber.org/system/files/working_papers/w17466/w17466.pdf [<https://perma.cc/KQ5X-4ZH4>].

Garofalo phrases it, “[l]arge, profitable corporations are demanding secrecy while they negotiate for billions of public dollars that are being granted by explicit statute to them individually.”²⁹⁶ The practice has recently become standard for the sort of megadeals discussed in this Article—meaning that the public often does not learn about the tremendous fiscal obligations and regulatory relief promised on its behalf until after the deal is finalized.

IV. INSTITUTIONAL ADVANTAGES OF A REGULATORY APPROACH

Drawing on historical context, economic theory, and contemporary reporting, this Article has made the case that dominant firms’ efforts to gain artificial advantages over their rivals through the expropriation of local public resources represents the sort of conduct that U.S. antitrust protections were designed to address. In addition to this *substantive case* for action under these legal authorities, this Part argues that a public enforcement approach—targeting cognizable antitrust harms—also provides important *institutional advantages* that improve both the normative desirability and success likelihood of government action.

This Part suggests that the FTC’s § 5 authority is a uniquely attractive vehicle for challenging this form of corporate power and misallocated public investment. This proposed enforcement strategy solves the coordination problem—between subnational jurisdictions competing over increasingly concentrated sources of private capital—that derives from the United States’ fiscal federalism design. It allows regulators to appropriately target the dominant firms that leverage their structural power over economically vulnerable competing jurisdictions, rather than scrutinizing only the state actions that result from such imbalanced bargaining dynamics. In contrast to private claims pursued under state and federal constitutional law, this approach also would allow the independent agency to draw on its institutional expertise by targeting those egregious business practices most likely to undermine fair competition—without disrupting the entire system of location-based policy incentives. Finally, this general approach can be adopted through a wide range of supervision activity

296. Pat Garofalo, *A Big, Bad NDA Mystery Mess*, BOONDOGGLE (Feb. 9, 2022), <https://boondoggle.substack.com/p/a-big-bad-nda-mystery-mess> [<https://perma.cc/P62X-B6QT>].

and enforcement strategies, ranging from the direct preemption of harmful practices—like the use of NDAs to bind public officials—to more modest actions—like the commissioning of expert studies investigating the effects of incentive megadeals on market structure.

A. Previous (Unsuccessful) Attempts

Before considering some of the ways the FTC Act could apply an antimonopoly analysis, it is worth considering briefly why past approaches have fallen short. These enforcement failures, this Section suggests, are due partly to the inadequate space provided within the doctrine for the specific consideration of the antitrust harms reviewed in Part III.

Corporate location incentives, as noted above, are by near-universal consensus considered beyond the reach of current federal statutory regulation.²⁹⁷ But scholars and advocates, joined by some politicians, have over the years—responding to growing evidence of the attendant aggregate harms—pursued various additional strategies to rein in their use. These efforts have broadly fallen into three categories: (1) voluntary efforts at interstate coordination, (2) state constitutional protections barring public appropriations for private use, and (3) interpretations of the federal constitution’s Commerce Clause that prohibit protecting in-state businesses from out-of-state rivals and unduly burdening interstate commerce.²⁹⁸ As demonstrated by the evidence reviewed above, it is fair to say these strategies have fallen short. But their failure offers important lessons about what an effective response *would* require—and good reasons to believe that a regulatory approach, implementing an antimonopoly framework, might yield greater success.

297. See *supra* notes 24–25.

298. In this respect, a list—from the 1999 student note mentioned above—of the currently available and (unenacted) potential “non-Commerce Clause constraints on state location incentives” is representative of the literature: “[N]on-commerce Constitutional provisions; voluntary non-compete agreements; international trade agreements, making location incentives more efficient; and a possible federal legislative response, all of which may restrict out-of-control state location incentive warfare.” Steven R. Little, Note, *Corporate Welfare Wars: The Insufficiency of Current Constraints on State Action and the Desirability of a Federal Legislative Response*, 22 HAMLINE L. REV. 849, 874 (1999).

1. *Voluntary Interjurisdictional Coordination.* Just as some state and local public officials in the late nineteenth century attempted to pursue coordinated action to stop the beggar-thy-neighbor regulatory spiral that resulted from the interstate competition for corporate charter activity, so too have states today pursued similar compacts. They have been similarly unsuccessful in those pursuits, for precisely the same reasons that eventually motivated Congress to create the FTC.

In striking parallel to the St. Louis Anti-trust Conference, the National Governors' Association in 1993 adopted a resolution seeking to limit states' use of corporate location incentives—encouraging governors “to withstand the political pressure that may result when they announce that their state will not engage in a bidding war.”²⁹⁹ Just as the 1899 compact failed when individual states “pursued their own parochial interests in imitating New Jersey,”³⁰⁰ this more recent joint effort fell apart when one of its organizers—Illinois Governor Jim Edgar—“repeatedly had to compromise his own principles to accommodate the demands of major Illinois employers.”³⁰¹

Just two years before that resolution, a similar agreement, between New York, New Jersey, and Connecticut (to stop offering incentives to businesses relocating from one of the three states to another), failed to last even a single year.³⁰² A contemporary account quoted Connecticut's economic development director: “I would welcome another meeting, but let's also be realistic. We're all protecting our job base.”³⁰³ More recently, seeking to end the “border wars” that had caused both states collectively to lose \$217 million in tax revenue³⁰⁴ in jurisdictional tax competition over businesses

299. NAT'L GOVERNORS ASS'N RESOL., ECONOMIC GROWTH AND DEVELOPMENT INCENTIVES (1993), reprinted in GREG LEROY, RICHARD HEALEY, DAN DOHERTY & HANY KHALIL, NO MORE CANDY STORE: STATES AND CITIES MAKING JOB SUBSIDIES ACCOUNTABLE 117, 119 (1994); see *supra* Part I.B.

300. Tung, *supra* note 125, at 84.

301. Enrich, *supra* note 24, at 397.

302. Steven Prokesch, *Promises Aside, States in Region Fight With One Another for Jobs*, N.Y. TIMES (Nov. 30, 1992), <https://www.nytimes.com/1992/11/30/nyregion/promises-aside-states-in-region-fight-with-one-another-for-jobs.html> [<https://perma.cc/93E7-44A8>] (“Despite such calls for cooperation, the fighting seems to be escalating.”).

303. *Id.*

304. *The New Border War*, ECONOMIST (Mar. 22, 2014), <https://www.economist.com/united-states/2014/03/22/the-new-border-war> [<https://perma.cc/79TL-4KUY>].

operating within the Kansas City metropolitan area, Missouri and Kansas tried unsuccessfully to reach a truce.

Currently, an ongoing campaign is enlisting state legislators from both parties to revive the interstate compact against “corporate tax giveaways.”³⁰⁵ But the same coordination problems that gave rise to these giveaways seem likely to prevent the compact from coming into existence, much less having any real bite. A Federal Reserve official summarized the dynamics that prevent effective state-level action at a 2007 congressional hearing: “The States won’t, on their own, stop using subsidies and preferential taxes to attract and retain businesses. . . . [A]s long as a single State engages in this practice, others will feel compelled to compete.”³⁰⁶

2. *State Constitutional Protections.* Most state constitutions today ban the appropriation of public funds for private use—prohibitions that were, in many cases, added in response to states’ experience with the local railroad subsidies.³⁰⁷ As common as corporate location megadeals have become, the vast majority of them might initially seem constitutionally invalid under these provisions. Judge Jeffrey S. Sutton has described them as reflecting “a procedural and substantive limit on state legislation” dedicating fiscal resources to private entities, such that “one could imagine the state courts enforcing these provisions rigorously.”³⁰⁸ But, as explained in his account, “that has not happened.”³⁰⁹

305. COALITION TO PHASE OUT CORPORATE TAX GIVEAWAYS, <https://endtaxgiveaways.org> [<https://perma.cc/7JA8-39SJ>].

306. Arthur J. Rolnick & Melvin L. Burstein, *Congress Should End the Economic War Among the States*, FED. RESRV. BANK MINNEAPOLIS (Jan. 1, 1995), <https://www.minneapolisfed.org:443/article/1995/congress-should-end-the-economic-war-among-the-states> [<https://perma.cc/Y2QJ-BLA8>].

307. See *supra* Part I.A; cf. Alan Hall, *Understanding the Anti-donation Clause: A Historical Perspective*, RODEY L. FIRM, May 23, 2014, at 1, https://www.rodey.com/wp-content/uploads/2022/05/rodey_anti_donation_clause_history.pdf [<https://perma.cc/X7JU-35GV>] (“[T]he best way to understand the [Anti-donation Clause of the New Mexico Constitution] . . . is to understand the history of the evil that the Clause was intended to counter. This requires a diversion into the amazing world of nineteenth-century railroad finance.”).

308. JEFFREY S. SUTTON, WHO DECIDES?: STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 263 (2021) (emphasis omitted).

309. *Id.*

Although there is some variation across states, the judicial inquiry under current doctrine generally proceeds in three steps: determining (1) what types of monetary assistance are constitutionally suspect, (2) whether the suspect monetary assistance serves a public purpose, and (3) what remedy should follow if the challenged spending is determined to meet both preceding prongs. But each of these steps is fraught. The first manages to be simultaneously too narrow and too expansive.³¹⁰ The second invites legislative judgement that courts are neither eager to engage in nor well positioned to undertake.³¹¹ And the third provides pragmatic judges with so few options that their analysis of the first two steps seems shaped by the goal of avoiding the third.³¹² In this context, it should come as no surprise that the public purpose doctrine has failed its basic task.

Moreover, current doctrine makes no distinction between subsidies offered to dominant firms and those offered to their smaller

310. Although states' public-purpose provisions contain different language, some courts have interpreted them as restricting only direct public spending transferred to private actors. But if the concern is the allocation of public resources within states and local governments that must generally balance their budget every year, this distinction makes little sense: Why should it matter whether those resources are dedicated through appropriated spending rather than targeted-tax expenditures? Courts' narrow focus on "spending" also overlooks the value—and democratic implications—of the regulatory *favors* that increasingly are offered as part of corporate location incentives. *Id.*

311. This stage of the inquiry requires courts to determine whether (constitutionally suspect) direct spending might still be permissible on the grounds that it primarily benefits the public rather than the private party that receives the allocation. *Maready v. City of Winston-Salem*, 467 S.E.2d 615, 624 (N.C. 1996). But there are two problems with this framework. First, it requires courts to reach what are essentially legislative judgments about which public purposes are "legitimate" and therefore allowable. In practice, it is generally enough for the legislature to point vaguely to the goal of "increasing the tax base" and the "creation of new jobs"—which is nearly *always* claimed as public justification, even in defense of the very worst deals. *Cf. Town of Beloit v. Cnty. of Rock*, 657 N.W.2d 344, 354 (Wis. 2003). As Wisconsin Supreme Court Chief Justice Abrahamson explained in her dissent, this test quickly "becomes a charade if a town may justify expenditures by merely offering enough of the proper buzzwords, 'job creation,' 'orderly growth,' 'increasing the tax base,' and 'environment[al] concerns,' without any facts to back up the assertions." *Id.* at 358–59 (Abrahamson, C.J., dissenting).

312. Should any challenged spending fail both prior tests, a straightforward application of the public-purpose clauses would seem to demand that the entire allocation be struck down as an unconstitutional private transfer. In other words, it is either all in or all out. And whether or not judges acknowledge it openly, their analyses of the first two prongs seem to be shaped by pragmatic considerations regarding the third prong—and, in particular, by the (arguably appropriate) hesitation to declare entire common categories of state "economic development" spending per se unconstitutional.

local competitors or any other group.³¹³ Indeed, the doctrine has been used to challenge such power-balancing forms of government action as a municipal grant of \$10,000 to a nonprofit supporting tenants organizing in Madison, Wisconsin.³¹⁴ This lack of distinction persists even as judges sometimes reveal, through their reasoning, that their jurisprudential determinations are shaped by antimonopoly concerns that are never directly considered in the current doctrine. Dissenting from a decision not to apply the constitutional protection to challenged assistance, for example, North Carolina Supreme Court Justice Robert Orr highlighted the plaintiffs' arguments that allowing "direct grants to specific, selected businesses" ultimately amounts to "selected corporate welfare to some of the largest and most prosperous companies in our [s]tate and in the country."³¹⁵

Despite these concerns, Judge Sutton summarizes that "the state courts have been hands off in the main in limiting their legislatures' assessment of what counts as a public purpose."³¹⁶ Although various factors have contributed to this doctrinal development, evidence suggests the same coordination problem that prevents effective state-led legislative action on this issue also has undermined litigation under state constitutional law. Hearing the appeal of a trial court decision that had invalidated local incentive awards under the state's constitutional public purpose requirement, for example, the North Carolina Supreme Court in 1999 expressed concern that the state

313. Because state courts tend to defer to legislative judgement on whether legislators enacted a particular deal to advance a "legitimate" public purpose, decisions tend to turn instead on whether a constitutional provision covers a challenged subsidy at all. Judges applying these provisions expend great trouble parsing legal distinctions that have very little relevance to the ostensible goal of democratic budgeting—instead policing questions like the enforceable line between direct and indirect monetary assistance. Although not the focus of this Article, future scholarship might explore how state courts could similarly adopt an antimonopoly framework to ground their consideration of corporate location incentives challenged under public-purpose provisions.

314. See *Hopper v. City of Madison*, 256 N.W.2d 139, 144 (Wis. 1977); cf. Devin Rose, *Madison's Tenant Resource Center Marks 30 Years of Brokering Tenant-Landlord Relations*, WIS. ST. J. (Oct. 22, 2010), https://madison.com/news/local/article_adaad39c-de54-11df-8d89-001cc4c002e0.html [<https://perma.cc/J2H9-MACK>] ("Tenants wanted repairs to get done and stable rental prices. Landlords thought the many tenant unions cropping up were getting too organized, and pressured city council members to stop funding the Madison Tenant Union, which had brought dozens of lawsuits against them.").

315. *Maready*, 467 S.E.2d at 635 (Orr, J., dissenting).

316. SUTTON, *supra* note 308, at 263.

“currently stands alone in so holding” governmental expenditures for economic incentives to be unconstitutional.³¹⁷ “[W]hile this Court does not pass upon the wisdom or propriety of legislation,” the majority noted, “it would be unrealistic to assume that the State will not suffer economically in the future if the [challenged] incentive programs . . . are discontinued.”³¹⁸

3. *The Dormant Commerce Clause.* Although corporate location subsidies are generally understood to be beyond the reach of current federal statutory regulation, commenters acknowledge that incentives may be legally suspect to the extent they unduly burden interstate commerce. This constitutional theory—in contrast to the state constitutional provisions just discussed—emerges not from express text motivated by popular opposition to location subsidies, but rather through the novel application (and proposed refinement) of longstanding judicial doctrine interpreting the federal Commerce Clause.

In an influential 1996 article, Peter D. Enrich argued that the Supreme Court “can and should interpret the Commerce Clause as . . . a restraint” on “the use of tax incentives to entice businesses to locate or expand in a particular state.”³¹⁹ He proposed judicial adoption of a new “reframed antidiscrimination principle”—prohibiting “state tax measures that discriminate against interstate commerce by distorting the decisions of economic actors in favor of expenditures on in-state activities”³²⁰—under which “business location incentives would be virtually per se unconstitutional.”³²¹ Of note, he grounded his case for pursuing such an approach in large part on the subnational coordination challenges described above: “Not only can the measures taken by each state undermine the economies of the others, but states may also find themselves caught in a ‘race to the bottom,’ in which

317. *Maready*, 467 S.E.2d at 627.

318. *Id.* at 626–27.

319. Enrich, *supra* note 24, at 381.

320. *Id.* at 457–58; see, e.g., *Bos. Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 329 (1977) (“No [s]tate . . . may ‘impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.’” (quoting *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959))).

321. Enrich, *supra* note 24, at 458.

competitive pressures compel them each to adopt measures contrary to their citizens' interests."³²²

Despite—or perhaps, in part, because of—the expansive nature of this constitutional claim, efforts to enforce its restrictions have failed. The last major development in this vein was nearly two decades ago when—in a case that Enrich helped initiate and then argued³²³—the Sixth Circuit invalidated an Ohio investment tax credit on antidiscrimination grounds in *Cuno v. DaimlerChrysler, Inc.*³²⁴ The Sixth Circuit's interpretation called into question the constitutionality of economic development incentives nationwide, casting legal doubt on a wide—and uncertain—range of place-based incentives. The Supreme Court granted certiorari on the question but declined to reach the Commerce Clause merits, vacating the lower court's decision on standing and jurisdictional grounds in 2006.³²⁵ But even before the Supreme Court issued its ruling, federal legislators had introduced a bill that would have preserved states' rights to use economic development incentives.³²⁶ And in the aftermath of the ruling, “[s]tates have continued to include investment tax credits in their menu of economic development tax incentives, and state tax competition has continued unabated.”³²⁷

B. The EU State Aid Regime as a Comparative Model

As these brief reviews demonstrate, the legal and political strategies currently imagined to be available as a check against this

322. *Id.* at 380; *see also id.* at 467 (“If the promise of a revitalized federalism is to be realized, . . . the states must operate within a framework of limits that protects them from falling into competitive vicious cycles.”).

323. *See* Paul Caron, *Students Help Enrich Prepare for Oral Argument in Cuno*, TAXPROF BLOG (Jan. 26, 2006), https://taxprof.typepad.com/taxprof_blog/2006/01/students_help_e.html [https://perma.cc/8CZG-GMFM] (“About a year after his article was published, Enrich was contacted by consumer advocate and former presidential candidate Ralph Nader, and he agreed to take up the cause of a group in Toledo, Ohio, including Charlotte Cuno.”).

324. *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738 (6th Cir. 2004), *vacated in part*, 547 U.S. 332 (2006).

325. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 351–52, 354 (2006).

326. *See* Walter Hellerstein, *Cuno and Congress: An Analysis of Proposed Federal Legislation Authorizing State Economic Development Incentives*, 4 GEO. J.L. & PUB. POL’Y 73, 75–78 (2006).

327. Michelle D. Layser, *Removing Barriers to State Tax Incentive Reform*, 171 U. PA. L. REV. 1235, 1287 (2023).

form of corporate dominance have fallen short for three general reasons that are each, in part, *institutional* in nature.

The two available state-led solutions both have been hindered by the same prisoners' dilemma that also prevented effective action against either the railroad subsidies of the late nineteenth century or the race to the bottom observed in the corporate chartermongering of the early twentieth century. The Commerce Clause approach partially resolves this issue, by interpreting *federal* constitutional text that would bind across jurisdictional boundaries. But this doctrine, like the state constitutional claims, provides no way of distinguishing between the numerous—and *very* different—contexts in which subnational governments today opt to directly support private actors. The lack of distinction threatens the legality of extremely broad categories of government action, including, for example, routine grantmaking to local community groups. Related to this deficiency, these two constitutional approaches also arguably target the wrong actor—the governmental entity over whom structural power is being exercised, rather than the dominant firms exercising such power. Finally, both of these legal strategies can be pursued exclusively through litigation—examining, in isolation, specific grant awards, as challenged by private parties—rather than either public enforcement actions or reasoned decision-making (considering stakeholder input) through rulemaking by independent federal agencies.

The regulatory approach envisioned in this Article resolves each of these problems, which together have undermined previous attempts to mitigate the various harms presented by corporate location megadeals. It retains the key advantage of the Commerce Clause approach (overcoming the coordination challenge) while accommodating important distinctions that specifically target competition harms³²⁸ and avoid sweeping up broad categories of government action. Even beyond these important advantages that apply generally to a multipronged competition policy framework, the

328. Notably, Enrich alludes to competition harms perpetuated through location incentives, noting that “one potential source of challenges to business location incentives is local businesses that object to the state assisting their prospective competitors.” Enrich, *supra* note 24, at 443 n.368. However, Enrich raises this possibility in the context of plaintiff standing for a constitutional challenge, rather than the federal laws designed to prohibit unfair competition. *Id.* at 414–15.

FTC's § 5 authority is particularly well-suited for regulatory action in this area for reasons detailed below.³²⁹

As an illustrative case study of this sort of approach—and additional persuasive evidence that forms of state aid are properly part of an effective competition policy agenda—consider the EU's restrictions on “State aid.” This doctrine restricts “any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.”³³⁰ In other words, many corporate incentives commonly offered in the United States not only are generally *unlawful* under EU law—they are held to violate its laws regulating *competition*. One casebook summarizes:

The purpose of controlling and, if necessary, prohibiting, State aid is to avoid *undue* actual or potential distortions of competition and negative effects on trade. Accordingly, public support to undertakings is only prohibited . . . if it “distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods” and only insofar as it “affects trade between Member States.” These are two distinct and necessary elements of the notion of State aid. . . . On the impact on competition test specifically, a measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes.³³¹

The origins of this policy reflected a view, among the founders of the European Community, “that state aids could give companies an unfair advantage and undermine the functioning of the common market.”³³² Under these longstanding guidelines, investment subsidies and tax incentives must generally be limited in size and targeted at poorer regions—recognizing the allocative economic justification

329. See *infra* Part IV.C.

330. Consolidated Version of the Treaty on the Functioning of the European Union art.107, May 9, 2008, 2008 O.J. (C 115) 49, 91 [hereinafter Consolidated European Union Treaty]; see also Umur Aydin & Kenneth P. Thomas, *The Challenges and Trajectories of EU Competition Policy in the Twenty-First Century*, 34 J. EUR. INTEGRATION 531, 537 (2012) (“[S]tate aid policy, based on Articles 107–109 of the TFEU, regulates and monitors national subsidies to ensure that they do not distort competition by giving an unfair advantage to their recipients.”).

331. EUGENE STUART & IANA ROGINSKA-GREEN, SIXTY YEARS OF EU STATE AID LAW AND POLICY 41–42 (2018) (quoting Consolidated European Union Treaty, *supra* note 330, at 91).

332. Aydin & Thomas, *supra* note 330, at 538.

articulated in Part II.³³³ The financial crisis and pandemic-related economic challenges, in combination with general concerns about international tax competition and industrial policy, have more recently prompted discussions about relaxing certain aspects of this policy.³³⁴ But over many years, starting in the “1990s, EU competition policy has become more concerned with normal or generic goals of competition law — that is, the prevention of harm to competition — rather than with market integration.”³³⁵

In 2016, for example, the European Commission determined that Ireland had violated this provision when it granted Apple tax benefits worth 13 billion euros.³³⁶ Announcing the judgment, European Commissioner for Competition Margrethe Vestager articulated the logic of an antitrust approach to state aid regulation: the firm-specific subsidy had violated competition policy because it “enabled [Apple] to pay substantially less tax than other businesses over many years.”³³⁷ Indeed, in public remarks at a recent conference, one European Commission staff member cited Amazon’s HQ2 search as an illustration of “why it is important to have a State aid control mechanism from an economic point of view.”³³⁸

333. One scholar considers the successes of the EU’s framework:

[I]t seems fair to conclude that locational tournaments are under better control in the EU; the Multi Sectoral Framework/Regional Aid Guidelines are doing their job at reducing the incentives given to large investment projects while contributing to regional policy objectives by concentrating state aid for mobile investment in poorer areas of the EU.

Kenneth P. Thomas, *EU Control of State Aid to Mobile Investment in Comparative Perspective*, 34 J. EUR. INTEGRATION 567, 577–78 (2012).

334. See, e.g., Vincent Delhomme & Tamara Hervey, *The European Union’s Response to the Covid-19 Crisis and (the Legitimacy of) the Union’s Legal Order*, 41 YEARBOOK EUR. L. 48, 67 (2022) (“The [E.U.] has relaxed the ordinary rules of trade and other obligations of Union membership, such as public procurement, competition, and state aids law, so as to make it easier for its Member States to adopt social and employment protection measures in the face of . . . the pandemic.”); European Commission Press Release IP/21/6245, *State Aid: Commission Adopts Revised State Aid Rules on Important Projects of Common European Interest* (Nov. 25, 2021).

335. Aydin & Thomas, *supra* note 330, at 538 (internal quotation marks omitted) (quoting DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE* 384 (1998)).

336. James Kanter & Mark Scott, *Apple Owes \$14.5 Billion in Back Taxes to Ireland*, *E.U. Says*, N.Y. TIMES (Aug. 30, 2016), <https://www.nytimes.com/2016/08/31/technology/apple-tax-eu-ireland.html> [<https://perma.cc/QW8F-DY73>].

337. European Commission Press Release IP/16/2923, *State Aid: Ireland Gave Illegal Tax Benefits to Apple Worth up to €13 Billion* (Aug. 30, 2016).

338. Wout De Cock, *15th EStALI Interactive Forum on EU State Aid Law 2019*, 18 EUR. ST. AID L.Q. 438, 440 (2019).

But even where enforcement is not pursued, the European Commission plays an important *supervisory* role: “Member states are required to notify the European Commission of any proposed state aid so that the Commission can determine whether the aid qualifies for exemption. The Commission also keeps existing aid under constant review and requires member states to provide it with annual reports.”³³⁹ This centralized data collection role stands in stark contrast with the current domestic status quo. As Garofalo summarizes, “[i]t’s often nigh impossible [in the United States] to track who is spending what on whom because government bodies either don’t keep a comprehensive data set [of location incentives] or do so somewhere that renders it inaccessible to all but the most dogged searchers.”³⁴⁰

The EU State aid law is aimed at achieving the primary goal of the Commerce Clause strategy—arguably the most successful of the recently attempted efforts to regulate U.S. firms’ incentive demands. Meanwhile, it also recognizes the sort of competition harms described here. And unlike the Commerce Clause strategy, the EU State aid regime specifically distinguishes between relevant *categories* of aid: “While it is forbidden for the Member States to grant direct or indirect funding to specific enterprises or groups of enterprises . . . [they may offer] broadly designed economic incentives which are, in principle, available to all agents within the economy.”³⁴¹

Writing for U.S. antitrust scholars interested in reviving the ideas of Progressive Era reformers, Professors Kathleen Thelen and Chase Foster recently argue that the U.S. has much to learn from the European Commission, which “applies its expertise to permit ‘healthy’ forms of coordination (e.g., among less powerful economic actors such as small businesses and workers) while prohibiting ‘unhealthy’ (e.g., coercive) forms—and to continually update its rules in line with new information, technological developments, and feedback from industry.”³⁴² Their account focuses on the doctrinal regulation of

339. David R. Collie, *State Aid in the European Union: The Prohibition of Subsidies in an Integrated Market*, 18 INT’L J. INDUS. ORG. 867, 868 (2000).

340. PAT GAROFALO, *THE BILLIONAIRE BOONDOGGLE* 76 (1st ed. 2019).

341. LEIGH HANCHER, YVO DE VRIES & FRANCESCO M. SALERNO, *EU STATE AIDS* 478 (6th ed. 2021).

342. Chase Foster & Kathleen Thelen, *Brandeis in Brussels? Bureaucratic discretion, social learning, and the development of regulated competition in the European Union*, 18 REGUL. & GOVERNANCE 1083, 1084 (2024).

horizontal coordination and the institutional advantages of agency administration, but also makes the case more broadly that “European competition law offers a particularly instructive example for [American] reformers,” including by “embod[ying] many of the features of Brandeis’ ideal of regulated competition.”³⁴³ This Section suggests that the European State aid regime provides an additional opportunity for cross-national learning in competition policy.

C. *Judicial Limitations on Antitrust Litigation*

In addition to offering advantages over the types of federal and state *constitutional* litigation that have been attempted (mostly without success), a public enforcement approach can be targeted to avoid many of the procedural obstacles that limit *antitrust litigation* in this area, particularly as pursued by private parties under the Sherman Act. This Article distinguishes between the application of *antitrust law*—the limitations of which in this context are acknowledged—and the forms of federal *market regulation* that are specifically authorized under the FTC Act. A full accounting of the judicial doctrines that limit antitrust law in this area, and the possibilities for litigation that might remain under current law, should be elaborated in future work. This Article aims to establish, more narrowly, that § 5 of the FTC Act provides one—among several—plausible paths forward for federal action.

Demonstrating that a category of firm behavior may tend to result in discrete competition harms is quite different from establishing the existence of specific legal authority to pursue corrective action under antitrust authorities as currently interpreted by federal courts. Indeed, one of the reasons that legal scholarship has not yet considered the possibility of federal regulation in this area under existing authority is that a variety of judicial doctrines have combined to narrow the reach of federal antitrust law with respect to state and local policymaking. In particular, judicial doctrines broadly immunize state-imposed restraints on competition—as well as the actions of private parties petitioning for such policies—from many forms of antitrust liability. Current and former FTC officials James C. Cooper and William E. Kovacic summarize the conventional understanding of these doctrines:

343. *Id.* at 8.

In the United States, the Supreme Court has crafted two judicial doctrines that greatly hamper the ability of the antitrust laws to deter state-imposed competition restraints. First, out of respect for federalism, restraints imposed directly by the state sovereign—a state legislature or a state supreme court, acting in a legislative capacity—are protected from antitrust challenge under the state action doctrine. Further, the state action doctrine may shield actions taken by subsidiary government entities and by private parties in some circumstances. Guided by First Amendment concerns, the *Noerr-Pennington* doctrine prevents agencies from bringing actions against parties for the anticompetitive effects of state action they urge.³⁴⁴

As they observe, “[b]ecause government action (and private conduct to obtain such action) is challengeable in only relative[ly] narrow circumstances, much of the battle [against anticompetitive state regulations] takes place in the legislative and regulatory arenas rather than in courts.”³⁴⁵

Based on such an understanding, it might seem initially that—despite the historical and economic case developed above—antitrust law, and perhaps even antimonopoly frameworks more broadly, are of no relevance to this broad policy area. But this Article develops several critical distinctions that challenge that view—at least in particular contexts and on qualified terms.³⁴⁶ Indeed, despite the judicial

344. Cooper & Kovacic, *supra* note 26, at 1567.

345. *Id.* at 1557.

346. The application of antitrust law to state subsidies would not be unprecedented, even in the United States. Consider, for example, the recent antitrust challenge brought by one city against the subsidies offered by another to fund the construction of a professional football stadium. In *City of Oakland v. Oakland Raiders*, Oakland sued the National Football League (“NFL”) as well as its member teams on the grounds that they had unlawfully “created artificial scarcity in their product (NFL teams), and then used that scarcity . . . to demand supra-competitive prices from host cities.” 20 F.4th 441, 448 (9th Cir. 2021). Although the Northern District of California ruled against the City of Oakland for failing to state a claim upon which relief could be granted, its decision hinted at the possibility for cities to allege antitrust harm based on lost tax revenue stemming from “an agreement between a local government and a private entity.” *City of Oakland v. Oakland Raiders*, 445 F. Supp. 3d 587, 599, 604 (N.D. Cal. 2020), *aff’d*, 20 F.4th 441 (9th Cir. 2021). The Ninth Circuit panel affirmed that Oakland’s theory was not entirely misplaced—noting that “[t]hese are precisely the kinds of harms to competition that the antitrust laws were intended to prevent.” *City of Oakland*, 20 F.4th at 457. This case is not a perfect parallel: Oakland’s legal theory did not allege that the *subsidies themselves* (or teams’ efforts to secure them) were anticompetitive, but rather that the *subsidy amounts* demanded from cities were *artificially high* as a result of the NFL’s unlawful restriction on professional football

limitations they describe, Cooper and Kovacic note: “The U.S. competition policy system provides some means for government agencies and private litigants to challenge government restraints on competition.”³⁴⁷ Future work should more comprehensively delineate the boundaries of regulatory possibility in this context, but—as an initial statement—consider the following distinctions.

First—and most important—is the critical point that state-action immunity doctrine first articulated in the 1943 *Parker v. Brown*³⁴⁸ decision limits the preemptive scope of the Sherman Act.³⁴⁹ By contrast, lower courts have not uniformly applied *Parker* immunity to FTC enforcement actions over the past eighty years.³⁵⁰ Crane and Hester recently demonstrated that “[n]either *Parker* nor its progeny squarely addressed whether antitrust enforcement by the FTC should be bound by the same constraints.”³⁵¹ There are, moreover, good reasons to distinguish between the two sources of legal authority. Drawing on similar historical context as reviewed in Part I.B., Crane and Hester argue that “the FTC Act’s context and history, as well as the commission’s institutional distinctiveness, suggests that the *Parker* doctrine is misapplied to the FTC”:

[U]nlike the Sherman Act of 1890, the FTC Act of 1914 evidences a congressional concern with anticompetitive state regulation. First, the FTC Act emerged from a Progressive Era reaction to weaknesses in state corporation law and proposals for a preemptive federal incorporation regime. Although Congress ultimately rejected the federal incorporation model, it did so in the belief that the creation of a new federal commission could solve the problems created by state facilitation of anticompetitive behavior that had occurred in the previous decades through the race to the bottom in state corporate law. Second, the FTC Act’s legislative history evidences a congressional belief that the FTC would have powers akin to that of

franchises. *Id.* at 448. But it does illustrate that scope exists for the extension of antitrust scrutiny in this area. *Id.* at 448–49.

347. Cooper & Kovacic, *supra* note 26, at 1567.

348. *Parker v. Brown*, 317 U.S. 341 (1943).

349. *Id.* at 352.

350. Crane & Hester, *supra* note 132, at 377. (“[D]espite frequent FTC litigation over the *Parker* doctrine over many decades, that legal issue [whether the Court’s logic in *Parker* and its progeny does not apply with equal force to the FTC] remains undetermined.”).

351. *Id.* at 368.

the Interstate Commerce Commission. . . . [C]ongressional references to the FTC as a generalist ICC for competition should be understood to imply a congressional understanding that the FTC would enjoy preemptive powers over state regulations that might facilitate anticompetitive behavior.³⁵²

For additional reasons elaborated in the next Section, they further note that, “from the perspective of institutional design, the FTC shares few of the attributes of Sherman Act enforcement that lead to concerns about excessive federal judicial control over state economic regulation.”³⁵³ They conclude “that the best historically informed and institutionally sound reading of Section 5 of the Federal Trade Commission Act suggests that the FTC should enjoy what the Supreme Court has hypothesized as ‘superior preemption authority’ over state and local regulations that unduly restrict competition.”³⁵⁴

It is possible that courts reviewing some future FTC action may ultimately take a different view. But this evidence demonstrates that it would be a mistake to simply assume without examining that this federal agency—created specifically to regulate problems created, in substantial part, by interjurisdictional tax competition—entirely lacks authority to take *any sort* of regulatory action related to this *broad category* of competition harms. Indeed, despite their emphasis on the judicial limitations imposed by these judicial doctrines, Cooper and Kovacic also argue that, in an integrated modern economy, “federalism arguments based on notions of state sovereignty and the local nature and effects of economic regulation arguably should be reassessed in light of the larger national interest in promoting a common economic union.”³⁵⁵

These objections so far have focused on the direct federal preemption of state and local policymaking. But as noted throughout the previous Parts, the most plausible—and arguably appropriate³⁵⁶—

352. *Id.* at 369; *see supra* Part I.B.

353. Crane & Hester, *supra* note 132, at 368; *see also id.* at 370 (“The FTC has economic expertise and institutional resources to analyze complex economic trade-off decisions, which the federal courts may lack.”).

354. *Id.* at 367–68.

355. Cooper & Kovacic, *supra* note 26, at 1578.

356. *Cf. Enrich, supra* note 24, at 468 (“In the competition over location incentives, mobile multistate businesses are not victims of state efforts but, in fact, are their primary beneficiaries.

target of regulatory scrutiny envisioned by this proposed approach is the *dominant firms* that exercise their power to secure these incentives. Specifically, that target ought to be unfair and anticompetitive firm behavior—rather than the *state and local government actions* that are distorted by their structural power. An analogy here can be made to the way that federal legislators, in enacting the FTC Act in 1914, opted to resolve the problems presented by interstate competition for corporate charter activity: Rather than entirely uprooting the state-based chartering system that was understood to have led to the abuses, they instead created an expert agency and charged it with regulating specific *anticompetitive practices*.³⁵⁷ This is one key difference between the FTC’s potential authority and the EU State aid prohibition, which generally constrains *state* actions rather than firm behavior.

In contrast with the state-action immunity doctrine that has developed as a specific interpretation of the Sherman Act, the *Noerr-Pennington* doctrine “rests on the primary principle of the right of citizens under the First Amendment to urge government action.”³⁵⁸ Even while the FTC may arguably exercise preemption authority over certain anticompetitive state regulations, any litigation-based enforcement actions pursued in this area would, for this reason, need to accommodate firms’ constitutional right of petition for government action. At the same time, the history and contemporary evidence reviewed above provide additional reason to be concerned about overly broad interpretations of this doctrine’s reach.³⁵⁹ At minimum, business practices expressly designed to *prevent* the forms of public democratic participation that *Noerr* is designed to protect—including, most notably, dominant firms’ widespread insistence on NDAs binding

The harms fall instead on the states themselves, on the citizens who depend upon and pay for services provided by the states, and on the national economy.”).

357. See *supra* Part I.B.

358. Cooper & Kovacic, *supra* note 26, at 1578.

359. Cf. FTC, ENFORCEMENT PERSPECTIVES ON THE *NOERR-PENNINGTON* DOCTRINE 3 (2006), <https://www.ftc.gov/sites/default/files/documents/reports/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf> [<https://perma.cc/U2BE-PP5F>] (“Although the *Noerr* doctrine secures important interests that promote our democratic system of government, some have tried to invoke this protection in circumstances that could impose substantial costs on consumers and competition without furthering the core principles underlying *Noerr*.”).

the public officials developing and approving incentive promises—should not be protected from regulatory scrutiny.

Finally, as discussed in the next Section, the FTC has a wide variety of regulatory tools at its disposal—including many that are not limited by the judicial doctrines discussed in this section. Indeed, the FTC’s staff has recently studied the competition consequences of state-level policies that are specifically acknowledged to be shielded by the state-action immunity doctrine. For example, one recent policy paper³⁶⁰—authorized by a unanimous commission vote³⁶¹—summarizes the agency’s policy perspectives on “regulatory regimes adopted by state governments that are intended to displace competition among healthcare providers”—known as “Certificate of Public Advantage” laws (“COPAs”).³⁶² In 2019, the agency issued orders to five health insurance companies and two health insurance systems, seeking a variety of information that would allow its economists to study the competition consequences of these state regulatory regimes.³⁶³ Reviewing “the available evidence [showing that] COPAs do not achieve the purported policy goals of reducing healthcare costs and improving quality,” the report cautioned state legislators against relying on such certificates “in the absence of evidence that COPAs produce better results than market-based competition.”³⁶⁴ The report further “invite[d] state lawmakers to engage with [the FTC] in addressing the problems associated with anticompetitive hospital consolidation and avoid the use of COPAs.”³⁶⁵ This collaborative approach demonstrates that judicial immunity doctrines—even those determined to apply in this context—do not operate as an absolute or

360. The FTC’s report specifically notes that “[o]nce granted, COPAs purport to shield provider mergers and other types of collaborations from federal antitrust enforcement under the state action doctrine.” FTC, *FTC POLICY PERSPECTIVES ON CERTIFICATES OF PUBLIC ADVANTAGE 1* (2022) [hereinafter *FTC POLICY PERSPECTIVES*], https://www.ftc.gov/system/files/ftc_gov/pdf/COPA_Policy_Paper.pdf [<https://perma.cc/AKZ6-K6SH>].

361. Press Release, *FTC to Study the Impact of COPAs*, FTC (Oct. 21, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/10/ftc-study-impact-copas> [<https://perma.cc/A35G-4YLE>].

362. *Certificate of Public Advantage (COPAs)*, FTC, <https://www.ftc.gov/news-events/features/certificates-public-advantage-copas> [<https://perma.cc/59ZU-5ULC>].

363. Press Release, *FTC to Study the Impact of COPAs*, *supra* note 361.

364. *FTC POLICY PERSPECTIVES*, *supra* note 360, at 1, 6.

365. *Id.* at 7.

insurmountable bar preventing agency action, consistent with the FTC's statutory charge to promote fair competition.

D. A Regulatory Approach Consistent with Congressional Design

This Article contends that regulatory scrutiny of location incentive megadeals—and corporate dominance over local communities more broadly—can take a wide variety of forms that are not limited by judicial immunity doctrines. In addition to the features that allow the FTC to exercise unique regulatory authority over certain categories of anticompetitive state and local policy, other aspects of the agency's institutional design make it particularly well-positioned to fulfill this proposed role.

This observation begins with the FTC's intended role as expert agency with broad investigative and rulemaking authority. As Neil Averitt notes, the FTC “has special characteristics that suit it to the exercise of a broader authority than a district court would have.”³⁶⁶ Significantly, the FTC's leadership has “developed expertise in the fields of business, law, and economics, and, in addition, [has] the assistance of a staff of industrial organization economists.”³⁶⁷ Even short of new rulemaking or enforcement actions under § 5, the FTC also is specifically empowered under § 6 with the ability to require an entity to file “annual and special . . . reports or answers in writing to specific questions” and to provide information about the entity's “organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals.”³⁶⁸ Additionally, § 6 allows the FTC “[t]o make public from time to time” portions of the information that it obtains, where disclosure would serve the public interest.³⁶⁹

But importantly, this intentional design feature—combined with the legal authority provided under § 5—also positions the agency to develop legal standards through rulemaking: “The Commission is empowered to make expert business judgments about the probable consequences of certain activities, and to prohibit those likely to result

366. Neil W. Averitt, *The Meaning of “Unfair Methods of Competition” in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 251 n.112 (1980).

367. *Id.*

368. 15 U.S.C. § 46(b).

369. *Id.* § 46(f).

in future antitrust violations.”³⁷⁰ Rather than needing to parse the likely future effects of individual incentive deals (a feature of both constitutional protections described above), the FTC has various tools available for making policy based on more global assessments of the likely economy-wide effects of specific business practices.³⁷¹

This regulatory authority extends to “conduct that threatens to bring about an antitrust violation in the foreseeable future.”³⁷² Indeed, the Supreme Court has determined that § 5 is intended “to stop in their incipency acts and practices which, when full blown, would violate [the antitrust] Acts,”³⁷³ and that “Congress enacted § 5 of the Federal Trade Commission Act to combat in their incipency trade practices that exhibit a strong potential for stifling competition.”³⁷⁴ Most notably, the FTC recently used its § 5 authority to initiate a rulemaking process restricting the use of noncompete clauses in employment contracts, based on the conclusion “that, in the aggregate, employers’ use of noncompetes undermines competition across markets in ways that are harmful to workers and consumers and warrant a prohibition.”³⁷⁵

But even as the agency’s authority is broad in some relevant aspects, its suitability for this role is affirmed by other features that usefully *limit* its power. Section 5 lacks a private right of action, meaning that all enforcement under this standard is pursued by an independent expert agency able to target particularly harmful practices. And Averitt summarizes:

370. Averitt, *supra* note 366, at 229.

371. One source explains the ramifications and purpose of the FTC:

In establishing the legislative standard declaring unfair *methods* of competition unlawful Congress supplemented the rule of the Sherman law and added substantially to the protection afforded to business by the court decisions referred to. The purpose of Congress was to inhibit in their inception those methods which if allowed to continue unchecked or unregulated, would produce the evils to the public which the Sherman law was designed to prevent.

RUSH CLARK BUTLER & CORNELIUS LYNDE, THE FEDERAL TRADE COMMISSION: AND THE REGULATION OF BUSINESS UNDER THE FEDERAL TRADE COMMISSION AND CLAYTON LAWS 5 (1915).

372. Averitt, *supra* note 366, at 242; *see also id.* at 248 (“The very purpose of the incipency doctrine was, after all, to reach undesirable conduct before it had resulted in public injury. It would be self-defeating to require a demonstration of that injury before finding a violation; such a rule would be contrary to the intent of Congress.”).

373. FTC v. Motion Picture Adv. Serv. Co., 344 U.S. 392, 394–95 (1953).

374. FTC v. Texaco Inc., 393 U.S. 223, 225 (1968).

375. Statement of Chair Khan, *supra* note 229.

There are a number of reasons why the FTC Act can properly reach a wider range of conduct than the other antitrust statutes. There are no criminal penalties, treble damages, or private actions under it, and so conduct that has not previously been held to be anticompetitive, or whose anticompetitive effects are present but not particularly serious, can be corrected without fear of inflicting excessive hardship.³⁷⁶

All of these institutional design features, considered alongside the historical context and contemporary evidence reviewed above, combine to make the FTC's § 5 authority a particularly apt mechanism for scrutinizing the various anticompetitive aspects of dominant firms' location megadeal demands.

Finally, this Article's argument also dovetails with the FTC's renewed enforcement efforts utilizing the full nature of its legal authority. For several decades, starting in the 1980s, the FTC had narrowly interpreted its authority under § 5, in what many critics described as an abdication of its statutory mission.³⁷⁷ But last November, the FTC issued a policy statement on the scope and meaning of unfair methods of competition—emphasizing its expansive reach “to encompass various types of unfair conduct that tend to negatively affect competitive conditions.”³⁷⁸ This Article argues that corporate location megadeals present a compelling candidate for regulatory scrutiny under this source of legal authority.

V. CHARTING A PATH FORWARD

This Article argues that the harms to fair competition resulting from corporate location incentive megadeals can be addressed through federal regulation, including under existing authority. This Article makes the case—drawing from historical context, economic theory, and comparative institutional analysis—that current law provides the FTC with latent regulatory authority that could be used to supervise dominant firms' efforts to extract public resources from local communities through location incentive megadeals. But even more

376. Averitt, *supra* note 366, at 251 n.112; *see also id.* at 237 (“The judicial decisions which have reviewed this legislative history confirm that the Commission has, as it must have, considerable flexibility in determining which particular acts or practices will constitute ‘unfair methods of competition.’”).

377. *See* Vaheesan, *supra* note 167, at 650–51.

378. FTC Policy Statement, *supra* note 36.

broadly, this Article argues that the competition harms associated with contemporary megadeals should be part of our antimonopoly *policy agenda*—pursued through any number of government actions, and by public authorities beyond the antitrust agencies. For example, President Joseph R. Biden recently declared as federal policy “that a whole-of-government approach is necessary to address overconcentration, monopolization, and unfair competition in the American economy.”³⁷⁹ This Article, similarly, envisions a multipronged effort to address the competition harms perpetuated by dominant firms’ incentive demands.

As an initial step, the FTC should commission from its expert economists a comprehensive study into the unanswered empirical questions about the relationship between location incentive megadeals and market structure, as well as the terms of fair competition. An extensive economics literature aims to answer the question of whether the generous location subsidies discussed in this Article are actually good policy—understood as whether the deals are “worth it” for the jurisdictions that offer them to the companies, in terms of realized economic growth and other promised benefits.³⁸⁰ But considerably less attention has been given to the question of how these targeted megadeals affect *market competition*. This lack of attention is not due to lack of interest: Very little information about incentive negotiations is made available to the public, and what does exist varies widely across jurisdiction.³⁸¹

Indeed, efforts to study the consequences of structural power in this domain have been directly hindered by its existence, as through the widespread use of NDAs preventing the public from knowing about location incentive offers. Only in 2015, after years of advocacy demands, did the Governmental Accounting Standards Board (“GASB”) begin requiring state and local governments to report

379. Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021); *see also* Lina Khan, *The New Brandeis Movement: America’s Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & POL’Y 131, 131–32 (2018) (“Antitrust law is just one tool in the antimonopoly toolbox. Over the course of two centuries, Americans created a host of competition policy levers exist [sic] across government to promote competition within open and fair markets.”).

380. For a recent review of this literature, see Slattery, *supra* note 178, at 7.

381. *See id.* at 2 (“First, there is a lack of coherent data on subsidies, due to limited transparency from state and local governments on the subsidy-setting process.”).

revenues lost to corporate subsidies.³⁸² But even these data—estimated aggregate annual dollar losses for each tax-break program—are significantly limited. Good Jobs First notes that “[d]espite many comments urging it to do so, GASB did not call for disclosure of company-specific recipients, future-year revenue losses, or even the number of tax-break deals behind the dollar figures.”³⁸³

As a first step toward developing a competition policy agenda in this area, the FTC should use its statutory authority to request information from dominant firms about the terms of their incentive agreements with states and local governments. These requests could be done as one-time requests for initial study or on an ongoing basis—for example, collected as practice during merger review or by focusing on firms with indicators of structural power in relevant markets. Using this information, the FTC should study the consequences of location incentive demands on channels of competition—and then initiate investigations of any unfair practices and harms to competition that are uncovered.³⁸⁴ Consistent with its supervisory authority and the public interest, the FTC could then make disclosures to the public from the information gathered through such requests.³⁸⁵

Where the FTC identifies evidence of unfair business practices and competition harms, this initial information-gathering should inform rulemaking and enforcement. In particular, the agency should use its statutory authority to pursue additional actions targeting specific anticompetitive abuses related to dominant firms’ incentive demands. Under its § 5 authority, the FTC could argue for a

382. *Statement No. 77: Tax Abatement Disclosures*, GOVERNMENTAL ACCT. STANDARDS BD. (Aug. 2015), <https://gasb.org/page/pronouncement?pageId=/standards-and-guidance/pronouncements/summary-statement-no-77.html> [<https://perma.cc/9LGM-93KM>].

383. *GASB Statement No. 77: A New Tool for Strengthening Progressive Budget Research & Advocacy*, GOOD JOBS FIRST (Jan. 2020), <https://goodjobsfirst.org/wp-content/uploads/docs/pdfs/GASB%20handout%202-pager%20January%202020.pdf> [<https://perma.cc/ZG45-6RA3>].

384. Cf. Michael Salinger & Paul A. Pautler, *The Bureau of Economics at the US Federal Trade Commission*, in *THE 2006 HANDBOOK OF COMPETITION ECONOMISTS*, GLOBAL COMPETITION REVIEW 3–5 (Apr. 2006) (“Staff economists work closely with the attorney staff in designing investigations, formulating candidate economic theories, and searching for confirming or denying evidence in documents, from customers, or industry sources.”).

385. See BUTLER & LYNDE, *supra* note 371, at 18 (“The [FTC Act] provides for the publication of annual and special reports of the Commission and of its decisions and also gives the Commission power to make public within its discretion information obtained by it, *except trade secrets and names of customers*.”).

presumption that certain business practices—including exclusive dealing requirements, certain firm-specific tax deals like “customer-based incentives,”³⁸⁶ and overbroad use of NDAs—constitute unfair methods of competition due to structural power in the market for corporate investment. Indeed, one antimonopoly advocacy group recently called for the FTC to “initiate an investigation and produce a public report” on the use of NDAs in economic development deals with state and local governments—and to then “apply remedies where appropriate.”³⁸⁷ This proposal represents precisely the sort of action that the FTC should pursue to fulfill its public obligation to supervise and protect against unfair and anticompetitive conduct.

Anticipating concerns about this proposed new application of the FTC’s longstanding institutional authority, it is worth emphasizing here that agency action need not—and indeed, for various policy and strategic reasons, *should not*—take the extreme form of simply barring location incentives outright.³⁸⁸ Even the EU’s comparatively strict state aid regime accommodates important distinctions between different categories and usages of location incentives.³⁸⁹ Indeed, the flexibility to calibrate the appropriate regulatory response from a wide range of options—based on expert judgment and stakeholder input—is one of the most desirable features of a regulatory approach. The importance of this feature is particularly evident when compared to the broad and disruptive constitutional claims that have been attempted in this area without much success.

The possibilities for remedial action extend beyond the FTC itself. Other federal agencies should use their own statutory authority to request information about location incentives and to study their effects on fair competition in the areas of their concern. In addition to the

386. See *supra* Part III.A.

387. Letter from Am. Econ. Liberties Project to Lina Khan, Chair, FTC (Sept. 28, 2021) (on file with author).

388. To use the FTC’s legal authority toward such far-reaching ends would also raise other objections beyond state antitrust immunity—for example, challenges under the emerging “major questions” doctrine. Cf. *West Virginia v. EPA*, 597 U.S. 697, 699 (2022); Randolph J. May & Andrew K. Magloughlin, *The Major Questions Doctrine Slams the Door Shut on UMC Rulemaking*, TRUTH ON MKT. (Apr. 28, 2022), <https://truthonthemarket.com/2022/04/28/the-major-questions-doctrine-slams-the-door-shut-on-umc-rulemaking> [<https://perma.cc/DT6Z-MHN6>] (arguing that “today’s Supreme Court would find that the FTC lacks authority to issue [unfair methods of competition] rules under the major questions doctrine”).

389. See *supra* Part IV.B.

possibilities for supervision action under existing authority, Congress should consider expressly extending existing statutory authorities to regulate location incentives, drawing from the institutional model of the EU State aid regime (and paired with necessary budgetary resources to pursue this mission). This new authority could be granted either to the FTC or to a new federal agency with the specific charge to regulate the various harms that result from unregulated interjurisdictional competition for mobile corporate investment.

Broader lessons from this proposed framework extend beyond the specific regulatory agenda envisioned here, namely with respect to industrial policy and fiscal federalism design. There has been a renewed interest, among policymakers and academics alike, in federally funded place-conscious industrial policy—represented most notably by the Creating Helpful Incentives to Produce Semiconductors Act (“CHIPS Act”).³⁹⁰ But policymaking in this area has not always been sensitive to competition harms. Indeed, certain aspects of the CHIPS Act’s implementation risk *contributing* to the problems identified here. Commerce Secretary Gina Raimondo recently testified that the federal government is “requiring the applicant [companies applying for CHIPS Act funding] to come to us with money from the state”—considering the “incentives” approved by state and local governments as one factor in federal funding applications.³⁹¹ Rather than using its fiscal authority to reduce local reliance on wasteful and potentially anticompetitive location incentives or to rebalance across regional inequalities, the federal government is reinforcing the incentive megadeal status quo.

The antimonopoly framework explored here also has implications for the United States’ fiscal federalism design. The forms of interjurisdictional tax competition that have, now and across history, contributed to antimonopoly harms ultimately derive from the absence of centralized fiscal transfers of the sort that are provided in every other wealthy democracy.³⁹² As Hiba Hafiz recently observed, the

390. Creating Helpful Incentives to Produce Semiconductors (CHIPS) Act, Pub. L. No. 117–167, 136 Stat. 1372 (2022).

391. Pat Garofalo, *The CHIPS Dirty Dozen*, BOONDOGGLE (Sept. 27, 2023), <https://boondoggle.substack.com/p/the-chips-dirty-dozen> [<https://perma.cc/866X-4C86>].

392. Cf. MARGARET WEIR & DESMOND KING, REDISTRIBUTION AND THE POLITICS OF SPATIAL INEQUALITY IN AMERICA 193 (2020) (“The United States stands out as the only advanced democracy that does not have a robust system designed to equalize school finance.”).

absence of centralized federal funding “places state and local governments in positions of having to discipline local populations to accept the terms of private firm-led economic development, primarily through tax incentives and regulatory waivers.”³⁹³

The United States’ comparatively anomalous fiscal federalism design—which requires local communities to generate large portions of their budgets from taxes on economic activity within their borders—puts local governments at a distinct disadvantage in negotiations with holders of mobile capital, including structurally dominant firms. Partly as a result of this design, corporations are able to leverage the economic vulnerability of local communities to override the public will and secure unpopular policy concessions—such that even where formal structures for democracy exist, private actors are able to exercise an effective veto over public policy.³⁹⁴

Under this institutional design, we should expect that local governments will continue to find it difficult—or even impossible—to resolve these policy failures in the continued absence of centralized fiscal transfers.³⁹⁵ By contrast, the federal government—under a different system of fiscal federalism—could allow cities to make democratic investments with the immense wealth produced by our economy, no matter how it is distributed over geographic space. This perspective also reframes the relevant policy question. Instead of asking how to convince Amazon to locate in excluded communities, policymakers should focus on ensuring that *all* communities are able to

393. Hafiz, *supra* note 220, at 1241.

394. Brian Highsmith, *The Bondholders’ Veto: Fiscal Federalism and Local Democracy*, L. & POL’Y ECON. PROJECT (Sept. 9, 2021), <https://lpeproject.org/blog/the-bondholders-veto-fiscal-federalism-and-local-democracy> [<https://perma.cc/MKW7-NW82>] (“Our system of fiscal federalism impedes social democracy by guaranteeing holders of private wealth—by virtue of their wealth—a veto over the democratic use of public money.”).

395. In particular, the fragmentation of metropolitan tax bases alters the dynamics of corporate relocations. Extensive research on urban policy implications of the United States’ knowledge economy has emphasized “agglomeration effects” accruing to “superstar cities.” See, e.g., *AGGLOMERATION ECONOMICS 1* (Edward L. Glaser ed., 2010) (“Agglomeration economies are the benefits that come when firms and people locate near one another together in cities and industrial clusters.”). But such spatial efficiencies are regional in nature, whereas local tax bases are jurisdictionally bounded. Even if network effects pull economic activity toward particular metropolitan areas, corporations retain their leverage over fiscally vulnerable municipalities within those metropolitan areas.

access the determinants of economic opportunity—whether or not some dominant firm decides to locate within the same jurisdiction.

CONCLUSION

To date, legal scholarship has tended to conceptualize corporate location incentives as misguided local tax policy: wasteful, but not unlawful; tax policy, rather than part of an antimonopoly regulatory agenda; a local rather than national concern. This Article challenges each aspect of this consensus. It reframes inefficient location incentive megadeals as resulting from the exercise of structural corporate power in the interjurisdictional market for corporate investment (rather than misguided lawmaking alone). This Article draws from history to show that landmark antimonopoly legislation was enacted in response to concerns about competition harms that had resulted from the unregulated competition for mobile corporate capital. It charts a path forward for federal supervision—administered under the legal authorities of the FTC Act, but implemented as market regulation. Finally, it demonstrates that the general goal of protecting against unfair and anticompetitive business practices related to firms' incentive demands could be pursued through a variety of actions—ranging from governmental studies and routine information requests to more ambitious options including new rulemaking and enforcement actions. Most broadly, this Article uses corporate location incentive megadeals as a case study to demonstrate that structural corporate dominance over local communities is a problem that federal regulation can help address.