# 1NC

## FW

#### Debates should center on whether the United States federal government should expand antitrust law.

#### The “USFG” is three branches.

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

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

#### Its is possessive

Macmillan Dictionary

[“its”, Macmillan Dictionary, http://www.macmillandictionary.com/us/dictionary/american/its, accessed 8-15-15, AFB]

Its is the possessive form of it.

#### Contextually, “expand the scope” means regulate additional anticompetitive behaviors

Cox ’19 [Kate, staff, “Antitrust 101: Why Everyone Is Probing Amazon, Facebook, Apple, and Google,” ARS TECHNICA, 11—5—19,

<https://arstechnica.com/tech-policy/2019/11/antitrust-101-why-everyone-is-probing-amazon-apple-facebook-and-google/>, accessed 6-2-21]

The Clayton Act expanded the scope of antitrust law to deal not just with monopolies, but specifically with anticompetitive behavior—basically, tactics that unfairly boost a company into a dominant market position or that unfairly keep a dominant company at the top and suppress competitors. At the highest level, these behaviors basically fall into two big buckets.

The first is growth through acquisition: you can't just buy out your primary competitor if the field isn't big enough for other companies to pose real competition. Consider the mobile market, for example: regulators decided the imminent union of Sprint and T-Mobile isn't anticompetitive, because T-Mobile and Sprint are the two smallest of the four major players. Even with one of them taken out, the market still has three national carriers. (And under the agreement with regulators, there will theoretically be a fourth carrier again.

But if AT&T and Verizon, the two dominant US mobile carriers by far, ever tried to merge operators, even the current crop of business-friendly regulators would almost certainly bring that proposal to a screeching halt. A deal of that magnitude would create a company so far beyond the reach of any potential competitor that no current player or new business could ever reasonably be expected to stand a chance of catching up.

The second metaphorical bucket holds the whole category of dominance through unfair dealings, which can be done by one company or as an agreement among several. One kind of unlawful anticompetitive behavior you find here is classic price-fixing. Recently, for example, StarKist was ordered to pay a $100 million fine after it and Bumble Bee were both found guilty of conspiring to fix prices in the canned tuna market, which is largely controlled by three companies.

Unfair behavior can also include a whole array of tactics undertaken by a single company, such as price discrimination, predatory pricing, or certain kinds of exclusivity requirements. These are the kinds of behaviors a federal judge found Qualcomm guilty of back in May, when she ruled that the company's business practices "strangled competition" with exclusive deals and patent licensing fees that charged device makers even when their products used a different brand of chip.

#### Prohibition is law forbidding action

Garner, Black’s Law Dictionary editor-in-chief, 16

[Bryan A., Black’s Law Dictionary, Fifth Pocket Edition, “prohibition”, p. 630]

prohibition. (15c) 1. A law or order than forbids a certain action.

#### Prefer our interpretation-

#### Limits---Not defending topical action unlimits the topic to anything being topical and stacks the deck against the neg from the start- fairness is a prior question because it determines our ability to engage.

#### Predictable Clash---Their interp moots pre-tournament research and strategy--- that’s key for argument refinement—which is inherently valuable and makes us more capable advocates-

#### Switch side debate enables reflexive openness and solves all of their offense --- reading it on the negative encourages empathetic learning and incorporates all sorts of different literature bases in to debates about topical affirmatives --- net benefit is linear thinking and meaningful engagement.

#### Debating against a well-prepared opponent makes us better advocates, making it more likely your ideas will be accepted---resolutional focus fosters the best form of disagreements by ensuring teams research the most persuasive version of their ideas while bolstering critical reflection and breaking down dogmatic beliefs

Conor Friedersdorf 17 is a staff writer at The Atlantic, The Highest Form of Disagreement: The best way to argue is to take on your opponents’ strongest arguments, not their weakest ones, 7-26-17, <https://www.theatlantic.com/politics/archive/2017/06/the-highest-form-of-disagreement/531597/>, y2k

And I want more Americans who demand these kinds of debates for the sake of our democracy. Just ideas against ideas, let them fight it out, and if you lose, come back with better ideas. Tony was right. A rumble can be clenched by a fair fight if you've got the guts to risk that. Are millions of Americans ready to start fighting fair for the sake of our democracy? For the sake of solving common problems we all face? Listening to those remarks Sunday at the Aspen Ideas Festival, which is co-hosted by The Aspen Institute and The Atlantic, I shared the speaker’s frustration with attacks on people rather than ideas, which pervade so much of today’s political discourse. And yet, I would add something to his analysis: ad hominem is a problem, but if you watch cable news, or follow Twitter, or reflect on the way that Donald Trump engages with Democrats, or Democrats with other Republicans, you notice a style of argument every bit as pernicious. It consists of constantly elevating the very worst of the other side, attacking only the weakest rather than the strongest part or version of the ideas held by the other political party or ideological tribe or cultural identity group. As Scott Alexander puts it, “The straw man is a terrible argument nobody really holds, which was only invented so your side had something easy to defeat. The weak man is a terrible argument that only a few unrepresentative people hold, which was only brought to prominence so your side had something easy to defeat.” Tucker Carlson is a master of the weak man––as was Jon Stewart. And America would benefit if our culture of argument elevated the opposite approach, steel-manning, “the art of addressing the best form of the other person’s argument, even if it’s not the one they presented.” Here’s Chana Messinger extolling it in one of those great old-school blog posts that I am honored just to honor: We probably know best which arguments are most difficult for our position, because we know our belief’s real weak points and what kind of evidence we tend to find compelling … use that information to look for ways to make their arguments better, more difficult for you to counter. This is the highest form of disagreement. If you know of a better counter to your own argument, say so. If you know of evidence that supports their side, bring it up. If their argument rests on an untrue piece of evidence, talk about the hypothetical case in which they were right... Because if you can’t respond to that better version, you’ve got some thinking to do, even if you are more right than the person you’re arguing with. In short, she says, “Think more deeply than you’re being asked to.” And bear these fruits: First, people like having their arguments approached with care and serious consideration. Steelmanning requires that we think deeply about what’s being presented to us and find ways to improve it. By addressing the improved version, we show respect and honest engagement to our interlocutor. People who like the way you approach their arguments are much more likely to care about what you have to say about those arguments… Second, people are more convinced by arguments which address the real reason they reject your ideas rather than those which address those aspects less important to their beliefs. Coming full circle to our NPR host’s project, Messinger argues that “steel-personning ~~steelmanning~~ makes you a better person. It makes you more charitable, forcing you to assume, at least for a moment, that the people you’re arguing with, much as you ferociously disagree with them or even dislike them, are people who might have something to teach you. It makes you more compassionate, learning to treat those you argue with as true opponents, not merely obstacles. It broadens your mind, preventing us from making easy dismissals or declaring preemptive victory, pushing us to imagine all the things that could and might be true in this beautiful, strange world of ours. And it keeps us rational, reminding us that we’re arguing against ideas, not people, and that our goal is to take down these bad ideas, not to revel in the defeat of incorrect people.” It’s only just out of reach.

## Cap

#### Capitalism exacerbates structural violence and inaugurates a system of crises

Parr 13—Associate Professor of Philosophy and Environmental Studies at the University of Cincinnati [Adrian, *THE WRATH OF CAPITAL: Neoliberalism and Climate Change Politics*, p. 145-147]

A quick snapshot of the twenty-first century so far: an economic meltdown; a frantic sell-off of public land to the energy business as President George W Bush exited the White House; a prolonged, costly, and unjustified war in Iraq; the Greek economy in ruins; an escalation of global food prices; bee colonies in global extinction; 925 million hungry reported in 2010; as of 2005, the world's five hundred richest individuals with a combined income greater than that of the poorest 416 million people, the richest 10 percent accounting for 54 percent of global income; a planet on the verge of boiling point; melting ice caps; increases in extreme weather conditions; and the list goes on and on and on.2 Sounds like a ticking time bomb, doesn't it? Well it is.

It is shameful to think that massive die-outs of future generations will put to pale comparison the 6 million murdered during the Holocaust; the millions killed in two world wars; the genocides in the former Yugoslavia, Rwanda, and Darfur; the 1 million left homeless and the 316,000 killed by the 2010 earthquake in Haiti. The time has come to wake up to the warning signs.3

The real issue climate change poses is that we do not enjoy the luxury of incremental change anymore. We are in the last decade where we can do something about the situation. Paul Gilding, the former head of Greenpeace International and a core faculty member of Cambridge University's Programme for Sustainability, explains that "two degrees of warming is an inadequate goal and a plan for failure;' adding that "returning to below one degree of warming . . . is the solution to the problem:'4 Once we move higher than 2°C of warming, which is what is projected to occur by 2050, positive feedback mechanisms will begin to kick in, and then we will be at the point of no return. We therefore need to start thinking very differently right now.

We do not see the crisis for what it is; we only see it as an isolated symptom that we need to make a few minor changes to deal with. This was the message that Venezuela's president Hugo Chavez delivered at the COP15 United Nations Climate Summit in Copenhagen on December 16, 2009, when he declared: "Let's talk about the cause. We should not avoid responsibilities, we should not avoid the depth of this problem. And I'll bring it up again, the cause of this disastrous panorama is the metabolic, destructive system of the capital and its model: capitalism.”5

#### Turn - Mutual Aid fails and ends up reproducing capitalist individualization. Historical examples of mutual aid all prove. Their advocacy aligns too closely with liberatarian rejections of the state in favor of a politics of individualized compassion.

Wuest 20 (Joanna Wuest, Fund for Reunion–Cotsen Postdoctoral Fellowship in LGBT Studies and is a lecturer at Princeton University, Mutual Aid Can’t Do It Alone, 12-16, <https://www.thenation.com/article/society/mutual-aid-pandemic-covid/>)

Since arriving on our shores this year, the Covid-19 pandemic has eroded Americans’ confidence in the ability of the government to perform its most basic functions. This loss of faith in the state has been accompanied by a renewed belief in the voluntary and reciprocal care of others, commonly referred to as mutual aid. Once relegated to pamphlets strewn about folding tables at a Food Not Bombs potluck, celebrations of mutual aid are now everywhere. Even the pages of The New York Times are adorned with endorsements of its transformative political potential, the idea that society might be redesigned bottom-up by such practices of magnanimity.

These displays of community care have indeed been vital throughout this time of bleeding. As the lockdowns have ravaged the American economy, existing inequalities have deepened. Millions of people have lost their employer-provided health insurance, and tens of millions have experienced food insecurity as food banks and professional charity operations have been stretched beyond their capacity.

In this grim context, the writer Rebecca Solnit has applauded the “creative and generous altruism” and “brilliant grassroots organizing” of our times, as have many others. She celebrates the volunteers who provide meals and groceries to the elderly and the infirm, emergency aid to undocumented immigrants and sex workers, and free musical entertainment from apartment balconies. Others, like the anarchist attorney and law professor Dean Spade, have encouraged mutual aid work that is at once antagonistic and an alternative to welfare administrators who measure worthiness according to formal criteria before doling out assistance. Across the liberal-left expanse, mutual aid is on everyone’s lips and in every extended hand.

But members of our crowd aren’t the only ones extolling the virtues of mutual aid. For decades now—and especially since the pandemic started—libertarians and conservatives from organizations like the Heritage Foundation and writers for National Review have commended care provided by those other than the state. Like their counterparts on the left, these groups have advanced an understanding of mutual aid not as a tactic alone but as a vision for remaking society.

Though ideologically distinct, many on the left and the right now share a hope that mutual aid can overcome poverty and rigid class divisions through spontaneous, organic relationships rather than beginning from plans for serious structural reform. For instance, Brooklyn-based efforts have been lauded for the cross-class mingling among people like tech workers and out-of-work restaurant workers that has come to define care networks in gentrified neighborhoods. And while the characterization of mutual aid as solidarity, not charity, stands in stark contrast with the conservative faith in tax havens that masquerade as philanthropy, the two converge on critiques of the government’s capacity to provide for the many.

It may sound churlish to be skeptical about this rekindled spirit of social generosity. But its anti-statist outlook ought to make mutual aid’s progressive advocates wary. After all, most on the left likely do not want to replace what remains of our welfare state with a gift economy, despite the romanticism attached to that more primitive condition of collaboration. Before we get too attached to mutual aid’s promise, it is worth looking back to the origins of its prominence in the United States, a time before voluntary associations were replaced by the care of the state.

In his 1902 book Mutual Aid, Peter Kropotkin, a Russian aristocrat turned anarchist, challenged the reigning social Darwinism of his time. Eugenicists like Herbert Spencer and Francis Galton had cast all of earthly life as an endless battle among competitive individuals seeking their self-interest. Kropotkin counterposed those dour depictions of the survival of the fittest with a theory of human nature rooted in cooperation. Inspired by his observation of birds, beavers, and other “sociable animals” weathering the brutal Siberian tundra, Kropotkin saw all organic life as defined by a communal management of scarcity and reciprocal care.

Though Kropotkin has been duly criticized for his naive view of human evolution—basically the inversion of the reductive accounts that it opposed—he did accurately observe that the late 19th century was rife with social organizations centered on collective care. This period also saw the first practices of mutual aid in the United States, predominantly taking the form of the fraternal society. By 1910, an estimated one-third of the adult male population belonged to one of these membership-based networks. Friendly societies and local lodges afforded wage replacement for sick workers, care for orphans, assistance for the elderly, and burials. Others like the Grange assembled over 1.5 million farmers to purchase machinery that was owned collectively.

As the Industrial Revolution kicked into full swing and the yeoman farmer and sharecropper alike were uprooted from agrarian life, the fledgling fraternal societies protected this new crop of wage laborers. Although some historians have portrayed the lodges as safe havens for white men alone—such organizations tended to be segregated by race and gender—the fraternal society was a sheer necessity rather than a site for rejuvenating a tattered rural masculinity. Notably, in the new urban landscapes, poor immigrants from Europe and Black sharecroppers from the South quickly formed benevolent associations of their own.

Today conservatives often recall the mutual aid society with rosy nostalgia. They wax poetic about a supposedly preideological era, in which members endeavored to make capital and labor friends and eschewed state solutions to social ills. That view of the history, however, distorts just how intertwined the early trade union movement and mutual aid institutions could be. Some labor federations, like the Knights of Labor, formed lodge-style arrangements to generate solidarity among workers as they struggled against Gilded Age robber barons and agricultural monopolists. Later in the 20th century, groups like the International Workers Order emerged to provide health insurance and medical clinics to its nearly 200,000 members. Today labor unions like the United Electrical, Radio and Machine Workers of America carry on that tradition by instructing union stewards to funnel resources to out-of-work members. In this rendering, mutual aid was—and is—less about mere benevolence than it is about the ethos that an injury to one is an injury to all.

Much like our present Covid care networks, mutual aid communities historically thrived during moments of crisis. Take the 1870s financial panics, in which a generation of workers lost their wages and savings. No longer willing to trust commercial institutions with their livelihoods, Americans turned to mutual savings banks and similar organizations that provided life insurance policies and other safeguards against sudden ruin. As a protracted depression followed the panics, many societies centralized their operations in order to serve a national membership base. By the advent of the 20th century, mutual aid had evolved from small kinship-style communities into a harbinger of the welfare state to come.

Despite their best efforts, mutual aid societies were not enough to stave off the worst of these crises. Slowly, as veterans’ organizations, federations of women’s clubs, and labor unions put pressure on the federal and state governments, early social welfare policies, including mothers’ and veterans’ pensions and state-guaranteed workers’ compensation, began to overtake the friendly societies.

By the time of the Wall Street crash of 1929, the inadequacy of mutual aid was becoming painfully apparent. In a rejection of small-scale efforts to tackle a colossus, the New Deal agenda of Franklin D. Roosevelt’s administration began an unprecedented expansion of social spending. In pairing pro-labor legislation like the National Labor Relations Act with social programs, the New Deal allowed unions to provide support for their members while shaping the state for progressive ends. Whereas in the past the American Federation of Labor turned its back on legislative reform for fear of undermining union power and accepting less than could be won at the bargaining table, the trade union movement began to play an essential role in constructing the welfare state. Labor advocates welcomed the relative inclusivity of New Deal reforms, happily ditching the old fraternal societies, which often raised dues rates on or barred entirely those employed in hazard-prone professions.

By the start of FDR’s Second New Deal in 1935, the mutual aid society had been superseded by a new nexus of state and social institutions more capable, protective, and widespread than any voluntarist variant that came before it.

If the New Deal rendered mutual aid obsolete, the welfare state’s subsequent fissuring and rollback have been largely responsible for the rebirth of the private-sphere social safety net. The tenuous nature of the New Deal coalition is partly to blame. Though federal social spending soon far eclipsed mutual aid coverage, Southern Democrats were successful in exempting massive numbers of Black and white agricultural workers from government largesse. Women were also excluded from programs like old age insurance, consigned instead to the far less generous benefits administered by states.

The situation of labor changed drastically, too, in the immediate post–New Deal era. Whereas the 1930s had been hospitable to a two-front fight aimed at both bosses and the state, the anti-labor Taft-Hartley Act in 1947 and the dawn of McCarthyism deterred many trade unionists from pursuing further such battles. While labor was forced into a defensive crouch, the liberal stewards of the New Deal order increasingly abandoned pro-worker policies for market-friendly ones. Turning their attention from full employment and single-payer health care, John F. Kennedy and Lyndon B. Johnson spent the 1960s implementing monetary and trade policies that laid the groundwork for our current wage stagnation and tariff wars.

This all set the stage for the New Left’s intense suspicions of the state—and a pivot to practices of community care. The Black Panther Party for Self-Defense was an exemplar of this tradition. Cofounders Huey P. Newton and Bobby Seale grounded the party’s work in nearly two dozen service-to-the-people survival programs, the corollary of a broader agenda to educate, organize, and foment revolutionary activity. As Newton recounted, such programs were meant to illuminate capitalism’s inability to fulfill the people’s daily needs.

One of the most effective of these projects was the Free for Children breakfast program. Within a year of its launch in 1969, the Panthers had fed over 20,000 youths in 19 cities. The program was so successful that it was mimicked by California Governor Ronald Reagan, who expanded the state’s nutrition assistance programs to counter the Black Panthers’ influence.

The Panthers’ free breakfast brigade is still remembered fondly; this year Representative Alexandria Ocasio-Cortez of New York recalled its legacy, comparing her office’s Covid-19 relief outreach to the breakfast program. But admirers of the Panthers often overstate the impact of their undeniably noble work. Despite her claim that the Panthers pressured the federal government to authorize a free breakfast program in 1975, the Department of Agriculture’s Food and Nutrition Service rolled out the first of several pilot programs three years before the Panthers’. (It was made permanent in the year Ocasio-Cortez cited.) Since 1946, the department has been offering its free and reduced-price National School Lunch program, a replacement for a patchwork array of volunteer ventures.

Still, much more important than debates over which came first are the issues of scale and routes toward systemic reform. While the Panthers fed an astounding number of children across an impressive geographic range, their 1969 record was dwarfed by the more than 500,000 kids the federal government served free and reduced-price breakfasts the following year. (The program currently feeds 14 million children.) Compared with the suite of aid programs launched by the Great Society and the War on Poverty, the Panthers’ service-to-the-people projects were a drop in the bucket.

But scale wasn’t their only goal. Unlike organizers of the March on Washington for Jobs and Freedom like A. Philip Randolph and Bayard Rustin—who conjoined labor, civil rights, and demands for a federal minimum wage and jobs program—the Panthers were interested in building dual power institutions that would one day compete with the state. As party member Lorenzo Kom’boa Ervin explained, their aim was to bypass the state by building “our communities into dual power communes, from which we can wage a protracted struggle with capitalism and its agents.”

But as the Panthers’ influence waned, an increasing number of self-styled community leaders became integrated into a political and entrepreneurial elite that largely neglected policies that would materially benefit the working-class Black population. Some would even come to assist a revanchist capitalist class in pillaging the welfare state and breaking the back of labor. There is a striking parallel between these developments and the trajectory of 19th century ethnically organized mutual aid outfits and related small-business ventures, which just as often evolved into capitalist enterprises and municipal political machines as they did vehicles for reform. And while a handful of those groups paved the way for strong unions and welfare policies, Black power came onto the scene at a time when the American left was enervated and there were few similar opportunities for egalitarian influence. A left-wing politics of mutual aid and self-care gave way to accommodation and brokerage.

By the late 20th century, liberals pushed for a more limited deployment of the state, inaugurating the practice of leasing out state functions to private entities like nonprofits. By the late 1970s, an all-out assault on labor and the welfare state began to roll back 20th-century workers’ wins.

As the United States went into lockdown last spring, the country entered a pandemic-induced recession with scant social protections. Faced with a hollowed-out welfare state and inadequate relief from the federal government’s initial stimulus, Americans had no choice but to rely on the generosity of their neighbors, friends, and colleagues. Since March, people from weekend volunteers to full-time anarchists have done extraordinary things to distribute food staples and provide shelter for those who found themselves hungry and homeless. Still, given that nearly a quarter of American households with children are carrying rental debt and that a permanent exodus of the poor and working class from major urban hubs is underway, such efforts are confined mainly to the margins.

Weathering the current crisis requires nurturing useful hope while avoiding palliative delusions. That means ditching our magical thinking about the sustainability of those mass mobilizations of goodwill that make the nightly news and pepper the pages of left-wing periodicals (both of which neglect the fact that charitable giving actually plummets during recessions). It also means recognizing that crises are excellent opportunities for revanchist right-wing forces to further raze state institutions and slam the lid on cries for justice. When labor-left movements were strong and could afford to go on the offense, the Great Depression created an opening for reform. If there is a lesson from mutual aid’s role in these past triumphs, it is that such community work was subordinated to the tasks of invigorating trade unions and pushing the state to enact universal programs.

Kropotkin was not wrong about our natural inclination to cooperate. But how we organize and nurture that cooperative instinct is crucial. A crisis can bring us together to rebuild durable structures for the collective good. It can also exacerbate the dog-eat-dog mentality that neoliberalism has cultivated for decades. Our country is coming to resemble a long-sought libertarian fantasy, with only atomized acts of compassion for those left out. We would do well to guard against this despotic individualism—the natural condition of the social without the state—and to be sober about what spurred this renaissance of mutual aid and what it portends.

#### Our alternative is to make pragmatic demands upon the state towards an anti-capitalist project through solidarity-based politics. This approach is necessary to open up space for more radical projects. Their strategy cedes political potential to conservative forces.

Harvey 15—Distinguished Professor of anthropology and geography at the Graduate Center of the City University of New York [David, “Consolidating Power,” *Roar*, Issue #0, p. 16, Fall 2015, https://roarmag.org/magazine/david-harvey-consolidating-power/]

So, looking at examples from southern Europe—solidarity networks in Greece, self-organization in Spain or Turkey—these seem to be very crucial for building social movements around everyday life and basic needs these days. Do you see this as a promising approach?

I think it is very promising, but there is a clear self-limitation in it, which is a problem for me. The self-limitation is the reluctance to take power at some point. Bookchin, in his last book, says that the problem with the anarchists is their denial of the significance of power and their inability to take it. Bookchin doesn’t go this far, but I think it is the refusal to see the state as a possible partner to radical transformation.

There is a tendency to regard the state as being the enemy, the 100 percent enemy. And there are plenty of examples of repressive states out of public control where this is the case. No question: the capitalist state has to be fought, but without dominating state power and without taking it on you quickly get into the story of what happened for example in 1936 and 1937 in Barcelona and then all over Spain. By refusing to take the state at a moment where they had the power to do it, the revolutionaries in Spain allowed the state to fall back into the hands of the bourgeoisie and the Stalinist wing of the Communist movement—and the state got reorganized and smashed the resistance.

That might be true for the Spanish state in the 1930s, but if we look at the contemporary neoliberal state and the retreat of the welfare state, what is left of the state to be conquered, to be seized?

To begin with, the left is not very good at answering the question of how we build massive infrastructures. How will the left build the Brooklyn bridge, for example? Any society relies on big infrastructures, infrastructures for a whole city—like the water supply, electricity and so on. I think that there is a big reluctance among the left to recognize that therefore we need some different forms of organization.

There are wings of the state apparatus, even of the neoliberal state apparatus, which are therefore terribly important—the center of disease control, for example. How do we respond to global epidemics such as Ebola and the like? You can’t do it in the anarchist way of DIY-organization. There are many instances where you need some state-like forms of infrastructure. We can’t confront the problem of global warming through decentralized forms of confrontations and activities alone.

One example that is often mentioned, despite its many problems, is the Montreal Protocol to phase out the use of chlorofluorocarbon in refrigerators to limit the depletion of the ozone layer. It was successfully enforced in the 1990s but it needed some kind of organization that is very different to the one coming out of assembly-based politics.

From an anarchist perspective, I would say that it is possible to replace even supra-national institutions like the WHO with confederal organizations which are built from the bottom up and which eventually arrive at worldwide decision-making.

Maybe to a certain degree, but we have to be aware that there will always be some kind of hierarchies and we will always face problems like accountability or the right of recourse. There will be complicated relationships between, for example, people dealing with the problem of global warming from the standpoint of the world as a whole and from the standpoint of a group that is on the ground, let’s say in Hanover or somewhere, and that wonders: ‘why should we listen to what they are saying?’

So you believe this would require some form of authority?

No, there will be authority structures anyway—there will always be. I have never been in an anarchist meeting where there was no secret authority structure. There is always this fantasy of everything being horizontal, but I sit there and watch and think: ‘oh god, there is a whole hierarchical structure in here—but it’s covert.’

Coming back to the recent protests around the Mediterranean: many movements have focused on local struggles. What is the next step to take towards social transformation?

At some point we have to create organizations which are able to assemble and enforce social change on a broader scale. For example, will Podemos in Spain be able to do that? In a chaotic situation like the economic crisis of the last years, it is important for the left to act. If the left doesn’t make it, then the right-wing is the next option. I think—and I hate to say this—but I think the left has to be more pragmatic in relation to the dynamics going on right now.

More pragmatic in what sense?

Well, why did I support SYRIZA even though it is not a revolutionary party? Because it opened a space in which something different could happen and therefore it was a progressive move for me.

It is a bit like Marx saying: the first step to freedom is the limitation of the length of the working day. Very narrow demands open up space for much more revolutionary outcomes, and even when there isn’t any possibility for any revolutionary outcomes, we have to look for compromise solutions which nevertheless roll back the neoliberal austerity nonsense and open the space where new forms of organizing can take place.

For example, it would be interesting if Podemos looked towards organizing forms of democratic confederalism—because in some ways Podemos originated with lots of assembly-type meetings taking place all over Spain, so they are very experienced with the assembly structure.

The question is how they connect the assembly-form to some permanent forms of organization concerning their upcoming position as a strong party in Parliament. This also goes back to the question of consolidating power: you have to find ways to do so, because without it the bourgeoisie and corporate capitalism are going to find ways to reassert it and take the power back.

What do you think about the dilemma of solidarity networks filling the void after the retreat of the welfare state and indirectly becoming a partner of neoliberalism in this way?

There are two ways of organizing. One is a vast growth of the NGO sector, but a lot of that is externally funded, not grassroots, and doesn’t tackle the question of the big donors who set the agenda—which won’t be a radical agenda. Here we touch upon the privatization of the welfare state.

This seems to me to be very different politically from grassroots organizations where people are on their own, saying: ‘OK, the state doesn’t take care of anything, so we are going to have to take care of it by ourselves.’ That seems to me to be leading to forms of grassroots organization with a very different political status.

But how to avoid filling that gap by helping, for example, unemployed people not to get squeezed out by neoliberal state?

Well there has to be an anti-capitalist agenda, so that when the group works with people everybody knows that it is not only about helping them to cope but that there is an organized intent to politically change the system in its entirety. This means having a very clear political project, which is problematic with decentralized, non-homogenous types of movements where somebody works one way, others work differently and there is no collective or common project.

This connects to the very first question you raised: there is no coordination of what the political objectives are. And the danger is that you just help people cope and there will be no politics coming out of it. For example, Occupy Sandy helped people get back to their houses and they did terrific work, but in the end they did what the Red Cross and federal emergency services should have done.

The end of history seems to have passed already. Looking at the actual conditions and concrete examples of anti-capitalist struggle, do you think “winning” is still an option?

Definitely, and moreover, you have occupied factories in Greece, solidarity economies across production chains being forged, radical democratic institutions in Spain and many beautiful things happening in many other places. There is a healthy growth of recognition that we need to be much broader concerning politics among all these initiatives.

The Marxist left tends to be a little bit dismissive of some of this stuff and I think they are wrong. But at the same time I don’t think that any of this is big enough on its own to actually deal with the fundamental structures of power that need to be challenged. Here we talk about nothing less than a state. So the left will have to rethink its theoretical and tactical apparatus.

## CP

#### Resolved: The United States Federal Government should substantially increase prohibitions on anticompetitive business practices by energy companies by expanding the scope of its core antitrust laws to account for “total welfare”.

#### The consumer welfare relies on a “market failure” approach that is impossible to prove and fails to address systemic risks like climate change. Only expanding the scope of the CWS to account for total welfare can address systematic failure.

Miazad 21 (Amelia Miazad is Founding Director and Senior Research Fellow of the Business in Society Institute at Berkeley Law., “PROSOCIAL ANTITRUST”, Prosocial Antitrust (March 11, 2021). Available at SSRN: https://ssrn.com/abstract=3802194 or http://dx.doi.org/10.2139/ssrn.3802194)

While courts routinely dismiss noneconomic or “non-welfare” justifications, precisely what procompetitive reasons come into play is, as Justice Stevens famously stated, “an absolute mystery”.242 As Professor John Newman points out, the “relevant case law reveals multiple competing approaches and seemingly irreconcilable opinions” on what constitutes “beneficial”.243 After all, whether a particular activity is beneficial necessarily begs the question— beneficial to what end? Professor Newman traces this confusion to the use of three different tests by courts:

Under the “market failure” approach, a valid justification is present if—and only if—the challenged restraint alleviates a market failure. Alternatively, the “competitive process” approach attempts to condemn restraints that harm (and bless restraints that benefit) “competition” itself or the so-called “competitive process”. Lastly, the “type of effect” approach appears to offer a shortcut: simply identify the effects of the challenged restraint, then ascertain whether they align with a pre-approved typology of virtuous marketplace effects (e.g., higher output, lower prices, etc.).244

This Article agrees with Professor Newman’s doctrinal, normative, and practical arguments in favor of the market failure test.245 Most contemporary courts also hold that “alleviating a market failure is an acceptable procompetitive justification.”246 But the market failure test is fundamentally at odds with the market reality of increasing universal ownership. Two limitations explain its inability to account for systematic and portfolio-wide risks. First, the market failure test relies on the prevailing consumer welfare standard.247 That generally means that a particular restraint of trade must alleviate a market failure by increasing consumer surplus in order for courts to deem it a valid procompetitive justification.248 By fastening market failure to consumer welfare, the market failure test becomes indistinguishable from the “type of effect” approach, which also focuses on measurable impacts on consumers including output and price. Second, the market failure test assumes the perspective of a single market, preventing it from capturing portfolio-wide systemic risks like climate change.

To be clear, this Article is not arguing that antitrust law should abandon the consumer welfare standard and expand its purview to encompass noneconomic impacts. Rather, it argues that the consumer welfare standard is too narrow to account for economic impacts on a portfolio-wide level. The total welfare standard is most closely aligned with the market reality of universal ownership, although it has been largely abandoned by courts.249 It seeks to maximize the total surplus of all participants in a market, including consumers and producers. The total welfare test’s aggregate value approach is more closely aligned with universal ownership, but it also analyzes an individual market—as opposed to market-wide impacts— because a so-called “general equilibrium analysis” is impractical. Developing a standard that aligns with the market reality of concentrated ownership is beyond the scope of this Article. This Article does argue, however, that the current consumer welfare standard impedes collaboration to address systematic economic risks, as the next Part explores

#### Climate change causes extinction

Fawzy et al. 20 (Samer Fawzy, School of Chemistry and Chemical Engineering, Queen’s University Belfast, Ahmed I. Osman, School of Chemistry and Chemical Engineering, Queen’s University Belfast· John Doran, The Bryden Centre, Letterkenny Institute of Technology, Letterkenny, Ireland· David W. Rooney, School of Chemistry and Chemical Engineering, Queen’s University Belfast, “Strategies for mitigation of climate change: a review” Environmental Chemistry Letters https://doi.org/10.1007/s10311-020-01059-w)

Climate change impacts, risks and vulnerabilities

An understanding of the severe impact of climate change on natural and human systems as well as the risks and associated vulnerabilities is an important starting point in comprehending the current state of climate emergency. Changes in climate indicators, namely temperature, precipitation, seal-level rise, ocean acidification and extreme weather conditions have been highlighted in a recent report by the United Nations Climate Change Secretariat (UNCCS). Climate hazards reported included droughts, floods, hurricanes, severe storms, heatwaves, wildfires, cold spells and landslides (UNCCS 2019). According to the Centre for Research on the Epidemiology of Disasters (CRED), the world encountered 315 cases of natural disasters in 2018, mainly climate-related. This included 16 cases of drought, 26 cases of extreme temperature, 127 cases of flooding, 13 cases of landslides, 95 cases of storms and 10 cases of wildfire. The number of people affected by natural disasters in 2018 was 68.5 million, with floods, storms and droughts accounting for 94% of total affected people. In terms of economic losses, a total of $131.7 billion was lost in 2018 due to natural disasters, with storms ($70.8B), floods ($19.7B), wildfires ($22.8B) and droughts ($9.7B) accounting for approximately 93% of the total costs. CRED also provides data on disasters over the past decade, which shows even higher annual averages in almost all areas, except for wildfire cases. The economic losses attributed to wildfires in 2018 alone are approximately equal to the collective losses from wildfires incurred over the past decade, which is quite alarming (CRED 2019). Moreover, wildfires are a direct source of CO2 emissions. Although wildfires are part of the natural system, it is clear that human-induced emissions are directly interfering and amplifying the impact of natural system emissions. It is evident that human-induced climate change is a major driving force behind many natural disasters occurring globally.

Furthermore, climate risks such as temperature shifts, precipitation variability, changing seasonal patterns, changes in disease distribution, desertification, ocean-related impacts and soil and coastal degradation contribute to vulnerability across multiple sectors in many countries (UNCCS 2019). Sarkodie et al. empirically examined climate change vulnerability and adaptation readiness of 192 United Nations countries and concluded that food, water, health, ecosystem, human habitat and infrastructure are the most vulnerable sectors under climate attack while pointing out that Africa is the most vulnerable region to climate variability (Sarkodie and Strezov 2019). It is also important to note the interconnected nature of such sectors and the associated impacts.

The 15th edition of the global risks report 2020 prepared by the world economic forum thoroughly presented a number of climate realities, laying out areas that are greatly affected. The risks included loss of life due to health hazards and natural disasters, as well as excessive stress on ecosystems, especially aquatic/marine systems. Moreover, food and water security are other areas that are highly impacted. Increased migration is anticipated due to extreme weather conditions and disasters as well as rising sea levels. Geopolitical tensions and conflicts are likely to arise as countries aim to extract resources along water and land boundaries. The report also discusses the negative financial impact on capital markets as systematic risks soar. Finally, the impact on trade and supply chains is presented (WEF 2020).

An assessment, recently presented in an Intergovernmental Panel on Climate Change (IPCC) special report, covered the impacts and projected risks associated with 2 levels of global warming, 1.5 °C and 2 °C. The report investigated the negative impact of global warming on freshwater sources, food security and food production systems, ecosystems, human health, urbanization as well as poverty and changing structures of communities. The report also investigated climate change impact on key economic sectors such as tourism, energy and transportation. It is evident that most of the impacts assessed have lower associated risks at 1.5 °C compared to 2 °C warming level. We would likely reach 1.5 °C within the next 3 decades and increases in warming levels beyond this point would amplify risk effects; for example, water stress would carry double the risk under a 2 °C level compared to 1.5 °C. An increase of 70% in population affected by fluvial floods is projected under the 2 °C scenario compared to 1.5 °C, especially in USA, Europe and Asia. Double or triple rates of species extinction in terrestrial ecosystems are projected under the 2 °C level compared to 1.5 °C (IPCC 2018). It can be simply concluded that the world is in a current state of climate emergency.

## Case

#### Antitrust law can either ossify OR counter economic inequality. Its path depends on changing legal enforcement.

John Mark Newman 21, Professor at University of Miami School of Law, “Racist Antitrust, Antiracist Antitrust,” The Antitrust Bulletin, 1–12, 2021.

The United States is slowly rediscovering politics. A decade-long experiment in laissez-faire policymaking has failed to correct societal inequities—much the opposite.1 If the tumultuous 2010s yielded one consistent theme, it is frustration with inequality coalescing into collective action.2 Multiple progressive political movements arose, each in its own way a response to the persistent effects of systemic inequality. Each is a call to wake up to the reality of how power has been apportioned and used—and, all too often, malapportioned and misused.

One might think antitrust law would have something to say about all of this. The earliest antitrust statutes were enacted during the late 1800s, at the height of the first Gilded Age of inequality in the United States.3 A broad-based coalition of workers and independent farmers, frustrated by the rapid consolidation of economic power in railroads, steel, and a host of other sectors, decided to push back. Their crowning achievement was the Sherman Act of 1890.4

Although various stakeholders have long disagreed about its goals, antitrust law is by its nature a tool for allocating and reallocating power.5 Enforcers and commentators have recently begun to respond to contemporary political movements by raising the possibility of using antitrust as a partial means of redress for systemic racism and economic inequality. Commissioner Slaughter suggests consciously incorporating racial inequity into enforcement prioritization decisions.6 That, in turn, could translate into a more active role for antitrust in blocking mergers and acquisitions and other business conduct.7 Conversely, Vaheesan calls for antitrust enforcers to stop intervening on behalf of powerful employers against workers, especially when those workers are disproportionately people of color.8

This essay attempts a modest contribution to this nascent body of commentary on antiracist antitrust.9 It does so by historicizing a pair of cases, one well-known, the other less so. This “compare and contrast” methodology is used frequently in antitrust discourse. When discussing antitrust’s goals, for example, two cases—United States v. Topco and Reiter v. Sonotone—are often presented as bookends for the 1970s. In his opinion for the majority in Topco, Justice Thurgood Marshall described the Sherman Act as “the Magna Carta of free enterprise, ... as important to the preservation of economic freedom ... as the Bill of Rights is to the protection of our fundamental personal freedoms.”10 By decade’s end, the Supreme Court’s tone had changed considerably—in 1979, the Reiter Court referred to the Sherman Act as a relatively humble “consumer welfare prescription.”11

But a change in goals does not always yield an immediate change in implementation—put another way, choice of an end does not necessarily dictate the choice of means. The pair of cases discussed below frame the 1980s, a decade in which antitrust’s end was fairly static, yet its means were still in flux. The first, Knights of the Ku Klux Klan (“KKK”), stands as one of the clearest, most admirable examples of antiracist antitrust in U.S. history. The second, Superior Court Trial Lawyers Association (“SCTLA”), is its opposite: the Sherman Act being deployed against an attempt to ensure adequate legal representation for indigent defendants, most of them being people of color.

Taken together, these two cases represent divergent paths. Which has the contemporary antitrust enterprise chosen to follow? The Supreme Court’s most recent substantive decision, Ohio v. American Express(“AmEx”), suggests both room for hope and reason for concern. With the latter in mind, the essay concludes by offering four recommendations for how antitrust can retake the high road. By avoiding overemphasis on categorical labels or particular types of effects, and by recentering a focus on power, the antitrust enterprise can play a vital part in addressing—and avoid exacerbating—structural inequality.

A. Knights of the KKK: Antiracist Antitrust

After the U.S. military exited Vietnam in 1975, millions of Vietnamese, Laotian, and Cambodian people fled the region.12 Rapid congressional action facilitated emigration to the United States for many of these displaced persons.13 Many settled in coastal Texas, a designated resettlement site that offered a familiar opportunity for sustenance: fishing and shrimping.14 Unsurprisingly, the refugees’ integration into the local economy was met with hostility on the part of incumbents. One antiimmigrant tactic was political: at the behest of the Texas Shrimp Association, the state legislature passed a bill in early 1981 that imposed a 2-year ban on issuing new shrimping licenses.15

But in the towns and cities along the Gulf coast, nativist locals were unsatisfied with what they perceived to be a half-measure by the state legislature. Boat merchants began charging premium prices to Vietnamese immigrants.16 Bait shops refused to sell to them.17 Rumors flew, with some locals suggesting the new shrimpers were being subsidized by the U.S. Government.18 Incumbents suggested the new entrants were overfishing and underpricing.19 A shaky cease-fire agreement was drawn up but quickly fell apart after the Federal Trade Commission warned that it violated the Sherman Act.20

In January 1981, one of the nativist locals met with Louis Beam, a Grand Dragon of the Knights of the KKK,21 to present the concerns of “a group of American fishermen.”22 The Klan moved swiftly. At a rally held on Valentine’s Day in Santa Fe, Beam warned the crowd that it “may become necessary to take laws into our own hands.”23 The Grand Dragon went on to invite attendees to train at Klanorganized “military camps,” inveighing that it would be necessary to “fight, fight, fight” and see “blood, blood, blood” for the salvation of the country.24 Beam vowed to give the newcomers “a lot better fight here than they got from the Viet Cong.”25 The crowd watched a demonstration of how to burn a boat and later a cross.26

On a clear day in March, a shrimp boat owned by one of the long-term residents was seen carrying men garbed in the traditional white robes and pointed hats of the KKK. Most were visibly armed, and the boat had been fitted with—and was firing—a cannon.27 Locals reported receiving threats that those who did business with Vietnamese immigrants would be viewed as “enemies.”28 A woman who had allowed an immigrant-owned fishing boat to use her docks was issued a warning: “You have been paid a ‘friendly visit’ do you want the next one to be a ‘real one.’”29 Klansmen burned crosses in the yards of immigrant shrimpers,30 set their fishing boats ablaze, and firebombed a home.31

Meanwhile, in Alabama, the cofounders of the Southern Poverty Law Center had been closely monitoring the Klan’s activities.32 In April 1981, Morris Dees and Joseph Levin filed a wide-ranging lawsuit in federal court, seeking to enjoin the Klan’s reign of terror. Judge Gabrielle Kirk McDonald, the first African American judge in the state of Texas, was assigned to hear the case.33 The defendants called for her disqualification, referring to her supposed prejudice against the Klan. Beam publicly called her a racial slur.34 Throughout the entire proceedings, Judge McDonald and her family received death threats and one-way tickets to Africa.35

Among the fourteen counts pleaded were violations of Sherman Act § 1 and § 2.36 The § 1 claim formed the core of the antitrust case: plaintiffs alleged that the defendants—the Knights of the KKK, Beam, various anonymous members of the Klan, the “American Fishermen’s Coalition,” and several individual fishermen—had conspired “to force the Vietnamese fishermen class to terminate or at the very least curtail their commercial fishing business in the Galveston Bay area” and to try to “intimidate them into selling off sixty percent of their shrimping boats.”37 The conspiracy’s goal, per the complaint, was to “eliminate or reduce competition” for incumbent fisherman in the area.38

After granting class certification, Judge McDonald issued a preliminary injunction ordering the defendants to cease their campaign of violence, threats, and intimidation. The imbalance of societal and material power was subtly—and effectively—emphasized throughout Judge McDonald’s opinion. Facts were presented without embellishment; they spoke for themselves. The reader learns, for example, of a Vietnamese shrimp seller who testified that “six weeks ago two American men drove up in a truck and pointed a gun at her” and that “her husband will not take out their shrimp boat on May 15, 1981 because she is afraid that he will be killed.”39

The antitrust analysis is notable for its clarity and brevity—indeed, to the contemporary observer, it is perhaps most remarkable for what it does not say. Although Judge McDonald began by stating that “the anti-trustlaws” forbid a “lessening of competitive conditions in the relevant market,” she went on to explain that plaintiffs could prove such a “lessening” by demonstrating an actual marketplace effect.40 No formal market definition was required. Nor did the opinion engage in a protracted attempt to fit the defendants’ conduct into a particular analytical category before deciding on the appropriate legal treatment.41 Again, proof of actual harmful effects was sufficient, at least to receive a preliminary injunction. In August, the court made the injunction permanent and ordered it to be posted publicly in the Gulf Coast area.4

B. FTC v. SCTLA

SCTLA was another antitrust lawsuit targeting coordinated activity, but the similarities began—and ended—there. While Knights of the KKK was championed by civil-rights attorneys, SCTLA was the brainchild of a hard-right-wing economist.43 In fact, the latter was filed against a group of publicinterest attorneys. Knights of the KKK exemplifies antitrust being used to counter coordinated power on behalf of displaced persons enduring personal and structural racism. SCTLA, on the other hand, exemplifies an antitrust enterprise oblivious to power imbalances and structural racism. James C. Miller III, President Reagan’s first appointee to chair the Federal Trade Commission, was the first nonlawyer ever to hold that position.44 Miller’s doctoral studies were completed at the University of Virginia’s economics department under James Buchanan, dubbed by some “the Architect of the Radical Right.”45 Buchanan had a controversial track record on racial issues—his academic center, formed amid Virginia’s “Massive Resistance” to federally mandated school desegregation in the 1950s, was pitched as a means for preserving the state’s “social order” and stymieing the “increasing role of government in economic and social life.”4 Buchanan was, according to Miller, one of his chief intellectual influences in the field of economics.47 One of Miller’s first actions as FTC chairman was to request a budget cut and a 10% reduction in personnel.48 Unsurprisingly, the Agency’s enforcement activity also plummeted. In just two years, antitrust actions dropped by nearly one-third, and consumer protection actions by more than onehalf.49 But one particular type of litigation bucked the downward trend. Miller spearheaded an enforcement initiative aimed at professional associations—and he “particularly liked the idea of bringing some cases against lawyers.”50 The District of Columbia in the 1970s was a majority-minority city; over 70% of residents identified as Black.51 More than 100,000 D.C. residents fell below the poverty line, with poverty rates exceeding 30% in some census tracts.52 In a 1963 decision, the U.S. Supreme Court had held indigent defendants in criminal cases are constitutionally entitled to adequate representation.53 D.C., like many jurisdictions, complied with this mandate via a dual system comprising a government-funded public defender’s office and court-appointed private lawyers.54 The District’s public defenders handled just 8%–10% of indigent defendants, leaving court-appointed lawyers to take up the considerable slack, a situation “unique among major urban jurisdictions.”55 Despite the pressing need for quality representation—and despite runaway inflation rates throughout much of the 1970s—statutory rates for court-appointed work in the District stayed flat for more than sixteen years.56 The D.C. Bar and the Judicial Conference of the D.C. Circuit released two reports finding that low compensation rates forced existing courtappointed lawyers to take on too many cases and dissuaded other attorneys from taking on any cases.57 As the first report explained, “[A] system which is heavily weighed against the indigent defendant in terms of the compensation that [their] attorney will receive raises serious questions of equal protection. The indigent’s rights under the Constitution are no less than the rights of the well-to-do.”58 Fed up with the situation, a group of court-appointed lawyers formed the SCTLA as a means of exerting political pressure. After initially casting about for the right tactical strategy, the Association was inspired to launch a strike by a suggestion from the dean of Howard University Law School: “[Y]ou will have to raise hell about this to attract somebody’s attention.”59 The D.C. Government— ostensibly the intended “victim” of the planned stoppage—was supportive. At a meeting with Association lawyers, Mayor Marion Barry tacitly encouraged the strike, as he was “very sympathetic” to the cause.60 And, once launched, the strike yielded rapid results: the City Council voted to increase funding, thereby improving the “quantity and quality of representation received by ... indigent clients.”61 Meanwhile, the Miller-helmed FTC had also been busy, opening an investigation into the Trial Lawyers Association before the strike had even begun.62 On December 16, months after the strike had concluded, the Commission proceeded with a complaint against the lawyers’ association and its four individual leaders. No practicable remedy was sought.63 The local government had already voted to increase funding and, despite being the ostensible “victim,” had neither asked the FTC to intervene nor sought to enjoin the boycotters under its own local antitrust authority.64 Rather strikingly, FTC staff internally recognized that the Association’s lawyers could not possibly have wielded market power. The Superior Court had the legal authority to order any member of the D.C. Bar to represent indigent defendants.65 In fact, it had done just that during a prior strike in 1974.66 Thus, the target of the strike could have simply ordered the attorneys to resume representation, ordered nonstriking attorneys to take on indigent clients, or both. The “victim” wielded all of the power.67 Nonetheless, the FTC pursued the case all the way to the U.S. Supreme Court, which roundly censured the strike. (Justice Marshall, the only Black member of the Court, joined Justice Brennan in dissenting from much of the majority opinion.68) The majority’s reasoning was formalistic: categorize, then condemn. To the majority, the strike was a “price-fixing agreement, a ‘naked restraint’ on price and output.”69 Once categorized as such, the strike was deemed, ipso facto, illegal per se.70 The fact that the boycotters clearly wielded no market power was irrelevant. The fact that the supposed “victim” had actively encouraged the strike was irrelevant. The fact that the strike benefited indigent defendants, many of whom were people of color who had endured decades of structural racism, was irrelevant. This was not antitrust’s finest hour.

C. Which Path Have We Taken? The Promise and Pitfalls of Ohio v. AmEx

These bookends of the 1980s—Knights of the KKK and Superior Court Trial Lawyers—suggest divergent approaches to the question of how to administer the antitrust laws. Which path has the contemporary antitrust enterprise pursued? The highest profile case of the past decade, Ohio v. AmEx, suggests both room for hope and reason for concern.

AmEx began as a suit by the U.S. Department of Justice Antitrust Division against the three largest creditcard companies, Visa, AmEx, andMasterCard.71The suit sought to enjoin “no-steering” rules contractually imposed by networks on all card-accepting merchants.72 In general, the challenged rules forbid merchants from presenting any particular credit network in a unique or differentiated way to their customers. Thus, for example, merchants cannot offer discounts for using a particular brand of card, tell customers “We prefer” a certain card, or inform customers of the costs associated with each brand.73 Visa and MasterCard quickly settled, but AmEx—which charged the highest merchant fees—fought to keep its rules in place.74

At trial, the Antitrust Division proved that AmEx’s no-steering rules had stifled competition and increased card acceptance prices across all networks.75 Merchants, in turn, passed along whatever costs they could to their customers via across-the-board retail price increases.76 To its credit, the Division brought to the trial court’s attention one of the most unusual—and most pernicious—effects of AmEx’s rules. Because merchants cannot treat higher-cost cards differently, they must raise retail prices to all of their customers, including those who pay with cash, checks, money orders, and food stamps.77 Such customers tend to be far less wealthy than credit-cardholders, especially AmEx cardholders.78 AmEx passes some, though not all, of its supracompetitive merchant fees through to its own cardholders in the form of cardmember rewards. In other words, AmEx’s rules force the least wealthy members of society to fund lavish travel points and perks for the most affluent.79

In a careful, well-reasoned decision, the trial court held that AmEx’s rules were unreasonable restraints of trade. Judge Garaufis’s opinion resisted easy formalizing and conclusory reasoning. The agreements at issue were between trading partners, not direct competitors. Yet, as Garaufis explained, AmEx’s rules did not “fit neatly into the standard taxonomy” of vertical versus horizontal restraints.80 The challenged agreements themselves may have been “vertical,” but the effects on competition were horizontal.81 AmEx’s rules prevented its rivals from attracting additional business by offering lower prices or higher quality, as Discover learned in the 1990s.82

As to effects, the court did not insist on a showing of any particular type of harm. Instead, it found that AmEx’s rules cause a wide variety of harms, including higher card acceptance costs for merchants, higher retail prices for consumers, and stifled innovation. The court also found the regressive forcedsubsidization effect to be anticompetitive:

[A] lower-income shopper who pays for his or her groceries with cash or through Electronic Benefit Transfer ... is subsidizing, for example, the cost of the premium rewards conferred by American Express on its relatively small, affluent cardholder base in the form of higher retail prices. The court views this externality as another anticompetitive effect of Defendants’ [rules].83

This particular effect technically occurred outside the relevant market (“general-purpose credit and charge card network services”). Again, however, the court refused to allow an artificial construct— market definition—to distract from actual analysis of real-world effects.

The AmEx litigation thus yielded two bright spots: the Antitrust Division’s decision to bring the case and Judge Garaufis’s sophisticated decision. Both closely attended to structural power and inequity. Like Knights of the KKK, these were examples of antitrust directly confronting a power imbalance and seeking to redress its harmful effects.

But that success was short-lived. On appeal, the Second Circuit issued a sloppily reasoned decision for the defendant. (During oral arguments, one of the judges implied that the relevant market must also include cardholders because he personally received frequent credit card applications in the mail.84) A disappointed Antitrust Division decided not to pursue the case further. A group of states led by Ohio, however, proceeded to appeal to the U.S. Supreme Court.

The majority opinion in Ohio v. AmEx carries all of the hallmarks of bad antitrust analysis, and poor-quality appellate review more generally.85 It placed enormous weight on the “vertical vs. horizontal” dichotomy without appearing to recognize the horizontal nature of the restraints’ effects.86 Instead of analyzing the factual record before it, the majority simply ignored—and sometimes outright changed—inconvenient truths.87 Instead of evaluating the relevant effects, the majority insisted on proof of one particular type of effect: an output reduction.88 As to the regressive forced-subsidization effect—which was, again, part of the factual record—the majority opinion was silent. Instead, the majority conjured up a novel effect, positing without support the idea that AmEx’s restraints were actually beneficial for “low-income customers.”89

Today, the widely felt and regressive effects of AmEx’s rules continue unabated. Given the racialized nature of wealth and income inequality in the United States,90 those effects contribute to historically rooted structural inequity. A case that had begun so promisingly ended in ignominy—after something of a zenith at the trial-court level, AmEx now stands as a nadir of modern antitrust.

D. A Path Forward

As bookends for the turbulent 1980s, Knights of the KKK and SCTLA represent two paths for antitrust. AmEx offers a contemporary view of what traveling each of those paths can look like. The antitrust enterprise might take a flexible approach, cognizant of real-world power structures, always seeking to protect the relatively powerless against the more powerful. On the other hand, antitrust might ossify, placing more weight on assigning categorical labels than on assessing actual effects and narrowing the analytical lens until concentrated power—antitrust law’s raison d’eˆtre91—becomes largely irrelevant.

Cases like SCTLA and AmEx, though troubling, may nonetheless offer useful insights. Set upon the right path, antitrust can serve as a useful tool in moving toward a more just society. Toward that end, four normative suggestions follow.

First, do not place undue weight onthe “horizontal versus vertical” distinction. Some horizontal restraints are harmful, but not every horizontal agreement deserves hasty condemnation. The SCTLAmajority allowed a label (“horizontal”) to obscure a lack of power. Similarly, Justice Thomas’s defendant-friendly reasoning in AmEx hinged in part on his statement that “vertical restraints are different” from horizontal ones.92 But such broad pronouncements elide the fact that vertical restraints—like the ones at issue in AmEx—can cause effects identical to those caused by harmful horizontal restraints.93

Second, do not place undue weight on categorizing conduct as “price-fixing,” “a restraint on output,” and the like. A classification system can offer value. But, like any other tool, it can be pushed far beyond its usefulness. Labeling the lawyers’ strike “price-fixing” (or, alternatively, a “naked restraint on output”) was essentially the beginning and end of the SCTLA Court’s analysis. Yet not all price-setting agreements are equally likely to cause harm, as most of those very same Justices had previously recognized.94 A strike functions by temporarily disrupting the internal workings of a specific buyer of labor,95 whereas the archetypical price-fixing cartel agreement functions by indefinitely controlling the market for a product.96 From an economic perspective, it makes little sense to treat the two as analytically identical. Classification systems can obscure important nuance, in addition to posing the obvious risk of misclassification.97

Third, do not artificially narrow the analytical lens by insisting on proof of a particular type of effect. Leading treatises,98 law-school casebooks,99 amicus briefs,100 and journal articles101 suggest that all of antitrust can be boiled down to simple analysis of output effects.102 As Bork put it, “The task of antitrust is to identify and prohibit those forms of behavior whose net effect is output restricting and hence detrimental.”103 Antitrust law’s output obsession may well have played a role in the SCTLA decision—recall the majority’s characterization of the strike as a “naked restraint on price and output.” The AmEx majority clearly fell into this trap, insisting that the plaintiffs demonstrate an output reduction despite abundant evidence of actual anticompetitive effects. This makes little analytical sense. Output reductions can be harmful or beneficial to consumers. Conduct can simultaneously push the output of multiple products in different directions. And anticompetitive conduct can be harmful without affecting output levels at all.104 All of this counsels against overreliance on a single type of effect.

Like most disciplines, antitrust has developed a variety of labels and heuristics. But when analytical tools begin to consume the analysis, antitrust can sight of its target. An analytical tool is just that: a tool, to be used when it is helpful and set aside when it is not. To be clear, this is not a call for the abandonment of economic methodology. It is instead a call for better economics, tailored to suit the task at hand. And what is that?

Fourth, antitrust analysis must center the overarching purpose of the law itself: countering concentrated power.105 Amid the complexity of contemporary markets, it can be easy to lose sight of that goal. This may help to explain the SCTLA and AmEx opinions, both of which were regressive in nature. It may also help to explain the federal enforcement agencies’ otherwise-puzzling decisions to weigh in against efforts by rideshare drivers—disproportionately people of color106—to organize.107 Through a narrow lens, collective organizing by workers can be viewed as “horizontal price-fixing” or “outputreducing,” as it was in SCTLA. 108 But, stepping back for a moment, is there any reason to worry that rideshare drivers will exercise dominance over Uber and Lyft, even if they receive limited collective bargaining rights? Keeping antitrust’s goal in view is appropriate not only on deontological grounds but also on utilitarian ones: It allows scarce enforcement resources to be more helpfully allocated.

Divergent paths lay open. The first leads to ossification and erroneous outcomes.109 When antitrust analysis is overly constricted, it risks exacerbating systemic inequality and becomes prone to harming those whom the laws were meant to protect. The alternative is a more flexible, robust approach attuned to economic realities, one that allows enforcers and judges to maintain focus on furthering the law’s fundamental purpose. If—but only if—the antitrust enterprise does so, it can play a vital role in helping to correct structural imbalances of power.

#### Transition to informal social movements fails.

Hubert Buch-Hansen 18, Department of Business and Politics, Copenhagen Business School, “The Prerequisites for a Degrowth Paradigm Shift: Insights from Critical Political Economy,” Ecological Economics, Volume 146, April 2018, pp. 157-163.

Political projects do not become hegemonic just because they embody good ideas. For a project to become hegemonic, (organic) intellectuals first need to develop the project and a constellation of social forces with sufficient power and resources to implement it then needs to find it appealing and struggle for it. In this context, it is worth noting that degrowth, as a social movement, has been gaining momentum for some time, not least in Southern Europe. Countless grassroots' initiatives (e.g., D'Alisa et al., 2013) are the most visible manifestations that degrowth is on the rise. Intellectuals – including founders of ecological economics such as Nicholas Georgescu-Roegen and Herman Daly, and more recently degrowth scholars such as Serge Latouche and Giorgos Kallis – have played a major role in developing and disseminating the ideas underpinning the project. A growing interest in degrowth in academia, as well as well-attended biennial international degrowth conferences, also indicate that an increasing number of people embrace such ideas. Still, the degrowth project is nowhere near enjoying the degree and type of support it needs if its policies are to be implemented through democratic processes. The number of political parties, labour unions, business associations and international organisations that have so far embraced degrowth is modest to say the least. Economic and political elites, including social democratic parties and most of the trade union movement, are united in the belief that economic growth is necessary and desirable. This consensus finds support in the prevailing type of economic theory and underpins the main contenders in the neoliberal project, such as centre-left and nationalist projects. In spite of the world's multidimensional crisis, a pro-growth discourse in other words continues to be hegemonic: it is widely considered a matter of common sense that continued economic growth is required. It is also noteworthy that economic and political elites, to a large extent, continue to support the neoliberal project, even in the face of its evident shortcomings. Indeed, the 2008 financial crisis did not result in the weakening of transnational financial capital that could have paved the way for a paradigm shift. Instead of coming to an end, neoliberal capitalism has arguably entered a more authoritarian phase (Bruff, 2014). The main reason the power of the pre-crisis coalition remains intact is that governments stepped in and saved the dominant fraction by means of massive bailouts. It is a foregone conclusion that this fraction and the wider coalition behind the neoliberal paradigm (transnational industrial capital, the middle classes and segments of organized labour) will consider the degrowth paradigm unattractive and that such social forces will vehemently oppose the implementation of degrowth policies (see also Rees, 2014: 97). While degrowth advocates envision a future in which market forces play a less prominent role than they do today, degrowth is not an anti-market project. As such, it can attract support from certain types of market actors. In particular, it is worth noting that social enterprises, such as cooperatives (Restakis, 2010), play a major role in the degrowth vision. Such enterprises are defined by being ‘organisations involved at least to some extent in the market, with a clear social, cultural and/or environmental purpose, rooted in and serving primarily the local community and ideally having a local and/or democratic ownership structure’ (Johanisova et al., 2013: 11). Social enterprises currently exist at the margins of a system, in which the dominant type of business entity is profit-oriented, shareholder-owned corporations. The further dissemination of social enterprises, which is crucial to the transitions to degrowth societies, is – in many cases – blocked or delayed as a result of the centrifugal forces of global competition (Wigger and Buch-Hansen, 2013). Overall, social enterprises thus (still) constitute a social force with modest power. Ougaard (2016: 467) notes that one of the major dividing lines in the contemporary transnational capitalist class is between capitalists who have a material interest in the carbon-based economy and capitalists who have a material interest in decarbonisation. The latter group, for instance, includes manufacturers of equipment for the production of renewable energy (ibid.: 467). As mentioned above, degrowth advocates have singled out renewable energy as one of the sectors that needs to grow in the future. As such, it seems likely that the owners of national and transnational companies operating in this sector would be more positively inclined towards the degrowth project than would capitalists with a stake in the carbon-based economy. Still, the prospect of the “green sector” emerging as a driving force behind degrowth currently appears meagre. Being under the control of transnational capital (Harris, 2010), such companies generally embrace the “green growth” discourse, which ‘is deeply embedded in neoliberal capitalism’ and indeed serves to adjust this form of capitalism ‘to crises arising from contradictions within itself’ (Wanner, 2015: 23). In addition to support from the social forces engendered by the production process, a political project ‘also needs the political ability to mobilize majorities in parliamentary democracies, and a sufficient measure of at least passive consent’ (van Apeldoorn and Overbeek, 2012: 5–6) if it is to become hegemonic. As mentioned, degrowth enjoys little support in parliaments, and certainly the pro-growth discourse is hegemonic among parties in government.5 With capital accumulation being the most important driving force in capitalist societies, political decision-makers are generally eager to create conditions conducive to production and the accumulation of capital (Lindblom, 1977: 172). Capitalist states and international organisations are thus “programmed” to facilitate capital accumulation, and do as such constitute a strategically selective terrain that works to the disadvantage of the degrowth project. The main advocates of the degrowth project are grassroots, small fractions of left-wing parties and labour unions as well as academics and other citizens who are concerned about social injustice and the environmentally unsustainable nature of societies in the rich parts of the world. The project is thus ideationally driven in the sense that support for it is not so much rooted in the material circumstances or short-term self-interests of specific groups or classes as it is rooted in the conviction that degrowth is necessary if current and future generations across the globe are to be able to lead a good life. While there is no shortage of enthusiasts and creative ideas in the degrowth movement, it has only modest resources compared to other political projects. To put it bluntly, the advocates of degrowth do not possess instruments that enable them to force political decision-makers to listen to – let alone comply with – their views. As such, they are in a weaker position than the labour union movement was in its heyday, and they are in a far weaker position than the owners and managers of large corporations are today (on the structural power of transnational corporations, see Gill and Law, 1989). 6. Consent It is also safe to say that degrowth enjoys no “passive consent” from the majority of the population. For the time being, degrowth remains unknown to most people. Yet, if it were to become generally known, most people would probably not find the vision of a smaller economic system appealing. This is not just a matter of degrowth being ‘a missile word that backfires’ because it triggers negative feelings in people when they first hear it (Drews and Antal, 2016). It is also a matter of the actual content of the degrowth project. Two issues in particular should be mentioned in this context. First, for many, the anti-capitalist sentiments embodied in the degrowth project will inevitably be a difficult pill to swallow. Today, the vast majority of people find it almost impossible to conceive of a world without capitalism. There is a ‘widespread sense that not only is capitalism the only viable political and economic system, but also that it is now impossible to even imagine a coherent alternative to it’ (Fisher, 2009: 2). As Jameson (2003) famously observed, it is, in a sense, easier to imagine the end of the world than it is to imagine the end of capitalism. However, not only is degrowth – like other anti-capitalist projects – up against the challenge that most people consider capitalism the only system that can function; it is also up against the additional challenge that it speaks against economic growth in a world where the desirability of growth is considered common sense. Second, degrowth is incompatible with the lifestyles to which many of us who live in rich countries have become accustomed. Economic growth in the Western world is, to no small extent, premised on the existence of consumer societies and an associated consumer culture most of us find it difficult to completely escape. In this culture, social status, happiness, well-being and identity are linked to consumption (Jackson, 2009). Indeed, it is widely considered a natural right to lead an environmentally unsustainable lifestyle – a lifestyle that includes car ownership, air travel, spacious accommodations, fashionable clothing, an omnivorous diet and all sorts of electronic gadgets. This Western norm of consumption has increasingly been exported to other parts of the world, the result being that never before have so many people taken part in consumption patterns that used to be reserved for elites (Koch, 2012). If degrowth were to be institutionalised, many citizens in the rich countries would have to adapt to a materially lower standard of living. That is, while the basic needs of the global population can be met in a non-growing economy, not all wants and preferences can be fulfilled (Koch et al., 2017). Undoubtedly, many people in the rich countries would experience various limitations on their consumption opportunities as a violent encroachment on their personal freedom. Indeed, whereas many recognize that contemporary consumer societies are environmentally unsustainable, fewer are prepared to actually change their own lifestyles to reverse/address this.

#### Legal engagement is the only way for social movements to build sustained countervailing power to change the status quo. Ceding the terrain of law dooms the AFF.

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

[\*548] INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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**Unless programmatic thought succeeds and takes up its task of reconstructing social life, military and economic crises become inevitable. Without imagination, crisis is the source of change; programmatic insight seeks to do the work of crisis, without the explosions.**

Roberto **Unger ‘5** Roscoe Pound Professor of Law, Harvard, former minister of strategic affairs, Brazil *What Should the Left Propose?* P. 1-11

The world suffers under a dictatorship of no alternatives. Although ideas all by themselves are powerless to overthrow this dictatorship we cannot overthrow it. All over the world, people complain that their ¤ national politics fail to deliver real alternatives: especially alternatives that would give new meaning, new l life, and new efficacy to the old progressive idea of a better chance for everyone — a chance to ensure the moral as well as the material necessities of life, a chance to work and to be cared for when one cannot work, a chance to engage in the affairs of one’s community and one’s society, a chance to do something with one’s life that has value in one’s own eyes. l Is it possible to suggest a way forward in a short space? And to do so in a manner revealing the similarities as well as the differences between the way forward for richer and for poorer countries? I believe that it is possible, and that it must be possible in brief if it is possible at all. Many countries are now governed by people who would like to be Franklin Roosevelt, and who do not know how. Many others are ruled by people pander1 ing to the interests of big business and to the desperate I and inverted resentments of a working-class majority that feels abandoned and betrayed by the would-be l Roosevelts. The self-described progressives appear on the stage of contemporary history as the **humanizers of the** **inevitable**: their program has become the program of their conservative adversaries with a falling discount. They disguise surrender as synthesis — for example, of social cohesion with economic flexibility. Their "third ways" are the first way with sugar: the sweetener of compensatory social policy and social insurance making up for a failure to achieve any fundamental broadening of opportunity. The calamitous ideological adventures ofthe twentieth century are spent. No global ideology with the worldwide authority of classical liberalism or socialism ; has yet arisen to take their place and to contest the arrangements now associated with the rich North i Atlantic democracies and with the ideas emanating from their universities. With this surprising silence of the intellect and with the consolidation of the American ascendancy, an unquiet order has descended upon the world. Wars are local: punitive expeditions by the remaining superpower against those who defy it, or i products of extreme oppression and desperate resistance in disunited countries, under the yoke of desi potic governments. No economic collapse seems { likely —given the resources of economic management { within countries and of economic coordination among them — that could rival in magnitude the economic disaster of the 1930s. § The great European social theorists — Karl Marx i first among them — identified the internal dynamics of societies — the revelation of inescapable conflicts and i missed opportunities — as the proximate cause of their transformation. These thinkers were mistaken. War and economic collapse have been the chief levers of change; catastrophe — unforeseen and uncontrolled — has served as the midwife of reform. 4 **The task of the imagination is to do the work of crisis without crisis**. However, the high academic culture of the rich countries, with its glittering worldwide prestige and influence, has fallen under the ` control of three tendencies of thought that help prevent this work from being done. Although the votaries of these three tendencies often regard themselves as adversaries and rivals, they are in fact partners. In the social sciences —— especially in the most powerful, economics — rationalization rules: the explanation of the workings of contemporary society becomes a vindication of the superiority or the necessity of the arrangements now established in the rich countries. In the normative discourses of political philosophy and l legal theory, humanization is in command: the justication of practices, such as compensatory redistribution by the State or the idealization of the law as a repository of impersonal policies and principles, that would make life less harsh for the poorest or the Q weakest. The most admired theories of justice place a gloss of metaphysical apology on the practices of redistributive tax-and-transfer adopted by the conservative social democracies of today. In this way, the humanizers hope to soften what they no longer know how to change or remake. In the humanities **escapism is the order of the day**: consciousness takes a ride on a roller coaster of adventure, disconnected from the reshaping of practical life. We are taught to sing in our chains. The silent partnership of these rationalizing, humanizing, and escapist tendencies in university 1 culture leaves the field open for forms of practical political thinking that are as deficient in insight as they are bereft of hope. \* In the United States, the Democratic Party, ever the instrument of American progressives, has failed to i produce a practical and attractive sequel to RooseX velt’s program, or to make up for the absence of 1 economic ruin and world war as incitements to re; form. Much of the white working-class majority of the country holds the policies favored by the Demo crats — to the extent these policies differ at all from I those advocated by the Republicans — to be products j of a conspiracy between some of the rich and many of the poor to promote the moral interests of the former and the material interests of the latter at the cost of their own values and advantages. They see little in the l shrunken governmental activism favored by the £ would-be progressives that addresses their interests I and much — especially by way of apostasy from the 4 religion ofthe family — that offends their ideals. Better i to mitigate their losses by cutting the federal govemment down to size. The result ofthe divorce in the preponderant world j power between the white working-class majority — a group that thinks of itself as "middle class" — and their [ would-be champions is fateful for the entire world. Its consequence is to aggravate a circumstance without precedent in modern history. When, during the ear lier, nineteenth-century episode of globalization Great Britain and the other European powers exercised a dominance less complete than the one the United States enjoys now, the ideological debates that resounded throughout the world were reflected, in deed anchored, within the most advanced countries. Now the hegemonic power is not in imaginative communion with the rest of humanity. Its leaders, its thinkers, and its population look out and see a world that will continue to be dangerous, poor, and unfree, unless it converges to the same institutional formula by which they believe themselves blessed. The rest of humanity, full of admiration for the l material exuberance and personal space einoyed by Q Americans, curses in response, ill concealing the l thought that it must ultimately choose war if the requirement of peace is surrender. The commanding beliefs of the American people — that everything is possible, that vast problems can be solved if broken up into pieces and addressed one by one, and that ordinary [people] ~~men and women~~ contain within themselves, individually and collectively, the constructive genius with which to craft such solutions — now find themselves without adequate practical expression. The richest and fireest part of the world has shown two faces to the rest of humanity. European social democracy has seemed to provide an alternative to the harshness of the American model; if the world could vote it might vote to become Sweden rather than the United States — a Sweden of the imagination. In the i meantime, however, the heart has been going out of historical social democracy. Under the disguise of an efort to reconcile Eur0pean—style social protection l with American—style economic flexibility, social del mocracy has given up, one by one, many of its traditional traits, and retreated to the last—ditch defense l of a high-level of social entitlements. [ This eviscerated version of social democracy can l neither address the problems of contemporary European societies nor bear the weight of humanity’s hopes. In Europe itself the erstwhile progressives appear as chastened votaries of the ideas of their l neoliberal opponents. In many countries, they find i their proposals for reform repudiated by an electorate I that is offered no real alternatives and that is told by g the political and academic authorities that none exist. i When we now turn to the world outside the North I Atlantic haven of relative freedom and prosperity, we § see only fragments of feasible and attractive alterna` tives, unexpressed in any project — or family of projects — that could appeal to the rest of mankind. Among the most successful developing countries in Q recent decades have been the two most populous — China and India. Each has succeeded by maintaining a measure of resistance to the universal formulas dispensed by the North Atlantic elites, particularly Washington, Wall Street, and the universities of the United States. Each has wanted to join the global i economy on terms that would allow it to organize its national life and to orient its economic development l in its own way. i However, in the great country that has been most \ fertile in institutional innovations — China — the scope and development of such innovations have remained I subordinate to the defense ofone—paity rule. The role that might have been played by an alternative set of ideas has been occupied by genuflections to the dead, inherited orthodoxy of Marxism and by fascination with the new, imported orthodoxy of the market economy, as it is understood in the political, financial, and academic capitals ofthe North Atlantic. In India, with its flawed but vibrant democracy, resistance to this imported orthodoxy has mainly taken the indis1 tinct {cnn of slowness and compromise, as if the point were to take one’s time in treading a path from which 5 there is no escape. The region of` the world that proved most pliant to the recommendations from the North — Latin America — has suffered a catastrophic decline in its relative position. In history obedience rarely pays; what pays is defiance. To the question, however, about the directions defiance should take if it is to further the promises of democracy, there is not yet an answer. We see in the world a universal political-economic orthodoxy contested by a series of local heresies. Yet only a universalizing heresy would suffice to counteract a universal orthodoxy. If the heresy is merely local in character and content it is likely to be abandoned at the first sign of trouble and pressure. If the local heresy l can resist, its resistance may depend on a religiously \ sanctioned way of life unsympathetic to the demo\_ cratic and experimentalist ideals to which progressives adhere. It is not only for practical reasons that a universaliz— ing heresy seems to be the indispensable antidote to l the universal orthodoxy about markets and governl ments that now provokes such resistance throughout l the world — whether in France and Germany or in g Russia, Brazil, and South Africa. It is because the causes of discontent — of which the first is failure to r anchor economic growth in a great broadening of { opportunity — are themselves universal. It is also because the established ways of responding to that ` discontent are so meager and ineffective. The repertory of institutional and policy alternatives on offer for the organization of economic, social, and political life is now very restricted. If we could progress anywhere in the world — rich or poor — **in expanding this institutional repertory** and anchoring practical progress in a broadening of opportunity, such an advance might have **implications for every country**. I The attempt to achieve economic growth with social inclusion fits readily with the search for proposals that are more than local solutions to local problems. It prepares the mind for a universalizing i heresy. However, the failure to anchor practical progress in a sustained widening of opportunity is not the sole source of the present unhappiness. There is another powerful source of discontent: the complaint that the orthodoxy prevents countries or regions of the world from developing their different forms of life and ideals of civilization by denying them an opportunity to house them in distinct ways of organizing society. Because it calls for a convergence of all countries to the institutions and practices now established in the North Atlantic, as well as for convergence within that world itself the orthodoxy seems to be the enemy of deep differences of experience and vision, The demand for pluralism, unlike the search for growth with inclusion, seems incompatible with a political and economic alternative claiming to be general in relevance and reach. 5 It is not. The semblance of paradox dissolves once i two premises are made explicit. The first premise is that an unqualified pluralism — an openness to any form of national life, no matter how despotic and unequal —— can form no part of the objective. The aim should be a qualified pluralism: to build a world of democracies in which the individual is empowered both to participate and to dissent. There is no single, uncontroversial interpretation of what a democratic society is or can become. Democratic ideals must be allowed to develop in different, even clashing directions if they are to develop at all. Under democracy the differences that matter most are those that lie in the future rather than those we have inherited from \ the past. Under democracy prophecy speaks louder than memory. The second premise is that the small repertory of institutional solutions now available to humanity — the i existing forms of political democracy, of the market i economy, and of free civil societies — **fails to provide the tools we need to develop national difference** in a form compatible with democratic ideals. A particular set of innovations in the organization of contemporary polities, economies, and societies can provide them. This set of innovations -— a major part of the pro1 gressive program that now needs to be advanced Y throughout the world — defines a narrow gateway \ through which humanity must pass if it is to strengthen its capacity to produce difference on the basis of democracy. To describe this gateway as it might be 1 approached by both richer and poorer countries is the concern of this hopeful manifesto. We cannot, however, understand this way forward unless we first grasp the nature of the obstacles with which we must contend, and of the forces and the opportunities on which we can count, in treading it. 11

**While they believe antitrust humanizes capitalism, the aff attempts to humanize the inevitable and make an intolerable world less bad – only an effort to reshape production through political experimentalism solves. The aff only tinkers with distribution.**

**Unger ‘5** What Should the Left Propose pp. 20ff

The hallmark of the alternative is to anchor social inclusion and individual empowerment in the institutions of political, economic, and social life. It is **not enough to humanize the social world**; it is necessary to change it. To change it means to engage, once again, with the effort to **reshape production** and politics, from which social democracy withdrew when the mid-twentieth-century compromise defining its present horizon was first formed. It means to take the familiar institutional forms of the market economy, representative democracy, and free civil society as a subset of a far broader set of institutional possibilities. It means to reject the contrast between market orientation and governmental direction as the axis organizing our ideological contests, and to replace it with a contrast among ways of organizing economic, political, and social pluralism. It means to root a bias to greater equality and inclusion in the organized logic of economic growth and technological innovation rather than making it rest on retrospective redistribution through tax and transfer. It means to democratize the market economy by innovating in the arrangements that define it, rather than merely to regulate it in its present form or to compensate for its inequalities through after-the-fact transfers. It means to radicalize the experimental logic of the market by radicalizing the economic logic of free recombination of the factors of production within an unchallenged framework of market transactions. The goal is a deeper freedom to renew and recombine the arrangements that compose the institutional setting of production and exchange, allowing alternative regimes of property and contract to coexist experimentally within the same economy. It means to take the overriding aim of social policy to be the enhancement of capability. Such an enhancement would progress thanks to a form of education addressed to the development of generic conceptual and practical capacities rather than to the mastery of job-specific skills. It would advance as well as through the generalization of a principle of social inheritance, assuring each individual of a basic minimum stake in resources on which he can draw at turning points in his life. It means to advance this democratization of the market economy in the context ofa practical organization ofsocial solidarity and a deepening of political democracy. It means never to reduce social solidarity to mere money transfers. Social solidarity must rest instead on the sole secure basis it can have: direct responsibility of people for one another. Such responsibility can be realized through the principle that every able-bodied adult holds a position within the caring economy the part of the economy in which people care for one anotheras well as within the production system. It means to establish the institutions of a high-energy democratic politics: one that permanently raises the level of organized popular participation in politics, engages the electorate as well as the parties in the rapid and decisive resolution of impasse between the political branches ofgovernment, equips government to rescue people from entrenched and localized situations of disadvantage from which they are unable to exit by the normal forms ofpolitical and economic initiative, allows particular sectors or localities to opt out of the general legal regime and to develop divergent images of the social future, and combines features of direct and representative democarcy. The guiding impulse of this Leftism is not the redistributive attenuation of inequality and inclusion; it is the **enhancement of the powers and the broadening of the opportunities** enjoyed by ordinary men and women on the basis of the piecemeal but cumulative reorganization ofthe State and the economy. Its watchword is not the humanization of society; it **is the divinization of humanity**. Its innermost thought is that the future belongs to the political force that most credibly represents the cause of the constructive imagination: everyone's power to share in the permanent creation of the new.