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#### Embracing the state’s ability to coordinate logistics is key to substantive equality – political commitments should embrace anti-domination as a method of redressing disparities in power – turns the Aff

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K. Sabeel Rahman, “Book Review: Reconstructing the Administrative State in an Era of Economic and Democratic Crisis,” *Harvard Law Review*, vol. 131, 2018, pp. 1682-1689, https://harvardlawreview.org/wp-content/uploads/2018/04/1671-1712\_Online.pdf.

A. Privatization and the Challenge of Contesting Economic and Social Structure

The regulatory state did not simply come into being because of the complexity of modern governance; rather, in its key moments of institutional innovation and development, the rise of modern administration has always been closely tied to substantive aspirations to counteract inequalities, hierarchies, and disparities of power generated by a changing social and economic order. As Michaels writes, the socioeconomic upheavals of industrialization led an "increasingly inclusive and mobilized public" to demand "greater protection from the vagaries, deceptions, and dangers of the marketplace" (p. 41). As a result, a "State newly tasked with these weighty and extensive responsibilities (and newly attuned to the disciplining effects of a more demanding, empowered, and diverse electorate) could no longer get away with being small or amateurish" (p. 41). The outcome of these demands was a burst of institutional innovation and state formation that created the explosion of new administrative bodies, commissions, and bureaucrats in the Progressive Era, accelerating with President Roosevelt's New Deal. While Michaels is certainly right to highlight the ways in which the professionalization and proceduralization of these new administrative powers were central to their legitimation, the rise of the modern regulatory state -- and its political and normative valence -- has to be understood in context of these substantive aspirations and concerns arising from the industrial economy.

The upheavals of industrialization generated more than simple economic dislocation; they provoked a deep political crisis. 26 Late nineteenth-century thinkers, lawyers, and reformers saw industrial capitalism as a fundamental threat to existing institutions and political ideals. Industrialization produced widespread immiseration, dislocation, and precarity. 27 But it also produced very clear and threatening new forms of economic power: the power of managers over workers and the rise of new corporate titans like J.P. Morgan, the Vanderbilts, and the Rockefellers, whose corporate control over finance, rail, oil, and other foundational goods and services placed whole towns and business sectors at their mercy. 28 At the same time, political institutions themselves were already viewed as captured, corrupt, or otherwise incapable of meeting these challenges: legislative corruption was a widespread concern, and a conservative judiciary posed a threat to basic state police powers aimed at protecting workers, health, and safety -- and curbing these new forms of corporate power. 29 This context generated social movements across the country, from the Farmers' Alliance (which would become the widespread Populist movement), to the largely urban, middle-class Progressive movement, to the growing organized labor movement. 30

While these movements were themselves highly diverse and heterogeneous in their members and demands, they shared a common set of ideas: that the industrial economy was a highly unequal one shaped by new forms of domination and power, and that for economic and political liberty to survive industrialization, new institutions would have to be created to empower the public and check the excesses of industrialization. First, the problem of industrial capitalism was not just one of income inequality or maldistribution. More critically, it was a problem of economic power. 31 For antitrusters and crusaders like Louis Brandeis, a key problem was that a variety of private actors, from monopolies and trusts, to finance, to corporations more broadly, had accumulated a degree of quasi-sovereign control over the economic vitality and well-being of individuals and communities -- yet were not subject to the kinds of checks and balances and norms of public justification that would have accompanied equivalent exercises of public power. 32 This problem of economic power also appeared in Progressive Era critiques of the market system itself. On this view, as thinkers like Robert Hale and John Dewey suggested, what might appear as impersonal "market forces" that, for example, drove wages down or prices up, were in fact the cumulative result of thousands of microscale transactions and bargains, each of which took place under (legally determined) disparities of power. Law constructed markets -- and thus shaped market forces themselves. 33

Second, if the problem of capitalism was really a problem of power, then the remedy required the construction of new forms of civic capacity empowered to contest such private and market power. Thus, for Progressive Era reformers, a key challenge was the challenge of action-ability. 34 As Dewey put it in his influential book, The Public and Its Problems, the problem of the modern public was that it was too scattered, diffuse, and disorganized, incapable of asserting its interests in the face of the pressures of the industrial economy. 35 By its very nature, economic inequality in an industrializing economy could not be counteracted at an individual level; the background disparities of power were systemic and could be altered only by equally systemic changes to the background rules of the marketplace itself. Indeed, this was one of the central insights of legal realist scholars and progressive economists like John Commons, Robert Hale, Richard Ely, and others, who saw the prospects for economic equity as requiring expansive efforts to restructure the background rules of the market itself. 36 By creating new institutions like regulatory bodies, reformers made it more possible to act on these seemingly powerful and diffuse forces; by situating these bodies in a larger context of public-oriented, democratic politics, these agencies could fairly be seen as agents of the public good. Thus, private power would be made contestable and governable by democracy. 37

These are the kinds of aspirations that fueled the experimentation with the expansion of the administrative state: starting at the state and local level with the efforts by cities to municipalize private utility companies and by state governments to create railroad oversight commissions and agencies to address labor, poverty, and public health, and then reaching the federal level as the Progressive Era Administrations of Presidents Theodore Roosevelt and Woodrow Wilson began to experiment with antitrust and economic regulatory oversight. 38 As Professor William Novak has convincingly argued, this proliferation of state and local regulatory experiments shaped a generation of legal scholars and policymakers, giving rise to the modern techniques of administrative governance and making the later New Deal creation of the modern administrative state possible. 39 The rise of administration, then, was inextricably related to the rise of democracy, in two related senses: first, the building of state regulatory capacity provided the democratic public as a whole with new tools through which to make a vision of socioeconomic order possible; second, these tools were at the outset oriented, at least in part, toward a substantive vision of democratic accountability and equality, not just of governmental actors, but perhaps even more importantly, of private economic actors whose unchecked private and market power posed a threat to democratic opportunity.

This relationship between democratic political agency and capacity, substantive ideals of democratic equality, and the administrative state also animated important episodes of regulatory institutional development and innovation in the mid- and late twentieth century. As the growing literature on "administrative constitutionalism" suggests, the frontline battles for economic, racial, and gender equality often involved the building and deploying of bureaucratic capacity, and internal battles between social movements and bureaucrats. 40 It was through the creation of regulatory institutions that labor rights, nondiscrimination protections, and access to federal welfare programs from Medicare to poverty assistance were made possible. Furthermore, it was through the pressures exerted on these bureaucracies by social movements that these regulatory tools were gradually repurposed toward enforcing and implementing equity- and inclusion-enhancing programs.

Consider, for example, Professor Karen Tani's recent work on the administration of welfare rights. As Tani documents, the development of a modern welfare rights regime involved a hard-fought shift away from a view of welfare as charitable support for the needy to welfare as a right that was an entitlement owed to members of the polity. 41 This shift had to be negotiated and was driven in large part by bureaucrats within the Social Security Administration, who asserted their specific vision of welfare as entitlement over the resistance of local welfare system administrators. To make the idea of welfare rights a reality, these bureaucrats experimented with implementing greater process protections for claimants. 42 These federal officers also developed new approaches to training and hiring bureaucrats, socializing them into a way of doing their day-to-day work that took as an axiom this more robust commitment to welfare as entitlement. 43 The success or failure of this effort turned not so much on the role of judicial interpretations of constitutional doctrine or presidential directives, but rather on more bureaucratic concerns: jurisdictional turf battles between local and state administrators more hostile to expanded welfare benefits and federal agencies seeking to expand access, difficulties of sourcing enough trained personnel who shared this larger mission, and the like. 44

A similar story can be told about the construction of equal access to Medicare. As Professor David Smith details in his historical account, it was the politics of regulation that constructed the reality of equal access to Medicare as a universal entitlement. 45 This outcome was neither obvious, nor predetermined. Rather, it was the contingent result of a complex interplay of bureaucratic innovation, social movement pressure, and regulatory policymaking. As Smith argues, in the early days of Medicare, there was a very real threat that the program would be administered in racially discriminatory and exclusionary ways. 46 The health system emerging in the mid-twentieth century reflected the legacy of racial exclusion and hierarchy in the Jim Crow South, marked by segregated and geographically concentrated hospital systems, and driving vastly divergent health outcomes and mortality rates between whites and African Americans. 47 Civil rights movement groups like the NAACP, Southern Christian Leadership Conference, Student Nonviolent Coordinating Committee, and Congress of Racial Equality, made the integration of hospitals and the healthcare system a key focal point -- taking the lead from African American health professionals who drove these campaigns. 48 Pressure from civil rights leaders led to a major shift in Department of Health, Education, and Welfare leadership and culture. By December 1965, the agency issued a new internal memo that declared its mission to include the compliance with an enforcement of civil rights goals, through the administering of Medicare funding for hospital systems. 49 The agency created an Office of Equal Health Opportunity in February 1966 to enforce Title VI compliance for any hospital receiving Medicare payments. 50 This new office in turn hired teams of investigators, coordinating with civil rights groups to train them and to identify hospitals that might be violating civil rights requirements. 51

The rise of the administrative state was thus not a politically neutral endeavor. The checks and balances that legitimate administrative authority in essence make possible (but do not guarantee) the contestation of deep forms of economic and social inequality, subordination, or hierarchy. This is not to say that administrative authority is always equality or inclusion promoting -- hardly. But in a reality where background economic, social, and historical conditions already encode structural disparities of wealth, opportunity, power, and influence, eliminating regulatory agencies and tools that are potentially capable of addressing these disparities (even if they are not always deployed in these ways) precludes much of equality- or inclusion-promoting public policy from getting off the ground in the first place. The dismantling of administrative institutions, then, is similarly nonneutral. Scholars of the administrative process have long warned of the dangers of special interest capture of regulatory agencies, which would cause administrative authority to be redirected to serve some interests over others. 53 But agencies can also be captured and neutered through inaction -- through what political scientists call "drift," where highly resourced and sophisticated players are able to produce substantive policy change simply by holding existing rules in place in the face of changing external conditions. 54 Dismantling agencies altogether would be an even more extreme form of opposition to these potential uses: rather than trying to capture or simply neuter the agency, more radical efforts to deconstruct regulatory institutions cut off the very possibility by eliminating the regulatory capacity itself, a kind of complete and total capture through deconstruction.

This substantive valence of administrative power and its potential deconstruction adds an important layer to Michaels's critique of privatization. Michaels alludes to the ways in which privatization risks permanently dismantling institutional tools and capacities that are difficult to rebuild. As Michaels warns, under privatization, "we will have hollowed out the government sector to such an extent that we may well lack the capacity, infrastructure, and know-how to reclaim that which has increasingly been outsourced or marketized" (p. 12). He rightly notes that privatization emerged as a "pivot[]" strategy in the Reagan era, a "second-best" to dismantling regulatory bodies themselves (p. 97). This is a problem in particular because "the Market, at least in its pure, idealized state, is not democratic, deliberative, or juridical. . . . It is the world of Schumpeter and Coase, not Montesquieu or Madison" (p. 5). Private corporate governance, meanwhile, cannot replicate the kinds of checks and balances that the separation of powers principles require (p. 164).

Dismantling administration and returning to private ordering is therefore troubling for democracy in three senses. First, given prior background structural patterns of exclusion and disparities of wealth, power, and opportunity, a return to private economic and social ordering is by definition a return to economic inequality, social hierarchy, and exclusion. Second, the dynamics of market competition or of corporate governance cannot replicate or replace public institutions of democracy or of checks and balances. They operate fundamentally differently and are not substitutes. Third, a dismantling of regulatory institutions removes some of the most vital and effective mechanisms through which we as a democratic public seek to contest and reshape these background structural inequities and exclusions: without tools of general administrative policymaking and enforcement, these structural inequities are harder to overcome and reshape.

#### Unfettered neoliberalism leads to mass violence and environmental destruction --- institutional change is key

Rees, professor at the University of British Columbia’s School of Community and Regional Planning, originator of “ecological footprint analysis,” founding member and former president of the Canadian Society for Ecological Economics, ‘15

(William, “Economics vs. the Economy,” http://www.greattransition.org/publication/economics-vs-the-economy)

Economic theories, though social constructions, can reflect reality to varying degrees. **In the face of** dire environmental challenges, **adopting a** realistic theory **is key to the** survival of global civilization. The neoliberal emphasis on limitless growth and monetary flows, a relic of nineteenth century thinking, **abstracts away from biological conditions**. By contrast, ecological economics—as distinct from environmental economics, which remains wedded to the neoliberal growth paradigm—understands the economy as a subsystem of the ecosphere and envisions a steady-state economy embedded **within natural constraints**. Achieving this equitably **will require significant redistribution** of wealth and income, reduction of material throughput, and a transition away from fossil fuels. Although the neoliberal paradigm remains dominant, its lack of fitness to current realities gives hope that an ecological alternative could ascend.

Social Constructs and Social Reality

Is there anything we can say about economics that takes us beyond pure “conjecture”? How can we tell whether one theorist’s interpretation of the economic process **is any “better” than another’s?**

These questions are not as simple as they seem. Of the many unique qualities that set Homo sapiens apart from other sentient beings, one of the most important is that we humans tend to create our own “realities.” To be more precise, we make up stories about almost everything, give tenacity to these stories through social discourse and repetition, and then “act out” the stories as if they were reality. Tribal myths, religious doctrines, political ideologies, academic paradigms, and grand cultural narratives are just some of the fabrications that can make or ruin individual lives and set the course for whole societies. Sociologists call the general phenomenon the “social construction of reality” (though it would be more accurate to refer to the social construction of shared perceptions). The fact of “social construction” provides a useful frame through which to assess the relative merits of neoliberal growth economics versus Herman Daly’s steady-state ecological economics for a full world.1

To begin, it is important to distinguish between “the economy” and “economics.” Both are made-up concepts, but with a significant difference. We define the economy as that set of activities by which human agents identify, develop/exploit, process, and trade in scarce resources. It generally encompasses everything associated with the production, allocation, exchange, and consumption of valuable goods and services, including the behavior of various agents engaged in economic activity. Different economies vary considerably in sophistication and organizational structure. However, **all economies are** real phenomena; people in every human society from primitive tribes through modern nation-states engage in economic activities as defined.

“Economics,” by contrast, **is pure abstraction**. It is that academic discipline dedicated to dissecting, analyzing, modeling, and otherwise describing the economy in simplified terms. Academic economists engage in the social construction of formalized models—verbal and arithmetic “paradigms”—about how the real economy works.

In fact, economists have advanced various competing economic paradigms to describe our modern, techno-industrial, mainly capitalist national and global economies. These differ substantially in terms of foundational principles, analytic tools, systemic scope, conclusions, and policy implications, particularly where the biophysical “environment” is concerned. This diversity should be no surprise: whatever their seeming conceptual elegance and analytic rigor, every economic paradigm is, at bottom, a socially-constructed figment of the human imagination, one that necessarily reflects the starting beliefs, values, and assumptions of its authors. And beliefs, values, and assumptions vary a great deal.

These insights should give us pause. Paradigms of all kinds, even those with demonstrably sketchy origins, assert enormous power over expressed human behavior. Indeed, it is truly remarkable that individuals and whole societies live in the real biophysical world guided by the parameters of various myths, paradigms, social norms, and cultural narratives that may have only a tenuous grip on that same reality.

This brings us back to wondering how reasonable people might choose between neoliberal growth economics and steady-state economics, particularly in a time of ecological turmoil. Postmodernists of the extreme relativist persuasion might argue that, **since all knowledge is socially constructed**, **there is no objective reality.** **Competing paradigms are therefore equally valid** (as in “my vision of the economy is as good as yours!”). This is dangerously wrong-headed: humans construct only their beliefs, not reality. **Relativistic equivalence** is itself a constructed fiction. Culture critic Neil Postman astutely observed, “You may say, if you \*wish, that all reality [i.e., perception] is social construction, but you cannot deny **that some constructions are ‘**truer’ than others**.** **They are not ‘truer’ because they are privileged; they are privileged because they are ‘truer.’**”2

To be clear, we should acknowledge that **many social constructs are pure illusion** with no counterpart in nature (e.g., the tooth fairy or the notion of a fiery hell); others specify entities that actually exist in total indifference to how people conceive of them (e.g., the law of gravity or the biogeochemical **cycling of nutrients**). Postman is referring to constructs in the latter category. All social constructions of real phenomena are conceptual models, **but a “truer” model will be supported by** tangible evidence, not opinion or wishful thinking. “**Truer” constructions are** better maps **that more fully and faithfully represent the real-world landscapes they purport to represent.**

It is also important to recognize that while belief in some illusory constructs (e.g., “the sun rises in the East”) is inconsequential, allegiance to **others can determine the fates of nations**. **How a society conceives of its economy**, for example, really matters. Indeed, operating from a realistic economic paradigm may even be a key to the survival of global civilization.

Neoliberal Mechanics or Eco-thermodynamics?

So, what do we know about real-world economic activities that might guide us in constructing a “true” economic paradigm? By “true,” I mean one that, among other requirements, adequately reflects the energy/material flows and biophysical processes basic to all living things, including human beings. It is not an exaggeration to say that such a paradigm is a matter of survival. After all, the human system functions like a multi-cellular organism except that, in addition to our bio-metabolic demands, we also have to account for humanity’s unique industrial metabolism. Six facts about humanity and the natural world seem particularly relevant:

1. All human economies are confined to planet Earth, i.e., they function within the ecosphere.

2. The entire human enterprise—our physical bodies, our possessions, and the infrastructure needed to maintain the functional integrity of the whole—is made from energy and materials that we extract from ecosystems and inanimate nature (i.e., from self-producing and non-renewable forms of so-called “natural capital”).

3. All energy and material flows/processes associated with economic activity are governed by well-known laws of physics and chemistry.

4. Real economies, societies, and ecosystems **are complex systems characterized** by lags, thresholds, and other forms of nonlinear behavior (complex systems dynamics) that make their trajectories under stress inherently difficult to predict.

5. The energy and material pathways associated with the acquisition of resources and the disposal of wastes require people to interact with both other species (ecosystems) and inanimate nature. In fact, a qualitative and quantitative record of these flows would describe humanity’s material ecological niche; the goods economy roughly maps the human ecosystem.

6. **The ecosphere is a finite entity with variable**, **but ultimately limited, regenerative and waste assimilation capacities.**

The next question is, how well do mainstream economics and Daly’s ecological economics respectively incorporate these framing constraints? The short answer for the neoliberal paradigm is “virtually not at all.” The dominant economics in this twenty-first century of increasing ecological turmoil is a relic of nineteenth century thinking. Its intellectual founders, motivated by the remarkable success of Newtonian physics, set out explicitly to model economics as the “mechanics of utility and self-interest.” The discipline consequently lost sight of the social context and purpose of economies and became totally abstracted from biological reality. Practitioners increasingly based their models on mechanical cause-effect logic and other simplistic assumptions in the service of analytic tractability. Growth through efficiency gradually became its raison d’être.

Analytic mechanics may have been a suitable platform for the design of early automobile engines, but it is grossly inadequate to reflect the lags, tipping points, multiple equilibria, irreversible transformations, and other complex dynamics of industrial economies or of the social and ecological systems within which they are embedded. However, since the scale of human activity relative to “the environment” was initially negligible, neoclassical economists were able to ignore biophysical context with impunity until the 1960s.

As pollution and general eco-dysfunction finally **became embarrassingly visible** (giving birth to modern environmentalism), the mainstream response was “environmental economics,” essentially an extension of the neoclassical growth-based paradigm. If environmental assets were being degraded, the solution was to monetize nature and let free markets do their magic. Put a price on pollution (i.e., “internalize the externalities”) and depend on market and technological efficiency gains to ease resource scarcity. Where that fails, human ingenuity, stimulated by rising prices**, will find substitutes for any failing good or service provided by nature.** As Nobel laureate economist Robert Solow famously wrote, “[t]he world can, in effect, get along without natural resources.”3 There was no perceived need to question the structural premises of the neoliberal model or its goal of unending growth through efficiency and technological progress. There are arguably no constraints on human ingenuity.

#### Rejection alone fails – lack of a coherent alternative locks in the neoliberal consensus

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George Monbiot, “Neoliberalism – the ideology at the root of all our problems,” *The Guardian*, 15 April 2016, <https://www.theguardian.com/books/2016/apr/15/neoliberalism-ideology-problem-george-monbiot>.

Imagine if the people of the Soviet Union had never heard of communism. The ideology that dominates our lives has, for most of us, no name. Mention it in conversation and you’ll be rewarded with a shrug. Even if your listeners have heard the term before, they will struggle to define it. Neoliberalism: do you know what it is?

Its anonymity is both a symptom and cause of its power. It has played a major role in a remarkable variety of crises: the financial meltdown of 2007‑8, the offshoring of wealth and power, of which the Panama Papers offer us merely a glimpse, the slow collapse of public health and education, resurgent child poverty, the epidemic of loneliness, the collapse of ecosystems, the rise of Donald Trump. But we respond to these crises as if they emerge in isolation, apparently unaware that they have all been either catalysed or exacerbated by the same coherent philosophy; a philosophy that has – or had – a name. What greater power can there be than to operate namelessly?

So pervasive has neoliberalism become that we seldom even recognise it as an ideology. We appear to accept the proposition that this utopian, millenarian faith describes a neutral force; a kind of biological law, like Darwin’s theory of evolution. But the philosophy arose as a conscious attempt to reshape human life and shift the locus of power.

Neoliberalism sees competition as the defining characteristic of human relations. It redefines citizens as consumers, whose democratic choices are best exercised by buying and selling, a process that rewards merit and punishes inefficiency. It maintains that “the market” delivers benefits that could never be achieved by planning.

Attempts to limit competition are treated as inimical to liberty. Tax and regulation should be minimised, public services should be privatised. The organisation of labour and collective bargaining by trade unions are portrayed as market distortions that impede the formation of a natural hierarchy of winners and losers. Inequality is recast as virtuous: a reward for utility and a generator of wealth, which trickles down to enrich everyone. Efforts to create a more equal society are both counterproductive and morally corrosive. The market ensures that everyone gets what they deserve.

We internalise and reproduce its creeds. The rich persuade themselves that they acquired their wealth through merit, ignoring the advantages – such as education, inheritance and class – that may have helped to secure it. The poor begin to blame themselves for their failures, even when they can do little to change their circumstances.

Never mind structural unemployment: if you don’t have a job it’s because you are unenterprising. Never mind the impossible costs of housing: if your credit card is maxed out, you’re feckless and improvident. Never mind that your children no longer have a school playing field: if they get fat, it’s your fault. In a world governed by competition, those who fall behind become defined and self-defined as losers.

Among the results, as Paul Verhaeghe documents in his book What About Me? are epidemics of self-harm, eating disorders, depression, loneliness, performance anxiety and social phobia. Perhaps it’s unsurprising that Britain, in which neoliberal ideology has been most rigorously applied, is the loneliness capital of Europe. We are all neoliberals now.

The term neoliberalism was coined at a meeting in Paris in 1938. Among the delegates were two men who came to define the ideology, Ludwig von Mises and Friedrich Hayek. Both exiles from Austria, they saw social democracy, exemplified by Franklin Roosevelt’s New Deal and the gradual development of Britain’s welfare state, as manifestations of a collectivism that occupied the same spectrum as nazism and communism.

In The Road to Serfdom, published in 1944, Hayek argued that government planning, by crushing individualism, would lead inexorably to totalitarian control. Like Mises’s book Bureaucracy, The Road to Serfdom was widely read. It came to the attention of some very wealthy people, who saw in the philosophy an opportunity to free themselves from regulation and tax. When, in 1947, Hayek founded the first organisation that would spread the doctrine of neoliberalism – the Mont Pelerin Society – it was supported financially by millionaires and their foundations.

With their help, he began to create what Daniel Stedman Jones describes in Masters of the Universe as “a kind of neoliberal international”: a transatlantic network of academics, businessmen, journalists and activists. The movement’s rich backers funded a series of thinktanks which would refine and promote the ideology. Among them were the American Enterprise Institute, the Heritage Foundation, the Cato Institute, the Institute of Economic Affairs, the Centre for Policy Studies and the Adam Smith Institute. They also financed academic positions and departments, particularly at the universities of Chicago and Virginia.

As it evolved, neoliberalism became more strident. Hayek’s view that governments should regulate competition to prevent monopolies from forming gave way – among American apostles such as Milton Friedman – to the belief that monopoly power could be seen as a reward for efficiency.

Something else happened during this transition: the movement lost its name. In 1951, Friedman was happy to describe himself as a neoliberal. But soon after that, the term began to disappear. Stranger still, even as the ideology became crisper and the movement more coherent, the lost name was not replaced by any common alternative.

At first, despite its lavish funding, neoliberalism remained at the margins. The postwar consensus was almost universal: John Maynard Keynes’s economic prescriptions were widely applied, full employment and the relief of poverty were common goals in the US and much of western Europe, top rates of tax were high and governments sought social outcomes without embarrassment, developing new public services and safety nets.

But in the 1970s, when Keynesian policies began to fall apart and economic crises struck on both sides of the Atlantic, neoliberal ideas began to enter the mainstream. As Friedman remarked, “when the time came that you had to change ... there was an alternative ready there to be picked up”. With the help of sympathetic journalists and political advisers, elements of neoliberalism, especially its prescriptions for monetary policy, were adopted by Jimmy Carter’s administration in the US and Jim Callaghan’s government in Britain.

After Margaret Thatcher and Ronald Reagan took power, the rest of the package soon followed: massive tax cuts for the rich, the crushing of trade unions, deregulation, privatisation, outsourcing and competition in public services. Through the IMF, the World Bank, the Maastricht treaty and the World Trade Organisation, neoliberal policies were imposed – often without democratic consent – on much of the world. Most remarkable was its adoption among parties that once belonged to the left: Labour and the Democrats, for example. As Stedman Jones notes, “it is hard to think of another utopia to have been as fully realised.”

It may seem strange that a doctrine promising choice and freedom should have been promoted with the slogan “there is no alternative”. But, as Hayek remarked on a visit to Pinochet’s Chile – one of the first nations in which the programme was comprehensively applied – “my personal preference leans toward a liberal dictatorship rather than toward a democratic government devoid of liberalism”. The freedom that neoliberalism offers, which sounds so beguiling when expressed in general terms, turns out to mean freedom for the pike, not for the minnows.

Freedom from trade unions and collective bargaining means the freedom to suppress wages. Freedom from regulation means the freedom to poison rivers, endanger workers, charge iniquitous rates of interest and design exotic financial instruments. Freedom from tax means freedom from the distribution of wealth that lifts people out of poverty.

As Naomi Klein documents in The Shock Doctrine, neoliberal theorists advocated the use of crises to impose unpopular policies while people were distracted: for example, in the aftermath of Pinochet’s coup, the Iraq war and Hurricane Katrina, which Friedman described as “an opportunity to radically reform the educational system” in New Orleans.

Where neoliberal policies cannot be imposed domestically, they are imposed internationally, through trade treaties incorporating “investor-state dispute settlement”: offshore tribunals in which corporations can press for the removal of social and environmental protections. When parliaments have voted to restrict sales of cigarettes, protect water supplies from mining companies, freeze energy bills or prevent pharmaceutical firms from ripping off the state, corporations have sued, often successfully. Democracy is reduced to theatre.

Another paradox of neoliberalism is that universal competition relies upon universal quantification and comparison. The result is that workers, job-seekers and public services of every kind are subject to a pettifogging, stifling regime of assessment and monitoring, designed to identify the winners and punish the losers. The doctrine that Von Mises proposed would free us from the bureaucratic nightmare of central planning has instead created one.

Neoliberalism was not conceived as a self-serving racket, but it rapidly became one. Economic growth has been markedly slower in the neoliberal era (since 1980 in Britain and the US) than it was in the preceding decades; but not for the very rich. Inequality in the distribution of both income and wealth, after 60 years of decline, rose rapidly in this era, due to the smashing of trade unions, tax reductions, rising rents, privatisation and deregulation.

The privatisation or marketisation of public services such as energy, water, trains, health, education, roads and prisons has enabled corporations to set up tollbooths in front of essential assets and charge rent, either to citizens or to government, for their use. Rent is another term for unearned income. When you pay an inflated price for a train ticket, only part of the fare compensates the operators for the money they spend on fuel, wages, rolling stock and other outlays. The rest reflects the fact that they have you over a barrel.

Those who own and run the UK’s privatised or semi-privatised services make stupendous fortunes by investing little and charging much. In Russia and India, oligarchs acquired state assets through firesales. In Mexico, Carlos Slim was granted control of almost all landline and mobile phone services and soon became the world’s richest man.

Financialisation, as Andrew Sayer notes in Why We Can’t Afford the Rich, has had a similar impact. “Like rent,” he argues, “interest is ... unearned income that accrues without any effort”. As the poor become poorer and the rich become richer, the rich acquire increasing control over another crucial asset: money. Interest payments, overwhelmingly, are a transfer of money from the poor to the rich. As property prices and the withdrawal of state funding load people with debt (think of the switch from student grants to student loans), the banks and their executives clean up.

Sayer argues that the past four decades have been characterised by a transfer of wealth not only from the poor to the rich, but within the ranks of the wealthy: from those who make their money by producing new goods or services to those who make their money by controlling existing assets and harvesting rent, interest or capital gains. Earned income has been supplanted by unearned income.

Neoliberal policies are everywhere beset by market failures. Not only are the banks too big to fail, but so are the corporations now charged with delivering public services. As Tony Judt pointed out in Ill Fares the Land, Hayek forgot that vital national services cannot be allowed to collapse, which means that competition cannot run its course. Business takes the profits, the state keeps the risk.

The greater the failure, the more extreme the ideology becomes. Governments use neoliberal crises as both excuse and opportunity to cut taxes, privatise remaining public services, rip holes in the social safety net, deregulate corporations and re-regulate citizens. The self-hating state now sinks its teeth into every organ of the public sector.

Perhaps the most dangerous impact of neoliberalism is not the economic crises it has caused, but the political crisis. As the domain of the state is reduced, our ability to change the course of our lives through voting also contracts. Instead, neoliberal theory asserts, people can exercise choice through spending. But some have more to spend than others: in the great consumer or shareholder democracy, votes are not equally distributed. The result is a disempowerment of the poor and middle. As parties of the right and former left adopt similar neoliberal policies, disempowerment turns to disenfranchisement. Large numbers of people have been shed from politics.

Chris Hedges remarks that “fascist movements build their base not from the politically active but the politically inactive, the ‘losers’ who feel, often correctly, they have no voice or role to play in the political establishment”. When political debate no longer speaks to us, people become responsive instead to slogans, symbols and sensation. To the admirers of Trump, for example, facts and arguments appear irrelevant.

Judt explained that when the thick mesh of interactions between people and the state has been reduced to nothing but authority and obedience, the only remaining force that binds us is state power. The totalitarianism Hayek feared is more likely to emerge when governments, having lost the moral authority that arises from the delivery of public services, are reduced to “cajoling, threatening and ultimately coercing people to obey them”.

Like communism, neoliberalism is the God that failed. But the zombie doctrine staggers on, and one of the reasons is its anonymity. Or rather, a cluster of anonymities.

The invisible doctrine of the invisible hand is promoted by invisible backers. Slowly, very slowly, we have begun to discover the names of a few of them. We find that the Institute of Economic Affairs, which has argued forcefully in the media against the further regulation of the tobacco industry, has been secretly funded by British American Tobacco since 1963. We discover that Charles and David Koch, two of the richest men in the world, founded the institute that set up the Tea Party movement. We find that Charles Koch, in establishing one of his thinktanks, noted that “in order to avoid undesirable criticism, how the organisation is controlled and directed should not be widely advertised”.

The words used by neoliberalism often conceal more than they elucidate. “The market” sounds like a natural system that might bear upon us equally, like gravity or atmospheric pressure. But it is fraught with power relations. What “the market wants” tends to mean what corporations and their bosses want. “Investment”, as Sayer notes, means two quite different things. One is the funding of productive and socially useful activities, the other is the purchase of existing assets to milk them for rent, interest, dividends and capital gains. Using the same word for different activities “camouflages the sources of wealth”, leading us to confuse wealth extraction with wealth creation.

A century ago, the nouveau riche were disparaged by those who had inherited their money. Entrepreneurs sought social acceptance by passing themselves off as rentiers. Today, the relationship has been reversed: the rentiers and inheritors style themselves entre preneurs. They claim to have earned their unearned income.

These anonymities and confusions mesh with the namelessness and placelessness of modern capitalism: the franchise model which ensures that workers do not know for whom they toil; the companies registered through a network of offshore secrecy regimes so complex that even the police cannot discover the beneficial owners; the tax arrangements that bamboozle governments; the financial products no one understands.

The anonymity of neoliberalism is fiercely guarded. Those who are influenced by Hayek, Mises and Friedman tend to reject the term, maintaining – with some justice – that it is used today only pejoratively. But they offer us no substitute. Some describe themselves as classical liberals or libertarians, but these descriptions are both misleading and curiously self-effacing, as they suggest that there is nothing novel about The Road to Serfdom, Bureaucracy or Friedman’s classic work, Capitalism and Freedom.

For all that, there is something admirable about the neoliberal project, at least in its early stages. It was a distinctive, innovative philosophy promoted by a coherent network of thinkers and activists with a clear plan of action. It was patient and persistent. The Road to Serfdom became the path to power.

Neoliberalism’s triumph also reflects the failure of the left. When laissez-faire economics led to catastrophe in 1929, Keynes devised a comprehensive economic theory to replace it. When Keynesian demand management hit the buffers in the 70s, there was an alternative ready. But when neoliberalism fell apart in 2008 there was ... nothing. This is why the zombie walks. The left and centre have produced no new general framework of economic thought for 80 years.

Every invocation of Lord Keynes is an admission of failure. To propose Keynesian solutions to the crises of the 21st century is to ignore three obvious problems. It is hard to mobilise people around old ideas; the flaws exposed in the 70s have not gone away; and, most importantly, they have nothing to say about our gravest predicament: the environmental crisis. Keynesianism works by stimulating consumer demand to promote economic growth. Consumer demand and economic growth are the motors of environmental destruction.

What the history of both Keynesianism and neoliberalism show is that it’s not enough to oppose a broken system. A coherent alternative has to be proposed. For Labour, the Democrats and the wider left, the central task should be to develop an economic Apollo programme, a conscious attempt to design a new system, tailored to the demands of the 21st century.

### 2NC

1AC Quotes from Bayno Krebs

“Social responsibility, justice, obligation to one another, and the push for higher commitment to the social order make the current state of Leftist politics constrained and lackluster”

“The asocial is interested in freedom, not responsibility, relationality, not sociality”

“**a move pushing against and away from spatial and temporal notions of obligation to the collective consciousness.** “

#### Their categorical rejection of social engagement recreates hegemonic ideology under the guise of self-creation while hollowing out resistance against neoliberalism

Ruti, professor of Critical Theory at the University of Toronto, ‘15

(Mari, *Between Levinas and Lacan: Self, Other, Ethics*, Bloomsbury Publishing, pg. 192-195)

What is disturbing here is not so much Butler's appreciation for religion but the crowding out of the secular that accompanies her revival of religious themes. Suddenly there is no breathing space outside of religion—something that is a little difficult for an atheist such as myself to process. The implication is that my secularism is an elaborate ruse or self-deception. If in Butler's earlier theories, then; was no outside of power, now there is no outside of religion. Either way, there is a love of subjection, but with the replacement of power by religion comes the strange notion that there is something laudatory about this subjection. Even though Butler has spent years criticizing Lacan’s concept of the Law of the Father, she now seems to have no problem with God the Father. I admit that this is when Kant starts sounding like my best friend. Indeed, what I see happening in Butler's discourse is **something that happens frequently** in contemporary theory: **in its** eagerness **to formulate the** latest critical paradigm—to reach the ever-so-coveted radical edge I mentioned above—this **theory tends to** vilify **the entity which immediately precedes the new paradigm** even when the entity in question is much less hegemonic than the one it time replaced. In the present instance, because secularism is what immediately preceded the current moment of postsecularism, progressive critics are falling over each other to prove that it was a **tremendous evil**, perhaps even a bigger evil than the religious authority that it replaced. Yet from, say, a secular feminist perspective—which, I concede, is not the only valid feminist perspective—this seems like a hugely conservative curveball thrown into an otherwise progressive game. Again, by this I do not mean to suggest that there is no space for religion in intellectual analysis, even in progressive theory. But—and I suppose this has been my complaint throughout this book—I find the either-or logic which dictates that now that religion is "in," secularism has to be "out," fundamentally flawed. I am willing to entertain the (somewhat strained I idea that God the Father could be turned into a progressive trope. But I am not prepared to give up the advances represented by secularism—including the fact that I, as a woman, am free to have sex outside of matrimony—in order to venerate this trope.

9

When I started writing this book, I did not know that end up defending aspects of Enlightenment secularism, let alone a priori normative limits. My background in progressive critical theory predisposed me to be much more interested in antinormative critiques aimed at unearthing the covert functioning of disciplinary power. Completing this hook certainly has not erased this interest. But the more I thought about ethics, the more convinced I became that the categorical rejection of a priori norms—even of the type of 'historical a priori" that Allen advocates—that characterizes the postmetaphysical approaches I have analyzed **is not only theoretically untenable but also** practically unbearable. In this conviction, I found an unexpected ally in Zizek who, in the closing pages of Less Than Nothing, seems to gesture toward something similar when he admits—thereby notably deviating from his usual stance regarding human rights—that even though we must acknowledge that human rights discourses privilege Western individualistic values, **we should not** make the mistake **of thinking that they are “directly and only capitalist ideological masks for domination and exploitation**."30 Indeed, Zizek asserts that this mistake would be even "more dangerous" (LN 1005) than the opposite one of accepting human rights as an instance of value free universality. This is because. Zizek continues, "formal freedom"— which human rights, like other rights-based systems of justice, presumably aspire toward (even if they always fall short of this goal)—"is the only form of appearance (or potential site) of actual freedom.” In other words, freedom cannot become actual without the envelope of formal freedom, which is why Zizek concludes that "if one prematurely abolishes “formal” freedom, one loses also (the potential of) actual freedom" (LN 1006).

These statements are somewhat difficult to reconcile with Zizek’s overall Marxist-Lacanian stance—a stance that valorizes the radical negativity of the ethical act that I analyzed in the previous chapter. Yet they **are compatible** with Zizek's anti-Levinasian defense of the "coldness of justice" that we encountered in Chapter 2. Realizing this, and considering the arguments I have made in this book, I am forced to admit that the conceptual sliding I perceive in Zizek between the negativity of the ethical act and the impartial coldness of justice (or "formal freedom") is not very different from my own vacillation between the Lacanian act (Chapter 4) and cosmopolitan human rights (this chapter). **It in fact seems obvious that both of these approaches**—**revolutionary and rights-based**—**are** necessary **for our** capacity **to think about ethics in the global arena.** This is why I have stressed in my commentary on Butler that I am not bothered by the sudden resurgence of liberal values in her theory but merely by her unwillingness to own up to this resurgence. Zizek does not have much trouble avowing his more Kantian moments. Butler, in contrast, **falls into the category of progressive thinkers who**, as Zizek puts it, **"improvise endlessly on the motif of impossible universality"** (LN 831} at the same time as she, whenever this serves her purposes, falls back on this very universality. It is this aspect of her work that ruffles me.

Undoubtedly a priori norms are often problematic, as is obvious from the painful histories of oppression, exclusion, and marginalization that have accompanied them. But they have also been essential for overcoming such histories, for gaining the kinds of "rights" that have had far-reaching economic, cultural, symbolic, and ideological repercussions. **This is why it seems injudicious to reject them across the board.** Furthermore, I am not even certain that the rejection at a priori norms necessarily decenters the self in quite the way that Butler, among many others, appears to assume. Butler privileges Levinasian relational ethics over Kantian, Habermasian, and other Enlightenment-inspired approaches in part because the latter's respect for a priori norms, in her opinion, leads back to the rationalist, autonomous humanist subject, or at the very least to its contemporary avatar: the neoliberal capitalist subject. **Yet arguably the effect of a priori norms is to** render the subject secondary (**rather than autonomous**): the subject is expected to obey such norms regardless of its self-serving interests. The Kantian categorical imperative, for instance, starts from the premise that how the subject feels—**whether it, for example, regards a given norm as a threat to its capacity to experience pleasure—is** completely irrelevant, to ethical deliberation. We all know that separating feeling from ethics is a rail order. But the relevant point here is that, from the Kantian perspective, the rejection of a prion norms comes across as too convenient, even self-centered and narcissistic, which is why it could easily be interpreted as a symptom of the very neoliberal capitalism that critics such as Butler denounce.

The self-absorbed neoliberal individual, who is used to an endless array of existential possibilities, and who **does not like limitations on her freedom**—including her freedom to buy everything that a decent department store makes available—may be perfectly happy with the idea that she **should not be beholden to norms** that might in some way thwart her ability to move about the world without restriction. From this viewpoint, **one could argue that a priori norms** war against the neoliberal capitalist ethos of unmitigated choice, that they, in a certain sense, "interrupt" the neoliberal subject (and its projects of self-actualization) **just as effectively as the Levinasian-Butlerian other does by introducing within its being “alien"** elements (norms) **that it experiences as constraining**. This is one reason I believe that a priori norms are not a completely preposterous alternative to the relativism that nibbles at the edges of contemporary progressive ethics and that, ironically enough, carries its own violence.

Let me add a final insight about a prion norms that may disrupt our usual lines of ideological allegiance, namely that Zizek's conceptualization of the Lacanian ethical act may tell us something useful about how to keep Allen's "historical a priori" from solidifying into an oppressive status quo. To grasp what I mean, it is necessary to understand a major distinction between Badiou's account of the truth-event on the hand and Zizek’s account of the act on the other. As we have seen, the event and the act both reveal (are supposed to reveal) a "truth" of some kind. But the oncological status of this "truth" is quite different for these two thinkers: if the event, for Badiou, reveals a truth that can be named and incorporated into the new social order that (potentially, through the subject's fidelity to the event) emerges from the ashes of the event, Zizek insists that the truth that arises from the subject's act of negativity has no positive status but, rather, signifies the ultimate failure of meaning as such. That is, while Badiou views the void of the event as containing some sort of legitimate meaning, Zizek views it in a more strictly Lacanian vein, as the "real" of the situation, as an insurmountable impediment to the legitimatization of meaning. This is why Zizek consistently accuses Badiou of downplaying the negative, destructive force of the event: "This, then, is the ultimate difference between Badiou and Lacan: Badiou's starting point is an affirmative project and the fidelity to it; while, for Lacan, the primordial fact is that of negativity (ontologically, the impossibility of the One being One)" (LN 836). **For Zizek, "**naming" the event, as Badiou strives to do. merely establishes a new hegemony—**one that seeks to suppress the disruptive force of negativity percolating beneath every social order (as it also percolates beneath every "coherent" subjectivity**).

**Their rejection of universalist ethics causes takeover by the Alt-Right by undermining narratives necessary to check the growth of the alt right**

**Tuttle 16**

Ian Tuttle is a National Review Institute Buckley Fellow in Political Journalism, The Racist Moral Rot at the Heart of the Alt-Right, April 5, 2016, <http://www.nationalreview.com/article/433650/alt-rights-racism-moral-rot>

Last week, Breitbart writers Allum Bokhari and Milo Yiannopoulos took it upon themselves to pen an apologia for the “Alternative Right,” or Alt-Right — the grab bag of ostensibly right-wing **anti-liberal ideologies** whose disciples, of late, are thrilling to the rise of Donald Trump. The Alt-Right has evangelized over the last several months primarily via a racist and anti-Semitic online presence. But for Bokhari and Yiannopoulos, the Alt-Right consists of **fun-loving provocateurs**, valiant defenders of Western civilization, **daring intellectuals** — and a **handful of neo-Nazis keen on a Final Solution 2.0, but there are only a few** **of them, and nobody likes them anyways**. In other words, anyone familiar with Yiannopoulos’s theatrics, or Breitbart’s self-appointment as Donald Trump’s Pravda, will not be surprised to learn that the article is a 5,000-word whitewash. But it is valuable, in this way: It exhibits, albeit inadvertently, the **moral and intellectual rot** at the **heart** of the Alt-Right. The Alt-Right’s **origin story** will sound familiar: Conservatives, the Breitbart writers say, refused to defend “humanism, liberalism, and universalism” against “black and feminist identity politics” and “left-wing moral relativism.” They “turned a blind eye to the rise of tribal, identitarian movements on the Left while mercilessly suppressing any hint of them on the Right.” (Something like this tale of woe is used by Trump supporters to explain, and to justify, his rise.) This is largely false. It’s simply nonsense to suggest that American conservatism was willfully complicit in the rise of the identity-politics Left. It’s simply nonsense to suggest that American conservatism was willfully complicit in the rise of the identity-politics Left, or that conservatives have wholly forsaken their commitment to constitutional, and generally Judeo-Christian, values. For decades, conservatives have fought against racial favoritism, against the normalization of sexual perversion, against the “Hey, hey, ho, ho! Western Civ has got to go!” ethos that animates so much of progressivism. Furthermore, it’s entirely plausible that, where conservatives have endorsed policies — high levels of immigration, for example — that have ended up undermining certain “core Western values” (the importance of the rule of law, say), it was out of a commitment to other high-minded principles also in keeping with the Western tradition. SHARE ARTICLE ON FACEBOOKSHARE TWEET ARTICLETWEETBut this is not about the Gang of Eight bill. Most on the Alt-Right do not only **reject the** “conservative **Establishment**” or some **other contemporary bogeyman**; they also **reject the ideals of classical liberalism** **as such**. That rejection **grounds** the thinking of **Jared Taylor, and Richard Spencer**, for instance — **representative “intellectuals” of the Alt-Right, according to Bokhari and Yiannopoulos**. These men — the founders of the publications American Renaissance and Radix Journal, respectively — have not simply been “accused of racism.” They are **racist, by definition**. Taylor’s **“race realism,”** for example, **co-opts** evolutionary biology in the hopes of demonstrating that the races have become **sufficiently differentiated** over the millennia to the point that the races are **fundamentally** — that is, **biologically — different**. Spencer, who promotes “White identity” and **“White racial consciousness,”** is beholden to similar **“scientific” findings**

. RELATED: Why White-Nationalist Thugs Thrill to Trump And it’s worth noting that the favorite slur the Alt-Right flings at conservatives they dislike is at bottom about miscegenation: “Cuckservative” refers to a form of sexual fetish in which a man, usually white, is aroused by watching his wife have sex with another man, usually black. As the curator of the **“Dark Enlightenment”** blog writes: “Among the **central principles** of **neo-reaction** — one of the top two, I’d say — is that long-separated human populations **differ, innately, in significant ways**, and that human cultures, when **correctly understood to be part of our** extended **phenotype**, reflect this underlying biological variation.” “**The Dark Enlightenment**” is the name, first and foremost, of a fuzzily argued manifesto of sorts, penned by **Nick Land**, formerly a **lecturer in continental philosophy** **at the University of Warwick**, and **another of Bokhari’s and Yiannopoulos’s go-to “intellectuals.**” Land is a more sophisticated thinker than Taylor or Spencer, but his “neo-reaction” is rooted in the **same fundamental rejection of egalitarianism**. The differences are less important than the similarities; the race realists call on evolutionary biology and cognitive science; **Land and his followers invoke postmodern philosophy**. Both, with the help of an **influential Alt-Right contingent** among computer scientists, draw on **cognitive science**. There is, then,contra Bokhari and Yiannopoulos**, continuity** on the Alt-Right, **from the more interesting thinkers to the** **“1488ers.”** This label comes from 14, for the “14 Words” of **neo-Nazism** (“**We Must Secure the Existence of Our People and a Future for White Children”),** and 88, for the eighth letter of the alphabet, H, doubled, HH, **ergo “Heil Hitler**.” **Clever, eh?** **Some want to put people in ovens**; **some just want** **an ability to “exit” multicultural society** **for an ethno-national arrangement**. But they’re all in agreement: “**All men are created equal” is not true**. **What follows is a 21st-century version of** Blut und Boden — **Blood and Soil** — **on one hand,** **or technological apocalypticism, on the other.** **But the two are not so different, as the Nazis understood**. (And to that point, **it’s telling that**, as Bokhari and Yiannopoulos note, some Alt-Right thought **has its roots** in the thinking of Giulio Evola, a mid-century Italian philosopher whose **apocalyptic vision of the world** derived from his own **woolly syncretism** and **eccentric mysticism**.) **Adherents of the Alt-Right not only conceive of the “Establishment” as traitorous; they also seem to think that liberal democracy itself** **was an abstraction** **tyrannically imposed** **on an unwilling populace.** **It wasn’t.** **It was a slowly and painfully forged response to centuries of challenges**. The Western, liberal-democratic order is **wracked with problems**, of course; but it always has been. **The question is, Has it been more fruitful**, **more liberating, more constructive in promoting the common good than** have **the various orders that came before it?** **And if so, is there a compelling reason for throwing it over** **in favor of the ancient belief that some men are**, indeed, **born with saddles on their backs**, **and a favored few born booted and spurred**, entitled **to ride them?** **This is the question the Alt-Right poses**. As it happens, **it’s an old question, and one to which our forebears gave powerful answers. But every generation has to relearn them. The larger the Alt-Right grows, the clearer it is that ours hasn’t.**

## Case

### 1NC

#### Contingent legal and policy interventions combined can meaningfully alter norms without reproducing status quo power relations

Faithful 10 – folk healing artist and healing justice practitioner rooted in the African diasporic tradition of conjure and former lawyer with a JD from American University Washington College of Law.

Richael Faithful, “(Law) Breaking Gender: In Search of Transformative Gender Law,” *Journal of Gender, Social Policy & the Law*, 2010, https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1490&context=jgspl

Andrew Gilden’s article envisions a system in which “legal rules may potentially counter such traditions by eliminating their means of perpetuation while simultaneously laying the foundations for a future that embraces a broad range of gendered expression.”47 To do this, he suggests that advocates must make a “conceptual shift” so that the law may reinforce more positive gender norms.48 Gilden then proposes a comparison to other gender-fluid systems to guide the Western “legal reconstructive project.”49 I hope that my previous points on criminalization reinforce his core arguments; however, I wish to redirect his conclusion that we are doomed until we change cultural norms around gender.

First, vigorous client advocacy and anti-essentialism50 advocacy are not mutually exclusive work. Brilliant litigators consistently advance client and community interests, although, admittedly, it is extremely difficult to do. It is a strategy in which inexperienced advocates should not necessarily engage.51 Gilden seems to argue that any “non-progressive” advocacy (advocacy that does not challenge gendered assumptions) is harmful because it reinforces the current legal regime. He categorically rejects such a “short-term strategy” that further entrenches gender norms.52 I qualify his point to mean this: we should encourage experienced advocates to engage in creative, effective, progressive lawyering that advances client and community interests. I defer to skilled practitioners for specific thoughts on this issue. Activists, in the meantime, can employ new law-making strategies.

Second, formal equality critiques that condemn any “non-progressive” approaches are not very helpful. Politics is not a zero-sum game. In other words, shaping our current reality does not resign us to the status quo; rather, it can offer wisdom to be used toward our present strategy as we fulfill our transformative vision. I urge gender-justice supporters not to shy away from post-identity critiques because alternatives seem unpalatable— alternatives, after all, should seem like a stretch. Instead, we should view critiques as insights into our possible future. So, where do we go from here?

Martha Fineman’s vulnerability thesis is a useful framework for the transformative gender law discussion.53 The vulnerability thesis envisions the development of political and legal institutions on a “comprehensive vision of the human experience.”54 Fineman argues that vulnerability is a variable condition based on human realities and that societal institutions, designed to “lessen[,] . . . ameliorate[,] . . . and compensate . . . for vulnerability,” should be responsive to these realities.55 Most convincing about Fineman’s work is its implicit anticipation that international models will finally penetrate United States jurisprudence.56 Her model predicts and utilizes constructive cultural and legal trends.

A positive, nexus-based civil rights model diverges from a formal equality model in three important ways. First, it assumes gender difference rather than gender conformity. The absence of a gender imperative necessarily diminishes its regulation. Second, a vulnerability model reverses the long-standing presumption that all discrimination is benign unless proven otherwise. Such a presumption for a state protection is consistent with a vulnerability thesis, and it is reasonable in light of the Fourteenth Amendment.57 Third, a nexus-based civil rights model shifts the discriminatory landscape from one that is dominated by a state intervener to one that includes a state protector. A state protector obligation provides a venue in which systemic oppression of all kinds can be seriously challenged, rather than ignored by the law. Change is inevitable, a new model is necessary, and the vulnerability model holds distinct promise.

A positive, nexus-based model is also more likely to be responsive to gender criminalization. Ancillary criminalization is constitutionally suspect due to its disparate impact on gender variant people. Systemic criminalization is interrupted as the government adopts a protector obligation and provides more robust safety nets. More universalized healthcare, for instance, is a safety net that would immensely benefit marginalized gender variant people on the whole. Equally important, a more responsive legal regime opens the floodgates of accountability from lawmakers to police. Decision-makers will be on notice that their behavior will be scrutinized if it deviates from fundamental nexus principles. A new model cannot eliminate discrimination or its deeply-rooted systemic effects, but it can ameliorate a political climate that has tolerated it for far too long.

The equal protection model and vulnerability model fail, however, if the general discrimination argument is lost. The success of any model is contingent on justice-minded people creating conditions in which not only is all discrimination suspect, but all discrimination is not treated the same under the law. The simple fact is that denying a job to a gender variant person because ze58 “doesn’t look right” is distinct from denying a gendernormative person the same job because ze is the least preferred candidate. Donald Lively and Stephen Plass contend that the formal equality regime is the result of competing governing values, not the result of a desire to end discrimination.59 If we were to settle the values debate and re-orient equal protection toward justice rather than sameness, we would have an opportunity to address marginalization at its core.60

#### Their politics is disastrous for everyone but a privileged elite – the solution is to reconfigure futurity

Ruti, professor of Critical Theory at the University of Toronto, March, ‘17

(Mari, *The Ethics of Opting Out: Queer Theory's Defiant Subjects*, Columbia University Press, pg. 90-91)

The stakes of Muñoz’s accusation are high, revolving around the question of who can afford to relinquish all hope of a better future in the way that Edelman’s rendering of queer negativity—with includes the derisive critique of the child as a sentimental emblem of reproductive futurity that I mentioned in chapter 1—calls for. Muñoz suggests that only those who “have” a future in the first place have the luxury of flirting with the idea of rejecting it; conversely, those whose futures are concretely (empirically) threatened are unlikely to advocate the annihilation of these futures. More specifically, Muñoz contends that it would be disastrous to “hand over futurity to normative white reproductive futurity,” arguing that the fact that this version of futurity is currently winning “is all the more reason to call on a utopian political imagination that will enable us to glimpse another time and place: a ‘not-yet’ where queer youths of color actually get to grow up” (2009, 95–96). In this manner, Muñoz alerts us to the fact that while Edelman elevates the child to an icon of reproductive futurity, “the future” has never been the province of all children; that is, though Muñoz agrees with the broad outlines of Edelman’s critique of reproductive futurity, he reminds us that this critique does not apply to the vast majority of the world’s children, that “racialized kids, queer kids, are not the sovereign princes of futurity” (95).

Like Edelman, Muñoz admits that the world as it stands is “not enough” (2009, 96), not able to offer adequate resources for subjective flourishing. But in his view, the way to deal with the world’s insufficiency and messiness is not to reject the future wholesale but rather to reconfigure its parameters. This, Muñoz asserts, can only be done by resurrecting “various principles of hope that are, by their very nature, relational” (94). As he elaborates, relationality may not always be “pretty,” “but the option of simply opting out of it, or describing it as something that has never been available to us, is imaginable only if one can frame queerness as a singular abstraction that can be subtracted and isolated from a larger social matrix” (94).

**Antinormativity is a disastrous form of politics – contingent reflexive commitment to normative ideals is essential to check abuses of power – their aff relies on maintaining the very concepts they criticize**

**Ruti**, professor of Critical Theory at the University of Toronto, March, **‘17**

(Mari, The Ethics of Opting Out: Queer Theory's Defiant Subjects, Columbia University Press, pg. 152-155)

For many queer theorists, rights-based **models of justice**—models that rely on a set of **normative ideals**—are merely an **insidious** form of biopolitical **control**, a means of further constraining us even as they profess to protect us. Undoubtedly this is sometimes true. And it is also true that rights-based models of justice cannot solve structural problems such as sexism, racism, homophobia, or poverty and that their practical application consequently often falls short of the ideals they profess. But this does not mean that I am prepared to **simply just throw out the ideals in question**, for I do not believe that the system’s **inability to live up to its ideals** automatically means that the ideals themselves are **intrinsically corrupt**. The ideal of formal equality under the law may frequently be violated in practice. But the demise of this ideal would arguably have even more **drastically oppressive consequences.**

Nor is it the case that normative ethics is **inextricably tied to the Enlightenment**

subject of abstract reason. As feminist philosophers such as Amy

Allen (2008), Seyla Benhabib (2006, 2011), and Nancy Fraser (2010, 2013) have illustrated, it is entirely possible to envision a set of a priori norms that are historically constituted—rather than metaphysically grounded— and that therefore remain open to **continuous modification**. Indeed, many of the norms that we, collectively speaking, live by have been conjured into existence through relatively recent **processes of negotiation**. Though there is no doubt that such negotiations always exclude certain individuals and populations—and though there is consequently no doubt that we need to stay **vigilantly attentive** to the **constitutive exclusions of our normative systems**—the alternative of **discarding all attempts** to improve these systems by, say, rendering them **more inclusive** or more **consistent** in their application would hardly be a productive course of action.

In this particular instance, Butlerian negotiation with power seems like a better option than Lacanian–Edelmanian and Foucauldian–Hufferian antinormativity. I would in fact go so far as to say that queer antinormativity can only survive to the degree that it **operates against the backdrop of basic rights**. As deficient as these rights are, as insincere as the foundations of contemporary liberal democracy may be, their absence would **obliterate the political space** within which queer antinormativity can operate. In this sense, antinormativity **presupposes the persistence of “liberal” values** even when it engages in a **vehement critique** of (neo)liberalism; ironically, as I already mentioned in chapter 1, the antinormative critic can **only flourish** to the extent that she can **implicitly “count on”** the practical (**boringly prudent**) liberal to **keep defending the very rights that she shuns**.

In this context, it seems fitting to raise the possibility that queer antinormativity, like queer performativity, might in some ways play right into the hands of neoliberal capitalism. Is it not the case that capitalism, like antinormativity, despises limits? Does it not thrive in the **absence of constraints?** After all, the self-absorbed neoliberal individual who is used to an endless array of existential possibilities and who does not like limitations on her freedom—including her freedom to choose her hair color, breakfast cereal, video game, and mode of exercise—may be perfectly happy with the idea that she should not be beholden to norms that might restrict her in some way. From this perspective, a priori norms could be argued to **war against the neoliberal capitalist ethos of unmitigated choice**, perhaps even decentering the neoliberal subject (and its projects of self-actualization) by introducing within its being “alien” elements (norms) that it experiences as constraining. As a result, queer theory’s categorical rejection of a priori norms can come across as a bit too convenient, as a symptom of the very neoliberal system that this theory condemns.

In addition, though collective norms that trump the wishes of the individual can be tyrannical, so can a radical antinormativity that veers into anything-goes relativism and that **consequently fails to distinguish** between **just and unjust actions**. Though there is no doubt that there are norms that are simply just oppressive—such as heteropatriarchal norms of gender and sexuality—there are others that may be the **most effective way to counter the abuses of power.** Yet other norms can cut both ways. For example, Benhabib (2011) points out in the contexts of global human rights discourses that even though such discourses can be—and have frequently been—used to advance Western economic and political interests across the world, they can also be—and have sometimes been—used to protect non-Western populations from precisely these interests (for instance, by placing restrictions on the exploitation of labor in free-trade zones).

That so many individuals and political groups around the globe are demanding basic human rights may on some level signify the triumph of Western imperialism; but on another level, it is an indication that there is something appealing about the prospect of such rights (my assumption being that people outside the Western world are not mere passive dupes of Western values, that they are perfectly capable of deciding which political goals they want to support). Likewise, even though rights discourses within Western societies can promote the socioeconomic agendas of the powerful, they can under certain circumstances be used to **shield the less powerful against such agendas**. The fact that rights-based justice fails as often as it succeeds **does not mean that it never succeeds**, **that it accomplishes nothing**.

### 2NC

**Legal engagement can meaningfully alter the norms underpinning their impacts**

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Andrew Gilden, “Toward a More Transformative Approach: The Limits of Transgender Formal Equality,” *Berkeley Journal of Gender, Law & Justice*, March 2008, https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1269&context=bglj

Although the inherent limitations of a formal equality approach to transgender rights might lead to the conclusion that the law is an inappropriate venue for gender reconstruction, 130 this Part will suggest that the legal system can be employed to embrace gender variance without implicitly reaffirming existing gender norms. **Rather than** conceptualize our legal system as simply a means of concealing and **furthering oppressive gender** **traditions**, the following discussion will expose the ways in which legal rules may potentially **counter** such traditions by **eliminating their means of perpetuation while** simultaneously **laying the foundations for a future** that embraces a broad range of gendered expression. 131 However, in order to harness the powers of the legal system in this fashion, two conceptual shifts must take place to move away from current reifying strategies. First, advocates must be able collectively to imagine a social landscape that would both liberate their existing clients from oppression and allow all people to present themselves to the world unconstrained by gender stigma. By solely focusing on accommodating the needs of existing clients and declaring success upon acquiring such accommodation, lawyers further a "good enough" mindset that can easily yield complacency in a broader critical project. 132 It is therefore crucial that a gender-utopian future serve as the foundation for **reforming the social construction of gender**. Second, attention must shift away from obtaining merely superstructural accommodations of gender non-conformity and towards a deeper challenge to the structural underpinnings of contemporary sex/gender norms. If these norms and their corresponding stigmas can persevere despite continually accommodating genderbased political movements, it is crucial to unearth the means by which they are able to persevere, and more specifically the ways in which the legal system contributes to this structural perseverance. Once this contribution is understood, it can be **directly challenged and replaced** with means for enabling our normative goals. If advocates can dismantle the rights and privileges conferred upon the discursive reproduction of gender norms, they can affirmatively protect the expressive rights of all people as these norms gradually lose traction in the coming generations.

Although these conceptual shifts are by no means simple endeavors, they are not without guidance. While this discussion does not foreclose any other inspirational source, the field of anthropology can provide profound insight into both the imaginative potential of gendered existences and the **means by which such existences may be maintained**. 3 3 Through thick134 investigation of cultures dispersed geographically and historically, anthropologists have engaged with societies that indeed conceive of gender in ways dramatically different from our own. 135 In numerous societies, one's gendered existence is not indelibly determined by one's biological sex but rather by other aesthetic,1 36 occupational,137 religious, 3 or sexual factors139 that interweave with the human body to produce gender identities largely incommensurable with existing Western categories. Moreover, these gender identities are **not inevitably** conceived as pre-ontologically **fixed** but rather as potentially dynamic throughout the course of one's life. 140 **From** the dynamic **variability** of gender identity **emerges the possibility of culturally sanctioned gender fluidity**. Although there are significant arguments against the "adoption" of any particular culture's gender constructs, 141 the broader landscape of gender fluidity illustrated by gender anthropology provides a useful guidepost in formulating a utopian vision of gender construction.

More difficult than identifying gender fluidity as a normative goal is identifying the means by which it may be implemented. Even if we wish to incorporate ideals of fluidity into Western transgender discourse, we cannot do so without understanding the social mechanisms by which a particular culture enables individuals to engage in dynamic gender expressive conduct without incurring enduring social stigma. When a child is born into a gender fluid society, what expectations are inscribed upon it? What limitations or freedoms attached? What family or kinship structures supervise the child's development? To what cultural images is the child exposed? Broadly speaking, in order to engage usefully with gender fluid traditions, we must examine "the social and psychic landscape of an infant's emergence."' 142 It is in this landscape that the plausibility, permissibility, and desirability of gender fluidity reside.

While this is undeniably a daunting task, thankfully it is central to the anthropological project, and significant ethnographic and theoretical work elucidates the structural underpinnings of gender fluidity in various cultures. What the lawyer must do, however, is synthesize this body of anthropological data and produce a set of "legal" rules that **enable and perpetuate fluidity**. Once a legal rule system of gender fluidity is outlined, the legal reconstructive project can begin.' 43 By comparing a rule system of gender fluidity to our existing jurisprudential structure-a rule system of gender rigidity-we can begin to unearth aspects of American jurisprudence that support dominant gender norms in perhaps a non-obvious manner. Because a legal rule system will involve not merely rules directly pertaining to gender recognition but also surrounding rules of kinship, religion, and economics, this approach can direct transgender activists towards areas of law in which gender norms are maintained sub silentio.

**Queer survival depends on legal engagement – contingent legal interventions that shield people from violence are an effective strategy**

**Spade 09** – Associate Professor of Law at Seattle University School of Law and founder of the Sylvia Rivera Law Project

Dean Spade, “Trans Law Reform Strategies, Co-Optation, and the Potential for Transformative Change,” *Seattle University School of Law Digital Commons*, 2009, https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1162&context=faculty

Given these observations, I can offer a few initial proposals, many of which are already being undertaken by some lawyers and activists working on trans issues. Because we know the limits of formal legal equality for affecting the life chances of those most vulnerable to oppression, the first step in assessing our trans legal reform work has to be focusing on legal strategies that are not primarily symbolic. We know that trans people as a group are economically marginalized, face high rates of imprisonment, face severe issues of access to health care and education, and experience high levels of violence.' 00 Many experience violence in institutions and contexts that will not be reached by anti-discrimination laws, and most do not have access to legal help to enforce broad statutory rights. 101 Given this, we must think about legal strategies that directly help those who are most vulnerable. We do not want legal victories that only provide a veneer of equality papering over a reality of extreme stratification. We do not want reforms to systems that only enhance their efficiency at reducing the life chances and life spans of trans people. The quality of our legal reform **work should be measured in meaningful changes to trans lives** - how many people get to go to school, have health care and stable housing, do safe and meaningful work, and become leaders in political struggles that concern them.

Prioritizing legal work like criminal defense, immigration assistance and public benefits access **are key for helping our community members survive** and become politically active. Building meaningful **political power** to make change **is tied to surviva**

**l**. If we want trans leadership in social movements, trans issues on many different kinds of agendas, and organized communities that can respond to attacks, then providing survival-level legal services in the areas where people are most vulnerable is essential. Waiting for "perfect plaintiffs" and "winning cases" on a narrow set of issues about employment and family protection, while ignoring the issues of most trans people who are either unemployed, low-wage workers, or criminalized workers means missing opportunities to effectuate the most change for the most people. This shift in how we think about legal reform, from big symbolic wins for plaintiffs with the most privilege and access and who experience discrimination through a single vector of oppression, to the daily struggle against legal hurdles for people who are most vulnerable is central to building meaningful change for trans people. Through this kind of analysis, we might find that law reforms like decriminalizing sex-work, drug possession, or homelessness might be more meaningful interventions than passing hate crime or anti-discrimination laws. Because of the narrowness with which the question "what is a trans law issue" is currently approached, we may be missing the most relevant opportunities for law reform to improve life chances.

Further, changing the direct service model to focus on bringing directly impacted people into organizing, rather than using traditional models that often make people feel judged for requiring services or keep people separate from others who are in similar or related situations, is essential. Survival services can be a key component for bringing people into political community with others facing similar conditions and can create a bridge to build a broader political awareness. Making our legal organizations look more like community organizing organizations, with a focus on offering our clients pathways to political organizing, builds the potential of our work to cultivate much more significant change than courts will ever deliver.

Our policy reform work also needs to come from this perspective. Changing key laws and policies that impact the survival of our communities is important, but must be done with care to avoid the dangers of legitimizing and expanding oppressive systems. When we seek to reform oppressive institutions, we have to ask ourselves how the reforms we are considering, or the various compromise positions we might be pushed into, will impact the most vulnerable people in our communities. For example, if we are trying to get a discriminating institution or system to recognize trans people's genders, but they want to use a surgery standard, we must recognize that this type of policy is not a victory for our community. Most trans people cannot or do not want to access such health care, and surgery-reliant policies shore up the stereotype that such care defines trans people's identities. Changing a law or policy from one transphobic position (trans people do not exist/cannot be recognized) to another (trans people can be recognized only through surgery) can actually make it harder to push for a policy that is based in the realities of trans people's lives, dividing our communities along lines of class, race, and gender.

Hate crime laws reflect a similar dilemma. The desire to have the violence trans people face recognized by law is reasonable. However, taking up a strategy that does nothing to prevent that violence and uses that violence to build up a criminal punishment system that targets people of color and the poor stands to divide our communities further and to legitimize that system.

To confront these challenges in our policy work, we must center the experiences of those most vulnerable in our communities (prisoners, poor people, youth, people with disabilities, immigrants) to determine whether the policy change we are considering actually looks good from the perspective of their experience. Policy issues like Medicaid coverage, prison health care, prison placement, immigration, gender change on identification documents, homeless shelter placement, access to health care for foster youth and youth in the juvenile punishment system, and placement in gendered group homes are examples of urgent areas affecting the survival of vulnerable trans people today. Within each of those areas in every jurisdiction there are an assortment of specific policy changes that could make these systems safer for trans people. Most of these issues still receive very little attention.

In doing policy reform work we must assess whether any aspects of our reform project that are incremental are actually regressive. Doing so means having a clear vision of what the world is that we are fighting for, against which we can measure incremental steps in order to ensure that they are going in the right direction. 10 2 This means we need to use political processes that actually identify vision. In our work as lawyers, that means stepping beyond the usual space of the nonprofit office where lawyers meet with each other alone to determine direction, or simply react to various unfair laws we discover. We need to connect our work directly with community organizing campaigns that bring together large groups of directly impacted trans people and work to build shared analysis of what we are experiencing and to build shared visions for how we want things to be. 10 3 These processes should guide our legal work. Any agenda will be stronger with organized communities pushing it forward, and any legal victory that does not have communities behind it will be unlikely to create deep and meaningful change in the distribution of life chances it is aimed to effect.

Building trans politics that is **centered around** a concern with the **redistribution of life chances**, that focuses on those who are most vulnerable, and that is primarily committed to anti-racism, feminism, antiabelism and wealth redistribution does not interest everyone. When we choose to think about our legal work in the context of this kind of politics, it is important to be aware that it may change who we count as allies and who will want to commit to this work with us. Not all trans people, for example, might be committed to prison abolition, or to enhancing income support to poor people in the U.S., or to demilitarization. But even knowing what our visions are allows us to figure out who we want to partner with in which moments and how to retain our vision in the face of difference. It also allows us to find allies we might have missed. If we know that trans people are experiencing significant harms because of "War on Terror" policy and law changes related to identification, for example, we have the opportunity to partner with other communities facing similar harms. These kinds of partnerships strengthen our political position and our political analysis and build long-term relationships that continue to benefit our visions for change. Getting clear about our vision makes it easier to make **principled decisions** about who to partner with and to build political alliances **that strengthen our work**.