Anything, Anytime, Anywhere: Is Antitrust Ready for Flexible Market Arrangements?

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The migration of business and social activities from physical to virtual venues, once known as the transition to the "New Economy,"[1] is one of the defining characteristics of the digital revolution. It began in the 1990s with what then seemed a futuristic vision that many activities could be done "anytime, anywhere."[2] Its pace persistently increased until the COVID-19 pandemic broke out. Then, in March 2020, governments, companies, and individuals across the world adopted social distancing practices to reduce infection risks. These voluntary and involuntary restrictions on activities in physical spaces have drastically accelerated the migration.[3] *The Economist* dubbed this byproduct of the pandemic "tech-celeration."[4] It is possibly the most consequential feature of the pandemic-induced market disruptions. Compared to prior waves of diffusions of new technologies, which were gradual processes, the broad migration to virtual venues in 2020 was instantaneous.

This article explores a relatively underdeveloped aspect of the migration: the proliferation of fluid forms of arrangements, which, in the absence of a better term, I call *flexible market arrangements* (FMAs). Concerns about competition in digital and labor markets and long-term trends in income and wealth inequality have shaped debates over antitrust policies in recent years. These debates, I argue, have failed to identify adequately the significance of the increasing prevalence of FMAs. This article seeks to clarify why the rapid spread of FMAs will become the subject of antitrust litigation, investigations, and legislative proposals.

In their essence, FMAs are alternatives to some of the structured arrangements that pervaded the brick-and-mortar economy. The core feature of FMAs—the flexibility—is derived from the elimination of economic constraints that are inherent to activities in physical spaces, such as the location of workers and consumers, capital investments, long-term contracts, employment relations, and preferences for in-person interactions. A simple way to think about this flexibility feature is that it resembles the theoretical possibility of doing anything, anytime, anywhere. In the brick-and-mortar

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[1] *See, e.g.*, Antitrust Modernization Comm'n, Report and Recommendations 31 (2007) (defining the "new economy" as "a diverse array of markets in which new information, communication, and other technologies have produced significant changes in recent decades."); Jonathan M. Jacobson, *Do We Need a "New Economy" Exception for Antitrust?*, Antitrust, Fall 2001, at 89; *How Real Is the New Economy*, The Economist, July 24, 1999, at 17; *The New Economy: Work in Progress*, The Economist, July 24, 1999, at 21.

[2] *See, e.g.*, Rob Eure, *On the Job, Corporate E-Learning Makes Training Available Anytime, Anywhere*, Wall St. J., Mar. 12, 2001, at R33 (reporting that "corporate e-learning" was expected to make "training available anytime, anywhere"); G. Christian Hill, *The Spoils of War*, Wall St. J., Sept. 11, 1997, at R1 (reporting about the construction of "nationwide digital networks" that would provide geographically seamless cellular-phone, paging and data-transmission links," and were "expected to eventually allow customers to use wireless phones or laptop computers anytime, anywhere"); Bart Ziegler, *Future Phones: Anytime, Anywhere*, Wall St. J., Mar. 20, 1995, at R18 (reporting that companies, such as AT&T and IBM, were "working on technology that [would] allow 'anytime, anywhere' communications," and that "the phone system of the future may be able to track down people and deliver a call no matter where they are").

[3] *See* Greg Ip, *'Covid Has Acted Like a Time Machine'*, Wall St. J., Dec. 27, 2020, at B1; Barak Orbach, *Antitrust in the Shadow of Market Disruptions*, 34 Antitrust, Summer 2010, at 32.

[4] Tom Standage, *After the Tech-celeration*, The Economist: The World in 2021, Nov. 16, 2020, at 23.

economy, information was scarce, coordination was costly, and collaborative activities typically required people to convene in the same physical space. The elimination of these constraints has considerably enhanced the capacity of businesses and individuals with access to digital technologies and high-speed internet to engage in trade and collaborative activities anytime, anywhere. As a phenomenon, the proliferation of FMAs amounts to an extraordinary transformation of the utilization of assets and labor in the economy.[5]

Alternative workspace and work arrangements epitomize the essence of FMAs.

Alternative workspace and work arrangements epitomize the essence of FMAs. Workspace arrangements concern the physical location and schedule of employees and other workers. In traditional workspace models, workers are expected to be in a particular physical facility during work hours or their shifts. Under flexible workspace arrangements, commonly known as "alternative workplace arrangements,"[6] workers have some control over where, when, and how much they work.[7] Work arrangements, in turn, concern the nature of the legal relations between the hiring and hired parties. The scope of the legal obligations of hiring parties lies on a sliding scale, ranging from employment relations with job security to gig arrangements. This continuum consists of varying degrees of flexibility. Flexible work arrangements, commonly known as "alternative work arrangements," include "independent contractors, contract workers, temporary help agency workers, and on-call workers."[8]

At first glance, the proliferation of FMAs might not seem like an antitrust concern. It represents uncoordinated decisions of billions of businesses and individuals worldwide to operate in highly competitive virtual marketplaces. And it allows local businesses to reach global markets to recruit talent, buy services and products, and sell their own products and services. The challenge to competition policy lies in the centralized facilitation of FMAs and the diverse welfare effects they produce.

FMAs are facilitated through digital platforms that harness scale, scope, and network effects.[9] Thus, market power is an ordinary characteristic in FMA markets. Further, the widespread adoption of FMAs produces significant distributive effects. The welfare gains are captured by the facilitating platforms and parties that can profitably rely on FMAs, whereas the losses are shared by parties operating in competitive and often global markets. The eliminated constraints—such as long-term leases, service agreements, and employment relations—are often lost sources of income and relative certainty for some parties. In other words, the flexibility generates welfare gains and losses. Flexibility is a desirable opportunity only when its costs are smaller than or comparable to its value. Many businesses and individuals probably prefer long term contractual relations over reliance on spot transactions in competitive global markets.

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[5] A parallel trend in the organization of market arrangements concerns the growing reliance on "formal relational contracts" that are less structured than "traditional transactional contracts." David Frydlinger et al., *A New Approach to Contracts, How to Build Better Long-Term Strategic Partnerships*, Harv. Bus. Rev., Sept. 2019, at 116, 125. *See also* Lisa Bernstein, *Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts*, 7 J. Legal Analysis 561, 614–15 (2015).

[6] *See, e.g.*, Mahlon Apgar IV, *The Alternative Workplace: Changing Where and How People Work*, Harv. Bus. Rev., May-June 1998, at 121.

[7] *See* Prithwirai (Raj) Choudhury, *Our Work-from-Anywhere Future*, Harv. Bus. Rev., Nov. 2020, at 58, 67; Council of Econ. Advisers, Exec. Office of the President, Work-Life Balance and the Economics of Workplace Flexibility 24–26 (2010).

[8] Lawrence F. Katz & Alan B. Krueger, *Understanding Trends in Alternative Work Arrangements in the United States*, 5 Russell Sage Found. J. Soc. Sci. 132, 144 (Dec. 2019).

[9] The term "digital platforms" has no uniform meaning. It can be understood as virtual venues—technological intermediaries that facilitate trade and interactions.

The market outcomes of the widespread adoption of FMAs—the acquisition of market power by platforms through efficient fragmentation of markets—is not harm to competition, as the term is interpreted by courts. The acquisition of market power is likely to be treated as "growth or development as a consequence of a superior product [and] business acumen."[10] The distributive effects, in turn, are likely to be regarded as "misfortunes which seem to be the necessary accompaniment of all great industrial changes."[11] "[A]ny great and extended change in the manner or method of doing business" is accompanied by "distress, and, perhaps, ruin" for "some of those who were engaged in the old methods," including "small dealers and worthy men."[12] Nonetheless, these economic consequences revived the public interest in antitrust law and led to mounting pressures to reform antitrust law.[13] Many contemporary antitrust disputes and debates concern the growing market power of digital platforms and the distributive effects of the transition to virtual venues.[14]

The Economic Boundaries of Firms

Integration. The integration of economic activities within firms is an intricate and fluid concept. The architecture of antitrust law, however, rests on a sharp distinction between property rights and contractual arrangements, although antitrust law arguably aims at "substance rather than form."[15] Integration in antitrust law ordinarily means property rights, although it is not entirely clear what degree of ownership establishes integration. In contrast, agreements typically mean arrangements between or among independent economic units that could be implicit, voidable, and even unlawful. More specifically, Section 7 of the Clayton Act provides that acquisitions of property rights, the effects of which "may be substantially to lessen competition, or to tend to create a monopoly" are unlawful; and Section 1 of the Sherman Act bans unreasonable restraints of trade accomplished through contracts, combinations, or conspiracies.

The increasing prevalence of FMAs will require a more nuanced approach to notions of integration in antitrust law.

From the business perspective, however, ownership and integration are not synonymous.[16] For example, the location of facilities is often more important to integration than property rights. Accordingly, facilities that a firm possesses through long-term leases might be more integrated than owned facilities. Similarly, a satellite office of a company is not as integrated into the organization as the headquarters office. The increasing prevalence of FMAs will require a more nuanced approach to notions of integration in antitrust law.

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[10] United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (defining the offense of monopolization under Section 2 of the Sherman Act).

[11] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323 (1897).

[12] *Id.*

[13] *See*, *e.g.*, Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. (2021); H. Comm. on the Judiciary, Subcomm. on Antitrust, Com. & Admin. L., Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations 7 (2020) [hereinafter House Report] ("Our laws must be updated to ensure that our economy remains vibrant and open in the digital age."); Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. Econ. Persp. 69, 90 (Summer 2019) (observing that "[present] economic conditions call for a reinvigoration of antitrust enforcement in the United States to promote competition, protect consumers and workers, and spur economic growth"); Barak Orbach, *The Present New Antitrust Era*, 60 Wm. & Mary L. Rev. 1439, 1458–61 (2019) (arguing that a new antitrust era began in the 2010s).

[14] *See*, *e.g.*, House Report, *supra* note 13, at 6 (noting that the super platforms, which started as "scrappy, underdog startups that challenged the status quo," now constitute "the kinds of monopolies we last saw in the era of oil barons and railroad tycoons."); Apple Inc. v. Pepper, 139 S. Ct. 1514, 1519 (2019) ("A claim that a monopolistic retailer . . . has used its monopoly to overcharge consumers is a classic antitrust claim").

[15] Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 760 (1984); *see also* Appalachian Coals v. United States, 288 U.S. 344, 377 (1933).

[16] *See*, *e.g.*, Bengt Holmström, *The Firm as a Subeconomy*, 15 J.L. Econ. & Org. 74, 100 (1999) (observing that property rights say "very little about the firm").

FMAs present varying degrees of integration. To illustrate, consider alternative workspace and work arrangements. Highly structured workspace and work arrangements appeared with the rise of the factory system in the 19th century. Over time, companies have adopted more flexible arrangements. For example, IBM has changed its approach to integration of employees in the firm several times. The company was "a pioneer and champion of the work-from-home concept."[17] In 2009, 40 percent of IBM employees worldwide worked remotely.[18] But, in 2017, after 20 consecutive quarters of falling revenues, IBM reversed "decades-long policies" and called "thousands of employees back to the office."[19] Less than three years later, coping with the COVID-19 pandemic, IBM adopted new work-from-home policies.[20] As the United States and other countries develop COVID-19 herd immunity, IBM will reconsider pandemic-instituted work-from-home policies.

The Relative Costs of Integration. The central question that studies of the boundaries of firms raise is "why we observe so much economic activity inside formal organizations if, as economists commonly argue, markets are such powerful and effective mechanisms for allocating scarce resources."[21] In a seminal 1937 paper that laid the foundation for this branch of economic literature, Ronald Coase argued that efficiency considerations explain the scope of firms.[22] In his words, "A firm will tend to expand until the costs of organizing an extra transaction within the firm become equal to the costs of carrying out the same transaction by means of an exchange on the open market or the costs of organizing in another firm."[23] Simply stated, Coase observed that firms integrate economic activities when the internal allocation of resources is more efficient than the market's allocation of resources. To illustrate, consider the choice between integration and outsourcing of economic activities. Firms typically integrate activities affecting their direction, such as management, R&D, and planning, and outsource activities that third parties could conduct efficiently, such as production, distribution, and certain types of consulting services.[24] Outsourcing, in turn, could be done through long-term contracts and gig arrangements. Activities that are outsourced through long-term contracts are less integrated than internal activities but more integrated than activities outsourced through gig arrangements.[25]

Antitrust merger review often requires assessments of whether the alleged efficiencies of a proposed merger outweigh competitive concerns. However, antitrust law does not impose restrictions on business expansion through internal growth (at least not without some monopolistic conduct). And, important to the analysis here, organizational choices to replace integration with outsourcing are, standing alone, beyond the reach of antitrust law.

The Evolving Antitrust Perspective. Coase and many other scholars in the early 20th century tried to explain the rise of large firms—then known as "modern corporations" or "trusts." Concerns

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[17] John Simons, *IBM Says No to Home Work*, Wall St. J., May 19, 2017, at A1.

[18] David Streitfeld, *Working from Home Has a Checkered Past*, N.Y. Times, June 30, 2020, at B1.

[19] Simons, *supra* note 17.

[20] *See* Arvind Krishna, *The IBM Work from Home Pledge: During Times of COVID-19*, LinkedIn (May 2, 2020), https://www.linkedin.com/pulse/i-pledge-support-my-fellow-ibmers-working-from-home-during-krishna (sharing a statement of IBM's Chairman and CEO).

[21] Bengt Holmström & John Roberts, *The Boundaries of the Firm Revisited*, 12 J. Econ. Persp. 73, 73 (Autumn 1998).

[22] R.H. Coase, *The Nature of the Firm*, 4 Economica 386, 390 (1937) ("The main reason why it is profitable to establish a firm would seem to be that there is a cost of using the price mechanism.").

[23] *Id.* at 395.

[24] *See, e.g.*, Aaron Tilley, *Intel Sets Strategy to Speed Its Chip Revival*, Wall St. J., Mar. 24, 2021, at A1 (describing strategic choices between integration and outsourcing of production activities).

[25] *See supra* note 5.

about the same phenomenon led to the enactment of the principal antitrust statutes—the Sherman, Clayton, and FTC Acts. Several old judicial opinions state that "decentralization"—namely, "the maintenance of fragmented industries and markets" through "the protection of viable, small, locally owned business"—was the intended goal of antitrust law, even if it results in "occasional higher costs and prices."[26] In the 1960s, the Supreme Court still perceived this position to be consistent with the understanding that antitrust law intends to protect "competition, not competitors."[27] This view, however, was abandoned long ago. As interpreted by courts since the late 1970s, "harm to competition" ordinarily means negative effects on price or output. This function of the competitive process has produced a controversy over hypothetical situations where efficiencies do not trickle down to consumers,[28] as well as a debate over whether that controversy has practical implications.[29]

Under present economic and legal conditions, the efficiency gains advanced through the broad adoption of FMAs are, in part, products of an improved ability to squeeze workers.

In the 21st century, it became clear that wealth does not trickle down as efficiently as once was broadly believed.[30] Further, a growing body of evidence indicates that assumptions about alleged efficiencies resulted in excessively permissive antitrust enforcement policies to the detriment of consumers and workers.[31]

The proliferation of FMAs presents a new wrinkle in the evolution of the global economy. "Superstar firms"—highly efficient companies—"initially gain large market shares by legitimately competing on the merits of their innovations or superior efficiency," and "[o]nce they have gained a commanding position, . . . they use their market power to erect various barriers to entry to protect their positions."[32] Under present economic and legal conditions, the efficiency gains advanced through the broad adoption of FMAs are, in part, products of an improved ability to squeeze workers.

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[26] Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962). *See also* FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967) ("Possible economies cannot be used as a defense to illegality."); United States v. Aluminum Co. of Am., 148 F.2d 416, 429 (2d Cir. 1945) (stating that one of the purposes of the antitrust statutes is "to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other").

[27] *See Brown Shoe*, 370 U.S. at 320, 344.

[28] *See*, *e.g.*, Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hastings L.J. 65, 150–51 (1982); Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself 107–15 (1978); Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 Am. Econ. Rev. 18, 33–34 (1968). Will Rogers, a prominent comedian and commentator, coined the notion of "trickle down" economics in a critique of the Republican Party economic agenda: "The money was all appropriated for the top in the hopes that it would trickle down to the needy. [President] Hoover was an engineer. He knew that water trickled down. . . . But he didn't know that money trickled up. Give it to the people at the bottom and the people at the top will have it before night anyhow." Will Rogers, *And Here's How It All Happened*, (Weekly Article 518), *in* Weekly Articles: The Hoover Years, 1931–1933, at 183, 184 (Steven K. Gragert ed., 2010).

[29] *See*, *e.g.*, Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 Fordham L. Rev. 2471, 2474 (2013) ("The volume and complexity of the academic debate . . . create an impression of policy significance that is completely belied by the case law, and largely by government enforcement policy.")

[30] *See* David Autor et al., *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q. J. Econ. 645, 702–04 (2020); Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States*, 1913–1998, 118 Q.J. Econ. 1, 35–37 (2003).

[31] *See*, *e.g.*, Shapiro, *supra* note 13, at 69–72 (concluding that "antitrust enforcement has been overly lax" in certain critical areas, most significantly merger review); John B. Baker, The Antitrust Paradigm 209 (2019) (concluding that permissive enforcement policies contributed to the reemergence of the "market-power problem"); John Kwoka, Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy 158 (2015) (concluding that, in recent decades, the antitrust agencies have frequently approved mergers that resulted in "competitive harm, usually in the form of higher price"). *See also* Steves and Sons, Inc. v. JELD-WEN, Inc., 988 F.3d 690 (4th Cir. 2021) (upholding a divestiture order of a merger approved and consummated in 2012).

[32] Autor et al., *supra* note 30, at 704.

The Design of FMA Markets

FMAs Distinguished from Spot Transactions. FMAs are hardly a new phenomenon. In some industries, they have always been the norm.[33] For example, gigs are and have always been the most common form of engagement in the live music industry. The gig itself is a spot transaction, not an arrangement. The practice of persistent engagement in gigs or persistent hiring of gig workers is an FMA. A musician who accepts engagements per performance (rather than an extended tour) is an FMA supplier, whereas a nightclub that schedules musicians to appear every night is an FMA buyer. But a couple who hire a musician to perform at their wedding are merely consumers who enter into a spot transaction with a gig supplier.

Matchmaking. The ability of businesses and individuals to rely on FMAs requires the availability of market institutions that allow potential buyers and sellers to find each other, gain some trust in each other, and transact efficiently. In the recorded music industry, ASCAP and BMI have been serving this function since the second quarter of the 20th century.[34] In the high-end segments of the live entertainment industry, promoters are the matchmakers. Vertical integration of promoters with ticket sellers and arenas could result in significant anticompetitive effects. For example, the 2009 Live Nation/Ticketmaster merger vertically integrated the world's largest concert promoter and the world's largest ticket selling company.[35] The merger arguably contributed to sharp increases in ticket prices.[36] Under public pressure, the Justice Department modified and extended the 2010 consent decree related to the settlement that had approved this merger under conditions.[37] Similarly, in the 1940s, two prominent boxing promoters consolidated control over boxing championships in three popular divisions—heavyweight, middleweight, and welterweight—through exclusive contracts with boxers and ownership of the most lucrative arenas. A lawsuit by the Justice Department led to the dissolution of this "boxing trust."[38]

In virtual venues, digital platforms are the matchmakers.[39] Their efficiencies have contributed to the formation and expansion of efficient markets for commodified services and products. But the harnessing of efficiencies hardly suggests that matchmakers do not engage in anticompetitive practices. On the contrary, their business aggressiveness and pursuit of market domination are consistent with a willingness to engage in exclusionary practices.

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[33] *See, e.g.*, Jennifer Smith, *For Hard-Hit Musicians, It's a New Gig Economy*, Wall St. J., Oct. 29, 2020, at A11.

[34] *See* Makan Delrahim, Assitant Att'y Gen., Dep't of Justice, Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees (Jan. 15, 2021); Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 23 (1979).

[35] *See* Press Release, U.S. Dep't of Justice, Justice Department Requires Ticketmaster Entertainment Inc. to Make Significant Changes to Its Merger with Live Nation Inc. (Jan. 25, 2010) (approving the merger under conditions); Ben Sisario, *Justice Dept. Clears Ticketmaster Deal*, N.Y. Times, Jan. 26, 2010, at B4; Dawn C. Chmielenski & Randy Lewis, *Live Nation, Ticketmaster Face Hurdles*, L.A. Times, Feb. 11, 2009, at C1.

[36] *See* Anne Steele, *Concert-Ticket Prices Rose 55% in a Decade*, Wall St. J., Dec. 27, 2019, at A1; Ben Sisario & Graham Bowley, *Roster of Stars Lets Live Nation Flex Ticket Muscles*, Rivals Say, N.Y. Times, Apr. 11, 2018, at A1. Concert ticket prices have been increasing persistently since the 1980s. The Live Nation/Ticketmaster merger price effects contributed to the trend. *See* Sara Fisher Ellison, *Internet Technology and Its Role in the Price of Concert Tickets*, 2 Antitrust Chron. 7 (Feb. 2021).

[37] Press Release, U.S. Dep't of Justice, Justice Department Will Move to Significantly Modify and Extend Consent Decree with Live Nation/Ticketmaster (Dec. 19, 2019) (recognizing that the Live Nation/Ticketmaster merger resulted in harm to competition).

[38] *See* Int'l Boxing Club of N.Y., Inc. v. United States, 358 U.S. 242 (1959); Joseph F. Hearst, *IBC Knocked Out by U.S. Supreme Court*, Chi. Daily Trib., Jan. 13, 1959, at III-1.

[39] David S. Evans & Richard Schmalensee, Matchmakers: The New Economics of Multisided Platforms 198 (2016) (observing that matchmakers "have been around for millennia" and arguing that the digital matchmakers, "the new market darlings . . . just use technology to improve on things that others have done for many years").

Collaborative vs. Trade Venues. FMA markets combine two types of virtual venues—venues that facilitate collaborative activities ("collaborative venues") and venues that facilitate trade in products and services ("trade venues"). Collaborative venues include productivity and communications platforms, such as the productivity suites of Microsoft and Google, Zoom, and Skype. Trade venues include platforms that facilitate trade between buyers and sellers, such as Airbnb, Amazon Marketplace, Amazon Flex, Apple's App Store, Care.com, Deliveroo, DoorDash, Etsy, Fiverr, HomeAdvisor, Lyft, and Uber.

In essence, collaborative venues harness direct network effects, whereas trade venues harness indirect network effects.[40] The distinction between collaborative and trade venues loosely parallels the traditional antitrust distinction between horizontal and vertical arrangements, including in its tendency to blur. Some platforms facilitate both collaborative activities and trade. For example, Peloton claims to be the world's "largest interactive fitness platform."[41] It "pioneered connected, technology-enabled fitness, and the streaming of immersive, instructor-led boutique classes to [customers] *anytime, anywhere*."[42] In other words, Peloton's services are a particular form of FMAs that competes with traditional fitness classes that take place in a specific location at a given time. Peloton's trade function is less pronounced than that of trade platforms like Amazon and Uber because the company vertically integrates the supply of services and sells subscriptions. Its trade function is similar to those of music and video streaming services that sell subscriptions (e.g., Apple Music, Disney+, and Netflix). Many models of online education use similar features that harness the potential benefits of collaboration and competition among students.

The Commodification of Economic Activities. The evolution of two models of trade platforms has led to the development of efficient and reliable markets for FMAs: online retailers and peer-to-peer markets.

Online retailers formed to sell highly standardized products, such as books, CDs, and gadgets.[43] In the mid-1990s, Jeff Bezos, Amazon's founder, "caught the Internet bug . . . . His passion was to exploit the Web's potential for electronic retailing, and Bezos picked books as the product most likely to sell successfully on-line."[44] In May 1997, days before Amazon went public, *Barron's* expressed skepticism of Bezos's business model:

> [Amazon's IPO raises] a basic question: Is it a wave of-the-future Internet company or just another bookseller on the Internet?
>
> Early chatter about the self-proclaimed "Earth's Biggest Bookstore" centers on what it calls "virtually unlimited online shelf space" and low overhead that some believe will make the brick, mortar and sales staff of traditional bookshops obsolete. If so, the promise of Internet commerce has been fulfilled—at last. . . .
>
> But those dazzled by the Web should remember that Amazon's business plan can easily be duplicated and that the company could end up down the same rabbit hole occupied by once-hot Internet-access providers.[45]

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[40] Direct network effects refer to the impact of the number of users of the same product or service on the value of that product or service to each user. Indirect network effects refer to the value of trade opportunities associated with the number of potential trade partners.

[41] Peloton Interactive, Inc., Annual Report (Form 10-K) (Sept. 11, 2020) at 5.

[42] *Id.* (emphasis added).

[43] *See, e.g.*, Margot Williams, *Holiday Shopping On-line: Selection Limited, but No Crowds*, Wash. Post, Nov. 1995, at 17.

[44] Karen Southwick, *Jeff Bezos, Amazon.com*, Upside, Oct. 1996, at 29.

[45] Scott Reeves, *Offerings in the Offing: Web's Biggest Bookstore? Don't Make Book on It*, Barron's, May 12, 1997, at 57.

Moving forward 20 years, in 2017, Lina Khan embarked on an influential journey into antitrust law, declaring that "Amazon is the titan of twenty-first century commerce."[46] Amazon and other online retailers have mobilized the migration of trade to virtual venues.

Peer-to-Peer (P2P) markets also emerged in the mid-1990s with the stunning success of eBay.[47] P2P markets facilitate efficient spot transactions, which "often are characterized by a high degree of heterogeneity," among "large numbers of fragmented buyers and sellers."[48] The original models of markets for used and peculiar products have evolved considerably over the past 25 years, leading to the formation of the amorphous sectors known as the "gig economy," "sharing economy," and "on-demand economy."[49] In these sectors, the supply of heterogeneous products and service is commodified.

Collaborative Activities. Doing things with others ("collaborative activities") is a common feature of production and consumption. On the production side, the integration of economic activities within firms intends, in part, to facilitate efficient collaborative activities. On the consumption side, doing things with others is the essence of social activities. Whether in service of production or consumption, collaborative activities can become the subject of FMAs.

The migration to virtual venues began in the 1990s with communications technologies that facilitated collaborative activities, such as email services, chatrooms, chat apps, and later social media networks. The early technologies allowed parties who knew each other to communicate and allowed individuals who wanted to engage in social activities "anytime, anywhere" to engage with similarly situated individuals in virtual venues, such as chat rooms. The subsequent development of matchmaking mechanisms and virtual payment systems further contributed to the transformation of collaborative activities.

Collaborative activities in physical venues typically involve cooperation among multiple individuals who convene in one place at the same time. The migration to virtual venues enables more flexible forms of collaborative activities. The cooperating individuals can be in different locations and their interactions could be spread over time. For example, virtual chats are flexible alternatives to in-person chats. They relieve individuals of the need to meet for chats and enable multitasking (e.g., simultaneous engagement in multiple virtual chats or chatting virtually while attending meetings). Alternative workspace and work arrangements exemplify how the migration to virtual venues has expanded the use of flexible alternatives to traditional models of collaborative activities.[50]

The pandemic devastated sectors of the economy that facilitated collaborative consumption activities in physical venues—restaurants, convention centers, shopping malls, movie theaters, gyms, stadiums, concert halls, casinos, traditional educational institutions, and many more. In these sectors, people used to do things with others, in part, because the aggregation of consumers generated economies of scale and scope and, in part, because consumers were drawn to places that facilitated in-person collaborative activities.[51] For example, most moviegoers attributed "some significance and value to the number of people in the screening room . . . and they [went]

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[46] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 710 (2017).

[47] *See* Adam Cohen, *Pierre Omidyar's Perfect Store Turns 10*, N.Y. Times, Sept. 7, 2005, at A24.

[48] Liran Einav et al., *Peer-to-Peer Markets*, 8 Ann. Rev. Econ. 615, 617–18 (2016).

[49] *See* FTC Staff Report, The "Sharing" Economy: Issues Facing Platforms, Participants & Regulators 10–19 (2016) (summarizing the characteristics of these sectors).

[50] *See supra* text accompanying notes 6–8.

[51] *See, e.g.*, Robert D. Putnam, Bowling Alone (2000).

to the movies . . . with their date, partner, children, or friends."[52] The migration to virtual venues has persistently diminished the attractiveness of some of these sectors, such as shopping malls and movie theaters. The pandemic, however, has hit particularly hard all sectors that facilitate shared consumption in physical venues. In the post-pandemic world, the facilitation of collaborative activities in physical venues will recover, but only partially. Businesses and individuals have learned that the virtual alternatives could be convenient and cost effective.

Matchmaking Mechanisms. One of the principal motivations for structured arrangements—long term relations—is the transaction costs associated with finding trustworthy partners for trade and social interactions. In physical venues, the costs of finding opportunities for trade and interactions could be high and tend to be related to the heterogeneity of tastes. For example, in the past, it was difficult for owners and collectors of collectibles to find each other. Likewise, it was difficult for fans of conspiracy theories to form vibrant communities.

The effectiveness of virtual venues rests heavily on matchmaking algorithms.[53] For example, trade platforms—such as Airbnb, Amazon, Care.com, Etsy, Fiverr, and Uber—allow sellers and buyers to find each other conveniently and inexpensively. They also include trustworthiness indicators—reviews and ratings—that give parties some confidence about engaging with strangers. In a similar fashion, social media platforms are used to develop communities for every taste, and dating platforms became the principal venues for finding companionship.[54] In these platforms, popularity indicators are the equivalents of trustworthiness indicators in trade platforms.

The efficacy of the matchmaking mechanisms enhances the value of digital platforms, and the control over these mechanisms gives digital platforms considerable power to influence choices, views, preferences, trade, and prices. To borrow from Coase's seminal inquiry into the nature of firms, economists used to think of "the economic system as being coordinated by the price mechanism" and perceived the "supersession of the price mechanism" as the "distinguishing mark of the firm."[55] Today, prices continue to govern markets, but monetary funds are no longer the exclusive form of currency. In many business models, attention and data are additional forms of currency. Importantly, the operators of virtual venues have considerable influence over access to markets and the price system, including exchange rates across forms of currency. As a result, the "degree to which the price mechanism is superseded" continues to vary "greatly,"[56] but probably much more than before.

Antitrust Implications

The Efficiency Paradox. It has long been understood that improved productivity (efficiencies) could cause social discontent and anxieties.[57] For example, Robert Bork recognized that "[i]ncome

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[52] Charles B. Weinberg et al., *Technological Change and Managerial Challenges in the Movie Theater Industry*, J. Cultural Econ., Jan. 2020, at 1, 5. *See also* Sebastiano A. Delre et al., *The Effects of Shared Consumption on Product Life Cycles and Advertising Effectiveness: The Case of the Motion Picture Market*, 53 J. Mktg. Res. 608, 608–09 (2016).

[53] Einav et al., *supra* note 48, at 618–22.

[54] *See, e.g.*, *Virtual Dating: Fever When You Hold Me Tight*, The Economist, May 9, 2020, at 47, 47 ("Even before the pandemic American couples were more likely to meet each other through online-dating services than through personal contacts."); *Sexual Selection: Putting the Data into Dating*, The Economist, Aug. 18, 2018, at 16; *Modern Love, The Internet Has Transformed the Search for Love and Partnership* The Economist, Aug. 18, 2018).

[55] Coase, *supra* note 22, at 387–89.

[56] *Id.* at 388.

[57] *See* Joel Mokyr et al., *The History of Technological Anxiety and the Future of Economic Growth: Is This Time Different?*, 29 J. Econ. Persp. 31 (Summer 2015); John M. Keynes, *Economic Possibilities for Our Grandchildren*, Nation & Athenaeum, Oct. 11, 1930, at 36 (observing that the world was "suffering . . . from the painfulness of readjustment between one economic period and another").

redistribution due entirely to increased efficiency may, and often does, produce social discontent, as when computers replace file clerks."[58] Not all firms and individuals have the vision, capacity, or courage to risk what they have and enter into emerging markets. By the time new technologies establish a new economic order, firms and individuals that were "unable to readjust themselves to their altered surroundings,"[59] suffer losses. The resulting tensions have been the source of two threads of simplistic misconceptions that have considerably influenced the development of antitrust law. One treats welfare losses that accompany efficiencies as evidence of harm to competition. The other treats alleged efficiencies as evidence that business conduct is procompetitive. Both threads are flawed in their logic.

Successful advancements of technological disruptions generate meaningful social costs. As already noted, social costs are not necessarily harm to competition so much as a logical outcome of competition, which society gambles will work out to provide the greatest good for the greatest number in the long run. On the other hand, the creation of efficiencies in some areas says little or nothing about the anticompetitive conduct of the disruptors in other areas.[60] It would be very difficult to identify successful disruptors that have not engaged in anticompetitive conduct in attempts to eliminate competition.[61] Still, evidence of distributive effects without more is not indicative of anticompetitive conduct. A practical aspect of the present level of social discontent is that it is likely to influence the development of antitrust law. Political pressures influence enforcement attitudes and could result in significant legislation.

Illustration: Gig Workers. As noted, 21st century gig arrangements are specific types of FMAs in labor markets. Industrialization and the emergence of large firms at the turn of the 19th century required courts to refine common law standards that governed agency relations in which agents are individuals. Then, the central question was under what conditions a hiring party might be vicariously liable for actions and misconduct of agents. To address this question, courts developed the distinction between employees and independent contractors.

In a nutshell, employees enjoy rights and legal protections that independent contractors do not have; and the risk exposure of principals (hiring parties) to liabilities created by agents is higher when the agents are employees. The rationale underlying this distinction was that employees are integrated into the business enterprise, while independent contractors are outside service providers hired to perform specific tasks. For example, large companies employ in-house counsel for legal tasks that are inherent in the operations of the organization and hire outside counsel for more specific tasks. For routine tasks—such as cleaning, scanning, training, and delivery services—the reliance on independent contractors is often more cost-effective than relying on employees.

Organizational choices of this kind have material distributive effects. The gig economy of the 21st century has considerably expanded the ability of businesses to rely on the services of workers

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[58] Bork, *supra* note 28, at 112.

[59] *Trans-Missouri*, 166 U.S. at 323.

[60] *See, e.g.*, Giulio Federico et al., *Antitrust and Innovation: Welcoming and Protecting Disruption*, 20 Innovation Pol'y & Econ. 125, 125–27 (2020).

[61] *See, e.g.*, United States v. Apple, Inc., 791 F.3d 290 (2d Cir. 2015) (concluding that Apple orchestrated a hub-and-spoke conspiracy); *In re* High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103 (N.D. Cal. 2012) (reviewing no-poach agreements of leading high-tech companies); United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (concluding that Microsoft engaged in exclusionary practices); United States v. Motion Picture Patents Co., 225 F. 800 (E.D. Pa 1915) (holding that motion picture pioneers conspired to monopolize the market for motion pictures).

who are not classified as employees.[62] It has, therefore, drawn attention to the distributive and normative implications of such arrangements.[63]

One branch of the battles over the legal rights of gig workers concerns situations in which digital platforms that match gig workers and customers set gig rates. Several antitrust lawsuits have depicted these arrangements as per se unlawful price fixing.[64] After all, the gig workers are independent economic units, not employees of the platform. This line of lawsuits is unlikely to prevail in courts. First and foremost, the restraints are vertical price restraints that are analyzed under the rule of reason.[65] Platforms like Uber and Lyft do not facilitate horizontal agreements among the gig workers, which could have been unlawful per se.[66] Second, courts are reluctant to apply the per se rule to disruptive market arrangements or to "business relationships where the economic impact of certain practices is not immediately obvious."[67] Third, the allegedly exploitive nature of gig arrangements is beneficial to consumers, as these arrangements depress prices. The resulting harm, therefore, does not constitute an "antitrust injury," as the term is interpreted by courts.[68] Fourth, users of transaction platforms—buyers and sellers—are typically not positioned to advance antitrust claims. To have access to the platform, they are required to waive the right to litigate claims and the right to participate in any class action.[69] Fifth, it is far from clear that antitrust law is the proper regulatory framework to address problems in labor markets relating to statutory rights and protection of workers.

The upshot is that, in the absence of proper legal protections for workers, the efficient organization of gig markets tends to impact workers. But the problem is inadequate legal protections for workers, not harm to competition.

Formalistic Functional Analysis. The fluid nature of FMAs is likely to underscore tensions between legal formalism and economics. Since the adoption of the rule of reason,[70] courts have persistently emphasized that antitrust law aims at "substance rather than form"[71] and, therefore, requires "functional analysis" of "how the parties involved in the alleged anticompetitive conduct actually operate."[72] In other words, "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law."[73]

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[62] *See* Katharine G. Abraham et al., *The Rise of the Gig Economy: Fact or Fiction?*, 109 AEA Papers & Proc. 357, 360–61 (2019).

[63] *See*, *e.g.*, Dara Khosrowshahi, *Gig Workers Deserve Better*, N.Y. Times, Aug. 11, 2020, at A23; Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. Rev. 1673, 1727–28 (2016).

[64] *See*, *e.g.*, Complaint, Meyer v. Kalanick, No. 1:15-cv-09796, 2015 WL 9166194 (S.D.N.Y. Dec. 16, 2015) (alleging that Uber's rate system is a per se unlawful price-fixing arrangement).

[65] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 882 (2007).

[66] *See* Barak Orbach, *Hub-and-Spoke Conspiracies* 3–4, Antitrust Source (Apr. 2016), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr16_orbach_4_11f.authcheckdam.pdf (explaining the rim requirement).

[67] FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 458–59 (1986); *see also* FTC v. Actavis, Inc., 570 U.S. 136, 159–60 (2013); *Leegin*, 551 U.S. at 886 (2007); Cal. Dental Ass'n v. FTC, 526 U.S. 756, 780–81 (1999); *BMI*, 441 U.S. at 24–25.

[68] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) ("Plaintiffs must prove antitrust injury . . . of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.").

[69] *See* Am. Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013) (*Amex I*) (holding that class action waivers are enforceable); Meyer v. Kalanick, 200 F. Supp. 3d 408 (S.D.N.Y. 2016), *vacated sub nom.* Meyer v. Uber Techs Inc., 868 F.3d 66 (2d Cir. 2017) (dismissing a complaint filed by Uber drivers against Uber).

[70] Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).

[71] *Copperweld*, 467 U.S. at 760.

[72] Am. Needle, Inc. v. NFL, 560 U.S. 183, 191–93 (2010).

[73] Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 466–67 (1992); *see also* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285–87 (2018) (*Amex II*).

The challenging questions presented by the migration to virtual venues concern (1) the conduct of the platforms whose matchmaking functions give them market power that could be exploited, and (2) situations where organizational choices between integration and FMAs create antitrust concerns.

In actuality, antitrust doctrines are guided by classifications of economic relations that were common in the brick-and-mortar economy. The challenging questions presented by the migration to virtual venues concern (1) the conduct of the platforms whose matchmaking functions give them market power that could be exploited, and (2) situations where organizational choices between integration and FMAs create antitrust concerns.

Platform Misconduct. Until relatively recently, the "prevailing wisdom" in the United States was that digital platforms, "despite their size, do not unfairly use their market power" because "competition is always just one click away."[74] This "one click away" proposition, a variant of the antitrust false positives principle,[75] was aggressively promoted by Google in its campaign to diffuse antitrust concerns.[76]

Nonetheless, concerns about the economic power of digital platforms have inspired voluminous literature and produced a flood of lawsuits, investigations, and legislative proposals. This trend will continue in the foreseeable future.

The Supreme Court's decisions in the *Amex* cases—*American Express Co. v. Italian Colors Restaurant* (*Amex I*) and in *Ohio v. American Express* (*Amex II*)—display an unwillingness to consider the possibility that companies that advance efficiencies engage in anticompetitive conduct.[77] In both cases, the Court used formalistic rationales to bar evaluations of substantive claims about anticompetitive conduct of a credit card platform.

In *Amex I*, participation in trade through the platform required vendors to consent to class arbitration waivers. The plaintiffs, small vendors, claimed that the credit card platform abused its market power to inflate its fees. The Court held that class arbitration waivers are enforceable, stating that "antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."[78] In *Amex II*, the plaintiffs challenged the legality of the platform's policy (the "anti-steering provision") prohibiting vendors from "discouraging customers from using their Amex card after they have already entered the store and are about to buy something, thereby avoiding Amex's fee."[79] Using a highly formalistic approach to market definition,[80] the Court concluded that the plaintiffs failed to show anticompetitive effects.[81] The efficiencies advanced by the platform contributed to the Court's unwillingness to assess the competitive effects of the platform's policies.[82]

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[74] *Europe v. Google: Not So Froogle*, The Economist, July 1, 2017, at 55, 55 (attributing the observation to Professor Herbert Hovenkamp).

[75] *See* Jonathan B. Baker, *Taking the Error out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 Antitrust L.J. 1 (2015) (studying the development of the principle and criticizing it); Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 3 (1984) (formulating the principle). For judicial endorsement of the false positive premise, *see*, *e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554 (2007); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 399 (2004); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986); United States v. U.S. Gypsum Co., 438 U.S. 422, 440–41 (1978).

[76] *See*, *e.g.*, Steve Lohr, *What Is Happening with the Antitrust Suit Against Google: A Primer*, N.Y. Times, Oct. 20, 2020, at B7; Alistair Barr, *Google Official Responds to Criticism*, Wall St. J., Sept. 26, 2014, at B3; Steve Lohr, *Google's Competitors Square Off Against Its Leader*, N.Y. Times, Sept. 22, 2011, at B3; Thomas Catan, *Google Defends Itself Amid Probe*, Wall St. J., June 25, 2011, at B1; Amit Singhal, *Is Google a Monopolist?*, Wall St. J., Sept. 17, 2010, at A19.

[77] *Amex I*, 570 U.S. 228; *Amex II*, 138 S. Ct. 2274.

[78] *Amex I*, 570 at 233.

[79] *Amex II*, 138 S. Ct. at 2280.

[80] For analysis of the case, see Herbert Hovenkamp, *Platforms and the Rule of Reason: The* American Express *Case*, 2019 Colum. Bus. L. Rev. 35 (2019).

[81] *Amex II*, 138 S. Ct. at 2287–88.

[82] *Id.* at 2282–83 & 2285–87.

Several antitrust lawsuits against Apple, such as *Apple v. Pepper* and *Epic Games v. Apple*,[83] raised similar questions about the abuse of market power by a trade platform. In *Pepper*, the plaintiffs—consumers—argued that Apple had monopolized the trade in iPhone apps and unlawfully used its monopolistic power to charge consumers higher-than-competitive prices. In *Epic Games*, an app developer challenged Apple's right to refuse to deal with developers who breach the company's policies. One of the preliminary questions that *Pepper* raised was whether the indirect purchaser doctrine barred buyers from suing platforms.[84] Emphasizing concerns about the power of a platform to influence prices,[85] the Supreme Court denied the defendant's motion to dismiss. In *Epic Games*, the court denied the plaintiff's motion for a temporary restraining order because of "the novelty and the magnitude of the issues, as well as the debate in both the academic community and society at large."[86]

The more challenging question that the proliferation of FMAs presents is whether the choices a firm makes between integration and FMAs could ever constitute antitrust violations.

Organizational Choices Between Integration and FMAs. The more challenging question that the proliferation of FMAs presents is whether the choices a firm makes between integration and FMAs could ever constitute antitrust violations. Antitrust lawsuits challenging the legality of franchise systems illustrate the spirit of such claims. Franchise systems are networks of businesses "whose very uniformity and predictability attracts customers."[87] They can be described as alternatives to integration. The franchisees are not owned by the franchisor, but must abide by the franchisor's standards.

In *American Needle*, the Supreme Court clarified that franchise systems are not immune from antitrust scrutiny.[88] A broad interpretation of *American Needle* might suggest that a fast-food chain, such as McDonald's or Burger King, cannot set rules restricting competition among franchisees over employees.[89] Could FMAs in labor markets include restrictions on workers preventing them from working for competing companies? Alternatively, could FMAs in labor markets facilitate unlawful conspiracies through information exchange among rivals? These questions and similar ones require courts to address preliminary questions such as whether the parties are legally capable of concerted action and whether they entered into an agreement within the meaning of Section 1. For the analysis here, the important point is that a firm's choice to adopt FMAs could result in antitrust litigation.

Eastman Kodak Co. v. Image Technical Services illustrates another scenario in which a choice between integration and contractual relations led to costly antitrust litigation.[90] In the 1980s, Kodak, then a relatively small manufacturer of copying and micrographic equipment, used a hybrid model for repair and maintenance services for its equipment. The company had an integrated service arm but also relied on independent service providers. After a few years of experiences with this hybrid model, Kodak concluded that complete integration would be beneficial. The case raised the question of whether this decision harmed consumers. The court concluded that Kodak's

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[83] Apple Inc. v. Pepper, 139 S. Ct. 1514, 1518–19 (2019); Epic Games, Inc. v. Apple Inc., No. 4:20-cv-05640-YGR, 2020 WL 5993222 (N.D. Cal. 2020).

[84] *Pepper*, 139 S. Ct. at 1520.

[85] *Id.* at 1519, 1525.

[86] *Epic Games*, 2020 WL 5993222, at *1.

[87] Principe v. McDonald's Corp., 631 F.2d 303, 309 (4th Cir. 1980).

[88] *American Needle*, 560 U.S. at 202–04.

[89] *See, e.g.*, Arrington v. Burger King Worldwide, Inc., 448 F. Supp. 3d 1322, 1330 (S.D. Fla. 2020) (concluding that a franchisor's relations with its franchisees resemble those of "a corporation organized into divisions or de facto branches, or that of a parent-subsidiary").

[90] *Kodak*, 504 U.S. 451 (1992).

policy excluded competition in the secondary market and, thus, could potentially form an antitrust violation.

Many other tying cases in the brick-and-mortar economy raised similar questions. In these cases, manufacturers of machines advanced a variety of techniques to force users—buyers or renters—to buy inputs, such as raw materials and services from the manufacturers.[91] Critics of those tying arrangements portrayed them as means to "multiply monopolies,"[92] whereas their defenders insisted that "a tied product normally does not increase the profit that the seller with market power can extract from sales of the tying product."[93]

Likewise, in *Jefferson Parish*, an anesthesiologist challenged the legality of a hospital's organizational policies. There, the hospital relied on a long-term contract with a group of anesthesiologists that had the capacity to meet the hospital needs.[94] The plaintiff believed that this agreement excluded competition and, in essence, argued unsuccessfully that antitrust law compelled the hospital to accommodate more flexible market arrangements.

In sum, the similarities between past and present organizational choices suggest that the proliferation of FMAs is likely to be the subject of antitrust disputes and debates.

Conclusion

In the United States, large-scale commercialization of digital technologies commenced in the mid-1970s, when conservative economic advocacy gained popularity and the Supreme Court's ideological orientation changed. The simultaneous formation of these turning points in American history was coincidental. In the decades that followed, the world has witnessed a dramatic transformation of the global economy driven by rapid technological change and globalization. The transformation was accompanied by sharp increases in concentration in key sectors, the rise of "superstar firms" (chiefly big tech companies), and growing economic inequalities.[95]

The parallel progression of these long-term trends raises the question of whether and to what degree the relaxation of antitrust enforcement standards has affected the competitiveness of the American economy and contributed to the rise in income inequality. Among scholars, there is a broad consensus that ideological convictions have led to excessive relaxation of antitrust enforcement policies that contributed in some fashion to a growing and worsening set of economic and social problems.[96] But this consensus does not imply that competition policy is "a substitute for

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[91] *See, e.g., id.*; Int'l Salt Co. v. United States, 332 U.S. 392 (1947); Henry v. A.B. Dick Co., 224 U.S. 1 (1912); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979); Cal. Computer Prods., Inc. v. IBM Corp., 613 F.2d 727 (9th Cir. 1979); Transamerica Computer Co. v. IBM Corp., 481 F. Supp. 965 (N.D. Cal. 1979); United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 344 (D. Mass. 1953); Advance Bus. Sys. & Supply Co. v. SCM Corp., 287 F. Supp. 143 (D. Md. 1968); United States v. Am. Can Co., 87 F. Supp. 18 (N.D. Cal. 1949); Xerox Corp., 86 F.T.C. 364 (1975).

[92] *A.B. Dick*, 224 U.S. at 53 (White, C.J., dissenting); *see also* Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 305 (1949) ("Tying agreements serve hardly any purpose beyond the suppression of competition.").

[93] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 36 (1984) (O'Connor, J., concurring).

[94] *Id.* at 4–8.

[95] *See* Autor et al., *supra* note 30, at 702–04; Piketty & Saez, *supra* note 30, at 35–37; *Too Much of a Good Thing*, The Economist, Mar. 26, 2016, at 23; *The Problem With Profits*, The Economist, Mar. 26, 2016, at 11.

[96] *See, e.g.*, Shapiro, *supra* note 13, at 69–72; Baker, *supra* note 31, at 11–31; Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 Ind. L.J. 1031, 1063 (2019); Suresh Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 Harv. L. Rev. 536, 537–40 (2018).

badly needed regulations directed at reducing the political influence of corporations, protecting privacy and data security . . . limiting the spread of disinformation,"[97] or alleviating income inequality.

Against this backdrop, the proliferation of FMAs is likely to become the subject of antitrust disputes and controversies. FMAs embody the business vision that drove the development of the digital economy—doing anything, anytime, anywhere. Their fluid nature creates challenges for the current modes of antitrust analysis that heavily rest on structural presumptions. And their welfare effects will intensify debates over the proper functions of antitrust enforcement in the digital economy. ●

[97] Shapiro, *supra* note 13, at 90.