Antitrust after Neoliberalism

Gerald Berk

Antitrust is back, and neoliberalism is in flux. Led by a new movement that takes its name from Louis Brandeis, it evolved quickly from obscurity to prominence. How should we understand the New Brandeisians? This article takes an interpretive approach. I draw on Foucault, because he illuminates the vital role of monopoly in the transition from liberalism to neoliberalism and provides a conceptual framework that allows us to understand the debate between neoliberals and neoBrandeisians accurately as a dispute over the standards for making truth claims about markets. Whereas neoliberals developed a formal theory that promised to the excise the problem of monopoly from antitrust, neoBrandeisians draw on Progressive-era Legal Pragmatism to show how that project cannot stand up to jurisprudential or empirical scrutiny. NeoBrandeisians offer a meliorist alternative: although they concede the impossibility of fully ridding markets of monopoly, they show how a vigilant and adaptative antitrust regime can subdue market power sufficiently to serve prosperity, liberty, and democracy.

Antitrust is back and neoliberalism is in flux (Bagg 2023; Berk 2019; Britton-Purdy et al. 2020; Foster and Thelen 2024; Somers 2021; Vogel 2024; Fligstein and Vogel 2020). Led by reformers who take their movement's name from Progressive-era antimonopolist and Supreme Court Justice Louis Brandeis, New Brandeisians have organized think tanks, edited magazines, held congressional hearings, enacted legislation, and reformed law school pedagogy. Following President Biden's (2021) executive order promoting competition, they were appointed to head the Federal Trade Commission and the Antitrust Division of the Justice Department. In little time, they augmented enforcement, blocked mergers, banned noncompete contracts and junk fees, won a case against Google, rewrote merger guidelines, and more. Early signs in the Trump administration indicate that we may have crossed an historical divide in antitrust. In her first public speech, Assistant Attorney General for Antitrust Gail Slater (2025) criticized neoliberal antitrust for succumbing to market power and promised to continue aggressive enforcement to serve the conservative ends of free markets and deregulation. Although President Trump dismissed the New Brandeisians from the Federal Trade Commission, the agency has continued its aggressive case against Meta (Benedict 2025). Beyond the executive branch, an alliance of Democratic and Republican states' attorneys general are continuing their suit against Google, and Republican Josh Hawley and Democrat Elizabeth Warren drafted a Senate bill to break up Google.

Although the New Brandeisians want to augment enforcement after 40 years of inaction, their goals are more ambitious than that: they seek nothing less than to restore a classically liberal and modern pragmatist account of markets to antitrust and to revise the standards by which truth claims can be made about competition and monopoly. Their critique of neoliberal antitrust is not merely that it failed to check predatory competition and break up monopolies: it also abandoned a truth founded in classical liberalism and extended to liberal democracy, namely, that markets are paradoxical. They are natural sites of power and artificial creations of law, in which competition can be both predatory and productive. As such, markets can promote decentralization or monopoly, improvement or stagnation, liberty or oppression, democracy or autocracy. The role of antitrust should be to distinguish predatory from productive competition and to channel behavior and market structure from the former to the latter. The long history of antimonopoly law shows how this is possible.

Neoliberals,[1] the neoBrandeisians charge, mistakenly thought economic theory could rid markets of paradoxical truths and the law of hard choices. They promised a positive theory, which could predict the consequences of and identify objective metrics for evaluating legal infractions

Gerald Berk (gberk@uoregon.edu, USA) is professor emeritus of political science at the University of Oregon. He is the author of Alternative Tracks: The Constitution of American Industrial Order *(1994; APSA Best Book in Politics and History) and* Louis D. Brandeis and the Making of Regulated Competition *(Cambridge University Press, 2009) and coeditor of* Political Creativity: Reconfiguring Institutional Order and Change *(2014). His recent work on institutional diversity and change in political economy, war, high technology, and antitrust can be found in* Theory & Society, Polity, Politics & Society, *and* Issues in Science and Technology.

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and, by doing so, remove subjectivity, inconsistency, and incoherence from antitrust. But 40 years of experience, charge the New Brandeisians, have refuted neoliberalism's promise. A foundational theory cannot solve difficult problems of antitrust law. Antitrust must restore old truths that markets are natural sites of power and artificial creations of law, in which competition can be both predatory and productive. And it must revise the standards accordingly by which truth claims can be made about competition and monopoly. Failure to do so will threaten not only markets but also liberty and democracy.

My goal in this article is to provide an accurate interpretation of the New Brandeisians (Bevir and Blakely 2018; Yanow and Schwartz Shea 2013). How should we understand their project? How should we characterize their debate with the neoliberals before them? How is my interpretation superior to other interpretations? I draw on Foucault's lectures on neoliberalism because they provide historical insights into the role of antitrust in the transition from liberalism to neoliberalism, as well as two helpful concepts for interpreting neoBrandeisian thinking: market veridiction and the monopoly paradox. At some point in the eighteenth century, writes Foucault, the market became a site of truth, or *veridiction*, instead of a site of justice. Political economy replaced law as the logic to justify and assess state action. Markets, on this view, generated natural prices, which liberal government was bound to obey. At the same time, classical liberals noticed that competition could also lead to monopoly. Foucault called this the *monopoly paradox*: on the one hand, states were bound to obey market truths (natural prices); on the other hand, market truths could not reveal themselves if states did not act first to prevent monopolies.

Seen through Foucault's conceptual framework, which sensitizes us to both the role of market veridiction and the monopoly paradox, the New Brandeisians are best understood as legal pragmatists. They draw from this Progressive-era reform movement because it shared their efforts to overturn a legal order that blocked reforms to check private power. Critically, the New Brandeisians are both antifoundationalists, who seek to undermine the theoretical pretentions of neoliberal antitrust, and antidualists, who seek to restore the classically liberal and legal pragmatist insight that markets are simultaneously natural sites of power and artificial creations of law. Prescriptively, they are meliorists, who see the ambiguous nature of markets as a source of vitality: although neoBrandeisians concede that it is impossible to fully rid markets of concentrated power, they insist that the long history of antimonopoly law shows it is possible to ameliorate power sufficiently to foster prosperity, liberty, and democracy.

I develop this interpretation of the New Brandeisians in four parts. The first part asks how we should characterize the New Brandeisian movement. It considers three recent interpretations: neoBrandeisians are populist, Marxist, or Polanyian. Although each characterization captures some feature of the movement, I show how none can make sense of its legal pragmatist commitments to antifoundationalism, antidualism, and meliorism. The second part explains Foucault's methodological framework. It recounts the role of monopoly in Foucault's genealogy of the transition from liberalism to neoliberalism, and it explains market veridiction and the monopoly paradox. The next part explains the neoliberal turn in US antitrust by using Foucault's framework to analyze Robert Bork's influential book, *The Antitrust Paradox*.

The fourth part, the heart of the paper, is a textual analysis of neoBrandeisian thinking in three sections. The first section explains the neoBrandeisian's pragmatist account of markets as ambiguous. Although they are sites of power that can foster stagnation, oppression, and autocracy, the history of antimonopoly law shows how markets can be configured to serve prosperity, liberty, and democracy. The second section turns to the neoBrandeisian's pragmatist critique of neoliberal antitrust by analyzing Lina Khan's influential 2017 article, "Amazon's Antitrust Paradox." Khan reveals the limits of Bork's promises to achieve objectivity, consistency, and coherence in antitrust by showing how Amazon gamed neoliberal rules. Although Amazon realized visible neoliberal metrics to show it was following the law, it also concealed its monopolistic strategies from neoliberal scrutiny. Antitrust, Khan concludes, necessitates vigilance and adaptation, because formal rules can never fully capture an aspiring monopolist's inventiveness to do an end-run around the law. The next section recounts a veridiction debate between neoBrandeisians neoliberals over the timing of antitrust action. Where neoliberals ask antitrust authorities to wait until markets reveal truths about alleged antitrust infractions before they act, neoBrandeisians ask them to act promptly, before market power becomes entrenched. The fatal flaw in neoliberal reasoning, argue the neoBrandeisians, lies in its inability to see how once monopoly power is entrenched, markets no longer provide usable truths to guide government action.

How Should We Characterize the New Brandeis Movement and Its Debate with Neoliberals?

Critics characterize neoBrandeisians as ideologues. They are backward looking populists, writes the "dean of antitrust" Herbert Hovenkamp (Charbit and Gachot 2021), who seek to decentralize the economy in the name of an idealized yeomanry of small businesses, entrepreneurs, and family farms (Hovenkamp 2019, 82–83, 89–90; see also Portuese 2022; Shapiro 2018). Alternatively, neoBrandeisians are Marxists who seek to displace market decisions with state authority in service of the working class, writes former Republican FTC commissioner Christine Wilson (Wilson 2022; Wilson and Cella 2022).

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Supporters, by contrast, dub neoliberals as ideologues, who obscured the political and legal causes of monopoly by falsely naturalizing markets. Economic sociologist Margaret Somers (2021) casts the neoBrandeisians as followers of economic anthropologist Karl Polanyi, who showed how markets are always artificial creations of law and politics. NeoBrandeisians, writes Somers, seek to denaturalize markets, and re-embed them in democracy by revitalizing antitrust (see also Block and Somers 2014; Britton-Purdy et al. 2020; Fligstein and Vogel 2020; Vogel 2019; 2024).

Although each of these perspectives accurately describes some features of neoBrandeisian thinking, all are misleadingly incomplete. Like populists, neoBrandeisians criticize bigness and venerate small business entrepreneurship (Khan and Lynn 2012; Wu 2018). Unlike populists, who trust competition and mistrust the administrative state, neoBrandeisians think competition can be predatory and so expert regulation is necessary. Like Marxists, neoBrandeisians think markets have a natural tendency to monopoly. However, unlike Marxists, they do not see this as the fatal contradiction of capitalism because, like Polanyians, they also think markets are artificial creations of law. The history of common law and statutory rules against monopoly demonstrates it is possible to ameliorate market power. Far from a fatal flaw, the paradox of markets is a source of its vitality. Finally, like Polanyians, neoBrandeisians think markets are embedded law and politics. But unlike them, neoBrandeisians see markets as ambiguous or paradoxical. They are artificial creations of law *and* natural sites of power. Competition is predatory *and* productive. Therefore, markets can centralize or decentralize power. They can be compatible with liberty and democracy or with oppression and autocracy.

Seen through Foucault's genealogy of neoliberalism, a more accurate picture comes into view: neoBrandeisians are legal pragmatists.[2] In Foucault's telling, German neoliberals after World War II labored to denaturalize monopoly because they thought it had become the leading justification for socialism. When they exported their project to the United States, the Americans drew on microeconomic foundations to construct a theory of market behavior, which claimed to be a definitive resolution to the problem of monopoly. The New Brandeisians explain why this project failed. They draw on Progressive-era legal pragmatists because they faced an analogous challenge—namely, to overturn an overly formal jurisprudence—that they believed locked in privilege and blocked reform (Khan 2018a; Lynn 2020, 147–55; Rahman 2017, 11–25, 54–96; Teachout 2020, 1092–97; Vaheesen 2019; Wu 2018, 33–44, 135–39). NeoBrandeisians borrow two critical methods (antifoundationalism and antidualism) and a prescriptive orientation (meliorism) from Legal Pragmatism.

Consider antifoundationalism, or the idea, as Supreme Court Justice Oliver Wendell Holmes in a 1905 dissent in *Lochner v New York* put it, that "general principles do not decide concrete cases." Perhaps no one applied antifoundational method more carefully to legal reasoning than John Dewey ([1925] 2008: 100–31; Shusterman 1994). In a 1924 essay, Dewey explained how the search for legal certainty in formal logic foundered on the indeterminant relationship between rules and facts. Reasoning by "formal logic," foundationalists assert that "every…logical conclusion 'subsumes' a particular under an appropriate universal." In jurisprudence, this means that "for every possible case which may arise, there is a fixed antecedent rule at hand," because cases are either "unambiguous" or easily classifiable by inspecting "indubitable facts." But judicial practice belied formal logic, because "situations… do not literally repeat themselves in all details" and because of the "troublesome flux of events" (Dewey [1924] 1993, 188). The search for legal certainty in logical foundations was a chimera. To be sure, Dewey conceded, legal certainty is valuable, and sometimes the association of rules and facts is uncontroversial. But this is the result of habits associated with environmental stability, not formal logic. When change is afoot, habit—parading as logical truth—tends to serve those who are privileged by the status quo and to block the inquiry necessary for effective legal reasoning.

Next consider antidualism, the method by which pragmatists showed how the sharp distinction formalists drew between public and private law became scrambled in practice (Ansell 2011, 11-12). Public law, wrote the formalists, governed state coercion, whereas private law governed voluntary transactions (Horwitz 1992, 164–66, 204–8).[3] Holmes (1897) took the lead by showing how public considerations permeated private contracts. In the age of industry, when business-to-business transactions were ubiquitous, it became impossible to specify every future contingency in contracts. When disputes arose and judges invoked a "reasonable man" standard to resolve difficult cases, wrote Holmes ([1897] 1993: 15–24), they unwittingly deferred to customary principles of public policy (Cohen 1933, 207; Horwitz 1992, 35–39). Public law, in other words, intruded on the most private of transactions. Pragmatists also observed how the prevalence of "law making by private groups" (unions and trade and professional associations) trampled the public/private distinction (Jaffe [1937] 1993). Finally, as Brandeis (*Liggett v Lee* 1933; Berk 2009, 35–67) and Robert Hale (1923) explained, the concentration of corporate power meant that private contracts between business, small and large, or labor and management inevitably involved coercion. Domination was not restricted to the public sphere.

Prescriptively, legal pragmatists were meliorists. Pragmatist meliorism, writes political theorist Alexander Livingston (2016, 136–37), was an "orientation," not a theory. Although it rejected the promise of human mastery through science, it held out the possibility for progress through inquiry, experimentation, and evaluation (James

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1907; Koopman 2009). The point of antifoundationalism was to reconfigure, not abandon, legal logic, wrote Dewey ([1924] 1993, 193). Jurists should think of general principles as "tools" for "inquiry" into the "probable consequences" of legal decisions, not as "deductive certainties." In this way, general principles become the "means to intellectual survey, analysis, and insight into the factors of the situation to be dealt with. Like other tools, they must be modified when they are applied to new conditions and new results have to be achieved."

In Progressive-era antirust, Brandeis levied antifoundational and antidualist criticism against legal formalists who drew antecedent distinctions between competition and monopoly, free and restrained trade. Competition, Brandeis noted, was ambiguous: it could be productive ("it prodded men to improvement") or predatory (the "competition that kills"; Berk 2009, 49, 52). Restraints on trade could also be productive (trade association product quality standards) or destructive (price fixing). The problem for antitrust was to distinguish and to channel behavior and market structure from predatory to productive; that is, to "regulate competition." Like Dewey, Brandeis thought that regulated competition necessitated inquiry. Antitrust jurists should treat rules as hypotheses to guide inquiry into *distributions of power*, *competitive processes*, and the *economic consequences* of factual situations under antitrust scrutiny (Berk 2009, 50–67, 228–29).

The neoBrandeisians are legal pragmatists. We shall see how they apply antidualist reason to explain how markets are simultaneously artificial creations of law and natural sites of power. Far from a fatal contradiction, neoBrandeisians see this as a source of meliorist vitality: the history of antitrust shows it is possible to subdue power sufficiently to make markets workable and compatible with democracy. We shall also see how neoBrandeisians deploy antifoundational critique to show how the neoliberal promise to theorize a determinant association between theory, rules, and facts fails in the emerging world of digital commerce. Searching for narrowly circumscribed facts, neoliberal regulators overlooked the methods by which Amazon monopolized the industry. In contrast, by treating neoliberal principles as hypotheses instead of decision rules, neoBrandeisians develop methods to adapt antitrust to the digital age. Finally, we shall see how neoBrandeisians deploy antifoundational critique to show how neoliberal guidance on the timing of enforcement fails. Where neoliberals ask regulators to wait until markets reveal truth about alleged violations before they act, neoBrandeisians show how waiting entrenches market power and undermines the capacity of markets to provide usable information to guide regulatory and judicial action. Instead, antitrust authorities should act prophylactically; that is, to prevent concentrated power before it undermines workable competition.

Foucault on Neoliberalism

In 1978, Foucault launched a series of lectures on neoliberalism, which are fruitful for making sense of the debate between neoliberals and neoBrandeisians. This section explains why. Foucault shows us how market veridiction became the lingua franca of liberalism. The differences between liberals, neoliberals, and neoBrandeisians, we shall see, are better understood as disagreements over the standards for making truth claims about markets than over ideology. Moreover, Foucault shows how the problem of monopoly was far more important to the transition to neoliberalism than commonly thought. Finally, he teaches us about the unique nature of American neoliberalism, whose intellectuals turned to formal theory to reinvigorate liberalism. I draw on this insight to reveal the formal turn in American antitrust and to explain why neoBrandeisians have found pragmatist methods useful in challenging neoliberalism.

Market Veridiction and the Monopoly Paradox

At some point in the middle of the eighteenth century, classical political economy replaced law and moral reasoning as the "mode of rationality" that liberal government "fostered and upon which it depended" (Best 2018, 93; Brown 2015, 57–58, 67–68). With political economy, truth replaced moral and juridical claims about the market. "The market no longer appeared as a site of jurisdiction" that marked off a realm of individual autonomy from the sovereign, lectured Foucault (2010, 32–33). It was no longer a site of "justice" to assess whether the Prince's actions were noble or corrupt. Instead, the market appeared as "something that obeyed" "natural" and "spontaneous mechanisms." Attempts to modify those mechanisms could only "impair and distort them." Nowhere was this more evident than in market prices, which expressed "true" relations between the "cost of production and the extent of demand." As such, prices became a "standard of truth that enabled us to discern which government policies are correct and which are erroneous." The market, in short, became a "site of *veridiction*," which told truths that governments "must obey."

It is important to understand that market veridiction is an historical concept meant to situate modern liberalism in light of what came before it. For all classical political economy's claims to reveal market truths that governments must obey, Foucault explains how it also admitted the limits of its own logic when it observed that competition could lead to monopoly as easily as it could to natural prices. Liberal political economy, then, could not serve either as a schema that fully determined state conduct, a "policy paradigm" that structured official cognition (Hall 1993), an "ideational blueprint" (Blyth 2003; 2013), a "totalizing paradigm," or what Bevir (2010, 42; 2016) calls a "quasi-structuralist episteme."[4]

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As Rabinow (2011) writes, truths for Foucault are tools: pragmatic instrumentalities to help subjects find their way about in problematic situations or what Foucault calls "*foyers d'experience*" (liminal spaces). Subjects cannot help but draw on historical modes of veridiction—truths formed amid prior problems and situations—even as they innovate to address new circumstances. Uncovering the history of truths, the problems they were meant to solve, their historical contingencies, fissures, paradoxes, and pathologies is Foucault's unique method of genealogy (see also Koopman 2009; 2017; Lemke 2019; Novkov 2011; Vucetic 2011).

Nowhere was the fissured nature of market truths more evident than in the problem of monopoly, writes Foucault. For no sooner did classical political economy identify the price mechanism as a truth machine than it also acknowledged that monopolies undermined the truth-telling capacity of markets. Foucault (2010, 64, 134–35, emphasis added) put it this way: "In the classical conception…of the economy, monopoly is seen as the semi-natural, semi-necessary consequence of competition… . Monopoly is an actual part of the logic of competition." If governments want to "save competition from its own effects," it "must act on…[those] economic mechanisms. *This is a paradox.*" The "monopoly paradox" ensured that market veridiction rested on a circular logic: governments were bound to respect the truth of natural prices only insofar as they also acted to prevent the monopolies that undermined natural prices.

The monopoly paradox, Foucault (2010: 64–65) noted, ensured that neither autonomous markets nor political economy applied to state action could, in and of themselves, produce liberty: "Freedom in the regime of liberalism is a not a given, it is not a ready-made region which has to be respected…. Freedom is something which is constantly produced. Liberalism is not acceptance of freedom; it proposes to manufacture it constantly, to arouse it and produce it." Nor does liberty derive from an ideal theory of markets. Indexed by a paradox wherein competition produces natural prices *and* monopolies—where markets are self-regulating and self-destructive—liberal government is an "art" that "entails at its heart a productive/destructive relationship with freedom." The same might be said for markets as for liberty; that is, the market is not a "ready-made region to be respected." It must be "constantly" nurtured by the "art of liberal government": that is, an art that acknowledges both natural prices and natural monopolies.

A Genealogy of Neoliberalism

At the end of World War II, some German intellectuals began to worry that the monopoly paradox had undermined liberalism. Once an agreed-on exception to the rule of natural prices, now socialists saw monopoly everywhere. Monopoly was not a paradox for socialists; it was a fatal contradiction of capitalism. As such, it became a justification for nationalization, collective bargaining, redistributive taxation, and social welfare. If German neoliberals were to neutralize these threats to liberty, denaturalizing monopoly was a necessary first step.

As Foucault explains, if Hayek, Von Mises, and Ropke were to curb socialist threats to liberalism, they needed to show how competition did not result in monopoly. Hayek led the way. More often than markets, he charged, it was the state that granted monopoly privileges and politics that entrenched them against competitive challenge. To be sure, Hayek and his colleagues admitted that sometimes monopoly had technical causes (such as scale economies). But these were always temporary, insisted Von Mises, because they were inevitably challenged by technical progress and by new rivals that were encouraged by monopoly profits. In Foucault's words (2010, 136–37), the German neoliberals aimed to free liberalism "from…the handicap of monopoly," remove the monopoly paradox from market veridiction, and set liberalism on a fresh and "utopian" foundation. Resolving the monopoly paradox once and for all was foundational to the neoliberal project.

Neoliberalism Comes to America

The Germans exported their efforts to denaturalize monopoly to the United States where they assumed a different form. Whereas the German response was institutional, the American response was epistemological. If governments, not markets, created and sustained monopolies, law and policy could be altered to reinvigorate liberalism, argued the Germans. An "ordoliberal" state would discourage monopoly and encourage a flourishing competitive economy of small and medium-sized enterprises. Carefully designed markets could prevent an entrenched proletariat, and demands for unionization, nationalization, and social provision would fade (Foucault 2010, 120–21, 176–79).[5]

American neoliberalism took a different turn. To Foucault's surprise, Americans looked to Viennese Positivism for a philosophically grounded defense of markets. Led by intellectuals at the University of Chicago, neoliberals sought to replace a putatively haphazard combination of ideologies, legal doctrines, and ad hoc economic principles with a general theory of economic behavior. In doing so, Foucault (2010, 222–33) noted, the Americans shifted the domain of economic analysis from production, exchange, and distribution under various conditions to a more "general field of reference of economic analysis," wherein the "object of study" attended to "the analysis of the internal programming of individuals' activity…. For the [American] neo-liberals, economic analysis should [explain] the nature and consequences of…substitutable choices, that is to say, the study and analysis of the way in which scarce means are allocated to competing ends."

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They aimed to build a general theory, founded on the psychology of human choice, that could be applied to any realm of life where scarcity reigned—from the market and politics to crime and the family (Bevir 2016; Brown 2015; Cooper 2020).

Anti-Antimonopoly in the United States

Foucault's account of German efforts to excise the monopoly paradox from liberalism stopped at the US border. Nonetheless, his account of neoliberalism's epistemological turn in the United States resonates in antitrust. This section traces Foucault's genealogy into Robert Bork's canonical 1978 text, *The Antitrust Paradox*. It shows how Bork developed a formal theory of markets to excise the monopoly paradox from antitrust and to turn antitrust reform into the vanguard of neoliberalism's pledge to save liberalism's allegiance to the rule of law from caprice, incoherence, and subjectivity.

From the Monopoly Paradox to the Antitrust Paradox

German neoliberals exported their attack on the monopoly paradox to the United States. Formed in 1946 under Hayek's guidance at the University of Chicago Law School, the Free Market Project turned its attention to denaturalizing monopoly; it was renamed the Antitrust Project in 1952. Under Robert Bork's guidance, the Antitrust Project built a theory of markets that transformed a durable truth in classical political economy—the monopoly paradox—into a thinking error, a logical contradiction to be solved by a foundational theory of markets (Eisner 2010; Khan 2020b; Sawyer 2024; Shaviro 2012; Teles 2010; Van Horne 2011).

The result of 25 years of scholarship, Bork's *Antitrust Paradox* detailed confusions in twentieth-century antitrust and outlined a model for rationalizing law and policy. It is easy to read Bork, as do the Polanyians, as a champion of deregulation, free markets, or disembedded liberalism (Britton-Purdy et al. 2020; Fligstein and Vogel 2020; Somers 2021; Vogel 2024). That is true enough, but Bork was more ambitious. He sought nothing less than to save the liberal rule of law from caprice, bias, and incoherence and, by doing so, to save democracy from interest group capture and ideological prejudice. Ridding antitrust of the monopoly paradox and setting market veridiction on empirically verifiable logical foundations were the bleeding edges of his grand project.

Consider Bork's brief for deregulation. Two problems plagued mid-century antitrust: ideology and interests (Bork and Bowman 1965). Ideologically, antitrust had always harbored the "loosely Jeffersonian" sentiment that "social and political health" was "engendered by a sturdy, independent yeomanry in the business world." The patron saint of modern antitrust, Louis Brandeis, Bork (1978, 47) charged, "was not so much a believer in competition as a believer in safety and smallness in the economic world." Interests also degraded antitrust. Like his colleague George Stigler (1971), Bork argued that regulation was inevitably designed by those with the greatest stake in redistributing rents to themselves. In antitrust this meant that the most "politically potent…groups" used their influence to suppress, rather than encourage competition (Bork 1978, 55). Add yeoman ideology to interest group domination, and the outcome was toxic. Antitrust "protected competitors not competition" (56). Bork's solution was deregulation, to disembed markets from a democracy corrupted by interest groups and ideology by realigning antitrust from redistribution to efficiency. Armed with a theory of economic efficiency, antitrust would enable markets, rather than regulators or judges, to select the most efficient forms of economic organization.

Bork's project was more ambitious than insulating the market from ideology and the "serfdom of interest group liberalism" (Lowi 1986–87). Armed with an economic theory predicated on the "internal rationality…of human behavior" (Foucault 2010, 223), Bork sought to reinvigorate liberalism by saving the rule of law from subjectivity (judge-made law), capriciousness (treating unlike cases alike), and imprecision (meaningless concepts). Antitrust became the cutting edge of that project. This required setting political economy on a solid epistemological foundation by showing how the monopoly paradox was not a market truth but instead was a logical error or, in Foucault's idiom, a false mode of market veridiction. Reconceptualized on logical micro-foundations, or what Dewey in 1924 called "antecedent principles," Bork would show how the *monopoly* paradox evaporated from antitrust doctrine. In its stead, he revealed an *antitrust* paradox, a policy at war with itself because it was so riddled with logical contradictions that it undermined the law's promises to bring about prosperity, liberty, and democracy.

In Bork's deductive critique, two associated principles of midcentury jurisprudence led judges and regulators astray: the doctrines of multiple goals and market fragmentation. On the first, antitrust statutes voiced social, political, and economic goals. Congress meant not only to ensure that monopoly did not undermine efficiency and low prices but also that it did not injure liberty and democracy. In the absence of a theory that explained how monopoly undermined these goals or how to arbitrate conflicts between them, jurists invented a proxy measure: market fragmentation.

Fragmentation, Bork (1978, 60–61) complained, was a "word without content." Is the "atomization of society" a good in and of itself? Does it provide a uniform standard for assessing multiple goals when they conflict? Is fragmentation a means to protect rivalry or its end? Reasoning deductively from antecedent principles, Bork reconceptualized market structure as a result of competitive processes among rational rivals, instead of an a priori

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normative standard for markets (fragmentation). When driven by competition to allocate resources to their most efficient use, Bork reasoned that the most resourceful rivals will always win. The predictable result of competition, then, is the "elimination of rivalry"; that is, market concentration. Fragmentation was precisely the opposite of a correct marker for effective competition.

Still worse, the fragmentation standard provided litigants with perverse legal incentives, because it granted losers entitlements to attack successful rivals. In the absence of a deductive theory of markets, rooted in sound micro-foundations, Bork wrote, antitrust doctrine became "paradoxical." A legal standard meant to "protect competition"—fragmentation—"protected competitors" from the discipline of market rivalry. Antitrust became a policy "at war with itself" (Bork 1978, 60; Bork and Bowman 1965).[6] In Foucault's language, Bork deduced a theory of market competition that transformed a durable feature of liberal market veridiction—the *monopoly* paradox—into a contradiction in formal logic, an *antitrust* paradox. A law meant to serve economic prosperity through competition undermined competition. In Bork's analysis, the monopoly paradox was no longer a challenging problem to be ameliorated by the "art" of liberal government (Foucault 2010): it was an "antitrust paradox" that could be settled by a formal theory of law and thereby excised from antitrust doctrine.

To be sure, Bork conceded that jurists occasionally recognized that fragmentation was an inappropriate proxy for multiple goals in statutory law. In those cases, they proposed to adjudicate competing goals on a "case-by-case" basis. Only facts could arbitrate whether a market structure or behavior was consistent with statutory intent. In the absence of a theory that derived rules from general principles and facts from rules, Bork objected, this was a recipe for caprice or "judge made law." Bork asked jurists instead to conceptualize the problem of monopoly from the perspective of the calculating monopolist, who was weighing the costs and benefits of market control. Consider, for example, the aspiring monopolists who engage in pricing below cost to drive rivals from the market. This strategy is never costless: they must consider whether they can recoup losses once they gain control. If they raise prices too high, they will draw new rivals into the market. The real question, then, is whether aspiring monopolists can recoup the cost of predatory behavior. Thus, instead of asking whether pricing below costs leads to monopoly (the absence of fragmentation), Bork asks jurists to deduce a determinant rule from general principles: Do aspiring monopolists raise prices to recoup the cost of pricing below costs once they gain market power? Logic, Bork concludes, replaces the fragmentation standard with the recoupment rule.[7] (As we shall see, it is precisely Bork's account of the relationship between general principle, rule, and fact selection that neoBrandeisians criticize when they explain why neoliberal regulators were unable to perceive how Amazon monopolized digital commerce.)

If fragmentation is an incoherent proxy measure for multiple ends, then another way to evaluate trade-offs is necessary. Appealing to diverse values is useless, Bork objected, because they are incommensurate. Antitrust needs an objective "common denominator": a uniform category to arbitrate competing interests or assess value trade-offs. In a commercial democracy, there is only one interest or value universal enough to serve that purpose: "consumer well-being." Take the trade-off between the gains of breaking up a monopoly and potential losses to efficiency. If a judge were to measure the gains to smaller-scale rivals against the efficiency losses of an incumbent enterprise, the result would be arbitrary or political. Held to the universal standard of consumer welfare, however, jurists can compare losses and gains on a uniform metric. In the absence of a consumer welfare standard, calculating trade-offs is capricious, unpredictable, and indeterminant. Antitrust risked becoming nothing more than a battle for private advantage (Bork 1978, 22–26, 83–115).

Bork's *Antitrust Paradox* succeeded in excising the monopoly paradox from antitrust doctrine for a generation (Lynn 2009; 2017; Sawyer 2024; Vogel 2024; Wu 2018). Markets were no longer understood as ambiguous sites of self-regulation (natural prices) and self-destruction (monopolies). Conceptualized instead as sites of rivalry between rationally calculating firms, the problem of monopoly evaporated. The following section will show how neoliberal theory succeeded in transforming antitrust rules concerning predatory pricing, vertical integration, and the timing of antitrust prosecution, and why the neoBrandeisians turn to Legal Pragmatism to explain why those rules fail.

The New Brandeisians

The results of neoliberal antitrust, charge the New Brandeisians, were predictable. Deregulation failed. Once proscribed, predatory practices were ignored. Market structures once thought to foster monopolistic behavior were abandoned in the law. Limits on market share, once thought necessary to prevent harm, were undermined. And mergers, once scrutinized for monopolistic consequences, were given a green light. The result was widespread monopoly—from traditional sectors like agriculture and brewing to modern industries like airlines and defense to postindustrial sectors like digital commerce. Only by reviving antitrust's focus on monopolistic market structure and predatory conduct would it be possible to reverse widespread concentrations of power (Khan and Lynn 2012; Longman 2015; Lynn 2009; 2012; Teachout 2020; Vaheesen 2019; Warren 2016; Wu 2018). For all their attention to deregulation, the New Brandeisians have more ambitious goals than enforcement. Seen through Foucault's genealogy of neoliberalism, they seek to challenge the foundationalist

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turn, restore the monopoly paradox, and reconfigure the veridiction regime in antitrust.

My account of the New Brandeisians draws principally on the works of four prominent lawyers: Zephyr Teachout, K. Sabeel Rahman, Lina Khan, and Jonathan Kanter. The first three worked with business journalists, Barry Lynn and Phillip Longman, who founded the New Brandeis Movement at the New America Foundation in 2009. (They formed an independent foundation, the Open Markets Institute [OMI], in 2017.) Teachout is an associate professor at Fordham Law School. She was a 2014 candidate in the Democratic primary for New York governor, a 2016 candidate for New York's nineteenth congressional district, and assistant attorney general for economic justice in New York State from 2022 to 2024 (Blumenthal 2015; Campanile 2018; Kormann 2016; Orden 2014). She serves on the OMI board. Rahman is a professor of law at Cornell Law School. He was president of Demos, an OMI fellow from 2012 to 2015 and served as senior counsel for the Office of Regulatory Affairs in the Biden administration (Rahman 2020). Khan conducted research at OMI before attending Yale Law School; after graduation, she returned to OMI as its legal director. She served as counsel to the House Sub-Committee on Antitrust and Administrative Law and chief commissioner of the Federal Trade Commission from June 2021 to January 2025. She is currently an associate professor at Columbia Law School (Khan 2020a). Jonathan Kanter served as an antitrust lawyer at the FTC from 1998 to 2002, where he worked on the Exxon-Mobil merger. He was a private antitrust attorney from 2002 to 2016, representing Microsoft, Epic Games, News Corp, Spotify, Yelp, and others. During that time, he became an outspoken critic of Google. In 2016, he formed he Kanter Law Group, which specialized in private antitrust litigation. Kanter led the Justice Department's Antitrust Division from 2021 to 2025 (Saric 2024; Ten Facts 2021).

NeoBrandeisians on Markets

New Brandeisians conceptualize markets pragmatically, not deductively. Like the legal pragmatists before them, they are antidualists, who reject the metaphysical distinction between artificial and natural markets. Markets, in their view, are both legal constructions and innate sites of power and coercion. On the one hand, this means that markets reflect the organization of entitlements to property and exchange in common, statutory, and constitutional law. On the other hand, it means that neoBrandeisians are antifoundationalists, who—like Dewey, Holmes, and Brandeis—think that law is never unassailable. It is always possible for an enterprising monopolist to capture, entrench, or abuse market power by finding ways to manipulate, end-run, or invent new interpretations of the law. Antitrust, argue the New Brandeisians, is an appropriate response to this dilemma because it acknowledges both the possibility and fallibility of the law to protect markets from paralyzing concentrations of power. In William James's (1907) idiom, antitrust is a meliorist orientation to an irresolvable dilemma: the monopoly paradox. It is easy to misinterpret the New Brandeisians as Marxists or populists if you see only their attention to power, or as Polyanians if you see only their attention to the embeddedness of markets in law. Once you see their perspective on markets in all its complexity and on the imperfect nature of antitrust, their pragmatism comes into focus.

Markets, write the New Brandeisians, are inexorably sites of power that tell truths that liberal democracies ignore at their peril. Far from a solution to the nineteenth-century legal formalist and twentieth-century neoliberal problem of coercion, writes Rahman (2017, 10), markets are "domains of power and conflict, riven by inequalities of bargaining power, welfare, and position." Teachout, Khan, and Rahman outline a framework to conceptualize market power and explain how it threatens prosperity, liberty, and democracy. Drawing on Progressive-era legal pragmatists Louis Brandeis, John Dewey, Robert Hale, and others, neoBrandeisians theorize markets as sites of "coercion, power, and social harm" (Rahman 2017, 54–77). Rahman distinguishes "dyadic" from "structural" power. Brandeis, he writes, diagnosed the former as domination by a "discrete, cognizable actor who intentionally exerts arbitrary influence on another." Institutionalized in a "particular group of private actors," dyadic power is manifested as the "capacity to dominate others…whether directly in the economy or indirectly in the policy process." But it also manifests in an institutionalized "deficit" of power in "citizens." In Brandeis's time, citizen agency went unrealized in corporate hierarchies and the policy process because there were insufficiently "powerful channels" through which they could "contest the…power [of] economic elite[s]" (Rahman 2017, 82–83).

Today, write Teachout and Khan (2014, 58), dyadic power is exercised in concentrated market structures through the power to regulate and tax. These powers manifest by governing "what is in a market" and by "self-regulat[ion]" (53–55). "Market power enables a company [or a cartel] to raise what it charges consumers and lower what it pays suppliers" (55–58). Such wealth extraction is better understood as a tax than a market transaction (see also Khan and Vaheesen 2017). Unlike public taxation, this form of coercion is unaccountable. Self-regulation occurs when one company or a small group of companies have sufficient market power to "set standards for the rest of the industry," which affect a broad array of citizens. Here again, market power takes on the "form" of coercive "political governance" without accountability (Teachout and Khan 2014, 55).

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Rahman (2017, 83–84) theorizes a second form of market power—structural domination—in which "no single actor intends to create…an unequal social structure." Rather, this power is the aggregate effect of each party seeking its own advantage against the background of established laws. Dewey and the legal pragmatists explained how putatively free markets could become "inequitable systems" of structural domination by exercising "instabilities, externalities, and risks that effected those far beyond the binary transactional relationships of private exchange" (Rahman 2017, 83–84). Teachout and Khan (2014, 588) quote Brandeis: domination may exist, "although it is not manifested in any overt act, and even though there is no intent…. Words of advice, seemingly innocent and perhaps benevolent, may restrain [others], when uttered under circumstances that make advice equivalent to command. For the essence of restraint is power; and power may arise merely out of position."

Although neoBrandeisians naturalize market power, unlike Marxists they do not think it is a fatal flaw of capitalist democracy. They are antidualists, who also think that markets are artificial creations of law and politics, and meliorists, who think antitrust is necessary and possible. "The New Brandeisians," writes Khan (2018b, 132), "believe the political economy is structured only through law and policy." The "economic order is fundamentally 'embedded in social relations,' and shaped by and subordinated to the social order," adds Rahman (2011, 277). "'Natural' market forces are the product of human agency." Nowhere is the artificial nature of markets more evident than in the long history of antimonopoly law. Built on eighteenth-century common law, modern antitrust is the quintessential "predistributive" policy, aimed at structuring markets to check private power before it threatens prosperity, liberty, and democracy (Lynn 2020; Teachout 2020; Wu 2018).[8]

In short, like classical liberals and the legal pragmatists before them, neoBrandeisians think markets have two paradoxical qualities: they are natural sites of power *and* artificial creations of law, and their primary governing mechanism—competition—can be predatory *or* productive. Far from being fatal contradictions for liberal market democracies, these qualities are sources of meliorist vitality for neoBrandeisians. They signal the pressing need for antitrust as an imperfect but workable solution to the monopoly paradox. As Jonathan Kanter (2023c) puts it, when open and competitive, markets "promote material progress," "choice and opportunity," and "democracy." When predatory, monopolistic, and closed, "real people suffer real harm," which threatens "the individual liberty of…citizens" and "undermin[es] the democrac[y] they hold dear." The purpose of antitrust, Kanter (2023a, emphasis added) has always been to ameliorate economic and political power. The Founders grasped this lesson; antimonopoly planks were written into state constitutions; and America's "greatest political leaders—Frederick Douglass, Senator Sherman, Franklin Roosevelt, Senator Kefauver—understood this *constitutional political economy*. They knew, as FDR put it, that 'freedom is no half and half affair.' Freedom in…the marketplace and the polling place go hand-in-hand. These leaders leaned on the antitrust laws and a competitive economy as a solution, as we must today."

Teachout and Khan agree. When efforts to regulate the political influence of private power fail, antimonopoly law has always served as a backstop for democracy. When the Supreme Court struck down campaign finance regulation in *Citizens United v FEC*, it unintentionally opened the constitutional door to antitrust. By declaring corporations immune from regulation because they are indispensable to the "architecture" of American democracy, argue Teachout and Khan (2014, 71), the Court made it possible to pose the predistributive question about the way we craft markets: Does "excess corporate size, scope, and industry concentration undercut democratic self-governance in ways that lobbying, and campaign finance reform do not address?" This is the central political and economic problematic for antitrust.

Unlike neoliberals, then, neoBrandeisians think that there is no theoretical solution to the problem of private power that can produce definitive legal judgments. Power will always threaten markets, liberty, and democracy. But neoBrandeisians are legal pragmatists, for whom private power can be lessened sufficiently to make markets workable and compatible with liberty and democracy. Antitrust authorities must be vigilant, and the law must adapt to businesses' endless inventiveness in finding ways to escape scrutiny by end-running the law. As Dewey (1924, 193) wrote, the law must be a site of inquiry and innovation, not mechanical jurisprudence (Pound 1908; 1910), especially at moments of economic flux like the present. Antitrust, Brandeis said, must be a "living law," in which empirical inquiry serves to clarify rules as much as rules guide inquiry. Nowhere is this lesson more pressing today, insist neoBrandeisians, than in the digital economy.

The Dynamics of Monopoly and the Limits of Neoliberal Antitrust

In 2017, Lina Khan published "Amazon's Antitrust Paradox." Arguably the most influential text in the neoBrandeisian canon (Horowitz-Ghazi 2023; Streitfeld 2018), it demonstrated the limits of Bork's promises to objectivity, consistency, and coherence in antitrust. It is easy to read "Amazon's Antitrust Paradox" as a root-and-branch critique of neoliberal deregulation: the old antitrust rules would have prevented a digital monopoly. But Khan concedes too much to neoliberalism for this to be a satisfactory interpretation. Amazon, she admits, realized neoliberal metrics for consumer welfare. It built a mass

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market, kept visible prices low, and reduced distribution costs. But Amazon also invented technologies and business practices that created and concealed monopoly power from neoliberal scrutiny. Like Neil Fligstein's seminal (1993) study of the historical relationship between corporate strategy and antitrust, which shows how managers repeatedly innovate to escape antitrust rules, Khan shows how Amazon gamed neoliberal rules and, by doing so, revealed the limits of Bork's promise to legal determinacy. Like the legal pragmatists, Khan shows how, in a moment of economic flux, the formalist promise to deduce a determinant relationship between general principles, rules, and facts failed.

Amazon, writes Khan, enacted neoliberal principles with predictably positive results for consumer welfare. Focusing on building a mass consumer following, it grew online commerce at an extraordinary pace, integrated forward into a distribution system optimized by inventory and transportation logistics, and diversified into mass-market services. "Customers universally seem to love the company. Close to half of all online buyers go directly to Amazon first to search for products, and in 2016, the Reputation Institute named the firm the "most reputable company in America for the third year running." At the same time, there is a "gnawing sense of that its dominance … may pose hazards," as well as confusion about how a company that provides so many benefits threatens markets and democracy (Khan 2017): "It is as if [Jeff] Bezos charted the company's growth by first drawing a map of antitrust laws, then devising routes to smoothly pass them…. With its missionary zeal for consumers, Amazon marched toward monopoly by singing the tune of contemporary antitrust" (710).

Khan asks us to consider first Amazon's practice of predatory pricing, or pricing below cost to drive rivals from the industry. Once presumptively unlawful, neoliberals argue that predatory pricing must be analyzed from first principles, which guide analysis to the subjective perspective of an aspiring monopolist who weighs costs against benefits or, in Foucault's idiom, calculates "substitutable choices." As Bork theorized, pricing below costs is only rational if a monopolist can recoup losses once rivals are driven from the market. The longer recoupment takes, the more costly it is, and the higher the recoupment price, the more likely competitors will enter and drive down prices. In truth, predatory pricing is irrational and rarely occurs (Khan 2017, 722–31). Yet, neoliberals derive an empirically verifiable standard for antitrust action from this analysis: the recoupment rule. If firms price below cost and do not raise prices once they have attained market power to recoup their losses, then the threat of entry is in force. Prices and costs, in this foundational analysis, are precise, measurable, and definitive.

Look closely at Amazon's dominance in the e-book market, urges Khan. Initially, pricing evidence demonstrates that, despite its market standing, Amazon did not set prices to recoup losses from pricing below costs. Instead, Amazon priced its e-book reader, the Kindle, and electronic bestsellers below cost to gain market dominance. Once it succeeded in dominating the e-book market, price increases were negligible. Both the DOJ and the FTC considered the charge of predatory pricing and dismissed it because it did not meet the recoupment standard (Khan 2017, 711–17).

Khan, like Dewey, asks us to consider the recoupment rule as a hypothesis for inquiry, not as a decision rule. From this perspective, the neoliberal promise to distinguish salient from irrelevant facts fails. Recoupment measures obscure as much as reveal evidence. Although Amazon kept visible prices low, it designed technologies, legal instruments, and managerial practices to build and conceal power in the e-book market. First, Amazon established a property right called Digital Rights Management (DRM), which restricted certain e-book formats to the Kindle. DRM meant that Amazon could compel readers to purchase a Kindle by offering bestsellers below cost and then locking them into future purchases. Second, Amazon designed software to gather data on reader habits, which it used to tailor recommendations and product placement. Together, these innovations locked readers into the Kindle, even as competitors offered better products at lower prices. Moreover, Amazon invented data-harvesting software to customize prices, making it impossible to locate a uniform baseline from which to distinguish predatory from competitive prices. By selling in multiple markets, Amazon recouped losses from e-book bestsellers and on e-books facing little competition. Finally, Amazon used its vendors' sales data to go into publishing itself and drive them out of business by privileging its own content (Khan 2017, 756–68). In Dewey's (1924) language, the relationship between general principles, rules, and facts is indeterminate, because situations are never exactly the same and because salient facts change during moments of economic change.

In short, deployed as a hypothesis for inquiry, instead of a "mechanically" (Pound 1908) applied rule, the recoupment standard reveals how Amazon invented methods for "rolling up" (Lynn 2009) the e-book market. Like Brandeis, Khan poses three questions: (1) Was Amazon's e-book strategy predatory or productive: What is the competitive process?; (2) Are better products driven from the market: What are the results for economic performance?; and (3) Can rivals compete, once Amazon achieved dominance: What is the resulting distribution of power in the industry? By answering these questions, Khan shows how Amazon gamed the recoupment standard by holding visible prices low and concealing predatory pricing from neoliberal scrutiny though data harvesting, cross-subsidization, vertical exclusion, and competing with platform vendors. Her antifoundational analysis, then, reveals the limits of a veridiction regime that promised determinant methods for evaluating predatory pricing.

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Consider next the problem of forward integration, or the methods by which Amazon formed its own distribution system. Under pre-neoliberal doctrine, antitrust officials worried that vertical integration would lock out rivals or limit their access to necessary supply or distribution markets. When combined with market power in commerce or production, vertical integration could be used as leverage to bar entry at another level. From a neoliberal perspective, however, it is a mistake to see integration into distribution as a method to foreclose competition or leverage power. Analyzed from the perspective of an aspiring monopolist weighing substitutable choices, two questions emerge. Is it cheaper to contract for distribution or to do it oneself? And if a firm does integrate to undermine rivals, can it maintain control if it does not introduce efficiencies to ward off new competitors? Bork 1978, 231, 234) answers that "predation through vertical merger is extremely unlikely" because "a manufacturer would not favor its retail subsidiary…unless it was cheaper to do so." Then it would "pass those savings on to consumers" or face new entrants. "The law against vertical mergers is merely a law against the creation of efficiency."

The trouble with Bork's analysis, writes Khan, is that it is impossible to falsify. If vertical integration occurs in this theory, it must have been motivated by and achieve cost reductions. Suppose, instead, writes Khan, echoing Brandeis's principles of pragmatist inquiry, we ask these questions: What was the distribution of *power* as Amazon built a distribution network, what competitive tactics did Amazon deploy (*process*), and what were the consequences for economic *performance*? From that perspective, writes Khan, the evidence is mixed. As Bork predicts, Amazon constructed an efficient delivery service through forward integration. It "established an extensive network of physical infrastructure: hundreds of warehouses, sorting centers, delivery stations…, and Prime Now hubs. [Amazon] is within 20 miles of 31% of the population and 20 miles of 60% of its core same-day base…. It expanded into trucking, container ships, planes, and drones, through which it speeds up how quickly it can transport goods to customers" (Khan 2017, 777–78).

Neoliberal theory verified, however, does not eliminate the relationship between theory, rule, and fact of indeterminacy, writes Khan, because Amazon learned how to game neoliberalism's veridiction (fact) regime. Amazon joined its efficient distribution infrastructure to three innovations, which entrenched its power over potential rivals and the vendors who use its platform: Amazon Prime, Fulfillment-by-Amazon (FBA), and Amazon Marketplace. Marketplace allows sellers to list their products on the platform, and Amazon then collects fees on their sales (Khan 2017, 781). Third-party sellers' share of total items sold on Amazon increased from 36% in 2011 to 50% in 2015. Amazon Prime asks consumers to pay an annual fee for free expedited shipping. Amazon bundled other deals with Prime, such as music streaming and faster deliveries. Fulfillment-by-Amazon (FBA) allowed merchants to store their products in Amazon warehouses and then provided vendors with packing, shipping, and customer services. Products sold through FBA were eligible for other advantages, such as faster shipping (776).

Coupled with Marketplace, Prime, FBA, and Amazon's capacity to harvest data, Amazon's efficient distribution system became an instrument of monopoly power at the same time as it served consumers by providing cheaper goods and faster service. Take Amazon's power over independent vendors. Tying Amazon's suite of services to its distribution system entrenches consumers and locks independent vendors into its platform. It also makes it harder for a rival platform to compete. Amazon's capacity to cross-subsidize losses with revenues from less competitive products meant that it could keep vendors from using independent shippers by charging less. And by favoring its own access to distribution services, Amazon's products outperformed those of independent merchants on distribution speed and quality (Khan 2017, 779).

Amazon augmented its power over potential entrants and Marketplace vendors by designing software to monitor consumer behavior on sales, failed searches, and more. It then used that data to go into business for itself and outcompete independent merchants by exploiting its power over product placement, access to distribution, and Prime services. "The current antitrust regime," Khan (2017, 783) concludes, "has yet to reckon with the fact that firms with concentrated control over data can systematically tilt the market in their favor." Under such circumstances, firms seeking dominance are always tempted to game existing rules and facts to their advantage. As Dewey put it in 1924, precisely "because circumstances are really novel and not covered by old rules…shrewd and enterprising men are encouraged to sail close to the wind and trust to ingenious lawyers to find [the] rule under which they can get off scot free."

In short, although Khan criticizes neoliberalism's deference to vertical integration, she concedes that its predictions of distributive efficiency and some measures of consumer welfare are accurate. Nonetheless, neoliberalism mistakes partial evidence for the whole because it insists on a foundational theory, which selects facts that blind it to business's ongoing incentive to innovate in ways that do an end-run around the prevailing rules (Fligstein 1993).

This is not to say that neoBrandeisians think economic analysis is useless or ideological. Echoing legal pragmatist Roscoe Pound (1908, 609–10; 1910), who wrote that science should serve law rather than subordinate it to formal logic parading as science, Jonathan Kanter (2022a) notes, "We must be mindful that economics—and expertise, more broadly—are merely tools to understand facts relevant to a particular case. Courts should use

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economics…to address questions of fact, not to resolve questions of law. And where there are natural experiments and direct evidence of competitive harm, economic theory must give way to market realities." As Kanter (2022c) explained to the New York Bar Association, "law enforcers are not central planners. At a certain point—in antitrust, and in every area of the law—we must exercise judgment." It is an "unavoidable part of law." The key is to make sure we "do it in a way that is reliable…and consistent with the statutes we enforce." Reliability means fidelity to precedent. Consistency means that the "right debate" will always address Congress's plain directive to "protect competition," not to achieve consumer welfare (see also Kanter 2022b).

Timing, Rules, and Truth

Perhaps nowhere is the debate between neoliberals and neoBrandeisians over market veridiction and the monopoly paradox starker than in a dispute over the timing of antitrust action. Neoliberals caution humility: authorities should wait until markets reveal truths about alleged legal infractions before they act, because markets are less likely to make costly mistakes than judges and regulators. In contrast, neoBrandeisians advocate prompt action before market power becomes so entrenched it is hard to dislodge. They apply pragmatist critical methods to reveal analytical and empirical flaws in neoliberal reasoning and offer a meliorist justification for prompt action: although decisive action may sacrifice short-run efficiencies, it is necessary to protect liberty, prosperity, and democracy from concentrated private power.

In an influential 1984 article, which advocated waiting, neoliberal judge Frank Esterbrook wrote, "The entire corpus of antitrust doctrine is based on the belief that markets do better than judges or regulators in rewarding practices that create economic benefit and penalizing others. The common belief that if markets are imperfect then something else must be better is a logical fallacy. One need not pretend that markets work perfectly to see that they are better than judges at penalizing inappropriate conduct" (24). Antitrust authorities, Esterbrook went on, face a "fundamental difficulty" in assessing the effects of conduct. If they "err by condemning a beneficial practice, the benefits may be lost for good." If they err "by permitting a deleterious practice, though, the welfare loss decreases over time," because "monopoly is self-destructive" (1, 2). As Hayek and Bork explained, monopoly prices, restricted output, or sluggish innovation will always provide incentives for new rivals to enter the market. The monopoly paradox is an illusion. Thus, the cost of a false-positive decision, Esterbrook concludes, is undoubtedly higher than the cost of a false negative. Although this might look like a recipe for deregulation, Esterbrook does not argue that government should never act but only that it should wait until markets have revealed truth first. His prescription is humility in the face of epistemological fallibility.

New Brandeisians criticize Esterbrook's argument for its conceptual fallacy, empirical error, and excising the monopoly paradox from antitrust. Like Dewey and Brandeis, they ask us to consider waiting as a hypothesis for inquiry, instead of a decisive rule. Three flaws of waiting become evident. First, historical evidence demonstrates that it can cause irremediable damage. Witness the Microsoft case, in which the court moved so slowly that Microsoft drove its rival Netscape from the market before the court found the defendant guilty (Reback 2009). Second, the more entrenched that market power becomes, the more likely it will be translated into political influence over judges and regulators. Put differently, history confirms the monopoly paradox: it is impossible to sustain the rules necessary for open markets in the face of private power (Teachout and Khan 2014). Third, like classical liberals and legal pragmatists, neoBrandeisians argue that the more entrenched monopoly power becomes, the less likely are markets to provide useful information to guide state action. In Foucault's idiom, the monopoly paradox belies Esterbrooke's waiting prescription, because markets can only produce truths (e.g., natural prices) that governments must obey if governments act to prevent the monopolies that undermine the capacity of markets to produce those truths.

Contrary to Esterbrooke's advice, neoBrandeisians ask regulators to act quickly before monopoly becomes entrenched. In a striking reversal of twentieth-century regulation, which was governed largely by general rules—or what antitrust doctrine called "rules of reason"—Rahman and Khan (2016, 20–21) call for a "policy in favor of simple rules and presumptions over 'rule-of-reason' analyses." Antitrust needs more "per se" standards, wherein "certain practices are presumed to be illegal without requiring plaintiffs to make significant showings. This would involve blocking problematic deals, rather than seeking to mitigate harms through conduct remedies or divestitures" (see also Kanter 2022c). Legislation should "change the 'unreasonable restraint' standard to an 'abuse of dominance' standard…, allowing for greater scrutiny of the business practices of market-dominant firms" (Rahman and Khan 2016, 23). Likewise, Khan and former FTC commissioner Rohit Chopra, called on the commission to use its rulemaking power to set "clear rules" of conduct to "help deliver consistent enforcement and predictable results. Reducing ambiguity about what the law is will enable market participants to channel their resources and behavior more productively" (Chopra and Khan 2020, 357).

NeoBrandeisians justify legal certainty by pragmatic (practical), not theoretical, necessity. They want to impose per se rules—with bright-line empirical standards (such as quantitative limits on market share)—to ameliorate

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predatory behavior and market power, not to solve the monopoly problem once and for all. NeoBrandeisians draw on a long record of per se rules in public law as a precedent for antitrust. Teachout's (2014) history of corruption law explains how the framers of the Constitution used per se rules to preclude activities perceived as so threatening to liberty and democracy that they warranted absolute prohibition: "Structural or prophylactic" rules "do not require proof of intent to convict. They work through changing incentives before the fact instead of punishing activity after the fact" (4–5). "Clearly defined," "bright line" rules are "made up of objective elements, with little room for different interpretation" (think "speed limits"). At the very least, they make definitive government action possible. At best, they take on "moral weight" that protects the "social fabric" (4–5, 184).

In antitrust, per se rules are meant to be applied before predatory conduct does irreparable damage. The risks associated with the timing of governmental action are precisely the reverse of neoliberal humility. Where Esterbrook calculates the risks of a false-positive decision as undeniably higher than those of a false negative, neoBrandeisians assess the risk of a false negative in some instances as categorically unacceptable. Structural rules, writes Teachout, are imperfect: they are a meliorist trade-off. They inevitably "cover innocent activity as well as insidious transactions." The Founders included a per se residency requirement for political office in the Constitution, because they thought "adventurism" so threatened republican government that it was necessary to preclude "potentially brilliant and important candidates." "Corruption," they said, "cannot be made to vanish"; it can only "be subdued" (Teachout 2014, 4–5, 47). Likewise, predatory conduct and market power cannot be made to vanish—they can only be ameliorated.

The historical record, write the New Brandeisians, belies neoliberal theory: more often than not, power begets power, not destabilizing competition. Structural rules warrant prophylactic injunction, even if that may mean setting aside short-term efficiency gains. Markets cannot realize gains from trade, generate innovation, cultivate liberty, or disperse power in service to democracy unless threats to competition are prevented (Kanter 2023b; 2023c). Nor can markets reveal usable truths about prices, costs, output, or innovation when monopolies become entrenched.[9] NeoBrandeisians, in short, demand legal certainty by fiat, not, as neoliberal formalists do, by claims to logical necessity.

To be sure, the New Brandeisians are legal pragmatists who observe that all rules are fallible. They concede that some predatory behaviors or monopolistic market structures will escape scrutiny and some regulatory or judicial actions will fail. Sometimes, action will be necessary after the fact: antitrust can always dismantle concentrated power through divestiture. But here too Rahman and Teachout (2020) argue that per se rules will dismantle power more decisively than the rule of reason. Finally, even where neoBrandeisians call for professional discretion, as in the implementation of their new merger guidelines, they also advocate extensive rulemaking, with clear distinctions of legality and illegality (US Department of Justice 2023).

The prevailing interpretations of the New Brandeisians cannot make sense of their demand for per se rules because they cast the movement as a return to twentieth-century regulation. However, that era was marked by general statutory rules, which granted judges and regulators enormous discretion in applying them to facts (Berk 2009; James 2000; Lowi 1979, 92–126; Orren and Skowronek 2017; Peritz 1996; Sanders 1999; Sawyer 2018). Indeed, it was precisely this sort of discretion that neoliberals like Bork opposed. Responding to the neoliberal demand for legal accountability, neoBrandeisians use pragmatist methods to reach different conclusions than their Progressive mentors. Rules should be precise and discretion limited.

Seen through Foucault's genealogy, the debate between neoliberals and neoBrandeisians over the timing of state action is better understood as a contest over market veridiction and the monopoly paradox than an ideological dispute over regulation. According to neoliberal theory, in time competition will always destabilize monopoly. Antitrust authorities who act prematurely ignore this truth at prosperity's peril. As legal pragmatists, neoBrandeisians reconceptualize waiting from a decision rule to a hypothesis. Inquiry, they conclude, demonstrates that power begets power, and only prompt action, enabled by bright-line rules, can protect markets from domination and stagnation.

Conclusions

The New Brandeisians are legal pragmatists. Like their Progressive-era mentors, they seek to overturn a formalist legal regime that blocks progress in addressing private power's threats to markets and democracy. Their project is multifaceted. As other commentators note, neoBrandeisians seek to reinvigorate antitrust enforcement for the sake of egalitarian liberalism, small business, entrepreneurship, and worker power (Hovenkamp 2019; Somers 2021; Wilson 2022). The core of their project, however, remains invisible to critics and supporters alike, especially its pragmatist commitments to antifoundationalism, antidualism, and meliorism.

NeoBrandeisians aim to overturn what they see as neoliberalism's false promise to overcome legal indeterminacy with a foundational economic theory and to return antitrust to its classically liberal and modern pragmatist roots. They are hopeful realists. They think that open markets do not flow directly from autonomy from government or from ideal theory enacted in law. Markets, like

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liberty, must be nurtured by a state capable of obeying market truths and creating the conditions for those truths to occur. NeoBrandeisians are antidualists, who think the most salient truth about markets is that they are both natural sites of power and artificial creations of law, where competition can be predatory or productive. Market ambiguity is not a fatal contradiction. Quite the opposite. For, like Dewey and James before them, neoBrandeisians are meliorists, who see vitality in paradox. Although they admit the impossibility of ridding markets of concentrated power once and for all, they think the history of antimonopoly law— from eighteenth-century common law to modern antitrust to the failed neoliberal era— demonstrates it is possible to subdue power sufficiently for workable competition to serve prosperity, liberty, and democracy.

It is easy to overlook the New Brandeisians' commitments to Legal Pragmatism or to mistake them for ideology when they are seen in isolation. NeoBrandeisians look populist when they venerate entrepreneurship and small business, Marxist when they theorize markets as sites of power, and Polanyian when they theorize markets as artificial creations of law. Interpreted, instead, through Foucault's genealogy of neoliberalism and its associated concepts of market veridiction and the monopoly paradox, the neoBrandeisian debate with neoliberals comes into sharper focus. Neither neoliberals nor neoBrandeisians are ideologues, who seek to naturalize or denaturalize markets in service of one class or another. They disagree over standards for making truth claims about competition and monopoly or what Foucault calls modes of market veridiction. Moreover, once you see this deeper disagreement between neoliberals and neoBrandeisians, some surprising agreements, which are invisible to critics and supporters alike, come into view. Like neoliberals, neoBrandeisians think that markets tell truths that liberal democracies ignore at their peril, even as they disagree over what those truths are. Like neoliberals, neoBrandeisians agree that antitrust law needs greater clarity and government authorities more accountability, even as they disagree over the means to achieve those ends. And like neoliberals, neoBrandeisians pay careful attention to the problem of paradox, even though it means something very different to each.

As Foucault teaches, the monopoly paradox has been with us since the beginning of liberalism. Adam Smith recognized that both low prices and monopolies were the natural consequences of competition. Looking backward and forward from 1978, Foucault noticed that the neoliberal effort to excise the monopoly paradox from market veridiction was unique in the history of liberalism. Germans ushered in the neoliberal era by denaturalizing monopoly. Their American protege Robert Bork turned the monopoly paradox into an antitrust paradox by formulating a theory to explain why a law meant to advance competition undermined it. In doing so, he excised the monopoly paradox from American antitrust. NeoBrandeisians endeavor to show how that project failed. Drawing on the legal pragmatists before them, they seek to restore the monopoly paradox to antitrust doctrine by showing how contemporary enterprise can innovate for economic improvement or to build, entrench, and abuse market power. Amazon's antitrust paradox consisted of doing both: building a mass market for digital commerce, which met neoliberal standards for consumer welfare and concealed innovations that monopolized that market from neoliberal scrutiny. The problem for contemporary antitrust is the same as it was in Brandeis's time, namely, to channel economic activity from the latter to the former.

By attending to the role of paradox in liberalism and ambiguity in the law, Foucault and Dewey explain how liberty is never the mere consequence of protecting market autonomy from government or enacting an ideal theory of political economy. Liberty must constantly be built. Like liberty, markets must be endlessly rebuilt through an antitrust that adapts to new forms of private power, contend the New Brandeisians, if they are to serve prosperity and democracy.

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Notes

1 Although neoBrandeisians pit themselves against Chicago School neoliberalism, for simplicity I use the term "neoliberalism" in this article. For a nuanced account of late twentieth-century antitrust as a combination of Chicago School and Harvard industrial organization economics, see Sawyer (2024).

2 I use the term "Legal Pragmatism" to stress the philosophically pragmatist nature of several Progressive-era legal reform movements: Legal Progressivism, Legal Realism, Sociological Jurisprudence, and Institutionalism (Farber 1995; Grey 1989; Horwitz 1992, 169–92; Menand 2001; Novak 2022, 83-89).

3 On pragmatist antidualism, see Ansell (2011, 11–12) and Shusterman 1994 (127–28).

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4 For a compelling pragmatist alternative to the concept of a policy paradigm, see Jabko (2019; 2026) on repertoires.
5 Ironically, as Foster (2022) and Foster and Thelen (2024) show, German ordoliberalism enabled Brandeisian-style antitrust in the late twentieth-century European Union far more than in the United States.
6 The idea that good policy intentions resulted in opposite outcomes (the "perversity thesis") was widespread in neoliberal thought. See Hirschman (1991) and Friedman (1962).
7 For Bork (1978) on the fallacies of predatory behavior, see 134–60, and on whether it is rational for monopolies to restrict output or raise prices, see 179–91.
8 On predistributive policy, see Jackson and O'Neil (2013); Hacker and Pierson (2010); Fligstein and Vogel (2020); Somers (2021), and Vogel (2024).
9 See Callaci and Vaheesan (2022, 49, 51–53) and US Federal Trade Commission (2024) for an account of how the FTC used this logic to ban noncompete contracts.

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