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#### Technical discussions of antitrust law are good---they create a paradigm shift in how we address monopoly power, the 1ac tradesoff.

David Dayen 15, author of *Monopolized: Life in the Age of Corporate Power (2020)* and *Chain of Title: How Three Ordinary Americans Uncovered Wall Street's Great Foreclosure Fraud*, “Bring Back Antitrust,” The American Prospect, Vol. 26, No. 4, Fall 2015, lexis.

In 1964, historian Richard Hofstadter gave a speech at the University of California, Berkeley, titled "What Happened to the Antitrust Movement?" He wondered why anti-monopoly sentiment ceased to become the subject of public agitation. "Once the United States had an antitrust movement without antitrust prosecutions," Hofstadter said. "In our time, there have been antitrust prosecutions without an antitrust movement."

Now we have lost both the movement and the prosecutions. When we talk about banks that are too big to fail, we're talking about antitrust. When we talk about the high cost of health care, we're talking about antitrust. So many of our key domestic issues are fundamentally questions about whether we should tolerate monopolies, or dismantle them. But this formulation-a centerpiece of public debate in the last robberbaron era between the 1880s and 1910s-has all but disappeared from popular discourse.

Can anti-monopoly sentiment be revived? When New York's Working Families Party first recruited Zephyr Teachout to run for governor, she said she would only do it if she could talk about monopolies. "They polled it, and they were correct that nobody knew what I was talking about," Teachout says. But when she eventually ran an insurgent campaign against incumbent Andrew Cuomo, she was determined to talk about it anyway.

"The minute you got past the sound-bite level, people responded to the concentration of power," Teachout says. They did campaign events at places where people paid their cable bills, using the pending Comcast-Time Warner merger, eventually abandoned, as the hook. She engaged farmers in upstate New York about monopsony power, and discussed Amazon and big banks on the stump. And it resonated. After only one month of campaigning, Teachout won 35 percent of the vote, with particular strength in upstate counties where farming issues were prominent.

"The Tea Party talks to people and says, 'You're out of power because government is taking it away from you,"' Teachout says. "Far too often, Democrats say, 'You're wrong, you're not out of power.' That's dissonant with our lived experience. You're out of power ... because your priorities don't matter and JPMorgan's do."

Beyond Teachout, you can see through the haze the stirrings of a grassroots antitrust agenda. The greatest anti-monopoly victory of the modern age, the Federal Communications Commission's net-neutrality rules, owed much to a smart, tech-savvy movement that leveraged big protest platforms. Web-native activists fought for the decentralized power of the Internet, without gatekeepers collecting tolls along the way. And they made the connection to things like the Comcast-Time Warner merger, which failed amid public outcry.

"After this existential threat to the Web, you see the same groups becoming interested in the deep history of anti-monopoly laws," Teachout says. "It's kind of an exciting intellectual moment, a fusion between old-school farmers who have been complaining for 30 years and new net-neutrality dreamers."

Monopolists have long used technological advances to consolidate power, from Gilded Age tycoons leveraging control of railroads and telegraphs to Amazon using its first-mover status in e-commerce to squeeze book producers, or Google harvesting traffic to their market-leading search engine to serve ads. It's easy to translate the need for a neutral platform for websites into the same need for book sales or car ride-sharing.

The European Union, in fact, did file formal antitrust charges against Google, accusing it of forcing search engine users into its own shopping platforms, and bundling Android phones with their own apps, to prevent competitors from performing the same functions. The FTC shut down its own investigation into Google over the same concerns in 2013. But an inadvertent disclosure revealed that the agency's Bureau of Competition recommended bringing a lawsuit, arguing that Google's conduct "has resulted-and will result-in real harm to consumers and to innovation in the online search and advertising markets." The political leadership ignored the recommendation.

The next administration must show "leadership that has a certain intellectual curiosity," says Maurice Stucke, pointing to the Google case as a missed opportunity. An alteration in posture would make enforcement far more vigorous, and bringing more cases will give litigators more experience and confidence to negotiate the judicial barriers. The American Antitrust Institute plans to create a transition document for the incoming administration, as they did for the Obama transition.

But at a time of political disempowerment, teaching about the dangers of monopolies and how we have the laws on the books to fight them, and creating upward pressure to do it, offers great potential for a paradigm shift. Connecting Senator Elizabeth Warren's fight against a rigged financial system and Al Franken's fight against media concentration can spark broader political energy.

You could see this potential in Washington, D.C., where in August, the city's Public Service Commission rejected a merger between energy firms Exelon and Pepco, citing "more active participation by parties and interested persons than any other proceeding in the Commission's more than a century of operations." Activists argued a giant Exelon conglomerate would fail to devote resources to the city's clean-energy goals, connecting anti-monopolization with fighting climate change.

There are a lot of reasons for runaway monopolies: an intellectual hijacking by Chicago-school conservative economists, the over-financialization of the economy, a failure of federal antitrust enforcement. But perhaps the biggest reason is that antitrust policy has become divorced from politics, confined to specialized lawyers and mathematicians instead of citizens and activists. Without grassroots momentum, politicians and enforcement agencies can safely ignore the issue. That's the challenge for a small band of academics, think-tank fellows, and activists: to make monopolies a vital issue again, connecting with the severe economic anxiety Americans feel.

#### Only that paradigm shift can make antitrust law effective.

Kate Andrias and Benjamin I. Sachs 21, Kate Andrias is Professor of Law, University of Michigan Law School. Benjamin I. Sachs is Kestnbaum Professor of Labor and Industry, Harvard Law School, “Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality,” 130 Yale L.J. 546, January 2021, lexis.

[\*548] INTRODUCTION

Among the painful truths made evident by COVID-19 are the deep inequality of American society and the profound inadequacy of our social-welfare infrastructure. The nation's lack of comprehensive health care, 1Link to the text of the noteits underfunded and inefficient system of unemployment insurance, 2Link to the text of the noteand weak workplace safety and health guarantees, 3Link to the text of the notealong with nearly nonexistent paid sick leave, 4Link to the text of the notedebtor-forgiveness rules, 5Link to the text of the noteand tenant protections 6Link to the text of the noteleave poor and working-class communities--particularly communities of color--dangerously exposed to the ravages of this pandemic, both physical and economic. 7Link to the text of the noteAmerica's weak social safety net is, in turn, a product of a profound failure that has plagued American democracy for decades now: the wealthy exercising vastly disproportionate power over politics and government. 8Link to the text of the note

[\*549] Indeed, public faith in American democracy is at near-record lows, and increasing numbers of Americans report that they no longer feel confident in the health of their democratic institutions. When asked why, many say that money has too much of an influence on politics and that politicians are unresponsive to the concerns of regular Americans. 9Link to the text of the noteResearch supports these fears, showing both that wealthy individuals are spending record sums on electoral politics 10Link to the text of the noteand that elected officials are at best only weakly accountable to nonwealthy constituents. 11Link to the text of the note [\*550] As political scientist Martin Gilens has observed, "[W]hen preferences between the well-off and the poor diverge, government policy bears absolutely no relationship to the degree of support or opposition among the poor." 12Link to the text of the note

Of course, democracy does not require that policymaking always follow majority will or the median voter's preferences. But democracy, as well as the faith citizens have in their government, falters when lawmakers persistently disregard the priorities of nonwealthy citizens.

Much of the legal scholarship (and public commentary) concerned with this democracy deficit focuses on the increased flow of money into electoral politics and advocates for stemming that flow. 13Link to the text of the noteScholars writing in this vein criticize the Supreme Court's jurisprudence, exemplified by Citizens United v. FEC, that has enabled unfettered campaign spending. 14Link to the text of the noteThey offer a range of reforms designed to limit the flow of money into elections, many of which would require a change in the composition of the Supreme Court or the ratification of a constitutional amendment. 15Link to the text of the noteA related group of scholars advocates for shielding the legislative and administrative process from money's influence through, for example, lobbying restrictions and disclosure requirements. 16Link to the text of the note

[\*551] A second robust body of scholarship focuses not on insulating the political process from money but on trying to ensure equal rights of individuals to participate in the governance process through elections. These scholars criticize barriers to equal voting rights, including contemporary uses of gerrymandering and legislation that impose hurdles on individual voters' ability to exercise the franchise or minimize the effective voting power of particular constituents. 17Link to the text of the noteScholars urge both doctrinal and legislative reform that would ensure more equal rights of participation.

In the last few years, a third approach has begun to emerge in the legal scholarship. This approach begins by recognizing the difficulty--both practical and constitutional--of keeping money out of politics. It also recognizes that while equal voting and participation rights are critical to the goal of combatting political inequality, they are not enough to ensure political equality in a system where wealth functions so prominently as an independent source of political influence. Thus, this third approach moves beyond campaign finance and individual participation rights and focuses instead on what we will call countervailing power. In particular, this approach is concerned with the ability of mass-membership organizations to equalize the political voice of citizens who lack the political influence that comes from wealth. 18Link to the text of the note

The beneficial effects of countervailing, mass-membership organizations are well known to theorists and researchers of democracy. 19Link to the text of the notePut simply, such groups increase political equality by building and consolidating political power for the [\*552] nonwealthy, thus serving as counterweights to the political influence of the rich. Mass-membership organizations can serve in this capacity because, at bottom, they aggregate the political resources and political power of people who, acting as individuals, are disempowered relative to wealthy individuals and institutions. 20Link to the text of the noteMore particularly, mass-membership organizations enable pooling of politically relevant resources, including money, among individuals with fewsuch resources; they provide information to decisionmakers about ordinary citizens' views; they navigate opaque and fragmented government structures, thereby enabling citizens to monitor government behavior; and they allow citizens to hold decisionmakers accountable. And, in fact, when citizens are organized into mass-membership associations that are active in the political sphere, researchers find an exception to the general rule that policymakers are disproportionally responsive to the preferences and concerns of the wealthy. 21Link to the text of the note

Over recent decades, however, there has been a decline in broad-based, massmembership organizations of low- and middle-income Americans. 22Link to the text of the noteThis decline in countervailing organizations has exacerbated the political distortions caused by the increase in political spending by the wealthy. But the capacity for countervailing organizations to address the distorting effects of wealth raises a critical question for legal scholars: How can law facilitate the construction of countervailing organizations among the nonwealthy? Put differently, how can law facilitate political organizing among Americans whose voices are drowned out by the distorting effects of wealth? That is the question we address in this Article.

Recently, legal scholars have begun to address related topics. For example, K. Sabeel Rahman and Miriam Seifter have written about ways that participation in administrative processes can improve the organizational strength of citizen groups. Thus, Rahman argues for designing administrative processes in ways that enhance the countervailing power of ordinary citizens, 23Link to the text of the notewhile Seifter urges administrative-law scholars to pay attention to the characteristics of interest groups participating in the administrative process and to consider "looking [\*553] within interest groups," referencing the manner by which interest groups determine the views of their constituents, "to illuminate the quality and nature of participation in administrative governance." 24Link to the text of the noteTabatha Abu El-Haj has urged greater use of universal benefits and targeted philanthropy, to encourage the growth of mass-membership organizations, since both "create reasons to organize on the part of beneficiaries." 25Link to the text of the noteBoth of us have written about the countervailing role that labor organizations can play in politics. 26Link to the text of the noteAnd Daryl Levinson and one of us have written about the ways in which ordinary public policy often has the effect--and at times the intent--of mobilizing political organization around the policy. 27Link to the text of the note

Meanwhile, another group of legal scholars has highlighted the importance of social movements and their organizations in legal change, focusing on how movements shape decisionmaking by courts, legislatures, and administrative agencies. 28Link to the text of the noteIn particular, a rich literature has developed on the relationship between popular mobilization and evolving constitutional principles, 29Link to the text of the noteand on [\*554] how "cause lawyers" can best serve social movements. 30Link to the text of the noteMore recently, there has been a resurgence of scholarship that "cogenerates legal meaning alongside left social movements, their organizing, and their visions." 31Link to the text of the noteThis work builds on an older tradition of critical legal studies and critical race theory that interrogates the limits of traditional legal rights in bringing about progressive social change given the political, economic, and social conditions that systematically disadvantage poor people and people of color. 32Link to the text of the note

To date, however, no one has tackled directly the question that we pose here. 33Link to the text of the noteRather than asking how the enactment of substantive legislation or administrative-participation mechanisms might boost organizing, how social [\*555] movements can or hope to reshape law, or how a focus on traditional legal rights disables fundamental social change, we ask how law could be used explicitly and directly to enable low- and middle-income Americans to build their own socialmovement organizations for political power.

The question is particularly urgent today as the COVID-19 pandemic has exacerbated society's existing inequalities. Working-class communities, especially low- and middle-income people of color, have experienced hardships as a result of the disease to a far greater extent than the wealthy--from massive unemployment to dangerous working conditions, from food insecurity to rising debt and risk of eviction. 34Link to the text of the noteThe suffering wrought by the pandemic, as well as by the financial crisis of 2008, has led to an upsurge in protests by low- and middle-income Americans, particularly among workers, tenants, and debtors. 35Link to the text of the noteAt the same time, endemic violence against Black communities, including the recent killing of George Floyd, has led to widespread organizing around issues of racial justice. 36Link to the text of the noteThese movements demand that government respond to the [\*556] concerns of ordinary Americans and attempt to elicit better treatment from powerful actors. Yet, despite their promise, such movements face significant obstacles in translating their members' anger into robust and lasting political power. 37Link to the text of the noteA pressing task, therefore, is to ask how law can facilitate and protect these new and revived protest movements, helping to create durable organizations that can exercise sustained power in the political economy.

We start from the premise that the robustness of countervailing, mass-membership organizations should be understood as a problem both of and for law. The shape of civil society and organizational life is already a product of legal structures and rules. 38Link to the text of the noteAnd although law has frequently been a tool of oppression, rather than of empowerment, of poor and working-class people and movements, 39Link to the text of the notealternative legal regimes that encourage the growth of and the exercise of power by social-movement organizations of the poor and working class are possible. Indeed, for those who are committed to decreasing political inequality, alternative legal structures that encourage the growth of countervailing organizations are imperative.

In analyzing how legal and institutional reforms could facilitate a different picture of organizational and political life in the United States, we draw from the successes and failures of labor law--the area of U.S. law that most explicitly and directly creates a right to collective organization for working people--while also moving beyond that context to literature considering "how, in what forms, and under what conditions social movements become a force for social and political change." 40Link to the text of the noteWe do not attempt to adjudicate priority among factors that [\*557] contribute to successful organizing, nor do we attempt to build an exhaustive list of such factors. Instead, we consolidate factors that have two attributes: (1) they are likely to contribute to the successful building of membership organizations among poor and working-class people, and (2) their existence or development might be enabled by law.

We recognize that some factors, undoubtedly critical to successful organizing, are beyond the reach of our proposal. For example, sociologists and historians have demonstrated that several structural opportunities helped facilitate the growth of the Civil Rights movement, including the collapse of cotton; the increase in Black migration and electoral strength; and the advent of World War II and the Cold War. 41Link to the text of the noteThese kinds of objective structural conditions, exogenous to movements themselves, are frequently important to movement formation, but they cannot be directly affected by the kinds of legal reforms we suggest. Likewise, sociologists have shown that strategic leadership within organizations is critical to movement success, 42Link to the text of the notebut internal leadership dynamics are not easily affected through legal regulation. 43Link to the text of the note

Three additional principles guide our analysis. First, because small-scale, concrete victories are essential to successful organizing, and because organizing tends to be most successful among people with shared identities and existing relationships, we focus on reforms that enable organizing within particular structures of authority and resource relations. By way of examples, we consider organizing among workers, tenants, debtors, and recipients of public benefits. We pick these contexts in part because they are ones rife with exploitation and [\*558] power imbalances and populated by the relevant income groups, and in part because they are home to important organizing efforts, both historical and contemporary. 44Link to the text of the noteWe do not suggest that these are the only relevant contexts in which our suggestions might be explored, nor do we in any sense imply that broader organizational development encompassing poor and working-class people as a whole is impossible or ineffective. In fact, the context-specific organizing regimes we envision might well facilitate broader community-based and political organization. However, we leave for another day exploration of how the law might directly enable broad-based political organization--say, a political organization of all poor people or a political-party system that incentivizes grassroots participation among nonwealthy individuals. 45Link to the text of the note

Second, we focus on how law can build organization, as opposed to more amorphous configurations of insurgency. The organizations our reforms seek to facilitate are very much social-movement actors, in that they seek to change "elements of the social structure and/or reward distribution of a society." 46Link to the text of the noteBut the goal is to encourage enduring organization that can wield sustained, [\*559] countervailing power. 47Link to the text of the noteThus, our approach rejects the idea that formal structures facilitated by law are necessarily deradicalizing and inimical to social change. 48Link to the text of the note

Finally, our focus is on how law can facilitate organizations of working-class and poor Americans--not on either of two other questions: one, how law could be designed specifically to enhance the political power of communities of color, or two, how law could encourage the formation of interest groups generally. The first question could not be more critical. Just as our government is disproportionately responsive to the wealthy, it is also disproportionately responsive to white people, 49Link to the text of the noteand the crisis of structural racism is perhaps the most acute we face as a nation. As such, a program for building political power among communities of color is just as necessary as a program for building power among workers and the poor. But it is also true that our focus on working and poor Americans ought, in practice, and in part due to the crisis of structural racism itself, to amount to a program for building power among and by communities of color. This is not the exclusive reach of our proposals, and continued attention must be paid to ensure that racial inequities do not infect the political organizing we aspire to enable. But because people of color are over-represented in the sectors of the population that we do address--low-income workers, tenants, government-benefits recipients, debtors--these communities would likely benefit from the success of our proposals. As to the second question, while a more expansive civil society may bring a host of benefits, including greater social cohesion and civic education, this Article's concern is with building organizations that can serve as a countervailing force to the extraordinary power of economic elites in our political economy. 50Link to the text of the note

[\*560] We argue that a legal regime designed to enable this kind of organizing should have several components. First, the law should grant collective rights in an explicit and direct way so as to create a "frame" that encourages organizing. Second, as importantly, though more prosaically, the law should provide for a reliable, administrable, and sustainable source of financial, informational, human, and other relevant resources. Third, the law should guarantee free spaces--both physical and digital--in which movement organization can occur, free from surveillance or control. Fourth, the law should remove barriers to participation, both by protecting all those involved from retaliation--no worker may be fired, no tenant evicted, no debtor penalized, and no welfare recipient deprived of benefits because they are active in or supportive of the movement's efforts--and by removing material obstacles that make it difficult for poor and working people to organize. Fifth, the law should provide the organizations with ways to make material change in their members' lives and should create mechanisms for the exercise of real political and economic power, for example by providing the right to "bargain" with the relevant set of private actors and by facilitating organizational participation in governmental processes. Finally, the law should enable contestation and disruption, offering protections for the right to protest and strike. 51Link to the text of the note

The particulars necessarily vary by context. For example, a law designed to generate organizing among tenants would start by affirmatively granting tenants the right to form and join tenant unions. It would grant such unions the right to access information and landlord property for organizational purposes. It would vest the organization with authority to collect dues payments through deductions from rent payments. It would mandate that landlords negotiate with tenants' organizations over rent and housing conditions. It would ensure that organizations have special rights of participation in administrative processes related to housing policy. And it would provide for the right of tenants to engage in rent strikes and protests, free from retaliation. A law designed to facilitate organizing among debtors would similarly create a collective frame, provide a mechanism for funding, protect against retaliation, mandate bargaining and [\*561] rights of participation in governance, and protect the right to protest and strike, but a debtor-organizing law might not provide for access to physical spaces, instead putting more emphasis on providing information and enabling online organizing.

Some of our proposals will generate resistance--theoretical, legal, and political. And, indeed, we concede that our approach has limitations. For example, we do not attempt to articulate the optimal level of political influence that the organizations in question ought to enjoy, nor a way of measuring when and whether they have become sufficiently strong. As Richard Pildes has written in a related context, we believe it is possible to "identify what is troublingly unfair, unequal, or wrong without a precise standard of what is optimally fair, equal, or right." 52Link to the text of the noteIn addition, the scope of our inquiry is limited to problems of economic inequality. Yet we do not mean in any way to minimize other aspects of inequality, including racial and gender discrimination and hierarchy, which are both inseparable from economic inequality and worthy of separate examination and intervention. To that end, we believe law ought to require inclusion and nondiscrimination among poor and working people's social-movement organizations. 53Link to the text of the note

Finally, we recognize both that our recommendations will not provide a panacea to the imbalance in power that characterizes our political economy and that our proposals will be difficult to enact. Indeed, although we suggest a range of possible reforms and explain how they could be achieved, the goal is to illuminate law's constitutive potential and to suggest a path for further work, not to provide a comprehensive blueprint. 54Link to the text of the noteIn short, analysis of what makes poor and working people's social-movement organizations succeed helps show that law [\*562] can make a difference--and that the absence of such law is a choice, one we believe our society cannot afford to make. 55Link to the text of the note

#### Turns case---causes excess wealth and inequality.

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1 The Code of Capital: Core Themes

I would like to thank the editors of Convivium for putting together this special issue and for inviting me to write a reply to the critiques in this issue. My hope was to write a book about capital that would open fresh perspectives and also engage readers from different disciplinary backgrounds. Having the opportunity to engage scholars from philosophy, law, sociology and business/accounting is a wonderful reward for such an undertaking. Thanks also to the contributors who read the book and put their thoughts and their critiques in writing. In what follows, I will summarize the core themes of my book with only scant reference to their critiques, which I reserve for the reply at the end of this issue.

Capital is not a thing, but a social relation, as Marx taught us (Marx, 1974) according to Marxists, the relation between capital and labor as at the heart of this relation. Ownership over the means of production allows capitalists to extract surplus from labor, which they can feed back into the production and surplus creation process, or take out for consumption. Law figures in this story, but as part of the super-structure, not its basis. Only the “old” institutional economists, foremost among them John Commons, gave law a central role in explaining capitalism (Commons, 1924). This book owes much to their writings and to the legal realists, as it does do social theorists like Karl Polanyi who sought to understand the long arch of historical transformations by observing the details that link societies to markets, social to economic and ultimately political change (Polanyi, 1944).

Capital, I argue in my book, is indeed a social relation, but one that is organized around and mediated by the state and its coercive powers, which have been institutionalized as law. Law is often depicted as a vertical relation between a state and the subject it controls, the people and organizations that occupy its territory. For social and economic activities, there is, however, another dimension of law, namely private law. The distinction between public and private law belongs to the modern period and is more pronounced in some legal systems than in others. It reflects an increasing differentiation of governance tasks and mechanisms for ever more complex social organizations. Several contributors to this issue have criticized this book for not saying enough about public law, a point to which I will return in my reply. For now, suffice to say that the legal domain that in my view has remained largely hidden from view in the discussion of social change, has been private law. It has been naturalized and reified and the fact that it owes its power of social ordering ultimately to the state is often ignored.

Private law consists of legal arrangements that allow private parties to organize their horizontal relations while resting assured that these arrangements will (in all likelihood) be enforceable in a court of law. Private actors may trade, invest, or gamble without this assurance, but they would have to protect themselves against possible breach or interference by strangers to their transactions and the social groups within which they take place. They would have to carefully select and monitor their counterparties or middlemen, wall in their properties, hire private guards, and so forth (Kronman, 1985; Landa, 1981). To be sure, modern technologies have greatly reduced the cost of self-help. As a result, the relative importance of coercive law enforcement (and thus of states) may decline. In the book, I argue that the digital code is unlikely to replace the legal code any time soon; and moreover, that the decisions that digital coders make are not fundamentally different from legal coders. Still, while writing the book, I did not fully grasp the potential of digital coding and of data, an issue I have since taken up (Pistor, 2020a, 2020b).

Setting aside the promises and challenges of the digital code, a critical premise of my argument is that for social relations to scale beyond the size of social groups that can rely on self-monitoring, something else is needed: a powerful agent with the authority to verify the rules that can enforce promises and uphold property rights, if necessary with the help of coercive power (Hodgson, 2009; Weber, 1968). Private law enables private parties to avail themselves of the state’s coercive powers in organizing their social and economic relations well beyond tightly knit spheres of exchange, while enjoying considerable flexibility in doing so. This is key for turning simple objects, promises and ideas or knowhow (or assets) into capital, that is, into assets that create new and secure past wealth. Deciphering the role that private law plays in the making of capital is the book’s core mission.

The basic argument the book makes is fairly simple: With the right legal coding any object, promise or idea can be turned into a capital asset. The process of coding capital bestows its holders with legal attributes that greatly enhance the likelihood that they will produce and secure wealth. I identify four attributes, namely priority, durability, universality, and convertibility. Priority means that some asset holders enjoy stronger rights than others; these rights can be extended in time by protecting them against other claims, thereby lending them durability and allowing capital to grow. Holders of financial asset attain durability by way of convertibility, an option to swap privately into state issued legal tender that maintains its nominal value (Ricks, 2016), and thereby to lock in past gains. Last but not least, universality ensures that all have to yield to these legal rights, whether or not they knew about them. Coding capital then is the process of grafting priority, durability or convertibility, and universality on to different types of assets and thereby creating wealth for their holders and inequality for the rest.

Only a handful of institutions of private law are needed to turn a simple asset into capital. For priority, property and collateral law do most of the work; and for durability, trust and corporate law. Bankruptcy is in the mix, because, even though it is mandatory and as such less malleable, it sanctions priority rights that were created outside bankruptcy. Owners of assets that are in the possession of a defaulting debtor can retrieve them, and holders of collateral interests can enforce against them before any other creditors. Claimants at the end of the queue get only the leftovers. The legal modules that confer priority and durability operate by design against anybody; in contrast, contract law is a legal relationship that binds only two parties to the contract. Still, contract law occupies an important role in the coding of capital, because contractual relations enjoy legal protection against outside interference. Moreover, with the help of information technology, the costs of contracting can be reduced to a point that contractual relations can be universalized – simply by requiring millions of platform users to click “agree” and thereby sign on to the same contract that bind everybody else. To be clear, these six modules are not the only legal devices that can be used for coding capital, but they have been central for coding of capital over the past four hundred years or so. The book applies this framework to the coding of land, firms, debt, and knowhow. While land came first, the story unfolds not in chronological order. In other words, there is no explicit or implied argument about historical stages of the coding of capital.

To me, one of the most striking discoveries was the persistence and versatility of the modules of the code. Property rights, as Bernard Rudden reminds us, first emerged during the age of feudalism (Rudden, 1994). The same legal modules, property rights, collateral as well as trust law, which were used to code land are used today for coding securitized assets and complex financial derivative structures. The legal modules are not entirely static; they were adapted to changing circumstances. Property rights in land evolved from an integral part of the feudal socio-political order into a legal right held by individuals in principle irrespective of their social status. I say “in principle”, because endowment effects limited access to land and other assets long after legal restrictions had been lifted and gave the privileged landowners a head-start over everyone else. The importance of land as the primary source of wealth prior to the onset of industrialization, and indeed of capitalism, is also evident in the evolution of trust last. Well into the nineteenth century, land was the only asset that could be conveyed to a trust, with sovereign debt and shares in the English East Indian Company allowed only later. Today, virtually anything that can generate future cash flows can be thrown behind the veil of a trust thereby granting investors (the beneficiaries) privileged access to these cash flows. In addition, the fiduciary duties of trustees have been relaxed, leading one student of trust law to talk of the “stripping of the trust” (Hofri-Winogradow, 2015), and beneficiaries have turned their equitable interests against the trust into fixed income claims.

These modifications notwithstanding, I stress continuity of the legal modules over change, because their basic structure remained intact even as they were adapted to new assets and changing circumstances. Still, there might room for another book that tells the story of each module over time, and preferably, in comparative perspective. In fact, I first thought about organizing the book around the legal institutions (property, trust, corporate law etc.), rather than the assets (land, firms, debt, knowhow) they have coded as capital. It might have been a great book for legal historians, but probably would have not conveyed the power of the legal code and its impact on the creation of wealth and inequality for a broader readership. Yet, analyzing the patterns of legal change in greater detail will be an important aspect for further deepening the theoretical analysis and drawing out the implications of “The Code of Capital” for social and political theory (more on this in the reply).

Placing private law at the center of the analysis seems to disregard the rise of global capitalism. Private law is domestic law; only some aspects of private have been harmonized globally. Even the EU, which had aspired to creating a comprehensives set of common rules for a common market, eventually switched direction. In lieu of a common set of substantive rules, say for contract, corporate law, etc., member states have harmonized the rules that determine which country’s rules should apply in cross-border cases where more than one legal system is in play. In legal jargon, these are the “conflict-of-law rules” (or international private law), which are part of the domestic legal orders of every country. These rules stipulate separately for every legal domain the factors that should determine whose law applies: the location of an asset for property rights, a company’s headquarters or place of incorporation for corporate law, or simply party choice for contract law – and increasingly for other areas of the law as well.

They may look arcane or unassuming, but these rules have been instrumental for the integration of economic and financial systems globally. In the absence of a global state and a global law, conflict-of-law rules have been used to extend the reach of domestic law beyond the territorial borders of the states from which it originated. Creating a menu of legal systems for private agents to choose from when organizing their transnational relations required at least two things: Different rules with some legal systems offering greater advantages for the coding of capital than others; and the willingness of states with less desirable rules to enforce the selected rules within their territories. The first condition is easy to meet, as legal rules do in fact vary across countries and legal system. More interestingly, they do so fairly systematically, with the common law offering for the most part superior conditions than do most civil law systems. Comparing civil law and common law regimes has a long trajectory, including more recently the law and finance literature (La Porta, Lopez-de-Silanes, Shleifer, & Vishny, 1998). I don’t add much to this debate other than suggesting that the organization of the legal profession, the role of private attorneys and courts in the legal system, has not received the attention it deserves.

The second condition, i.e. other states willing to enforce foreign law in their courts, requires a bit more explanation. Here, we have seen a shift over the past several decades towards allowing private parties to freely choose the law from among different legal systems that best suits their needs. Some states did so on their own behest; others were pushed by economic and legal integration projects, such as the European Union. Either way, the timing is conspicuous: it overlaps with the integration of financial markets globally since the late 1980s and early 1990s. Teasing out the interaction between decisions to remove capital controls, to privatize financial intermediaries and allow for the free movement of capital and changes in conflict-of-law rules certainly deserve further research.

When using the lens of the code of capital, global capitalism does not appear as some “supra-national” system that is detached from states or state law or that has diminished the role of states. Instead, global capitalism is rooted in select legal systems that have accommodated capital for centuries and that today are home to the major players in global finance, as well as the 100 top global law firms. English law has dominated international trade for centuries, with the direction of causality possible running from empire to legal dominance, but equally possible in the opposite direction. Today, English and New York state law dominate the coding of financial capital that is traded globally. These two jurisdictions are the rule makers for global capital. Most other jurisdictions will recognize and enforce the legal rights they create; they are rule takers. By recognizing and enforcing foreign law in their courts, they extend universality way beyond the territory of the country to provide the critical modules of the code.

Capital and the system to which it has given its name was not designed by anybody in a coherent fashion, but neither can it be described as the product of natural evolution. To turn a simple object, promise or idea into capital, somebody must decide, which and whose assets shall be coded as capital; others must accept the coding, even yield to it. And should the coding be challenged, someone must decide, whether a strategy should be upheld, struck down, or changed. These tasks are taken up by different agents: asset holders, lawyers, courts, regulators, and legislatures; and not just agents that all belong to the same state, but are dispersed among several. The de-centering and diffusion of state power through private law and conflict-of-law rules, the book suggests, is critical for understanding a system that is at once built from state law and difficult to constrain through collective governance mechanisms of states. This might help explain, why there is no simple reform strategy. In the book, I therefore propose a strategy of incremental change aimed at scaling back the mechanism that have contributed to the diffusion of state power and their concentration in private hands. To several critics this strategy is unsatisfactory. I don’t disagree and my own thinking has evolved since the book went to press, especially since the economic fallout from COVID-19 pandemic, which might create an opportunity for more radical change. Still, the measures I discuss in the book are in my mind and indispensable for creating the needed space for retooling state power.

### T

#### Topical affirmatives must affirm the resolution---they don’t:

#### The “United States federal government” is the three branches in DC

U.S. Legal ’16 [U.S. Legal; 2016; Organization offering legal assistance and attorney access; U.S. Legal, “United States Federal Government Law and Legal Definition,” <https://definitions.uslegal.com/u/united-states-federal-government/>; RP]

The United States Federal Government is established by the US Constitution. The Federal Government shares sovereignty over the United Sates with the individual governments of the States of US. The Federal government has three branches: i) the legislature, which is the US Congress, ii) Executive, comprised of the President and Vice president of the US and iii) Judiciary. The US Constitution prescribes a system of separation of powers and ‘checks and balances’ for the smooth functioning of all the three branches of the Federal Government. The US Constitution limits the powers of the Federal Government to the powers assigned to it; all powers not expressly assigned to the Federal Government are reserved to the States or to the people.

#### Expanding the scope of CORE antitrust law requires modifying Sherman, FTC, or Clayton

US Chamber of Commerce, no date [America’s Antitrust Laws Protect Competition and Benefit Consumers, https://www.uschamber.com/antitrust-laws,]

Antitrust laws ensure competition in a free and open market economy, which is the foundation of any vibrant economy. And healthy competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality products and services, more choices, and greater innovation. The core of U.S. antitrust law was created by three pieces of legislation: the Sherman Antitrust Act, the Federal Trade Commission Act, and the Clayton Antitrust Act. These laws have evolved along with the market, vigilantly guarding against anti-competitive harm that arises from abuse of dominance, bid rigging, price fixing, and customer allocation.

#### Prohibitions are legal restrictions against certain conduct.

DLD ‘ND [Duhaime's Law Dictionary; “Prohibition Definition”; http://www.duhaime.org/LegalDictionary/P/Prohibition.aspx; AS]

A legal restriction against the use of something or against certain conduct.

Only ensuring debates are grounded in resolution-based stasis guarantees contestability and reasonable burdens for 2Ns – any alternative definition of the topic is infinitely unpredictable and nullifies core negative research

#### There’s 2 impacts---

#### 1) Procedural Fairness---Predictability of the resolution ensures an equal chance to win 50% of debates on the negative---non-resolutional aff choice overstretches the research burden which puts them structurally ahead. It also decreases the viability of pre-tournament prep which unbalances the game. That’s an impact since debate is inherently a competitive space and the ability to win each individual debate matters---especially true considering the ballot can only resolve our procedural impacts

#### 2) Iteration---resolutional stasis is key to refute the aff rigorously---their interpretation encourages AFF conditionality and shielding links since their advocacy isn’t tied to a predictable stasis---that encourages teams to craft the trickiest 1AC which prevents testing over essential truth-claims and solvency---instead prefer debates against well-prepared opponents that make us better advocates---that fosters the best disagreement and ensures we have the ability to persuade people who hold dissenting opinions

Default to competing interpretations---winning the 1AC was good doesn’t prove their counterinterpretation is. Neg framework ballots pick a winner but no ballot solves structural impacts. Any “net benefit” to their interp that isn’t about the types of debates it encourages is not offense---you can vote neg and agree with claims like “the 1AC was good” or “some topical debates could be bad”.

### K

#### Avoiding institution-building abdicates the potential for communal power and reduces revolution to static bursts of energy

Srnicek & Williams ‘15 (Nick, Theorist and activist, and Alex, PhD student at the University of East London, *Inventing the Future: Postcapitalism and a World Without Work,* ebook)

To invoke modernity is ultimately to raise the question of the future. What should the future look like? What courses should we set? What does it mean to be contemporary? And whose future is it? Since the emergence of the term, modernity has been concerned with unravelling a circular or retrospective notion of time and introducing a rupture between the present and the past. With this break, the future is projected as being potentially different from and better than the past.14 Modernity is tantamount to ‘the discovery of the future’ and has therefore found itself intimately linked with notions such as ‘progress, advance, development, emancipation, liberation, growth, accumulation, Enlightenment, embetterment, [and the] avant-garde’.15 Suggesting that history can progress through deliberate human action, it is the nature of this progress that competing definitions of modernity have struggled over.16 Historically, the left has found its natural home in being oriented towards the future. From early communist visions of technological progress, to Soviet space utopias, to the social democratic rhetoric of the ‘white heat of technology’, what set the left apart from the right was its unambiguous embrace of the future. The future was to be an improvement over the present in material, social and political terms. By contrast, the forces of the political right were, with a few notable exceptions, defined by their defence of tradition and their essentially reactionary nature.17 This situation was reversed during the rise of neoliberalism, with politicians like Thatcher commanding the rhetoric of modernisation and the future to great effect. Co-opting these terms and mobilising them into a new hegemonic common sense, neoliberalism’s vision of modernity has held sway ever since. Consequently, discussions of the left in terms of the future now seem aberrant, even absurd. With the postmodern moment, the seemingly intrinsic links between the future, modernity and emancipation were prized apart. Philosophers like Simon Critchley can now confidently assert that ‘we have to resist the idea and ideology of the future, which is always the ultimate trump card of capitalist ideas of progress’.18 Such folk-political sentiments blindly accept the neoliberal common sense, preferring to shy away from grand visions and replace them with a posturing resistance. From the radical left’s discomfort with technological modernity to the social democratic left’s inability to envision an alternative world, everywhere today the future has largely been ceded to the right. A skill that the left once excelled at – building enticing visions for a better world – has deteriorated after years of neglect. If the left is to recover a sense of progress, however, it cannot simply adopt the classic images of history headed towards a singular destination. Progress, for these approaches, was not only possible, but in fact woven as a necessity into the very fabric of history. Human societies were thought to travel along a pre-defined pathway towards a single outcome modelled after Europe. The nations of Europe were deemed to have developed capitalist modernity independently, and their historical experiences of development were considered to be both necessary and superior to those of other cultures.19 Such ideas dominated traditional European philosophy and continued on in the influential modernisation literature of the 1950s and 1960s, with their attempts to naturalise capitalism against a Soviet opponent.20 Partly endorsed by both early Marxism and later Keynesian and neoliberal capitalisms, a one-size-fits-all model of historical progress positioned non-Western societies as lacking and in need of development – a position that served to justify colonial and imperial practices.21 From the standpoint of their philosophical critics, these notions of progress were disparaged precisely for their belief in preconceived destinations – whether in the liberal progression towards capitalist democracy or in the Marxist progression towards communism. The complex and often disastrous record of the twentieth century demonstrated conclusively that history could not be relied upon to follow any predetermined course.22 Regression was as likely as progress, genocide as possible as democratisation.23 In other words, there was nothing inherent in the nature of history, the development of economic systems, or sequences of political struggle that could guarantee any particular outcome. From a broadly left perspective, for example, even those limited but not insignificant political gains that have been achieved – such as welfare provision, women’s rights and worker protections – can be rolled back. Moreover, even in states where nominally communist governments took power, it proved far more difficult than expected to transition from a capitalist system of production to a fully communist one.24 This series of historical experiences fuelled an internal critique of European modernity by way of psychoanalysis, critical theory and poststructuralism. For the thinkers of postmodernism, modernity came to be associated with a credulous naivety.25 In Jean-François Lyotard’s epochal definition, postmodernity was identified as the era that has grown to be suspicious of the grand metanarrative.26 On this account, postmodernity is a cultural condition of disillusionment with the kinds of grandiose narratives represented by capitalist, liberal and communist accounts of progress. To be sure, these critiques capture something important about the chronological texture of our time. And yet, the announcement of the end of grand narratives has often been viewed by those outside Europe as being absolutely of a piece with modernity.27 Further, with the benefit of thirty years’ hindsight, the broader impact of the cultural condition diagnosed by Lyotard has not been the decline of belief in metanarratives per se, but rather a broad disenchantment with those offered by the left. The association between capitalism and modernisation remains, while properly progressive notions of the future have wilted under postmodern critique and been quashed beneath the social wreckage of neoliberalism. Most significantly, with the collapse of the Soviet Union and the rise of globalisation, history does appear to have a grand narrative.28 Throughout the world, markets, wage labour, commodities and productivity-enhancing technologies have all expanded under the systemic imperative to accumulate. Capitalism has become the destiny of contemporary societies, happily coexisting with national differences and paying little heed to clashes between civilisations. But we can draw a distinction here between the endpoint (capitalism) and the pathway towards it. Indeed, the mutual entanglement of countries means that the European pathway (heavily reliant on exploiting colonies and slavery) is barred for many of the newly developing countries. While there are broad paradigms of development, each country has had to find its own unique way to respond to the imperatives of global capitalism. The path of capitalist modernisation is therefore instantiated in different cultures, following different trajectories and with different rhythms of development.29 Uneven and combined development is the order of the day.30 Progress is therefore not bound to a single European path, but is instead filtered through a variety of political and cultural constellations, all directed towards instantiating capitalist relations. Today, modernisers simply fight over which variant of capitalism to install. Recuperating the idea of progress under such circumstances means, first and foremost, contesting the dogma of this inevitable endpoint. Capitalist modernity was never a necessary outcome, but instead a successful project driven by various classes and a systemic imperative towards accumulation and expansion. Various modernities are possible, and new visions of the future are essential for the left. Such images are a necessary supplement to any transformative political project. They give a direction to political struggles and generate a set of criteria to adjudicate which struggles to support, which movements to resist, what to invent, and so on. In the absence of images of progress, there can only be reactivity, defensive battles, local resistance and a bunker mentality – what we have characterised as folk politics. Visions of the future are therefore indispensable for elaborating a movement against capitalism. Contra the earlier thinkers of modernity, there is no necessity to progress, nor a singular pathway from which to adjudicate the extent of development. Instead, progress must be understood as hyperstitional: as a kind of fiction, but one that aims to transform itself into a truth. Hyperstitions operate by catalysing dispersed sentiment into a historical force that brings the future into existence. They have the temporal form of ‘will have been’. Such hyperstitions of progress form orienting narratives with which to navigate forward, rather than being an established or necessary property of the world. Progress is a matter of political struggle, following no pre-plotted trajectory or natural tendency, and with no guarantee of success. If the supplanting of capitalism is impossible from the standpoint of one or even many defensive stances, it is because any form of prospective politics must set out to construct the new. Pathways of progress must be cut and paved, not merely travelled along in some pre-ordained fashion; they are a matter of political achievement rather than divine or earthly providence.

#### Capitalism locks in extinction – it depoliticizes the left, collapses the environment causes endless war, and a backsliding into fascism that accelerates their impacts – the status quo can and will get worse absent the alternative

Shaviro 15 – (Steven Shaviro is an American academic, philosopher and cultural critic whose areas of interest include film theory, time, science fiction, panpsychism, capitalism, affect and subjectivity. He earned a PhD from Yale in 1981. “No Speed Limit: Three Essays on Accelerationism” <https://track5.mixtape.moe/qdkkdt.pdf> rvs)

The problem may be summarized as follows. Capitalism has indeed created the conditions for general prosperity and therefore for its own supersession. But it has also blocked, and continues to block, any hope of realizing this transformation. We cannot wait for capitalism to transform on its own, but we also cannot hope to progress by appealing to some radical Outside or by fashioning ourselves as militants faithful to some “event” that (as Badiou has it) would mark a radical and complete break with the given “situation” of capitalism. Accelerationism rather demands a movement against and outside capitalism—but on the basis of tendencies and technologies that are intrinsic to capitalism. Audre Lord famously argued that “the master’s tools will never dismantle the master’s house.” But what if the master’s tools are the only ones available? Accelerationism grapples with this dilemma. What is the appeal of accelerationism today? It can be understood as a response to the particular social and political situation in which we currently seem to be trapped: that of a long-term, slow-motion catastrophe. Global warming, and environmental pollution and degradation, threaten to undermine our whole mode of life. And this mode of life is itself increasingly stressful and precarious, due to the depredations of neoliberal capitalism. As Fredric Jameson puts it, the world today is characterized by “heightened polarization, increasing unemployment, [and] the ever more desperate search for new investments and new markets.” These are all general features of capitalism identified by Marx, but in neoliberal society we encounter them in a particularly pure and virulent form. I want to be as specific as possible in my use of the term “neoliberalism” in order to describe this situation. I define neoliberalism as a specific mode of capitalist production (Marx), and form of governmentality (Foucault), that is characterized by the following specific factors: 1. The dominating influence of financial institutions, which facilitate transfers of wealth from everybody else to the already extremely wealthy (the “One Percent” or even the top one hundredth of one percent). 2. The privatization and commodification of what used to be common or public goods (resources like water and green space, as well as public services like education, communication, sewage and garbage disposal, and transportation). 3. The extraction, by banks and other large corporations, of a surplus from all social activities: not only from production (as in the classical Marxist model of capitalism) but from circulation and consumption as well. Capital accumulation proceeds not only by direct exploitation but also by rent-seeking, by debt collection, and by outright expropriation (“primitive accumulation”). 4. The subjection of all aspects of life to the so-called discipline of the market. This is equivalent, in more traditional Marxist terms, to the “real subsumption” by capital of all aspects of life: leisure as well as labor. Even our sleep is now organized in accordance with the imperatives of production and capital accumulation. 5. The redefinition of human beings as private owners of their own “human capital.” Each person is thereby, as Michel Foucault puts it, forced to become “an entrepreneur of himself.” In such circumstances, we are continually obliged to market ourselves, to “brand” ourselves, to maximize the return on our “investment” in ourselves. There is never enough: like the Red Queen, we always need to keep running, just to stay in the same place. Precarity is the fundamental condition of our lives. All of these processes work on a global scale; they extend far beyond the level of immediate individual experience. My life is precarious, at every moment, but I cannot apprehend the forces that make it so. I know how little money is left from my last paycheck, but I cannot grasp, in concrete terms, how “the economy” works. I directly experience the daily weather, but I do not directly experience the climate. Global warming and worldwide financial networks are examples of what the ecological theorist Timothy Morton calls hyperobjects. They are phenomena that actually exist but that “stretch our ideas of time and space, since they far outlast most human time scales, or they’re massively distributed in terrestrial space and so are unavailable to immediate experience.” Hyperobjects affect everything that we do, but we cannot point to them in specific instances. The chains of causality are far too complicated and intermeshed for us to follow. In order to make sense of our condition, we are forced to deal with difficult abstractions. We have to rely upon data that are gathered in massive quantities by scientific instruments and then collated through mathematical and statistical formulas but that are not directly accessible to our senses. We find ourselves, as Mark Hansen puts it, entangled “within networks of media technologies that operate predominantly, if not almost entirely, outside the scope of human modes of awareness (consciousness, attention, sense perception, etc.).” We cannot imagine such circumstances in any direct or naturalistic way, but only through the extrapolating lens of science fiction. Subject to these conditions, we live under relentless environmental and financial assault. We continually find ourselves in what might well be called a state of crisis. However, this involves a paradox. A crisis—whether economic, ecological, or political—is a turning point, a sudden rupture, a sharp and immediate moment of reckoning. But for us today, crisis has become a chronic and seemingly permanent condition. We live, oxymoronically, in a state of perpetual, but never resolved, convulsion and contradiction. Crises never come to a culmination; instead, they are endlessly and indefinitely deferred. For instance, after the economic collapse of 2008, the big banks were bailed out by the United States government. This allowed them to resume the very practices—the creation of arcane financial instruments, in order to enable relentless rent-seeking—that led to the breakdown of the economic system in the first place. The functioning of the system is restored, but only in such a way as to guarantee the renewal of the same crisis, on a greater scale, further down the road. Marx rightly noted that crises are endemic to capitalism. But far from threatening the system as Marx hoped, today these crises actually help it to renew itself. As David Harvey puts it, it is precisely “through the destruction of the achievements of preceding eras by way of war, the devaluation of assets, the degradation of productive capacity, abandonment and other forms of ‘creative destruction’” that capitalism creates “a new basis for profit-making and surplus absorption.” What lurks behind this analysis is the frustrating sense of an impasse. Among its other accomplishments, neoliberal capitalism has also robbed us of the future. For it turns everything into an eternal present. The highest values of our society—as preached in the business schools—are novelty, innovation, and creativity. And yet these always only result in more of the same. How often have we been told that a minor software update “changes everything”? Our society seems to function, as Ernst Bloch once put it, in a state of “sheer aimless infinity and incessant changeability; where everything ought to be constantly new, everything remains just as it was.” This is because, in our current state of affairs, the future exists only in order to be colonized and made into an investment opportunity. John Maynard Keynes sought to distinguish between risk and genuine uncertainty. Risk is calculable in terms of probability, but genuine uncertainty is not. Uncertain events are irreducible to probabilistic analysis, because “there is no scientific basis on which to form any calculable probability whatever.” Keynes’s discussion of uncertainty has strong affinities with Quentin Meillassoux’s account of hyperchaos. For Meillassoux, there is no “totality of cases,” no closed set of all possible states of the universe. Therefore, there is no way to assign fixed probabilities to these states. This is not just an empirical matter of insufficient information; uncertainty exists in principle. For Meillassoux and Keynes alike, there comes a point where “we simply do not know.” But today, Keynes’s distinction is entirely ignored. The Black-Scholes Formula and the Efficient Market Hypothesis both conceive the future entirely in probabilistic terms. In these theories, as in the actual financial trading that is guided by them (or at least rationalized by them), the genuine unknowability of the future is transformed into a matter of calculable, manageable risk. True novelty is excluded, because all possible outcomes have already been calculated and paid for in terms of the present. While this belief in the calculability of the future is delusional, it nonetheless determines the way that financial markets actually work. We might therefore say that speculative finance is the inverse—and the complement—of the “affirmative speculation” that takes place in science fiction. Financial speculation seeks to capture, and shut down, the very same extreme potentialities that science fiction explores. Science fiction is the narration of open, unaccountable futures; derivatives trading claims to have accounted for, and discounted, all these futures already. The “market”—nearly deified in neoliberal doctrine—thus works preemptively, as a global practice of what Richard Grusin calls premediation. It seeks to deplete the future in advance. Its relentless functioning makes it nearly impossible for us to conceive of any alternative to the global capitalist world order. Such is the condition that Mark Fisher calls capitalist realism. As Fisher puts it, channeling both Jameson and Žižek, “it’s easier to imagine the end of the world than the end of capitalism.”

**The alternative is to affirm the model of the Communist Party – only the Party can provide effective accountability mechanisms and praxis necessary to mobilize communities, and connect local struggles to a movement for international liberation**

**Escalante 18** – (Alyson Escalante is a Marxist-Leninist, Materialist Feminist and Anti-Imperialist activist. “PARTY ORGANIZING IN THE 21ST CENTURY” September 21st, 2018 <https://theforgenews.org/2018/09/21/party-organizing-in-the-21st-century/>)

I would argue that within the base building movement, there is a move towards party organizing, but this trend has not always been explicitly theorized or forwarded within the movement. My goal in this essay is to argue that base building and dual power strategy can be best forwarded through party organizing, and that party organizing can allow this emerging movement to solidify into a powerful revolutionary socialist tendency in the United States. One of the crucial insights of the base building movement is that the current state of the left in the United States is one in which revolution is not currently possible. There exists very little popular support for socialist politics. A century of anticommunist propaganda has been extremely effective in convincing even the most oppressed and marginalized that communism has nothing to offer them. The base building emphasis on dual power responds directly to this insight. By building institutions which can meet people’s needs, we are able to concretely demonstrate that communists can offer the oppressed relief from the horrific conditions of capitalism. Base building strategy recognizes that actually doing the work to serve the people does infinitely more to create a socialist base of popular support than electing democratic socialist candidates or holding endless political education classes can ever hope to do. Dual power is about proving that we have something to offer the oppressed. The question, of course, remains: once we have built a base of popular support, what do we do next? If it turns out that establishing socialist institutions to meet people’s needs does in fact create sympathy towards the cause of communism, how can we mobilize that base? Put simply: **in order to mobilize the base which base builders hope to create, we need to have already done the work of building a communist party.** It is not enough to simply meet peoples needs. Rather, we must build the institutions of dual power in the name of communism. We must refuse covert front organizing and instead have a public face as a communist party. When we build tenants unions, serve the people programs, and other dual power projects, we must make it clear that we are organizing as communists, unified around a party, and are not content simply with establishing endless dual power organizations. We must be clear that our strategy is revolutionary and in order to make this clear we must adopt party organizing. By “party organizing” I mean an organizational strategy which adopts the party model. Such organizing focuses on building a party whose membership is formally unified around a party line determined by democratic centralist decision making. The party model creates internal methods for **holding party members accountable**, unifying party member action around democratically determined goals, and for educating party members in communist theory and praxis. A communist organization utilizing the party model works to build dual power institutions while simultaneously educating the communities they hope to serve. Organizations which adopt the party model focus on propagandizing around the need for revolutionary socialism. They function as the forefront of political organizing, empowering local communities to theorize their liberation through communist theory while organizing communities to literally fight for their liberation. A party is not simply a group of individuals doing work together, but is a formal organization unified in its fight against capitalism. Party organizing has much to offer the base building movement. By working in a unified party, base builders can ensure that local struggles are tied to and informed by a unified national and international strategy. While the most horrific manifestations of capitalism take on particular and unique form at the local level, we need to remember that our struggle is against a material base which functions not only at the national but at the international level. The formal structures provided by a democratic centralist party model allow individual locals to have a voice in open debate, but also allow for a unified strategy to emerge from democratic consensus. Furthermore, **party organizing allows for local organizations and individual organizers to be held accountable for their actions.** It allows criticism to function not as one independent group criticizing another independent group, but rather as comrades with a formal organizational unity working together to sharpen each others strategies and to help correct **chauvinist** ideas and actions. In the context of the socialist movement within the United States, such **accountability is crucial**. As a movement which operates within a settler colonial society, imperialist and colonial ideal frequently infect leftist organizing. Creating formal unity and party procedure for dealing with and correcting these ideas allows us to address these consistent problems within American socialist organizing. Having a formal party which unifies the various dual power projects being undertaken at the local level also allows for base builders to not simply meet peoples needs, but to pull them into the membership of the party as organizers themselves. The party model creates a means for sustained growth to occur by unifying organizers in a manner that allows for skills, strategies, and ideas to be shared with newer organizers. It also allows community members who have been served by dual power projects to take an active role in organizing by becoming party members and participating in the continued growth of base building strategy. It ensures that there are formal processes for educating communities in communist theory and praxis, and also enables them to act and organize in accordance with their own local conditions. We also must recognize that the current state of the base building movement precludes the possibility of such a national unified party in the present moment. Since base building strategy is being undertaken in a number of already established organizations, it is not likely that base builders would abandon these organizations in favor of founding a unified party. Additionally, it would not be strategic to immediately undertake such complete unification because it would mean abandoning the organizational contexts in which concrete gains are already being made and in which growth is currently occurring. What is important for base builders to focus on in the current moment is building dual power on a local level alongside building a national movement. This means aspiring towards the possibility of a unified party, while pursuing continued local growth. The movement within the Marxist Center network towards some form of unification is positive step in the right direction. The independent party emphasis within the Refoundation caucus should also be recognized as a positive approach. It is important for base builders to continue to explore the possibility of unification, and to maintain unification through a party model as a long term goal. In the meantime, individual base building organizations ought to adopt party models for their local organizing. Local organizations ought to be building dual power alongside recruitment into their organizations, education of community members in communist theory and praxis, and the establishment of armed and militant party cadres capable of defending dual power institutions from state terror. Dual power institutions must be unified openly and transparently around these organizations in order for them to operate as more than “red charities.” Serving the people means meeting their material needs while also educating and propagandizing. It means radicalizing, recruiting, and organizing. **The party model** remains the most useful method for achieving these ends. The use of the party model by local organizations allows base builders to gain popular support, and most importantly, to mobilize their base of popular support towards revolutionary ends, not simply towards the construction of a parallel economy which exists as an end in and of itself. It is my hope that we will see future unification of the various local base building organizations into a national party, but in the meantime we must push for party organizing at the local level. If local organizations adopt party organizing, it ought to become clear that **a unified national party will have to be the long term goal of the base building movement.** Many of the already existing organizations within the base building movement already operate according to these principles. I do not mean to suggest otherwise. Rather, my hope is to suggest that we ought to be explicit about the need for party organizing and emphasize the relationship between dual power and the party model. Doing so will make it clear that the base building movement is not pursuing a cooperative economy alongside capitalism, but is pursuing a revolutionary socialist strategy capable of fighting capitalism. The long term details of base building and dual power organizing will arise organically in response to the conditions the movement finds itself operating within. I hope that I have put forward a useful contribution to the discussion about base building organizing, and have demonstrated the need for party organizing in order to ensure that the base building tendency maintains a revolutionary orientation. The finer details of revolutionary strategy will be worked out over time and are not a good subject for public discussion. I strongly believe party organizing offers the best path for ensuring that such strategy will succeed. My goal here is not to dictate the only possible path forward but to open a conversation about how the base building movement will organize as it transitions from a loose network of individual organizations into a unified socialist tendency. These discussions and debates will be crucial to ensuring that this rapidly growing movement can succeed.

## Case

### Antitrust Good

#### Antitrust debates are good---rigorous and iterative research gives us the tools to challenge violent corporate monopolization.

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Jeremie Greer and Solana Rice, “Anti-Monopoly Activism: Reclaiming Power Through Racial Justice,” *Liberation in a Generation*, March 2021, pp. 3-13, https://www.liberationinageneration.org/wp-content/uploads/2021/03/Anti-Monopoly-Activism\_032021.pdf.

It is critical that grassroots leaders of color are positioned to lead on anti-monopoly policy, as they are uniquely positioned to understand its impact on people of color at the household, community, and societal levels. This gives them a unique perspective in policy ideation efforts that should be valued and validated. These leaders also possess the unique skills to mobilize the people and public power that are necessary to force the government to reclaim its historic role of reining in runaway corporate monopoly power.

We at Liberation in a Generation believe that the power to change our economic systems rests with the organizers of color who are building the political strength of communities of color. Anti-monopoly research and advocacy need to better quantify, center, and reflect what people of color are experiencing and the ways that they are being harmed by monopoly power’s reach. These efforts should also better connect anti-monopoly policy and advocacy as tools to advance the existing priorities of leaders of color, such as the Green New Deal, Medicare for All, closing the racial wealth gap, and a Homes Guarantee. This paper aims to contribute a major step in the long journey of bridging the divide between anti-monopoly researchers and policy advocates and grassroots leaders of color. The first step on that journey is knowledge.

Recognizing that anti-monopoly work is a new policy issue to many grassroots leaders of color, this paper will serve as a primer to 1) educate grassroots leaders on the issue of corporate concentration, 2) connect the issue to racial justice, and 3) recommend a path forward for grassroots leaders as well as the researchers and advocates who need to embrace them. Our hope is that this paper provides a foundation of knowledge that grassroots leaders of color can use to build race-conscious solutions and mobilize for action to rein in runaway corporate monopoly power. To that end, the paper is organized into six sections.

SECTION 1 Monopoly Power Is Corporate Power Magnified and Maximized

In 1975, millions flooded theaters to see the blockbuster thriller Jaws. The story follows a police chief in a small resort town as he risks his life to protect beachgoers from a monstrous man-eating great white shark.

Monopolies are a lot like the shark in Jaws. While enormous, ruthless, dangerous, and scary, the movie’s monster is just a shark, and the police chief uses tools and community to defeat it. Comparatively, while also enormous, ruthless, dangerous, and even scary, monopolies are just corporations, and we, together, can confront them. Their massive power controls the wages we earn, the prices we pay, and the actions of the politicians who are supposed to represent us in DC, the statehouse, and city hall. In a representative democracy, we the people are at the top of the food chain, and it is within our power to make these monopolies fear us— and end their existence in the first place.

Grassroots leaders of color are highly experienced and uniquely skilled at challenging corporate power, and these capacities can and should be used to curb monopoly power. For example, the Athena Coalition8 has successfully leveraged grassroots power to challenge the monopoly power of Amazon, and Color of Change9 has effectively used grassroots digital organizing to challenge the monopoly power of social media platforms such as Facebook. Putting monopolies in the crosshairs of organizers is critical because they best understand the real human and structural devastation caused by monopoly power, which is otherwise all too easily neglected.

Though we believe that grassroots leaders of color have the experience and expertise necessary to challenge monopoly power, the question remains: Why should they lead this fight? Grassroots leaders of color are already engaged in high-stakes battles with the forces of corporate power on fundamental issues, including environmental justice, worker justice, housing justice, prison and police abolition, and voter and democratic justice. We believe that these efforts can be bolstered if anti-monopoly policy development and advocacy were incorporated into these existing efforts but then followed the lead of organizers. For example, the primary opponents of prison and police abolition are private prison monopolies, such as GEO Group and CoreCivic, which profit from the arrest and incarceration of Black and brown people. Opponents of the Green New Deal include energy monopolies BP and ExxonMobile, whose profits are derived from polluting Black and brown communities.10 Finally, opponents of the Homes Guarantee, and its call for creating 12 million units of social housing outside of the for-profit housing market, include big banks that profit from the commodification of affordable and low-income housing. Challenging these opponents by diminishing their monopoly power could prove to be a powerful weapon in the fight to dismantle unchecked corporate power and its real-life economic impact on people of color.

How Corporate Monopolies Show Up in Today’s World

The distinguishing features of monopolies, when compared to your run of the mill corporation (large or small), are the reach and intensity of the corporate power that they wield. Monopoly power turbocharges the ills of corporate power and creates a wider impact of the overlapping consequences for people. In many ways, monopolies are created when corporate power becomes governing power.11 Their sheer size and market dominance allow them to govern markets, and their expansive wealth gives them the power to manipulate prices, crush workers, and steamroll governments. Ultimately, monopolies’ extreme economic power—which they use to gain outsized political power and then more economic power—undermines the collective power of workers, consumers, small businesses, local communities, and governments.

It has become difficult, and inadequate, to rely on legal definitions to identify monopolies. The legal definition of monopolization is highly technical and complicated by centuries of conflicting jurisprudence. It's been narrowed to exclusively focus on the negative impact that anticompetitive actions have on consumers.12 This narrower focus intentionally shielded monopolies from any accountability for anticompetitive harm inflicted on workers, the environment, local communities, government, and democracy. Federal enforcement of monopoly power is confined to the highly specialized legal practice of antitrust law enforcement.13 However, centuries of political power wielded by corporate monopolies and their acolytes (e.g., universities, think tanks, trade associations, and major law firms) have rendered much of antitrust law enforcement toothless.14

In the late 19th and early 20th century, the definition of monopoly was much wider and comprehensive. In this paper, we will expand the definition as well. Recognizing that this definitional work is in many ways a work in progress, we offer our definition as a point of discussion and debate for the larger field of anti-monopoly advocates.

In this paper, we define monopoly as a corporate entity (a single corporation or a group of corporations) whose sheer size and anticompetitive behavior grant it disproportionate economic power and governing influence. This negatively affects the well-being of workers, consumers, markets, local communities, democratic governance, and the planet.

Below are a few major industries that reveal how corporate concentration and monopolistic industries harm the economic lives of workers, consumers, and communities of color.

Big Tech

Four corporations comprise what has come to be known as “Big Tech”: Amazon, Apple, Facebook, and Alphabet (the parent company of Google). Each of these technology firms dominate an enormous share of their respective technology markets. Google, for example, controls 90 percent of the internet search market, and it controls the largest video sharing platform on the internet through its ownership of YouTube. Apple controls 50 percent of the cellphone market,15 and Amazon controls 50 percent of all ecommerce. Facebook and its many subsidiaries (such as WhatsApp and Instagram) dominate the social media and online advertising marketplace.16 Other technology firms, including Uber, Lyft, Microsoft, and Netflix, also demonstrate monopolistic, anticompetitive behavior in their respective markets. In many ways, these companies, and the people who control them, are the “robber barons” of our time.

Big Pharma

The world's largest pharmaceutical corporations, including Johnson & Johnson, Pfizer, Merck, Gilead, Amgen, and AbbVie, together comprise “Big Pharma.” These monopolies build their profits by controlling the prices of critical life-saving pharmaceuticals (e.g., insulin, drugs that regulate blood pressure, and critical antibiotics) and life-altering medical devices (e.g., heart stents and joint replacement devices). Between 2000 and 2018, a disproportionately small number of pharmaceutical companies made a combined $11 trillion in revenue and $8.6 trillion in gross profits.17 In 2014, the top 10 pharmaceutical companies had 38 percent of the industry’s total sales revenue.18 Much of these profits were gained driving up the price of critical drugs , extorting research and development (R&D) funding from the government, and leveraging Big Pharma’s political influence to weaken government oversight of the industry.19

Big Agriculture

Big Agriculture, or “Big Ag,” refers to monopolies that control major aspects of the global food supply chain. This includes companies such as Cargill, Archer Daniels Midland Company (ADM), Bayer, and John Deere. Though once a diffuse network of small farmers and supply chain companies, recent mergers have created a system comprising a small number of corporations that are crowding out smaller, family-run companies including small farms. Similar to Big Pharma, government subsidies are a massive component of the obscene profits made by Big Ag. Further, as often the largest employer in many small rural towns, these corporations often ruthlessly wield their monopoly power to drive down wages and benefits to workers, skirt government safety regulations, and bully (and even buy out) small farmers.

Big Banks

Known as the “Big Five,” five banks control almost half of the industry’s nearly $15 trillion in financial assets: JPMorgan Chase, Bank of America, Wells Fargo, Citigroup, and US Bancorp. Their collective importance to the nation’s financial system has led some to consider them “too big to fail.”20 In fact, in response to the financial crisis of 2008, the federal government provided trillions of dollars in relief to ensure that they did not collapse under the weight of the crisis.21 The Big Five have an incredible influence over the flow of money throughout our economy. They finance critical goods and services, such as housing, higher education, infrastructure, and renewable energy. They also finance extractive elements of our economy, such as fossil fuels and private prisons. But, most importantly, they set the rules for who can and cannot access loan capital, and their exclusionary practices have been widely linked to the growth of racial wealth inequality (as described in Section 3).

#### Monopoly capitalism worsens every form of oppression and antitrust advocacy strengthens every angle of resistance.

Greer and Rice, 21—co-founders and co-executive directors of Liberation in a Generation (Jeremie and Solana, “Anti-Monopoly Activism: Reclaiming Power through Racial Justice,” <https://www.liberationinageneration.org/wp-content/uploads/2021/03/Anti-Monopoly-Activism_032021.pdf>, dml) [language modifications denoted by brackets]

Since the founding of the nation, people of color have been living an economic nightmare. People of color have persistently lagged behind white people in nearly every economic category, including employment, income, education, small-business ownership, home ownership, and asset-ownership. This is the result of the rise and reach of concentrated wealth and power, including monopoly power.

The Racial Wealth Gap

Economic racial disparities do not happen by accident. Rather, they are the product of centuries of systemic racism and have been built into the design of our economic system, which has created what we at Liberation in a Generation call the Oppression Economy. The Oppression Economy uses the racist tools of theft, exclusion, and 31 exploitation to strip wealth from people of color, so that the elite can build their wealth. In this Oppression Economy, racism is profitable, and it fuels a cycle of oppression 32 that depresses the economic vitality of people of color, suppresses our political power, and obstructs our ability to utilize democracy to change economic rules that make racism profitable in the first place.

Racial wealth inequality is the consequential disease caused by the Oppression Economy. Today, racial wealth inequality has reached astronomical levels and will continue to rise if nothing is done. Without drastic policy action it will take 228 years for average Black wealth and 84 years for average Latinx wealth to match the wealth that white households hold today. Further, if nothing is done—or we attempt to return 33 to “normal” and fail to distance racism34 after COVID-19—Black and Latinx wealth will reach zero sometime in the middle of this century. These disparities are driven by 35 36 two reinforcing phenomena connected to the issue of corporate concentration: 1) the systematic withholding of wealth from people of color and 2) the gross concentration of wealth held by the corporate elite.

Between 1983 and 2016, which coincides with the rise of corporate and monopoly power, average Black and Latinx wealth was dwarfed [outpaced] by the wealth accumulated by white households. In fact, average Black wealth decreased by more than 50 percent over this period. This is the result of a long history of economic oppression that has 37 actively blocked people of color from building wealth or has stripped their wealth through theft and predation. The beneficiaries and perpetrators of this ever-growing gap are the corporate elite who set the rules of the economy. The corporate elite’s actions have led to people of color being paid less for their labor and having to pay more for the basic necessities of life. Here are a few metrics that speak to this reality.

• Black, Indigenous, and Latinx women earn between 55 cents and 63 cents for every dollar earned by white men.38

• Low income people of color often pay a 10 percent poverty premium for essential goods and services.39

• Black and Latinx households are far more likely than white households to be unable to pay their monthly bills or cover unexpected expenses.40

• Black households are more likely to be denied mortgage credit and end up paying more when they are able to access credit.41

• Black households, in particular, suffer from a crippling debt burden composed of an array of predatory credit products (e.g., student, small-dollar, auto, and home loans).

The phenomenon fueling racial wealth inequality is the concentration of wealth in the hands of a small number of individuals. Today, the wealthiest 400 people in the US hold more wealth ($3.2 trillion) than the entire Latinx population ($2.4 trillion)and 43 more than 70 percent of the Black population combined ($4.41 trillion). While the 44 average wealth of Black people has decreased since the 1980s (as cited earlier), the average wealth of those on Forbes’s list of the 400 wealthiest people increased from $600 million in 1982 (adjusted for inflation) to $8.0billion in 2020.. You might be 45 asking, what does the Forbes 400have to do with monopoly? Well, it is a who’s who of corporate monopolists.

The people on this list are some of the most egregious perpetrators of driving down wages, expanding income inequality, degrading the health of workers, desecrating the environment, fleecing consumers, perpetuating racial residential segregation, driving community disinvestment, avoiding taxes, and corrupting our democracy. These monopolists utilize ruthless business practices to perpetuate their unquenchable thirst for maximized profits and for control of major segments of the US economy—and people of color bear the brunt.

America’s Legacy of Racism Drives and Sustains Corporate Concentration

The confluence of monopoly power and racial inequality is not new. The construction of an economy that relies on unchecked capitalism to create the modern-day monopolist relies on the construction and maintenance of America’s racial caste system. The legacy of theft, exclusion, and exploitation of people of color by corporate monopolists has been with us since the founding of the nation. In fact, prior to the Civil War, southern plantation owners were the equivalent of the modern-day Fortune 500 monopolists. The Mississippi Valley had more millionaires per capita than anywhere in the country, making it the Silicon Valley of that period. Prior to the Civil War, the combined value of America’s approximately 4 million slaves was $3.5 billion, making it the largest single financial asset in the entire economy, bigger than all manufacturing and railroads combined.46

As the roots of this problem run deep and disproportionately impact people of color, so too must the solutions. Today’s corporate monopolies are built on the foundation of an economy that also stole land from Indigenous people through genocide and forced removal, and built a labor market on the bodies of enslaved Black people. Nothing in our economy is race-neutral, including our work to dismantle monopoly power and the racial wealth inequality it causes, so we must seek race-conscious solutions.

Scholars have developed a catalogue of research confirming what many people of color experience on a daily basis: Corporations have seized control of many aspects of our lives that were once intended to serve the public good over private sector interests. Examples include the growth of charter schools and for-profit colleges as an alternative to public schools; the growth of private health insurance and private hospitals; the growth of private prisons and paid services in prison, such as phone calls and health care. However, more research is needed that connects the economic conditions of people of color to the growth of monopoly power, a call to action we further explore in Section 6.

Connecting Monopoly Power to Other Movements

There is no silver bullet to slaying the monster that is systemic racism. Leaders of color across the country are actively organizing people of color to advance bold and transformational economic and racial justice policies. These leaders are doing the hard work of transforming our economic systems by advancing liberatory policies such as a Homes Guarantee and a federal jobs guarantee; and by dismantling systems of oppression, including police and prison abolition, ending voter suppression, and curbing corporate power. To this end, anti-monopoly policy and advocacy work can be a powerful tool to advance these transformative, activist-led movement priorities.

To win the battle to advance movement priorities, we must seek to pull every lever of power at our disposal and to directly confront one of their most ardent political opponents: corporate monopolies. The Action Center on Race and the Economy (ACRE) is deftly integrating anti-monopoly tactics to advance their racial and economic justice mission. In advancing police abolition, for example, they highlight the fact that big banks (as discussed in Section 1) finance “police brutality bonds” that fund the payment of police department settlements for acts of police brutality.47 Additionally, they have highlighted for grassroots leaders of color the connections that corporate monopolies have to anti-Muslim bigotry, the Puerto Rican debt crisis, and pharmaceutical prices.48

Corporate monopolists, including big banks, big tech, and big pharma, are often primary opponents in the battles for bold, transformational movement priorities. For example, activists for bold environmental justice policies, such as the Green New Deal, have encountered strong opposition from fossil fuel monopolies, such as Exxon, Shell and BP; but also, Wall Street bank monopolies financing fossil fuel monopolies, in addition to other monopolies in the airline industry. In another example, Wall Street 49 monopolies have aggressively clashed with affordable housing advocates as their investments have displaced residents of color from their homes and businesses and have also gentrified communities of color from Harlem to Oakland and Detroit to New Orleans. Directly challenging the monopoly power of these corporations could prove to be a useful tactic for activists of color to further movement priorities.

#### Engaging legal institutions is key

Thomas, 19—Nash Professor of Law, Columbia Law School (Kendall, “Practicing Queer Legal Theory Critically,” Critical Analysis of Law 6:1 (2019), dml)

While they vary in form and focus, the contributions to this issue of Critical Analysis of Law invite reflection on what I take to be one of the animating ambitions of queer legal teaching and writing on sex and sexuality law: to radically reimagine and rethink the relationship between legal theory and legal practice (a relationship, it should be noted, which in the U.S. common law system and legal academy has always accorded priority and primacy to the latter). If the central object of mainstream sex law scholarship is the theory of legal practice, the field-defining feature of queer legal studies is a preoccupation with the practice of legal theory or, more precisely, a reflexive understanding that the practice of legal theory is a kind of legal practice and not just a second-order theory about law practice. Put another way, queer legal studies involves a commitment by those who do it to active and ongoing mindfulness of the ways in which legal theorizing about sex, gender and sexuality, like all legal theory, is a practice that takes place “in the world, as well as in the academy.” 3

“Queer legal methods” (and we must speak here in the plural) thus reject the traditional and (at least in the U.S.) still dominant view that positions legal scholars and the practice of legal scholarship in a domain which—at least aspirationally or “in theory”—is separate and distinct from, and only contingently connected to, the legal actors, ideologies and institutions law studies. Queer legal inquiry understands itself to be immanently located, embedded and invested in the field of sex and gender law that it investigates.

Taking these axiomatic observations about the dependent origination and transversal imbrication of theory and practice as a point of departure, I propose to offer a few thoughts on the relevance, meaning and value of the idea of “critical analysis of law” in queer legal studies. Notions of the “critically queer,” “queer as critique,” the “queercritical,” “critical queer engagement” and “critical queer legal sensibility” figure explicitly here in Joseph Fischel’s conversation with Paisley Currah and Aeyal Gross,4 as well as in the essay by Brenda Cossman.5 Each of these contributions draws—or can be read to draw—an implicit distinction between “critical” and “non-” or “anti-critical” queer inquiry, interpretation and argument. The question I propose to explore here is, “What makes this or that practice of queer legal theory a ‘critical’ practice?” Using two very different queer theoretical arguments on the subject of same-sex marriage as interlocutive texts, I am going to suggest that we can parse the distinction between “critical” and “non-critical” queer legal imaginaries and analysis by looking at whether and (if so) how particular queer theory arguments engage the question of power.

In Wedlocked: The Perils of Marriage Equality, Katherine Franke argues that the story of the legal struggle for the right to “same-sex marriage” offers a case study of the ways “rights-bearing subjects are almost inevitably shaped by the very rights they bear.” 6 For Franke, this juridical subject-shaping reveals that “rights” and “freedom” are not only contingently, but inversely, related: to gain rights is to lose freedom. Writing in the midst of what would become a successful campaign to secure the right to marry in the U.S., Franke notes the paradoxical situation in which gay and lesbian Americans were to find themselves once they were forced to reckon with the reality that “the state acquires a legal interest in your relationship” when one enters the regime of civil marriage.7 “[Y]our relationship is now governed by law, and . . . you have to play by law’s rules.” 8 This “[c]loaking” of “freedom in state regulation . . . is a curious freedom indeed, for this freedom comes with its own strict rules.” 9

Wedlocked figures the presence of the state and state regulation of sex as the absence of sexual freedom. In this vision, then, the decision to embrace a civil rights vision that sought “public citizenship” in the “distinctly private domain” of marriage can only be considered a tragic choice.10 Indeed, Franke depicts the decade or so between the 2003 Supreme Court decision in Lawrence v. Texas11 that struck down criminal prohibitions on consensual gay and lesbian sex and federal judicial recognition of a constitutional right to same-sex marriage rights in almost nostalgic terms. During this brief interregnum, lesbians and gay Americans were able to live out “a kind of freedom from the ‘bonds’ of marriage.” 12 This was a moment, in Franke’s account, that allowed gay men and lesbians to creatively experiment with and explore relational possibilities beyond the boundaries of state governance. What, we might then ask, drove the leaders of the “marriage equality” movement to throw themselves so eagerly into the arms of the law, to bargain away their “freedom from marriage” in exchange for the “freedom to marry”? How do we explain the “strange,” “curious,” “odd yearning” of some gay men and lesbians for public state recognition of our private sexual relationships and intimate associations?13

Building on a line of argument first developed by queer studies scholars such as Lauren Berlant and Michael Warner,14 Franke’s answer begins by noting the ways in which “gaining the right to marry has marked a kind of emancipation from the burden of social abjection.” 15 This is so on at least two grounds. First, the marriage license operates as a badge of social belonging and state recognition of the equivalence of hetero- and homoconjugality. Second, the marriage license serves as a symbolic credential that attests to the value and legitimacy of a homosexual couple’s relationship. To possess a marriage license is to possess a species of symbolic currency—a conjugal coupon, if you will—which can be used to redeem the myriad economic, legal and social privileges that flow from membership in the marriage club.16

Franke contends that the success of the American campaign for “marriage equality” was achieved in no small part through a “conscious strategy of radically refiguring the meaning of homosexuality.” 17 In a pivotal passage, Wedlocked describes this cultural project in language that warrants extended quotation:

This entailed carefully crafting a revised conception of gayness organized around a status or stable identity rather than sexual acts, and substituting love and familial devotion as the operative forms of affect that bound same-sex couples together rather than sodomy or sexual attraction. Put more bluntly, it meant reorienting the public’s attention from the genitals to the heart, from the bushes to the hearth, from prurience to parenthood and from sin to sacrament.18

In short, argues Franke, the campaign to achieve lesbian and gay marriage rights “successfully rebranded” gay and lesbian identity and experience by “cleaving the sex out of homosexuality.” 19 The tragedy, in Franke’s view, was that this historic social movement mobilization and meaning-making sought and secured nothing more than the hollow, heterocentric right to be “locked into a set of traditions and roles that [the lesbian and gay community] had no part in creating and that were not formed with us in mind.” 20

In this volume, Brenda Cossman includes Katherine Franke in the company of scholars who draw on the language and ideas of queer theory without identifying as queer theorists.21 In both its formal method and its substantive themes, Wedlocked’s argument against same-sex marriage is clearly “queerly influenced.” 22 Contrast the “no name queerness” 23 of Franke’s cautionary tale about the perils of the same-sex marriage with the very different uses to which Kim Katrin Milan and Tiq Milan put queer theory language and concepts in their “A Queer Vision of Love and Marriage.” 24

In a TED Talk that has, as of this writing, received nearly 1.5 million views, a black trans queer man named Tiq Milan, and Kim Katrin Milan, a black queer cisgender woman, share the story of their whirlwind “courtship” and marriage.25 One of the most striking things about this talk is its almost dizzying deployment of queer theory ideas and arguments to make a case for embracing the “institutions and traditions” of civil marriage, a wedding ceremony, monogamy, adopting and raising a family.26 Because “God was never supposed to bless a union for folks like us, and the law was never supposed to recognize it,” Tiq Milan says, “sprinting towards” his wife’s “hand in marriage was the queerest thing that I could do.” 27 Because the “gift of queerness is options,” Kim Milan tells the audience, “it was incredibly freeing” for her, “my father’s bastard child,” to be able to “choose the name of a man who chose me first.” 28 The Milans met and fell in love during a 3,000-message, 72- hour-long Facebook conversation, and so “fittingly,” they shared “all of our wedding photos on Facebook . . . and Instagram, of course.” 29

And we quickly realized that our coming together was more than just a union of two people, but was a model of possibility for the millions of LGBTQ folks who have been sold this lie that family and matrimony is antithetical to who they are —for those of us who rarely get to see ourselves reflected in love and happiness.30

Later in their presentation, Tiq Milan characterizes the “possibility that we are practicing” in even more expansive terms.31 The Milans understand their queer marriage, and the queerness which is their “major key,” as experiments, without “any blueprints,” for “reinventing time, love and institutions.” 32

We are creating a future of multiplicity. We are expanding the spectrum of gender and sexuality, imagining ourselves into existence, imagining a world where gender is selfdetermined and not imposed, and where who we are is a kaleidoscope of possibility without the narrow-minded limitations masquerading as science or justice.

Kim and Tiq Milan performatively enact a marital relationship which “has always been about setting each other free.” 34 As they tell it, this practice of reciprocal freedom is animated by a queerness that is “fluidity and limitlessness all at once,” that claims “a freedom too strange to be conquered.” 35 In the Milans’ queer vision of love and marriage, their relationship is nothing less than a “tool of revolutionary change.” 36

Obviously, Tiq and Kim Milan’s queer paean to conjugal freedom offers an answer to the question “Why marriage?” 37 that is diametrically opposed to Katherine Franke’s “progressive queer” elegy on the limits and unfreedom of wedlock.38 I am less interested here in the very different uses to which Wedlocked and “A Queer Vision of Love and Marriage” put the language of queer theory than I am in the degree to which Franke’s queer case against, and the Milans’ queer case for, gay marriage may be said to inhabit the same or at least overlapping “logical space.” 39 Although Franke and the Milans come down on radically different sides of the queer marriage debate, they are united in a common preoccupation with the meaning of marriage to and for the “subjects” of marital rights. Kim and Tiq Milan celebrate the legal right to marry as a terrain of possibility in which people who have been “marginalized because of our identities” can find and live “their authentic selves.” 40 Katherine Franke reminds us that legal marriage rights, like all rights, entrench, regulate, channel, constrain and stabilize identity and “produce the subject they pretend only to presuppose.” 41 The subjugation of rights in marriage law threatens to “lock us into roles, responsibilities and limitations from which it is very hard to break free.” 42

Despite their differences and disagreements, however, both these “queer”- influenced accounts and the shared preoccupation with the “subjective side” (the “we,” “us,” “you” or “I”) of marriage rights show an unqueer and uncritical lack of deep interest in, or engagement with, what the modern story of civil marriage, marriage equality and the right to legally marry tells us about the question of power.

Why power? I began this discussion by suggesting that the queerness of queer legal theory derives in part from a recognition that it is a socially and institutionally situated practice. This situated mindfulness of the myriad ways in which legal scholarship is not only connected to, but also continuous with, law and “all the apparatuses, institutions, and rules that apply it,” 43 is also a hallmark of “critically queer” legal-theoretical practice. One of the insights which makes critical queer legal studies critical in the sense that interests me here, however, is the recognition that the field of legal practices in which queer legal theory work takes place is not just an intellectual but a political domain; what this means, specifically, is that no truly critical analysis of law is possible that fails to reckon with and provide an account of the “economy of power relations” to which legal theory and legal practice belong.44

Further, critical queer legal theory can think reflexively about its status as a way to study law and legal power, and a locus of the very normative and performative power that is its object of study. We can measure the distance between critical and non-critical uses of queer legal theory by looking at whether and how a given queer legal analysis “works” (as they say in house ball culture), and works with its own implication in the nexus of force relations and “power-knowledge.” 45 Because it understands that “nothing more than a dash or a hyphen keeps power and knowledge apart,” 46 critical queer legal studies acknowledges, accepts and performatively leverages the political conditions and constituent components of the mixed modal analysis that I have been calling “theory-practice” as an interpretive framework for understanding how legal power is exercised in and through the production of legal knowledges. Deepening and extending queer theory’s destabilizing interrogations of binary thinking about heterosexuality and homosexuality, maleness and femaleness, masculinity and femininity, sexual acts and sexual identities, or normative and nonnormative sexualities, critical queer legal studies resists the disciplinary division of labor between legal theory and legal practice, insisting that only a critical articulation of theorypractice can provide an adequate framework for understanding legal power-knowledge relations in the modern era.

Where, then, might a “critically queer” account of the techniques and forms and relations of “conjugal power” in U.S. marriage law start? As a threshold matter, answering this question will almost certainly require a shift in focus from the issues of identity and subjectivity to which I called attention in my discussion of Wedlocked and “A Queer Vision of Love and Marriage.” As Bruno Perreau has recently argued in his Queer Theory: The French Response, queer theorists have “revitalized the way that subjectification is conceptualized.” 47 Queer theory has provided a language and lens for analyzing the cracks between and noncoincidence of “sexual categories and behaviors,” the convergent, colliding, contradictory practices of “identification and deidentification,” and the complex choreographies through which “subjects constitute themselves.48 Nonetheless, concludes Perreau—and I concur— a queer theoretical practice that centers only on questions of identity, subjectivity and its performativities will eventually hit an analytic brick wall “if it fails to pay attention to the role of institutions.” 49

The call for critical queer analyses beyond the subjectification paradigm is not a call to abandon the investigation of gender and sexual identities. Rather, it’s a plea to attend to the emergence, or better yet, the institution of those identities in and through government and the art of governing. Foucault describes “government” in this sense broadly as a “conduct of conduct.” 50 The term refers to all the modes and techniques of power or the “ensemble of actions” 51 by which actors, including state actors, “structure the possible field of action of others” 52 through “acts upon their actions.” 53 The analysis of a society’s power relations cannot “be reduced to the study of a series of institutions,” 54 including the all too often reified and fetishized power of “the state,” or as Foucault put it, “the set of institutions we call the state.” 55 Accordingly, a queer legal critique approaches “the state” as “nothing more than a way of governing” or “type of governmentality” that sits alongside many other institutions, apparatuses and rules tasked with applying the law.5

### Economic Metaphors Turn---1NC

#### Reject their descriptions in context of market metaphors, it turns the case. It reinforces corporatization of education and normalizes inequitable power structures---affirming without it solves their offense

Kip Austin Hinton 15, Assistant Professor, The University of Texas Rio Grande Valley, “Should We Use a Capital Framework to Understand Culture? Applying Cultural Capital to Communities of Color,” Equity & Excellence in Education, 48(2), 299-319, 2015.

Influence of an Economic Metaphor on Communities of Color

It makes sense for a neoliberal economist to embrace the prism of social or cultural capital, because economic research frequently interprets the world as a primarily economic sphere. But what about when a social justice educator embraces social or cultural capital? Many social justice advocates do not define the world in economic terms, and do not see market forces as the primary solution to oppressive systems. Capitalism promotes hegemony, not social justice. The agenda of capital has always run counter to the goals of community empowerment: “Within this transformed system, capital demanded that the household function as a factory” (Perelman, 2000, p. 74). According to Weber, the mere existence of family relationships presents an obstacle to capitalism (Collins, 1986, p. 269). Decades ago, Apple (1971) warned that schools were slipping into a marketplace orientation, prioritizing “maintenance of the same dominant world-view” (p. 27). Public institutions have indeed become more market-driven, focused on capital in a way that disempowers communities of color, making it harder to enact democratic reforms (Apple, 2006; Clawson & Leiblum, 2008). Metaphorical capital does not contribute to this directly, but rather indirectly—through metaphor.

Across metaphorical capitals, each framework is fundamentally economic. Research on funds of knowledge and community cultural wealth mimic economic vocabulary without a conception of investment or of supply and demand. Looking to the source, Bourdieu’s (1977) prominent theories are influenced by the economic work of Marx (2011). This makes it particularly notable that Bourdieu himself ignores most aspects of economic capital when he applies it to cultural interaction. Bourdieu does not theorize systems of exchange, return on investment, loans, entrepreneurship, or the actions of cultural capitalists. In fact, Bourdieu’s original concept is somewhat analogous to money, not to capital. Successive theorists have been reluctant to move beyond Bourdieu’s initial, imprecise articulations (Dika & Singh, 2002; Lin, 1999). So, although it may be unusual to come across a theory of race that ignores racism, it is common for a theory of capital to ignore capitalism.

Metaphors have influence. In a metaphor, one domain of human thought is superimposed on a different domain, creating important influence on the receiving domain (Barcelona, 2003). Lakoff (2004) and others have explained how a repeated metaphor reifies in our consciousness, even altering neural processes (Kovecses, 2010). The way any issue is framed, writes Mehta (2013), ¨ “changes the nature of the debate” (p. 292). A problem’s definition is a political consideration, deeply influencing which questions we ask, and which solutions we consider (Lakoff & Pinker, 2007; Sandikcioglu, 2003). This is illustrated by prominent metaphors in the languages of industrialized nations. We use money metaphors to think about time (spend time, living on borrowed time); we use war metaphors to think about arguments (defend a position, surrender a point). As Lakoff and Johnson (2003) explain, we do not explain arguments using a dance metaphor (p. 5), but if we did, it would influence the way we see our opponents/partners.

In the case of culture, are there limits to what education researchers are willing to characterize as capital? Derrida and Moore (1974) warn us of “deploying” metaphors “without limit”: “Consequently the reassuring dichotomy between the metaphorical and the proper is exploded” (p. 74). S. Smith and Kulynych (2002) claim social capital confuses analytical categories because capital is inextricably tied to economic discourse; this critique applies to all forms of metaphorical capital. In public consciousness, capital will not be divorced from capitalism. Deployments of metaphorical capital, therefore, impose the economic worldview of capitalism. These theories position capital and wealth as the normal ways of defining a relationship. Even if such theories were revised to reflect money instead (e.g., “cultural currency”), they would still precariously assume that human interaction can and should be explained in economic terms.

Metaphorical capital advances an economic framework that interprets educational or cultural situations as capitalist, neoliberal, and market-based. We have adopted a specific paradigm, and now that paradigm dictates policy options (P. Hall, 1993). Neoliberal solutions, including standardized testing and charter schools, already dominate education reform (Jones & Vagle, 2013). Political and social critiques are central to critical race theory—yet are marginalized by neoliberal discourse. It is significant that Friedman (1997), one of the most influential proponents of capital and capitalism, advocated privatization of all public schools through vouchers. Rather than functioning as independent fields, education and economics are deeply connected, often in destructive ways. In the past decades, education research has seen an increase in both capitalrelated social theory and the influence of economics. Privatization and corporatization have increased throughout education systems (Saltman, 2012). Aside from the direct harm caused by market-based reform (Burch, 2009; Saltman, 2000), corporatization has reinforced the economic worldview that was embodied by metaphorical capital. Education reports are filled with finance-related vocabulary: funds, investment, value-added, stakeholder, productivity, buy-in. Economic perspectives infringe on discussions about students, even when topics are ostensibly unrelated to money. “This is the extent of capitalism’s hegemony, that it has colonized our capacity to imagine alternatives” (Hickel & Khan, 2012, p. 221). Language influences thought, and educators begin to accept the market mindset. We normalize an inequitable power structure. The capitalist viewpoint becomes the normal way to see everything, and its opportunistic oppression, likewise, becomes normal. It is not surprising, then, that the assets of communities of color go unrecognized—and as I write this, I struggle to explain the limitations of a capitalist frame without reproducing that frame, with my problematic word choice, “assets.”

Freire (1970) has been influential among scholars who rely on metaphorical capital to write about students of color. It is significant that Freire employs economic metaphors to represent the problem (Oughton, 2010): “Banking education” is his name for the method that dehumanizes students (Freire, 1970, p. 73). Freire recognizes economic power as a destructive force at play in the lives of the poor. He consistently opposes multiple elements of the neoliberal agenda, especially the prioritization of capital (Carnoy, 1998; Freire, 1998). Throughout his work, Freire offers ways to counter the commodification of students and promote true democracy (Marginson, 2006). A Freirean analysis of metaphorical capitals, then, notices the neglect of power relations and the depiction of human relationships as economic exchanges.

Hegemonic cultural values, says Gramsci (2011), are those that are accepted as inevitable. The status quo of the economic system cannot be separated from the status quo of the education system. Gramsci embraces education, believing the development of working class intellectuals will reshape the status quo. Gramsci recognizes resistance and promotes agency, in ways that are echoed by community cultural wealth. Though Gramsci opposes economism, he never claims culture, education, and economics are independent (Jessop & Sum, 2006). These are multiple facets of a single, comprehensive system of power. That is to say, there is no such thing as a non-economic policy goal. Do we choose capital as a metaphor because it is the best metaphor, or because it is the one we are familiar with? A Gramscian analysis by Torres (2013) examines the way a neoliberal framework asserts itself as common sense within educational reforms. In a capitalist system, power is allocated to the financially powerful, structuring our self-definitions. As participants in a capitalist system, capital is our common sense, our default, so it is not a surprise that we append the word even when it is unnecessary. These are “tacit, discursive endorsements of neoliberal ideology” (Ayers, 2005, p. 535). From a social justice perspective, metaphors are not arbitrary tools to assign without consequence. They make claims about truth, using rhetoric that “cannot be neutral” (Derrida & Moore, 1974, p. 41). Discourse matters, whether within controversies over Native American mascots (King & Springwood, 2001) or a politician’s description of a war as a “crusade” (Kellner, 2007). Power relations connect seemingly innocuous discursive practices to broader practices of political rhetoric, discrimination, and global financial institutions (McKenna, 2004). In an analysis of community college mission statements, Ayers (2005) concludes that “neoliberal discourse” directs attention to market concerns, so “curriculum is likely to become heavily laden with a market ideology that reinforces and reproduces power asymmetries” (p. 546). By repeating neoliberal vocabulary, frameworks of metaphorical capital have potentially weakened democracy by re-inscribing a framework of capitalism. Even when a particular study’s content works against oppression, language choices may not.

Although market-based education reforms have become more powerful, those who promulgate theories of metaphorical capital have become less likely to have academic understanding of capital itself (Dika & Singh, 2002). Cultural neglect of students of color cannot be logically separated from the economic exclusion they face, as irrelevant curriculum leads to higher pushout rates (M. Fine, 1991; Solorzano & Yosso, 2001). Yes, the cultures of black, Latina/o, Native ´ American, and Asian American students deserve equal footing inside classrooms, and this is true even—or especially—when those cultural practices are not easily framed as a form of capital. I am inspired by Yosso (2005) in her referral to Anzaldua’s (1990) call for a more empowering ´ theory. Yet I think of Lorde’s (1984) warning, “the master’s tools will never dismantle the master’s house,” because those tools keep a part of us stuck within “the master’s relationships” (p. 123). Wealth and capital are the capitalist’s tools, the capitalist’s relationships. These are not ethical relationships (Schweickart, 2002). The dominance of financial vocabulary empowers non-human (and inhumane) relationships, through capitalism. These are the relationships between supply and demand; between capital and commodity; between powerful and powerless; between legislation and corporation. As argued by Giroux and Giroux (2006), global capital is responsible for making the wealth and achievement gaps worse for black and Latina/o communities.

I specifically claim that this supposed metaphorical capital is not capital at all. As social justice researchers, we are not neutral; we seek ways to fight oppressive conditions. Yet by basing our metaphors on capital, our theoretical frameworks promote a worldview that is inconsistent with our own goals. Letting go of the metaphor of capital, we may find more relevant and more ethical ways to theorize culture.

### A2: Affect

#### Affective accounts of how power is distributed are neither explanatory nor politically scalable

**Pruchnic 8**, Wayne State University, "The Invisible Gland: Affect and Political Economy", Volume 50, Number 1, Winter, muse.jhu.edu/journals/criticism/v050/50.1.pruchnic.html

These chapters on affective labor also most explicitly foreground the difficulty of integrating affect into theories of political economy and possibilities for political action. Although contributors ably map how affect creates value in contemporary capitalism, they struggle somewhat with determining the value of affect—or, more precisely, the value of affect theory—in changing our responses to economic and cultural practices. Granted, many of the authors explicitly position their projects as diagnostic rather than prescriptive in nature. Wissinger concludes by suggesting that thinking about “preindividual forces of affectivity and bodily energies” provides a “new angle” on how imagining technologies constitute bodies (255). [End Page 165] Ducey similarly defers focus on possible responses to affective labor, arguing that since affect “is not subject to the usual forms of measurement and analysis . . . the political responses its modulations call forth are emergent and unpredictable” (205). The essays that do focus most explicitly on such responses are, ironically, those in which theories of affective labor are a starting-off point rather than a consistent resource in their analysis. As such, their conclusions tend to follow descriptions of the new importance of affect in economics and culture with fairly traditional suggestions for intervention based on collective organization and political recognition. For example, Melissa Ditmore concludes her sharp analysis of the Dunbar Mahila Samanwanya Committee, an organization that promotes the safety and welfare of its sixty thousand Indian sex workers, by noting irony “in the fact that the DMSC works with immaterial affect laborers in the world’s oldest, but as yet unrecognized, profession to advance their cause at a far deeper, more meaningful and effective level than has been achieved by recognized workers in affect labor” (184). However, the productive interventions identified here are fairly traditional, and because of the relative singularity of what Ditmore calls “the world’s oldest form of affective labor” (both generally and particularly in India, where the laws governing sex work are fairly ambiguous), it is difficult to imagine how the examples given here might be translated to other forms of affective labor (such as health care, “women’s work,” and modeling, to use the other industries assayed in this subject cluster) (170). Similarly, David Staples contributes a notable argument that affective labor is best approached through a Bataillean general economy rather than a restricted political economy, but his conclusion suggests that the best response to the devaluation of “women’s work” is to quantify the time of that labor; drawing on Derrida’s work on gift economies, Staples states that although the “ethical duty or responsibility implicit in child care cannot be measured, or estimated, or valorized as such,” the “time of child care can,” and can also be rewarded based on its duration, a measure he sees occurring in the commodification of child care generally and in the 1999 rewriting of the constitution of Venezuela in particular (145). Both the conclusions marking the unpredictability of future response and those relying on fairly traditional strategies of intervention speak to the relative difficulty of following up analyses of the operations of affect with techniques for mobilizing affect productively.¶ All of which is to say, though Affective Turn does a better job of introducing readers to the central issues surrounding the study of affect in the humanities and social sciences than any single work I am aware of, [End Page 166] its value comes as much from the way it underscores sticking points or aporias in this work as from the individual accomplishments of its contributors. Indeed, the above concerns are perhaps better taken not as criticisms of Affective Turn but of the segment of “the affective turn” to which the authors are most commonly responding—work, notably that of Sedgwick and Massumi, that has positioned affect theory as a productive alternative to “critique” in its traditional sense: a “way out” of the ostensibly moribund focus on relationships of dominance and subversion and the identification of this or that phenomenon as ideologically or socially constructed. Certainly such an endeavor has had a salutary effect on the contemporary critical terrain, both through its emphasis on the often-neglected role of human physiology and nervous processes in human subjectivity and ideation, as well as its antagonism toward the idea that beliefs and predispositions can somehow be made privative or defused when exposed to rational critique. However, the question of how to deploy these insights within the traditionally “rational” ecology of research in the humanities and social scientists has proven to be a thornier issue.¶ One could, for instance, abandon traditional registers of academic criticism, as do the more experimental and autoethnographical chapters in Affective Turn. These works remain somewhat unsatisfying, however, because even though they may succeed in producing a “feeling” of or for the affective phenomena under review, the motivational or persuasive import to the work is much less clear. One could also simply emphasize the importance of affect as a critique of “critique” itself, as do Goldberg and Willse, who in their piece marvel that even after the impact of deconstruction, “academic scholarship continues to engage media objects as exterior, applying theory against them to interpret or reveal their meanings and truths” (265). Similarly, Bianco positions her work as an intervention into the dominance of psychoanalytical and ideological approaches to film criticism. Yet, I take it, though such paradigms have not necessarily entered “straw man” territory at this time, we are seeing diminishing returns on such calls as they continue to multiply. Perhaps most telling is the emphasis, behind these approaches and throughout much of the work within the volume, on affect as not only primary in many dimensions of experience but also, unlike experience itself, ultimately irreducible and “unrepresentable.”¶ Such an emphasis makes the critical edge of the majority of chapters more what we might code “aesthetic” than rhetorical, or more focused on the description of affects and affective processes rather than their possible manipulation. The influence for this approach, it seems, is at least partially Massumi’s “The Autonomy [End Page 167] of Affect,” which looms large over much of Affective Turn. The terms and phrases used there to describe affect and affective “intensity”—“unassimilable,” “outside expectation and adaptation” (85), “in excess of any narrative or function line” (87), “irreducible excess” (87)—are recurrently paraphrased and alluded to throughout the volume.2 In Affective Turn, as in Massumi’s article, such depictions, as much as they are meant to be in some way “post-postmodern,” seem to at least equally take us back to a certain type of pseudo-modernist aestheticism. Indeed, the references cited above ring most clearly as descriptions of “the sublime” more than anything else. Perhaps, as Negri contends in another oft-cited work that also emphasizes the “immeasurability” of affect, “the Sublime has become normal.”3 However, it seems we have yet to find the way to move from describing affective processes in aesthetic terms to producing strategies for mobilizing those processes, or, perhaps more precisely, how we might use our recognition of the affective dimension of politics to leverage affect for political purposes.

### A2: Aff Theory

#### Their criticism of reform fails and opens the gates to violent roll-back of previous gains

Levi & Shay ‘12

Jennifer Levi and Giovanna Shay. Jennifer Levi is the director of the Transgender Rights Project of GLAD (Gay and Lesbian Advocates and Defenders). Jennifer has participated in successful efforts to pass transgender-inclusive antidiscrimination laws throughout New England. Giovanna Shay is a co-chair of the Corrections Committee of the American Bar Association Criminal Justice Section. She has participated in institutional change litigation involving prisons, as well as efforts to enforce the Prison Rape Elimination Act (PREA) and amend the Prison Litigation Reform Act (PLRA). Both serve on the faculty of Western New England University School of Law. - “The dangers of reform” - Source: The Women's Review of Books. 29.4 (July-August 2012): p30. Info Trac database

In his recent book, Normal Life, Dean Spade, a law professor at Seattle University School of Law and noted transgender activist, criticizes several law-reform movements, including those to improve prison conditions, win marriage equality for same-sex couples, and ensure that hate crimes and antidiscrimination laws include transgender people. Spade finds fault with LGBTQ rights organizations' efforts to win mainstream acceptance, arguing that instead of pursuing an equality agenda, they should focus on changing "the distribution of life chances," by "demand[ing] radical redistribution of wealth and an end to poverty." Spade's critique has the most force in the context in which it originated--calling for an end to what David Garland first described as mass incarceration, the system many refer to as the "prison industrial complex." It is less persuasive when applied to the realm of free-world LGBTQ rights. Spade's perspective is shaped by the prison-abolitionist movement, as well as, he says, by critical race theory and "woman of color feminism." In 2002, Spade founded the Sylvia Rivera Law Project (SRLP), which provides free legal services to transgender and gender nonconforming people, and whose mission, according to its website (slrp.org/about), is "to guarantee that all people are free to self-determine their gender identity and expression, regardless of income or race, and without facing harassment, discrimination, or violence." Normal Life is rooted in this experience, and fits comfortably within a series of recent prison-abolitionist works focusing on the experiences of queer and transgender people, including Queer (In)Justice: The Criminalization of LGBT People in the United States (2010), and Captive Genders: Trans Embodiment and the Prison Industrial Complex (2011), a collection of essays to which Spade contributed. Spade writes that his purpose in Normal Life is to describe a "critical trans politics ... that demands more than legal recognition and inclusion." Arguing that equality of life chances, or distributive justice, cannot be achieved through law reform alone, he calls for a broader agenda: "prison abolition, the elimination of poverty, access to full health care, and an end to immigration enforcement." These goals, he submits, "cannot be conceptualized or won within the realm of US law." Citing the work of critical race theorist Alan Freeman, Spade questions the focus of antidiscrimination law on violations of individual rights, which, he argues, tends to obscure more systemic and structural kinds of disadvantage. Instead of pursuing a rights-based law reform strategy, Spade writes, the trans movement should focus on "population-level operations of power," such as ending mass incarceration. The models he recommends for pursuing "transformative change" will resonate with those familiar with the work of organizers such as "rebellious lawyering" proponent Gerry Lopez, Brazilian educational reformer Paolo Freire, or civil rights campaigner Ella Baker: "[M]eaningful change," Spade says, "comes from below," and "those most directly impacted" should lead the fight. Normal Life's leftist critique of liberal reform has deep roots in the history of US social movements. For example, in his book Stories of Scottsboro, James Goodman describes how, in 1931, during the trial of the Scottsboro Boys (nine African American teenagers falsely accused of raping two white women), leaders of the International Labor Defense (ILD) organization attacked the NAACP as "an instrument of the white capitalist class for the perpetuation of the slavery of the negro people." ILD members marched with signs equating "lynchers, reformers, and enemies of the Negro people." Then as now, leftists viewed the racialized criminal-punishment system as a tool of broader economic oppression. Spade writes that advocates seeking to remedy prison conditions should beware of inadvertently strengthening the prison system. He explains: We must avoid proposals that include constructing buildings or facilities to house trans prisoners, to hire new staff, or make any other changes that would expand the budget and/or imprisoning capacities of the punishment system. He goes on to say, "[W]e must ensure that legal work is always aimed at dismantling the prison industrial complex ... [k]nowing that the system is likely to try to co-opt our critiques to produce opportunities for expansion." This is essentially the criticism of prison reform leveled by Angela Y. Davis in her 2003 book, Are Prisons Obsolete? She argues that, despite the good intentions of advocates, prison reform can produce more prisons--new and sanitized versions built to reduce overcrowding. Davis warns that discussions of prison reform focus "almost inevitably on generating the changes that will produce a better prison system." Although some reforms may be significant, she writes, "frameworks that rely exclusively on reforms help to produce the stultifying idea that nothing lies beyond prison." It is not only prison abolitionists who share Spade's concern about the unintended consequences of prison reform. The sociologist Heather Schoenfeld writes that prison-conditions litigation in Florida contributed to a prison building boom there. Other commentators--including James Jacobs, Malcolm Feeley, and Van Swearingen--argue that prisoners' rights litigation contributed to the "bureaucratization" of prisons, consolidating administrators' power even as it asserted prisoners' rights. Examples of double-edged US criminal-punishment reforms extend well beyond prison conditions. As described by Kate Stith and Steve Y. Koh (in "The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines," Wake Forest Law Review, 1993), some of the initial proponents of federal sentencing guidelines were liberal academics and judges, who wanted to rationalize sentencing to make it fairer and more consistent. Unfortunately, as innumerable commentators have recounted, the implementation of the guidelines produced draconian sentences, ultimately contributing to the growth of US prisons. In adopting an all-or-nothing approach, however, Spade fails to acknowledge ways in which the liberal prisoners' rights movement has helped to advance critical trans politics. At a minimum, prison-reform litigation generated information, through civil discovery, that advocates used to draw attention to prison conditions. Access to prisoners has been facilitated by the minimal legal protections and professional norms that the prisoners' rights movement helped to achieve. Rather than undermining the radical project that Spade promotes, liberal law-reform efforts arguably laid foundations for the prison-abolitionist movement. As for hate crimes prohibitions, Spade writes that they "strengthen and legitimize the criminal punishment system," which targets poor people of color and singles out poor trans people of color for particular harassment. "Changing what the law explicitly says about a group," he points out, "does not necessarily remedy the structured insecurity faced by that group." We ourselves are agnostic on the question of hate crimes penalties for crimes against LGBTQ people: the exclusion of sexual orientation and gender identity from existing laws not only minimizes the seriousness of anti-LGBTQ violence but also nearly guarantees a dearth of law enforcement resources. Nevertheless, we are also acutely aware of the danger of expanding the already massive criminal-punishment system in any way. In the context of mass incarceration, in which reform can produce ever cleaner and more technologically advanced human warehouses, Spade's arguments are well-taken. His critique is less persuasive when he moves into the broader arena of LGBTQ rights. Spade believes that law reform is at odds with distributive justice. In his view, advocacy that departs from the idealized approach he champions harms the transgender community. While we laud his critique of some elements of liberal law reform, we disagree with his zero-sum frame. Law reform is only one piece of a strategy. It cannot achieve everything, but it is sometimes a necessary precondition to reaching other goals and, at a minimum, is not a causative element for diminished opportunities and status. A transgender equality movement that includes expansion of antidiscrimination laws and marriage equality among its goals is coextensive with the project of "transformative change." Spade argues that antidiscrimination laws "create the false impression that ... fairness has been imposed, and the legitimacy of the distribution of life chances restored." But such protections merely ensure that a person's sexual orientation or gender identity cannot be an obvious basis for an adverse employment action. They are nowhere near broad enough to promise substantive equality, for transgender people or anyone else. However, excluding gender identity and sexual orientation from existing employment protections is far more damaging than committing the resources for the advocacy required to expand them. In addition, organizing to pass antidiscrimination laws has activated and radicalized LGBTQ advocacy organizations. The California-based Transgender Law Center (incubated by the National Center for Lesbian Rights) and the Massachusetts Transgender Political Coalition (first envisioned by GLAD staff members and interns) are two examples of the generativity of liberal law reform efforts. Both organizations share many of the distributive justice goals of SRLP. Spade is not the first to criticize the movement for marriage equality for same-sex couples. In "Arguing Against Arguing for Marriage" (University of Pennsylvania Law Review, 2010), Shannon Gilreath claims that "marriage is dangerous for Gays conceptually, in its patriarchal and heteropatriarchical foundations." In less absolute terms, Katherine Franke writes in the New York Times (June 23, 2011) that same-sex marriage is a "mixed blessing," which may undermine other arrangements that LGBTQ people have used to "order our lives in ways that have given us greater freedom than can be found in the one-size-fits-all rules of marriage." Spade goes too far in applying the same critique to both prison reform and marriage equality. Removing gender discrimination from the institution of marriage does not strengthen it in the way that modifying the criminal-punishment system reinforces mass incarceration. The institution of marriage has an evolving social meaning. Extending it to lesbians, gay men, bisexual and transgender people reaffirms our human dignity. Even the most steadfast critics of the marriage-equality movement--including the lesbian activists and law professors Nancy Polikoff and the late Paula Ettelbrick--have acknowledged that critiques of marriage and the marriage equality movement need not be on a collision course. In addition, Spade ignores law-reform efforts spearheaded by LGBTQ legal organizations other than those focused on hate crimes, anti-discrimination, and marriage. These include challenges to discriminatory health care access and to prison regulations that deny essential medical care to transgender inmates; immigration reform advocacy; and support for transgender students and homeless LGBTQ youth. To ignore these efforts is to miss the ocean for the tidal pool beside it.

#### Refusal to engage the state recreates neoliberal ideology by falsely staticizing the state as always violent – tactical engagement is better than pure rejection

Dhawan 15. Nikita, Professor of Political Science (Political Theory and Gender Studies) and Director of the Research Platform Gender Studies: "Identities – Discourses – Transformations" at the University of Innsbruck, Austria, Homonationalism and State-phobia: The Postcolonial Predicament of Queering Modernities, Academia.edu

As Foucault himself warns state-phobia is deeply inscribed in liberal and neo-liberal ideas of civil society. The wickedness of the state is juxta- posed against the inherent goodness of civil society, so that the aim is the ‘whithering away of the state’. This anti-state-centric approach to political power, locates radical politics in extra-state space of innovation. This is why Puar and others reject pragmatic politics of same-sex marriage or anti-discrimination legislations. In contrast they support civil society campaigns like pink-watching that increasingly deploy the strategy of surveillance for shaming states into good behavior. Even as one critiques the harnessing of gender and sexuality by neo-liberal capitalism, the rejection of all feminist- queer politics oriented towards the state as part of a biopolitical agenda is disingenuous state-phobic rhetoric.¶ Postcolonial-queer-feminists are caught in an ambivalent, double-bind vis-à-vis the state: On the one hand, the state has historically been the source of violence and repression through the criminalization and pathologization of non-normative sexual practices. And yet, queer strategies seek to instru- mentalize the state to promote sexual justice. Even as the state is known to perpetuate heteronormative ideologies, which are founding myths of nations, the hope is that the state can function as a site of redress of gender and sexual inequality. Despite the problematic track-record with regard to sexual politics of all nation-states, whether European or non-European, it is dangerous to disregard the immense political implications of state-phobic positions, which are increasingly popular in radical discourses in the West.¶ As the recent re-criminalization of homosexuality in Uganda, India and Nigeria demonstrate, negotiations with state are indispensable and imperative for emancipatory queer politics in the global South. This is not a plea for statism; rather, one must be aware of the dangers of the replacement of state with non-state actors as motors of justice. Against this background, the recent anti-statist stance within postcolonial queer scholarship is alarming, as it ignores the importance of the state for those citizens who do not have access to transnational counterpublic spheres to address their grievances. ¶ Decolonization, whether in USA, Israel or India, cannot be achieved merely through a strategy of shaming the state. Rather in the Gramscian- Spivakian sense, it is imperative to enable vulnerable disenfranchised indi- viduals and groups to access the state (Dhawan 􀀲􀀰􀀱􀀳). Accordingly, instead of a for or against position vis-à-vis the state, the more challenging question is how to reconﬁgure the state, given that its institutions and policies are the mobile eﬀect of a regime of multiple governmentalities. Thus the chal- lenge is how to pursue a non-statephobic queer politics that at the same time neither rationalizes the biopolitical state project nor makes the queer bodies governable. In postcolonial contexts, the state is like a pharmakon , namely, both poison and medicine. Postcolonial queer politics must explore strategies of converting poison into counterpoison (Spivak 􀀲􀀰􀀰􀀷: 􀀷􀀱).¶ Herein the ambivalent function of the state must be addressed. As Pharmakon, the inherent condradictions must be engaged with: Violence and justice, ideology and emancipation, law and discipline. If, following Foucault, the state has no stable essence, then it is marked by undecidability or doubleness. The sole focus on the negative aspects of the Pharmakon, namely the destructive and repressive traits, neutralizes and ignores the enabling and empowering aspects. Thus postcolonial-queer-feminist poli- tics must transform poison into remedy and formulate critique of the state beyond state-phobia. A challenging task, but anything else would be too risky!

#### Avoiding power cedes politics to the right and re-inscribes gender roles

McCluskey 8 [Martha, Professor of Law and William J. Magavern Faculty Scholar @ SUNY Buffalo Law, “How Queer Theory Makes Neoliberalism Sexy”, Buffalo Legal Studies Research Paper No. 2008-15]

Queer theory's anti-moralism works together with its anti-statism to advance not simply "politics," but a specific vision of good "politics" seemingly defined in opposition to progressive law and morality. This anti-statist focus distinguishes queer theory from other critical legal theories that bring questions of power to bear on moral ideals of justice. Kendall Thomas (2002), for example, articulates a critical political model that sees justice as a problem of "power, antagonism, and interest," (p. 86) involving questions of how to constitute and support individuals as citizens with interests and actions that count as alternative visions of the public. Thomas contrasts this political model of justice with a moral justice aimed at discovering principles of fairness or institutional processes based in rational consensus and on personal feelings of respect and dignity. Rather than evaluating the moral costs and benefits of a particular policy by analyzing its impact in terms of harm or pleasure, Thomas suggests that a political vision of justice would focus on analyzing how policies produce and enhance the collective power of particular "publics" and "counterpublics" (pp. 91—5). From this political perspective of justice, neoliberal economic ideology is distinctly moral, even though it appears to be anti-moralist and to reduce moral principles to competition between self-interested power. Free-market economics rejects a political vision of justice, in this sense, in part because of its expressed anti-statism: it turns contested normative questions of public power into objective rational calculations of private individual sensibilities. Queer theory's similar tendency to romanticize power as the pursuit of individualistic pleasure free from public control risks disengaging from and disdaining the collective efforts to build and advance normative visions of the state that arguably define effective politics. Brown and Halley (2002), for instance, cite the Montgomery bus boycott as a classic example of the left's problematic march into legalistic and moralistic identity politics. In contrast, Thomas (2002) analyzes the Montgomery bus boycott as a positive example of a political effort to constitute a black civic public, even though the boycott campaign relied on moral language to advance its cause, because it also emphasized and challenged normative ideas of citizenship (p. 100, note 14). By glorifying rather than deconstructing the neoliberal dichotomy between public and private, between individual interest and group identity, and between demands for power and demands for protection, queer theory's anti-statism and anti-moralism plays into a right-wing double bind. In the current conservative political context, the left appears weak both because its efforts to use state power get constructed as excessively moralistic (the feminist thought police, or the naively paternalistic welfare state) and also because its efforts to resist state power get constructed as excessively relativist (promoting elitism and materialism instead of family values and community well-being). The right, on the other hand, has it both ways, asserting its moralism as inherent private authority transcending human subjectivity (as efficient market forces, the sacred family, or divine will) and defending its cultivation of self-interested power as the ideally virtuous state and market (bringing freedom, democracy, equality to the world by exercising economic and military authoritarianism). From Egalitarian Politics to Renewed Conservative Identity Queer theory's anti-statism and anti-moralism risks not only reinforcing right-wing ideology, but also infusing that ideology with energy from renewed identity politics. Susan Fraiman (2003) analyzes how queer theory (along with other prominent developments in left academics and culture) tends to construct left resistance as a radical individualism modeled on the male "teen rebel, defined above all by his strenuous alienation from the maternal" (p. xii). Fraiman observes that this left vision relies on "a posture of flamboyant unconventionality [that] coexists with highly conventional views of gender [and] is, indeed, articulated through them" (p. xiii). Fraiman links recent left contempt for feminism to a romantic vision of "coolness ... epitomized by the modem adolescent boy in his anxious, self-conscious and theatricalized will to separate from the mother" who is by definition uncool—controlling, moralistic, sentimental and not sexy. (p. xii). Even though queer theory distinguishes itself from feminism by repudiating dualistic ideas of gender, its anti-foundationalism covertly promotes an essentialist "binary that puts femininity, reproduction, and normativity on the one hand, and masculinity, sexuality, and queer resistance on the other" (p. 147). This binary permeates queer theory's condemnation of "governance feminism." (Brown and Halley, 2002; Wiegman, 2004) a vague category mobilizing images of the frumpy, overbearing, unexciting, unfunny, and not-so-smart "schoolmarm" (Halley, 2002) whose authority will naturally be undermined when real "men" appear on the scene. Suggesting the importance of gender conventions to the term's power, similar phrases do not seem to have gained comparable academic currency as a way to deride the complex regulatory impact of other specific uses of state authority -for instance postmodernists do not seem to widely denounce "governance anti-racism," "governance socialism," "governance populism," "governance environmentalism" or "governance masculinism" (though Brown and Halley do criticize progressive law reform more generally with the term "governance legalism" (p. 11)). Queer attraction to an adolescent masculinist idea of the "cool' dovetails smoothly with the identity politics of the right. Right-wing politics and culture similarly condemn progressive and feminist policies with the term "nanny state" (McCluskey, 2000; 2005a). The "nanny state" epithet enlists femaleness or femininity as shorthand to make some government authority feel bad to those comfortable with or excited by a masculinist moral order, it adds to this sentimental power by coding the maternal authority to be resisted as a "nanny" (rather than simply a "mommy"), enlisting identities of class, age—and perhaps race and nationality—to enhance uncritical suspicions of disorder and illegitimacy. The "nanny state" slur tells us that a rougher and tougher neoliberal state, market, and family will bring the grown-up pleasures, freedom, and power that are the mark and privilege of ideal manhood. The "nanny state" is not an isolated example of the use of gender identity to disparage progressive or even centrist policies that are not explicitly identified as feminist or gender-related. For example, "girlie-man" gained currency in the 2004 presidential election to disparage opposition to George W. Bush's right-wing economic and national security policies (Grossman and McClain, 2004), and and in 2008 critics of presidential candidate Barack Obama similarly linked him to disparaging images of femininity (Campanile 2008; Faludi 2008). These terms open a window into the connections between economic libertarianism and moral fundamentalism. Libertarianism's anti-statism and anti-moralism requires sharp distinctions between public and private, morality and power, individual freedom and social coercion. The problem, if we assume these distinctions are not self-evident facts, is that libertarianism must refer covertly to some external value system to draw its lines. Identity conventions have long helped to do this work, albeit in complex and sometimes contradictory ways. Power appears weak, deceptive, illegitimate, manipulative, controlling, undisciplined, oppressive, exceptional, or naive if it is feminized; but strong, self-satisfying, public-serving, protective, orderly, rational, and a normal exercise of individual freedom if it is masculinized. Conventional political theory and culture identifies legitimate authority with an idea of a masculine power aimed at policing supposedly weaker or subordinate others. A state that publicly depends on and promotes such power enhances rather than usurps private freedom and security in citizenship, market, and family, according to the traditional theory of the patriarchal household as model for the state (see Dubber, 2005). Queer theory updates this pre-modern political ideology into smart postmodernism and transgressive politics by re-casting its idealized masculine power in the image of a youthful and sexy disdain for feminized concerns about social, bodily, or material limits and support. In her challenge to this queer romanticization of "coolness," Fraiman (2003) instead urges a feminism that will "question a masculinity overinvested in youth, fearful of the mutable flesh, and on the run from intimacy ... [to] claim, in its place, the jouissance of a body that is aging, pulpy, no longer intact... a subject who is tender-hearted ... who is neither too hard nor too fluid for attachment; who does the banal, scarcely narratable, but helpful things that moms' do" (p. 158). Feminist legal theory concerned with economic politics adds to this alternative vision an ideal that advances and rewards the pleasure, power, and public value of the things done by some of those moms' nannies (McCluskey, 2005a)—or by the many others engaged in the work (both paid and unpaid) that sustains and enhances others' pleasure and power in and out of the home (McCluskey, 2003a; Young, 2001). One means toward that end would be to make the domestic work (and its play and pleasure) conventionally treated as both banal or spiritual (see Roberts, 1997b) deserving of a greater share of state and market material rewards and resources on a more egalitarian basis, as Fineman's (2004) vision would do.