## 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.

**Business practices are ongoing conduct defined by the behaviors of many market participants**

Kerry Lynn **Macintosh 97**, Associate Professor of Law, Santa Clara University School of Law. B.A. 1978, Pomona College; J.D. 1982, Stanford University, “Liberty, Trade, and the Uniform Commercial Code: When Should Default Rules Be Based On Business Practices?,” 38 Wm. & Mary L. Rev. 1465, Lexis

These new and revised articles reflect a strong trend toward choosing default rules 4 that **codify** existing **business practices**. 5 [FOOTNOTE 5 BEGINS] In this Article, the term "business practices" is used to refer to practices that **emerge over time** as **countless market participants** exercise their **freedom to engage in profitable transactions**. For an account of the evolution of business practices, see infra Part II. As used here, "business practices" is **broader** and less technical than "trade usage," which the Code narrowly defines as "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the **transaction in question**." U.C.C. 1-205(2). [FOOTNOTE 5 ENDS] This is particularly true of the recent revisions to Articles 3 (Negotiable Instruments), 4 (Bank Deposits and Collections) and 5 (Letters of Credit).

#### Anticompetitive practices evidence violation of antitrust laws

**Acquisition. Gov, 2021** [“Subpart 3.3 – Reports of Suspected Antitrust Violations,” US General Services Administration Federal Government Computer System Report; <https://www.acquisition.gov/sites/default/files/current/far/html/Subpart%203_3.html>]

3.301 General.

(a) Practices that eliminate competition or restrain trade usually lead to excessive prices and may warrant criminal, civil, or administrative action against the participants. Examples of anticompetitive practices are collusive bidding, follow-the-leader pricing, rotated low bids, collusive price estimating systems, and sharing of the business.

(b) Contracting personnel are an important potential source of investigative leads for antitrust enforcement and should therefore be sensitive to indications of unlawful behavior by offerors and contractors. Agency personnel shall report, in accordance with agency regulations, evidence of suspected antitrust violations in acquisitions for possible referral to—

(1) The Attorney General under [3.303](https://www.acquisition.gov/sites/default/files/current/far/html/Subpart%203_3.html#wp1087181); and

(2) The agency office responsible for contractor debarment and suspension under [Subpart 9.4](https://www.acquisition.gov/sites/default/files/current/far/html/Subpart%209_4.html#wp1083280).

3.302 Definitions.

As used in this subpart—

“Identical bids” means bids for the same line item that are determined to be identical as to unit price or total line-item amount, with or without the application of evaluation factors (e.g., discount or transportation cost).

3.303 Reporting suspected antitrust violations.

(a) Agencies are required by [41 U.S.C. 3707](http://uscode.house.gov/browse.xhtml;jsessionid=9F4BEA467D4DDD1DD75B265F8B1F83E0) and [10 U.S.C. 2305(b)(9)](http://uscode.house.gov/uscode-cgi/fastweb.exe?getdoc+uscview+t09t12+37+408++%2810%29%20%252) to report to the Attorney General any bids or proposals that evidence a violation of the antitrust laws. These reports are in addition to those required by [Subpart 9.4](https://www.acquisition.gov/sites/default/files/current/far/html/Subpart%209_4.html#wp1083280).

(b) The antitrust laws are intended to ensure that markets operate competitively. Any agreement or mutual understanding among competing firms that restrains the natural operation of market forces is suspect. Paragraph (c) of this section identifies behavior patterns that are often associated with antitrust violations. Activities meeting the descriptions in paragraph (c) are not necessarily improper, but they are sufficiently questionable to warrant notifying the appropriate authorities, in accordance with agency procedures.

(c) Practices or events that may evidence violations of the antitrust laws include—

(1) The existence of an “industry price list” or “price agreement” to which contractors refer in formulating their offers;

(2) A sudden change from competitive bidding to identical bidding;

(3) Simultaneous price increases or follow-the-leader pricing;

(4) Rotation of bids or proposals, so that each competitor takes a turn in sequence as low bidder, or so that certain competitors bid low only on some sizes of contracts and high on other sizes;

(5) Division of the market, so that certain competitors bid low only for contracts awarded by certain agencies, or for contracts in certain geographical areas, or on certain products, and bid high on all other jobs;

(6) Establishment by competitors of a collusive price estimating system;

(7) The filing of a joint bid by two or more competitors when at least one of the competitors has sufficient technical capability and productive capacity for contract performance;

(8) Any incidents suggesting direct collusion among competitors, such as the appearance of identical calculation or spelling errors in two or more competitive offers or the submission by one firm of offers for other firms; and

(9) Assertions by the employees, former employees, or competitors of offerors, that an agreement to restrain trade exists.

(d) Identical bids shall be reported under this section if the agency has some reason to believe that the bids resulted from collusion.

(e) For offers from foreign contractors for contracts to be performed outside the United States and its outlying areas, contracting officers may refer suspected collusive offers to the authorities of the foreign government concerned for appropriate action.

(f) Agency reports shall be addressed to the—

Attorney General   
U.S. Department of Justice   
Washington DC 20530   
Attention: Assistant Attorney General   
Antitrust Division

and shall include—

(1) A brief statement describing the suspected practice and the reason for the suspicion; and

(2) The name, address, and telephone number of an individual in the agency who can be contacted for further information.

(g) Questions concerning this reporting requirement may be communicated by telephone directly to the Office of the Assistant Attorney General, Antitrust Division.

#### 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-

#### You should privilege debate over different political paradigms over endorsing any one political paradigm. Unflinching commitments ignore the complexity and partiality of any political theory. Promoting clash is key to interrogate complex issues, problematize solutions, and actualize any benefits of debate.

Tully ‘2 – Jackman Chari of Philosophical Studies at Toronto (James, Political Philosophy as Critical Activity, Political Theory 30 (4) p. 544-546)

Accordingly, understanding and clarifying political concepts, whether by citizens or philosophers, will always be a form of practical reasoning, of entering into and clarifying the ongoing exchange of reasons over the uses of our political vocabulary. It will not be the theoretical activity of abstracting from everyday use and making explicit the context-independent rules for the correct use of our concepts in every case, for the conditions of possibility for such a metacontextual political theory are not available. When political philosophers enter into political discussions and disputes to help clarify the language being used and the appropriate procedures for exchanging reasons, as well as to present reasons of their own, they are not doing anything different in kind from the citizens involved in the argumentation, as the picture of political reflection as a theoretical enterprise would lead us to believe. Political philosophy is rather the methodological extension and critical clarification of the already reflective and problematised character of historically situated practices of practical reasoning.'8 Thus, we can now see why the first step should be to start from the ways the concepts we take up are actually used in the practices in which the political difficulties arise. Here we 'bring words back from their metaphysical to their everyday use' to ensure that the work of philosophy starts from 'the rough ground' of struggles with and over words rather than from uncritically accepted forms of representation of them, which may result in 'merely tracing round the frame through which we look at' them. '9 On this view, contemporary political theories are approached, not as rival comprehensive and exclusive theories of the contested concepts, but as limited and often complementary accounts of the complex uses (senses) of the concepts in question and the corresponding aspects of the problematic practice to which these senses refer. They extend and clarify the practical exchange of reasons over the problematic practice of governance by citizens, putting forward a limited range of academic reasons, analogies, and examples for employing criteria in such-and-such a way, for showing why these considerations outweigh those of other theorists, and so on (often of course with the additional claim that these limited uses transcend practice and legis- late legitimate use). A theory clarifies one range of uses of the concepts in question and corresponding aspects of the practice of government and puts forward reasons for seeing this as decisive. Yet there is always the possibility of reasonable disagreement, of other theories bringing to attention other senses of the word and other aspects of the situation that any one theory unavoidably overlooks or downplays. Political theories are thus seen to offer conditional perspectives on the whole broad complex of languages, relations of power, forms of subjectivity, and practices of freedom to which they are addressed. None of these theories tells us the whole truth, yet each provides an aspect of the complex picture.20 This first form of survey enables readers (and authors) to understand critically both the problem and the proposed solutions. It enables us to see the reasons and redescriptions on the various sides; to grasp the contested criteria for their application, the circumstances in which they can be applied, and the considerations that justify their different applications, thereby passing freely from one sense of the concept to another and from one aspect of the practice to another; and to appreciate the partial and relative merits of each proposal. To have acquired the complex linguistic abilities to do this is literally to have come to understand critically the concepts in question. This enables us to enter into the discussions of the relative merits of the proposed solutions our- selves and present and defend our own views on the matter. To have mastered this dialogical technique is to have acquired the 'burdens of judgment' (in a broader sense than Rawls's use of this phrase is normally interpreted) or what Nietzsche called the ability to reason 'perspectivally'.21 This form of practical reasoning is also a descendent of the classical humanist view of political philosophy as a practical dialogue. Because it is always possible to invoke a reason and redescribe the accepted application of our political concepts (paradiastole), it is always necessary to learn to listen to the other side (audi alteram partem), to learn the conditional arguments that support the various sides (in utramque partem), and so to be prepared to enter into deliberations with others on how to negotiate an agreeable solution (negotium).22

## Cap

#### The affirmative is a product of neoliberalism, producing violent forms of disciplining, and results in the hypervaluation which turns the efficacy of the aff.

Mitchell 13—Assistant Professor, Feminist Studies Department, Critical Race and Ethnics Studies, U.C. Santa Cruz [Nick, “On Audre Lorde’s Legacy and the “Self” of Self-Care, Part 2 of 3,” May 14, 2013, http://www.lowendtheory.org/post/50428216600/on-audre-lordes-legacy-and-the-self-of]

Audre Lorde didn’t die a natural death. She died an institutionally produced one, a death that was generated at the level of social infrastructure. I want us to learn to regard Audre Lorde’s death as an effect of racial capitalism—its fundamentally unequal provisioning of wealth and social goods, its ableist and productivist standards as to what constitutes a healthy person, its fashioning of health care as a private commodity rather than as a fundamental right, and its particular commingling of sexism and racism that at one and the same time materializes the constant demand that black women work and renders the work they do invisible. The conditions that produced Audre Lorde’s death, in other words, might also serve as a reminder that in the aggregate, black women bear a disproportionate share of racial capitalism’s propensity to work its workers to death. And a major feature of these death-making conditions is to be found in the ways in which it is structured so as to refuse to recognize as work what so many black women do for themselves, for each other, and for their communities—this may include but is not limited to the largely unwaged work of cooking, cleaning, raising, educating, and caring for children and adults in its myriad forms. (This is the work, to paraphrase part of the most overlooked chapter of Angela Davis’s Women, Race, and Class, that no one notices until it’s not done.)

To reiterate, these death-making conditions serve as a motor for racial capitalism not only through the erasure, devaluation, and naturalization of life-making and life-sustaining (also called "reproductive”) work that women are expected to learn to do, to do, and to love doing,[1] but also because through the erasure of “women’s work” as work, they serve to compel and coerce workers to accept waged labor above and beyond the work they already perform. This compulsion and coercion regularly takes the form of the form of the stigmatization and surveillance of poor people and poor women especially, who use governmental assistance to survive. And again, here, black women bear the brunt of the burden of capitalism’s stigmatization of the poor (of color). "Welfare,“ as Dorothy Roberts puts it, "has become a code word for race.” By which she means: a code word for blackness. Think here of the sheer prominence of the “welfare queen” stereotype (and its deployment to make common sense out of the notion that black women who use governmental assistance are parasitic on the social body). Think here, also, how the racializing and gendering of that stereotype authorizes the constant surveillance to which welfare recipients are regularly and systematically subjected, surveillance whose purpose it is to call into doubt the ability of welfare recipients to make fitting choices in deciding how and what to feed themselves (and those that depend upon them), how and what they should consume.

It matters that Audre Lorde, by virtue of a class mobility that materialized in the form of advanced degrees, international recognition and renown, and semi-stable employment with what were clearly circumscribed “health benefits,” may have been able to escape the worst of the state-sanctioned, Reaganomics-fueled state surveillance directed towards poor black women.[2] And it also matters that the racializing and gendering project of the capitalism that underwrites that surveillance also shaped the conditions in which she lived and died in ways that are too rarely recognized. We in the U.S. left are well trained to express outrage when black lives are stolen in spectacular events—not only in the assassinations of “our” Malcolms and Martins, but even in the executions of our less famed Emmetts and Oscars and Trayvons. Yet we are not always best equipped to organize against the politics that produce deaths not in spectacular (and regular), direct, face-to-face expressions of violence but rather, through other, less readily visible, rhythms and structures of everyday life. To ask that we regard Audre Lorde’s death as the outcome of a politics (and not just a disease) is both to invoke Lorde less as an exceptional figure than as a powerfully exemplary one, and to direct our attention to how the murderousness of capitalism expresses itself where it is most mundane.[3]

Mundane murderousness, slow death (which may in many cases not be slow at all), has taken institutional form in part as a consequence of the consolidation of health care as a for-profit industry that defines health as the capacity to work. “Health,” in this context, is measured by the health of racial capitalism. Such a definition means that being healthy is understood as having the capacity to optimize your ability to be exploited. No medical leave, then, for the English prof who’s battling cancer. No capacity, then, to decide for herself what her health needs are and to act on that decision—the social infrastructure of neoliberalism has already coded giving its workers that much freedom, that kind of autonomy, as an unaffordable extravagance.

Care as extravagance. Historically speaking, it is here, in the Reagan era, that the “self” of self-care emerged. Donald Vickery and James Fries’s bestseller Take Care of Yourself: A Consumer’s Guide to Medical Care was published in 1981, and formed part of a larger explosion of “self-help” publications that encouraged a readership increasingly clobbered by a neoliberal assault—against liveable wages, workers rights, social services, and the welfare state writ large—to take it upon themselves to manage the consequences of that clobbering. And I would argue that the “self” of self-care came into being precisely as an effect of that management, as well as of the clobbering that both preceded and accompanied it. It euphemizes as a goodwill gesture (the benevolent “take care of yourself!”) an imperative that, if elaborated, looks much more like a relation of coercion and discipline (“take care of yourself or your job will go to someone who does”; “take care of yourself lest you fall ill and get saddled with medical debt”; “take care of yourself because you have no right to expect that society will”; “take care of yourself…or else”). The self of self-care, all of this is to say, has a history that should serve as a caution toward attempts to make self-care an unqualified good. It is a self that is specifically calibrated as a defensive reaction to the combination of austerity politics with reinvigorated forms of gendered racism that cut across the entire social formation.

Especially for those of us who were born and/or grew up in the Reagan and Bush I eras, the self of self-care was the form of selfhood that hegemonic institutions taught us to internalize. This is not to say that there is nothing of value to be found in the language of practice of self-care. It is to suggest, rather, that self-care is not simply a form of struggle but the outcome of various struggles that have played out on a larger scale than we tend to acknowledge when we speak of it. This struggle involved, among other things, the disqualification of initiatives by the radical labor movement to establish universal health care as a right rather than a “benefit” restricted to and contingent upon employment in certain sectors. It involved the marginalization of years of efforts by the Black Panther Party and the National Welfare Rights Organization both to establish community clinics and to redefine health care not as a commodity but as both a fundamental question of justice and a condition of community self-determination.[4]

With all of this said, what do we make of this Audre Lorde quote?: “Caring for myself is not self-indulgence, it is self-preservation, and that is an act of political warfare.” It is both thrilling and affirming, I think, to sit with the possibilities of redefining self-care as though it were going on the political offensive. This may especially be the case in a context where the dominant meaning of “care” either has become industrialized in such a way that it consolidates (instead of contests) one’s'alienation from her conditions of existence, or from the means necessary to inform herself about, determine, and pursue the course of care and wellbeing that she needs.

But what I think is especially important about this now regularly cited quotation is what comes before the first comma, what comes before, that is, the moment when self-care finds its euphemistic, sunny resolution as “political warfare”: the disavowal of self-care as “self indulgence.” What, after all, is wrong with self-indulgence, with stealing time to enjoy the self, to pursue ways of being and living that are not necessarily productive, even if to do so is to steal away from the justifiably voracious appetites of left political desire? Lorde’s rewriting of self-care as political warfare seems to me to be symptomatic of a philosophy of movement building that has an unacknowledged investment in surveilling the behavior of its members (and demanding that they surveil themselves), a philosophy that is so deeply committed to the idea that everything is political that it cannot see the ways it enforces that definition through the implicit demand that its members justify all their behavior on its terms. Everything is political, in other words, can be a particularly disciplinary and disciplining definition of the political because of the way that it privileges a kind of ruthless scrutiny, assessment, and justification of one’s behaviors on the basis of whether or not they generate political value. At the same time, it tends to regard the political less as a contestation over social transformation than as the sum total of “good” or “bad” political behaviors.

At worst, everything is political can privilege a kind of left version of austerity logic, one that calls implicitly for the abstention from behaviors that don’t serve the Higher Purpose of generating and assessing individual behavior in the form of political value. It can only handle self-indulgence and extravagance when those things can be given a justifiable political form, when they can be commended or valorized, in other words, for how radical they are. It can only handle self-indulgence and extravagance, in other words, when they cease to be self-indulgent or extravagant at all, and claim, on the flip, to be productive and progressive.

Austerity logics, whether they come from the left or the right, get articulated through the bodies of black women by making certain kinds of demands on them. An important thing to understand about these demands is that they do not simply take the form of general devaluation. They do not simply take the form of the welfare queen stereotype. They can also take the form of a general overinvestment or hypervaluation—in feelings and performances of excessive admiration, deference, and high regard. They can inhabit the expectation—an expectation that, again, can have the force of a demand—that black women embody a kind of superhuman strength, or that they inherently possess an exceedingly resolute political consciousness. Unlike the bad faith that underwrites the demonization of black women as unproductive, this leftist hypervaluation of black women often takes the form of love.

Love: Killing love, perhaps. It is the kind of love that solicits a constant performance from black women, one that demands that they be endlessly productive, endlessly working, for the movement, even after death. It is for this reason that I spent some time in the last post attempting to contest the deification of Lorde: I want to make visible just how much work is implicitly called for in the desire for black women to be adequate to what is asked of them–which they very well may also want of themselves. The point is that any politics that seeks to celebrate the seemingly superhuman accomplishments of black women can become the unwitting collaborator with the entire field of the political that we might want to contest, a field in which the superhuman demands placed on black women are nothing short of murderous. The point is, while it may appear to honor the Audre Lordes (1934-1992) and the Barbara Christians (1943-2000) and the VèVè Clarks (1944-2007) and the Sherley Anne Williamses (1944-1999) with the demand that they rest in power, there may also be an ethics, if not also a justice, in insisting on their right to rest in peace.

And the point is that our discussions about self care are particularly impoverished when they fail to engage broader questions about the structure of health care, the social distribution of wealth, and the conditions in which we live and work. This is the thread I’ll pick up in the third and final installment of this piece by addressing last year’s series of debates on self-care and community care.

#### Capitalism causes environmental destruction and wars

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

#### The aff seeks legitimation within academic structures—viewing affirmation as the fulcrum from change create neoliberal enclave politics.

Phillips 99 Dr. Kendall R., Professor of Communication at Central Missouri State University, PhD in Speech Communication from Pennsylvania State University, MA in Speech Communication from Central Missouri State University, BS in Psychology and Sociology from Southwest Baptist University, “Rhetoric, Resistance, and Criticism: A Response to Sloop and Ono”, Philosophy & Rhetoric, Volume 32, Number 1, p. 96-101

My concern with this movement centers around an issue that Sloop and Ono seem to take as a given, namely, the role of the critic. On one hand, calling for the systematic investigation of existing marginalized discourses is a natural extension both of critical rhetoric (see McKerrow 1989, 1991) and of the general ideological turn in criticism (see Wander 1983). On the other hand, the ease of transition from criticism in the service of resistance to criticism of resistance may obscure the need to address some fundamental issues regarding the general function of rhetorical criticism in an uncertain and contentious world. Beyond licensing the critic to engage in political struggle, Sloop and Ono advocate the pursuit of covert resistant discourses.

Such a move not only stretches our understanding of rhetoric and criticism, but also alters significantly the relationship between critic and out- law. Critical interrogation of dominant discursive practices in the service of political/cultural reform is supplanted in favor of positioning covert out- law communities as objects of investigation. Invited to seek out subversive discourses, the critic is positioned as the active agent of change and the out-law discourse becomes merely instrumental. Rather than academic criticism acting in service of everyday acts of resistance, everyday acts of resistance are put into the service of academic criticism.

Rhetorical resistance

That we are "caught within conflicting logics of justice that are culturally struggled over" (Sloop and Ono 1997, 50) and that rhetoric is employed in these struggles seems an uncontroversial statement. Despite the theoretical miasma surrounding judgment, Sloop and Ono accurately note, the material process of rendering judgments (and of disputing the logics of litigation) continues in the world of actually practiced discourse. In the materially contested world, rhetoric is utilized both by those seeking to secure the grounds of dominant judgment and by those seeking to undermine or supplant dominant cultural logics with some out-law notion of justice.

The distinction between these two cultural groups, "in-law" and out- law, however, deserves some consideration prior to any discussion of the role of the critic as implied in the out-law discourse project. The discourse of the dominant or those within the bounds of superordinate logics of litigation is reminiscent of Michel De Certeau's (1984) strategic discourse. For De Certeau, strategies are utilized by those who have authority by virtue of their proper position. Strategies exploit the institutionally guaranteed background consensus by which power relations (and litigations) are maintained and advanced. In contrast, tactics are utilized by those having no proper place of authority within the discursive economy who must seek opportunities whereby the discourse of the dominant might be undermined and contested. To extend Sloop and Ono's definition, out-law discourses are those that can (and, by their analysis, do) take advantage of situations (e.g., race riots) to disrupt the regularity of dominant cultural groups.

The ongoing struggle between strategically instituted cultural dominants and the "out-law always lurk[ing] in the distance" (66) is acknowledged, even celebrated, by Sloop and Ono. What their acknowledgment fails to provide, however, is a clear need for critical intervention. Indeed, quite the reverse is presented: It is the critic (particularly the left-leaning critic) who needs out-law discourse. While the struggles over justice, equality, and freedom have gone on, the left-leaning critics are those who have theoretically excluded themselves from the disputes. The study of out-law dis- courses, then, provides a means to reinvigorate the intellectual and re-institute (academic) leftist thinking into popular political struggles (53-54). Thus, Sloop and Ono's project incorporates three types of rhetoric: the rhetoric of the in-law, presumably the traditional object of critical attention; the rhetoric of the out-law, the study of which may transform our understanding of judgment as well as reinvigorate leftist democratic critiques; and the rhetoric of the critics who, having lost their political po- tency, can exploit the discourse of the out-law to promote ideological struggles. It is to this critical rhetoric that I now turn.

Resistance criticism

Sloop and Ono (1997) clearly state the relationship they envision between the rhetorical critic and out-law discourse: "Ultimately, we will argue that the role of critical rhetoricians is to produce 'materialist conceptions of judgment,' using out-law judgments to disrupt dominant logics of judgment" (54; emphasis added). Here the critic seeks out vernacular discourse (60), focuses on the methods and values embodied in these communities (62), listens to and evaluates the out-law community (62-63), and chooses appropriate discourses for the purpose of disrupting dominant practices (63). Essentially, it is the critic who seeks out marginalized discourses and returns them to the center for the purpose of provoking dominant cultural groups (63).

Despite acknowledging the efficacy of out-law discourses, Sloop and Ono assume that the critiques generated and presented by the out-law community have only minimal effect. The irony, and indeed arrogance, of this assumption is evident when they claim: "There are cases, however, when, without the prompting of academic critics, out-law discourses serve local purposes at times and at others resonate within dominant discourses, disrupting sedimented ways of thinking, transforming dominant forms of judgment" (60; emphasis added). Sloop and Ono seem to suggest that such locally generated critiques are the exception, whereas the political efficacy of the academic critic is the rule. This seems an odd claim, given that the justification for their out-law discourse project is the lack of politically viable academic critique and the perceived potency of out-law conceptions of judgment. Their suggestion that out-law communities are in need of the academic critic contradicts not only the already disruptive nature of existing out-law discourses (the grounds for using out-law discourse), but also the impotence of contemporary critical discourse (the warrant for studying out-law discourse).

By this I do not mean that the critiques and theories generated by academically instituted intellectuals have not been incorporated into subversive discourses. Just as out-law discourses inevitably mount critiques of dominant logics, so, too, the perspectives on rhetoric and criticism generated by academics are used in resistance movements. Feminist critiques of patriarchy, queer theories of homophobia, postcolonial interrogations of race have found their way into the service of resistant groups. The key distinction I wish to make is that the existence of criticism (academic or self-generated) in resistance does not necessitate Sloop and Ono's move to a criticism of resistance.

What Sloop and Ono fail to offer is an adequate argument for "taking public speaking out of the streets and studying it in the classroom, for treating it less as an expression of protest" (Wander 1983, 3) and more as an object for analysis and reproduction within the political economy of the academy. Philip Wander made a similar charge against Herbert Wicheln's early critical project, and this concern should remain at the forefront of any discussion aimed at expanding the scope and function of criticism. Sloop and Ono offer numerous directives for the critic without addressing whether the critic should be examining out-law discourses in the first place. While it is too early to suggest any definitive answer to the question of criticism of resistance, some preliminary arguments as to why critics should not pursue out-law discourses can be offered:

(1) Hidden out-law discourses may have good reasons to stay hidden. Sloop and Ono specifically instruct us that "the logic of the out-law must constantly be searched for, brought forth" (66) and used to disrupt dominant practices. But are we to believe that all out-law discourses are prepared to mount such a challenge to the dominant cultural logic? Or, indeed, that the members of out-law communities are prepared to be brought into the arena of public surveillance in the service of reconstituting logics of litigation? It seems highly unlikely that all divergent cultural groups have developed equally, or that all members of these groups share Sloop and Ono's "imperial impulse" (51) to promote their conceptions and practices of justice.

(2) Academic critical discourse is not transparent. Here I allude to the overall problem of translation (see Foucault 1994; Lyotard 1988; Lyotard and Thebaud 1985; Zabus 1995) as an extension of the previous concern. Critical discourse cannot become the medium of commensurability for divergent language games. Are we to believe that the "use" of out-law dis- course by critics to disrupt dominant practices can fail to do violence to these diverse/divergent logics? Are out-law discourses merely tools to be exploited and discarded in the pursuit of returning leftist academic dis- course to the center?

(3) Perhaps the academic translation of out-law discourse could be true to the internal logic of the out-law community. And, perhaps the re-presentation of out-law logic within the academic community will bestow a degree of legitimacy on the out-law community. Nonetheless, the effect of legitimizing out-law discourse is unknown and potentially destructive. In an effort to siphon the political energy of out-law discourse into academic practice, we may ultimately destroy the dissatisfaction that serves as a cathexis for these out-law discourses. It seems possible that academic recognition might take the place of struggle for material opportunities (see Fraser 1997). But, will academic legitimation create any material changes in the conditions of out-law communities? I mean to suggest, not that it is better to allow the out-law community to suffer for its cause, but rather that incorporating the struggle into an (admittedly) impotent academic critique does not offer a prima facie alternative.

(4) Criticism of resistance denies the practical and theoretical importance of opportunity. Returning to De Certeau's notion of tactics, the crucial element of these discursive moves is their use of opportunity to disrupt the proper authority of the dominant. The kairos of intervention provides the key to undermining "in-law" discourses. But when is the "right moment in time" for the academic reproduction of out-law discourse? Mapping the points of resistance (ala Foucault and Biesecker) entails interrogating "in-law" discourses for their incongruities and contradictions, not turning the academic gaze upon those communities waiting for an opportunity. Out-laws do not lurk in the forefront (66), hoping to be exposed by academic critics; they wait for the right moment for their disruption. Rhetoricians can provide rhetorical instructions for seeking opportunities and for exploiting these opportunities (literally making the culturally weaker argument the stronger), but this does not justify interrogating (intervening in) the cultural logics of the marginalized.

The concerns raised here are not designed to dismiss Sloop and Ono's provocative essay. The divergent critical logic they outline deserves careful consideration within the critical community, and it is my hope that the concerns I raise may help to further problematize the relationship between

resistance and rhetorical criticism.

Rhetorical criticism

As I have suggested, my purpose is to use the provocative nature of Sloop and Ono's project to extend disputes regarding the ends of rhetorical criticism. Diverging perspectives on the ends of criticism have been categorized by Barbara Warnick (1992) as falling along four general lines: artist, analyst, audience, and advocate. Leah Ceccarelli (1997) discerns similar categories around the aesthetic, epistemic, and political ends of rhetorical criticism.

The out-law discourse project presents clear ties to the notion of critic as advocate. For Sloop and Ono, the critic is an interested party, discerning (and at times disputing) the underlying values and forces contained within a discourse. Additionally, however, the out-law discourse critic is an analyst focusing on the hidden, aberrant texts of the out-law and "rendering] an incoherent or esoteric text comprehensible" (Warnick 1992, 233). Now, I am not suggesting that a critic must serve only one function or that the roles of advocate and analyst are mutually exclusive; rather, these entanglings of power (political ends) and knowledge (epistemic ends) are inevitable. My concern is that we not neglect the complexity of these entanglements. Turning covert out-law discourses into objects of our analyses runs the risk of subjecting them both to the gaze of the dominant and to the power relations of the academy. As the works of Michel Foucault (especially 1979, 1980) aptly illustrate, practices presented as extending such noble goals as emancipation and humanity may endow institutions of confinement and objectification. Any justification for studying out-law dis- course because doing so may extend our political usefulness in the pursuit of emancipatory goals must not obscure the already existing power relations authorizing such studies. Our attempts to extend our domains of knowledge and expertise (authority) must not be pursued unreflexively.

#### Our alternative is to make pragmatic demands upon the state towards an anti-capitalist project through solidarity-based politics. Ethical positions are insufficient – using political tools to break down monopoly through antitrust is necessary.

Vaheesan ’19 [Sandeep; Legal Director @ Open Markets Institute, JD @ Duke; “The Profound Nonsense of Consumer Welfare Antitrust,” *The Antitrust Bulletin* 1(16); AS]

III. The False Naturalization of the Market

A market economy is a state-constructed institution. Government action establishes the foundational rules of an economy—rules without which an economy cannot function. Among other things, government at different levels creates property rights, enforces contracts, charters corporations, issues money, awards copyrights and trademarks, and establishes consumer and worker rights. Antitrust rules are part of this dense layer of rules that enable and shape market activity. Despite frequent invocations of “free markets” and the “private sector” in public discourse, a market does not emerge spontaneously but depends on extensive state action.

The Supreme Court and the DOJ and the FTC, explicitly or implicitly, suppress the constitutive function of state action. Instead, in line with the paradigm of the law and economics school in general, they rely on a false conception of the market. The Court and the agencies treat existing market arrangements as somehow natural or efficient and view antitrust as exogenous government intervention that should be circumscribed. Rather than treat antitrust law as part of the stateconstructed system of market rules, judges and enforcers view antitrust as an incursion on the Edenic marketplace.

A. The State Construction of the Market

Government, at federal and state levels, establishes the conditions and rules necessary for a market to function. It creates and protects property rights, enforces contracts, charters corporations, and issues money. These are illustrative and just some examples of the state structuring and governance of the market. Without these rules and a coercive authority to enforce them, a market activity could not exist, let alone flourish. In other words, a market economy is not and cannot be “free” but is instead constructed through government action.

The state defines and enforces rules of property. The state decides what qualifies as property and offers holders of property rights, whether in land or over intangibles, the right to call on coercive state action when their interest has been infringed. And the question of what constitutes property is not stable. State action has both narrowed and broadened property. For example, the Civil War and the ratification of the 13th Amendment abolished and outlawed slavery—property rights in human beings.31 In other ways, the state has expanded the scope of property. Property over intangibles has expanded over the course of American history. For example, Congress and the courts have broadened the subject matter entitled to exclusivity rights32 and extended the length of copyright terms.33 The Supreme Court in Goldberg v. Kelly in 1970 recognized that the meaning of property is indeterminate and that common law conceptions are not preserved in an amber encasement for eternity.34

The government also facilitates the making of contracts. Courts stand ready to enforce contracts and award relief in the event one party fails to fulfill its commitments and breaches the contract. Without this coercive power, contracts would not carry the force of law. In ruling that racially restrictive covenants in housing are unconstitutional, the Supreme Court described how the purportedly private world of contract is backed by public power. The Court stated:

These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell.35

Courts also withhold enforcement of other contracts. For instance, in many states, credit contracts with interest rates in excess of the state cap are unenforceable.36 Similarly, the State of California bars the judicial enforcement of noncompete clauses against workers.37

Market governance is not and cannot be neutral. In addition to being illustrative of how state action constructs a market, property and contract show how the state decides who wields power in the economy. The government through property, contract, tort, banking regulation, consumer protection, and numerous other areas of law not only sets the rules of the game but also allocates who has enforceable rights.

In expanding or narrowing legal rights, the government decides who possesses power and who does not. Workers who can organize boycotts and sympathy strikes have much greater power to unionize firms and industries and reach favorable terms with employers than workers who do not possess this right, such as American workers at present. Similarly, consider state law on noncompete clauses. A state that enforces noncompete clauses against workers tilts the balance of power in the employment relationship in favor of employers, relative to a state that does not enforce these restraints.

Against this background of market-creating state action, antitrust modifies existing legal entitlements and redistributes power within the economy. It reconfigures state construction of the economy. The late antitrust scholar John Flynn situated antitrust against this background of state action and wrote:

Antitrust policy should be viewed as it originally was in the legislative history of the antitrust laws and the Addyston Pipe & Steel case as part of the fundamental laws defining the scope of property and contract rights, rather than as a bothersome limitation upon the unfettered right to invoke the community’s law to exercise such rights.38

Consider two important ways in which antitrust reshapes common law legal entitlements. First, antitrust limits the ways in which property holders can acquire and use these legal entitlements. For example, the Clayton Act abridges the right of businesses to acquire the property rights of competing or otherwise related businesses.39 In limiting the property rights of some entities, it grants greater freedom to customers, suppliers, and others affected by the power associated with concentrated property holdings. Second, the antitrust laws limit the scope of contract law. The Sherman Act prohibits contracts that restraint trade or monopolize markets. For instance, it prohibits price-fixing contracts that raise or lower prices.40 In limiting the contractual freedom of certain parties, the Sherman Act protects, for instance, consumers from unduly high prices for essentials and workers from unfairly low wages for their labor.41

Antitrust law is analogous to nuisance law. Nuisance law restricts how property owners exercise their rights—for example, by prohibiting the operation of furnaces that produce noxious fumes that are carried downstream by the wind—to protect other property owners’ right of quiet enjoyment on their land. In a similar vein, antitrust law restricts the liberty of powerful actors to use their property rights as they wish and thereby protects the property rights and liberty of others. Like nuisance, antitrust law does not abridge rights categorically but instead reallocates them, limiting the discretionary power of corporations and enhancing the freedom of consumers, sellers, small firms, and rivals.

B. The Supreme Court and Federal Court Naturalize the Common Law Rules of the Market

In adopting and implementing consumer welfare antitrust, the Supreme Court and the antitrust agencies have naturalized the legal construction of the market. Much of this has been implicit. Their embrace of consumer welfare meant an embrace of the law and economics ideology that asserts self-regulating markets in which the state “intervenes” after the fact, for better or for worse. Against this background of a natural market and natural common law rules, antitrust is treated as a “statist” encroachment that should be treated skeptically and circumscribed. While this market naturalization is generally implicit in antitrust opinions and guidance documents, the FTC does surface it in its competition advocacy work and reveals its belief in an Edenic, prepolitical marketplace.

The law and economics ideology that has informed contemporary antitrust submerges the state action underlying a market economy. Indeed, law and economics has more deeply shaped antitrust than any other field of law. The framework of law and economics posits a market preexisting the state. The market emerges as a force of nature. The state follows and intervenes in response to discrete market failures in which existing markets do not conform to certain textbook criteria (the optimistic view of the state) or in response to political pressures from well-connected individuals and organizations (the pessimistic view of the state). In this framework, the legal construction of the existing market and economy is erased.

## Case

### 1NC—Top Level

#### 1. Vote neg on presumption—

#### The 1AC fails to change the structures of debate that they criticize --- people flow, process, and evaluate their arguments --- while the 1ac expresses the need for absolute distance from “traditional policy debate,” they robustly participate in them --- intercollegiate debate only exist as an extension of state funding and support. Their arguments gain moral force not because of how different they are from normal practice, but because of the very structures of the university and burden of rejoinder which they claim to be separate from.

#### 2. Resistance DA—

#### 1) Resistance focused on livingness within debate fails to challenge existing power relations

Cheah 11 Pheng CHEAH Rhetoric @ Berkeley ’11 “Crises of Money” in Creolization of Theory eds. Françoise Lionnet, Shu-mei Shih p. 84-93

At the same time, however, Fanon's insistence on the dignity of sheer life as the necessary outcome of his analysis of colonial trauma leaves the governing motif of the classical concept of trauma intact. For whether it is a matter of mere corporeal survival or being able to lead an emotionally healthy, bearable, and less unhappy life, what is always at stake is the security of the living self**,** the organism's ability to protect itself from physical or psychical distress that comes from the outside.10 The ultimate aim of Fanon's explication is to remove the various external impositions that have led to the evisceration of black consciousness: the collective unconscious, the racialepidermal schema, the various processes of unconscious socialization of the black person as an individual, but most important, the social, political, and economic conditions of European colonialism. Black Skin, White Masks is intended to be a mirror that enables the black person to recognize himself as a universal human being so that he can be returned to the path of a normal or undistorted dialectical relation to the world.11 The important point here is that this involves the constitution of a strong consciousness that can master and bind the physical and psychical excitations impacting on it. Fanon's project is essentially one of helping the subject regain its self-mastery, power, or sovereignty so that it can return to an autonomous, normal path of development, one free of any heteronomy or subordination to an other. The fundamental principle or value governing Fanon's project thus remains that of security: the reconsolidation and strengthening of an interior so that it can withstand or regulate any breaching from the outside, so that it can stem any excessive exposure to alterity. (Colonial) political domination or subjugation is traumatic because it causes the erosion and loss of the colonized subject's psychical self-mastery. Conversely, political and economic sovereignty or self-determination is the necessary condition for black consciousness to regain its self-mastery and health.

#### 2) Strategies that preference resilience increase the strength of the very institutions they criticize—

James 14 (Robin James is Associate Professor of Philosophy at UNC Charlotte, ON RESILIENCE & ‘SELF-CARE AS WARFARE’, September 28, 2014, <http://www.its-her-factory.com/2014/09/on-resilience-self-care-as-warfare/)//TR>

I’ve been using the concept of [resilience](http://www.its-her-factory.com/2014/05/oh-bondage-up-yours-resilience-as-feminine-ideal-and-racializing-technology-my-philosophia-2014-talk/) as a way to understand one of these latter methods. (I think self-care is legible as resilience only when subjects occupy specific situations.) What do I mean by ‘resilience’? Well, some women are tasked with the imperative “you must be a survivor.” We’re supposed to Lean In, or show “grit” by learning to code, to rock, to run, or whatever. By overcoming our personal gendered damage, we both (a) show that society has overcome patriarchy, and (b) take out the trash, those individuals/groups who aren’t flexible, adaptable, indeed, resilient enough to keep up with the post-feminist times. Resilience is a means of producing (a) and (b)–it’s a way of organizing society to funnel the profits from this surplus value to privileged people and institutions. This is why resilience is not about personal healing: resilient self-care is just another, upgraded way of instrumentalizing the same people.

Resilience is not actually about your survival; it’s about the survival and health of hegemonic institutions like MRWaSP. It’s a strategy MRWaSP uses to wage its war. Contemporary white supremacist patriarchy “includes” some formerly excluded populations, but they’re included as always in need of remediation, as eternally working on and improving themselves (we’re not “in” yet, just constantly leaning that way). (Just to be clear: individuals can be seen as successfully and finally remediated, but the group as a whole still isn’t completely finished.) This is really convenient for capitalism too, because people’s endless laboring on themselves opens up the personal “disciplines” (what were formerly preconditions for capitalist production, what standardized workers and made them docile cogs in the machine) as sources of surplus value production.

The labor of resilience only seems like self-care because society is structured so that it functions optimally when you (or people like you) succeed. So resilience isn’t about cultivating what you need, it’s about adapting to dominant notions of success. What they say is ‘healthy’ might not actually be healthy, for example. This is self work, but not necessarily self “care.” This sort of work looks and feels like care because its rewards are generally affective, physiological, and personal. It is a kind of “care” labor on the self, but it is not actually “caring” in the sense of 70s feminist care ethics, i.e., of cultivating relationships that support one another. In fact, I think cultivating relationships that support one another–that is, re-organizing society on whatever scale you can to make it more survivable–is one of the best ways to think about refusing the work of resilience. It’s quite similar to what Ahmed describes as “redirecting care away from its proper objects.”

Re-organizing relationships of support and dependence is one thing that happens when workers go on strike. In a well-organized strike, supporters and participants help one another do things that would normally happen as a business transaction, like the provision of food and services. So maybe those of us tasked with the work of resilience should imagine our resistance not as warfare, but as a strike. There’s a difference between surviving a system predicated on your death, and bending the circuits of systems designed to support (a very narrowly drawn model of) your life. In the former case, your survival disrupts systems predicated on your death; in the latter case, refusing to work/generate surplus value diminishes the vitality of the systems that profit from your work.

I think there are some other important differences between resilience and guerilla self-care, differences that make it pretty clear that “an individual woman who is trying to survive an experience of rape by focusing on her own wellbeing and safety” is not “participating in the same politics as a woman who is concerned with getting up ‘the ladder’” (Ahmed). First, resilience is a specific method for producing human capital, that is, for getting a return on the investments you make in your self-improvement. And to get these returns, your recovery must be spectacular–that is, made into a spectacle consumable (and shareable) by others. Resilience discourse makes a spectacle of the performance of survival. Self-care isn’t resilient self-work unless it’s rendered into human capital, i.e., what gets you “up the ladder.” Second, self-care is an ongoing process. Dealing with trauma can be a lifelong project. Resilience, on the other hand, treats therapeutic overcoming as a resolved accomplishment: I was once damaged, but now I am better. Resilience says “Look, I Overcame” (spectacle + past tense).

#### 3) Disavowal of norms, which allow for debate to occur. Focus on the freedom to be oneself supports the culture of self-affirmation. The politics of performing self-determination turns into conformity and authoritarian *enclave politics*.

Myers 13—Associate Professor of political science and gender studies at the University of Utah [Ella, *Worldly Ethics: Democratic Politics and Care for the World*, p. 46-49]

The therapeutic ethics advanced by Foucault and Connolly resonate strongly with dominant features of American culture. In particular, therapeutic ethics echoes a widely held popular belief, captured in this chapter's second epigraph, that working on oneself is the path to broader social change. This view is expressed quite clearly today in the doctrine of ethical consumerism, which holds that individuals should critically reflect on their consumption practices, making changes in themselves and in their personal conduct (namely, in what they buy) in order to generate collective change. In addition to expressing the striking and disturbing conviction that a primary way of shaping the self and becoming a better person is through purchasing commodities, this orientation rests on the belief that each individual's action will additively amount to something greater, producing transformation on a large scale. This is a more simplistic model than Connolly's in that it recognizes no difference between micropolitics and macropolitics, treating the latter as simply the cumulative result of the former. There are, nonetheless, real similarities between Foucauldian inspired ethics and the more generalized conviction that transforming oneself is the most important and even the most politically significant project a person can undertake.

Even though Foucault's and Connolly's accounts of ethics may not intend to further the prevalent popular belief that you change the world by changing yourself, conceptualizing ethics primarily in terms of self intervention is dangerous in the context of an American cultural environment that can fairly be described as narcissistic.1l5 There is no doubt that the Foucauldian-inspired arts of the self Connolly advocates are meant to challenge reigning ways of being and to transform individuals in ways that enable them to engage more effectively in collective projects, including critical and oppositional endeavors that aim to alter status quo arrangements. Yet the massive popularity of self-help programs disseminating the view that worldly events are the direct result of one's personal thoughts, in conjunction with capitalist ideologies that tend to reduce the aesthetics of existence to the acquisition of a lifestyle through shopping, along with many other cultural influences that promote questionable techniques of the self, should make one hesitate before embracing an ethics that focuses so heavily on concern with oneself.1l6 Even Connolly's version of therapeutic ethics, which he wants to demarcate from unappealing forms of self-indulgence, runs the risk of being captured by prevailing habits and beliefs that can render arts of the self nondemocratic, even antidemocratic.

Some of Connolly's own formulations bring this danger into relief. For example, Connolly sometimes uses the term micropolitics to refer not only to the self's reflexive tactics but also to small-scale intersubjective relations and projects that might not typically be recognized as political in nature but which Connolly maintains can support and enhance macropoliticsP7 Micropolitics of this sort are already "ubiquitous," but they can be developed, readers are told, in ways that are "more or less conducive to democratic politics."1l8 This dimension of micropolitics is sometimes depicted by Connolly as a bridge connecting concentrated work on the self to organized forms of collective citizen action. But the concrete examples of micropolitical activity that he gives, even those that extend beyond the self's relation to itself, raise new doubts about how resistant or transformative such activity really is. Indeed, some of what Connolly has in mind seems depressingly adaptive to contemporary arrangements, considering how focused his examples are on individual lifestyle choices rather than on the admittedly more difficult problem of how to mobilize energies for more collaborative, oppositional, and inventive endeavors. Writing of micropolitics, Connolly counsels, "If you are in the middle class, buy a Prius or a Volt and explain to your friends and neighbors why you did; write in a blog; attend a pivotal rally; ride your bike to work more often; consider solar panels; introduce new topics at your church." While these things may be worth doing, it is not clear why one should believe they will foster an urge to "participate in larger political assemblages in more robust ways," as Connolly wagers.ll9 Indeed, these recommendations seem to reinforce the belief that political change is a happy by-product of small decisions made by each individual. Despite Connolly's best intentions and his ambitious calls for broad transformation in the direction of deepening pluralization, greater economic equality, and less vengeful foreign policy-the therapeutic ethics he endorses is too easily absorbed, even co-opted, by a dominant culture that rewards forms of preoccupation with the self that do little to facilitate associative democracy.

This point seems to be unwittingly made, in a slightly different context, by Cressida Heyes's Self-Transformations: Foucault, Ethics, and Normalized Bodies. Heyes's stated objective is to rescue Foucault's work on ethics from misreadings that liken self-care to self-indulgence, in order to defend the importance of "somaesthetics," in which the self strives to cultivate a body in ways that are resistant to normalization. Yet although Heyes is devoted to the idea that ethical self-diSCipline, performed by the self on the self, can be an "art of living with greater embodied freedom," the vast majority of the book is spent investigating, in great detail, case studies involving contemporary practices of askesis (sex reassignment surgery, Weight Watchers, and cosmetic surgery), which, Heyes convinc-. inglyargues, help to produce "docile bodies."12o So although Heyes continues to hold out the hope that concentrated work on the self, and specifically on one's body, can serve as a site of resistance against normalizing power, the overwhelming sense conveyed by her research is how readily and thoroughly care for the self is promoted and practiced in conformist, "self-absorbed" ways.l21 There is little acknowledgment of the difficulty her examples pose to her celebration of a transgressive, liberating somaes- thetics. What does it mean to endorse an ethics focused on rapport asoi and on "somatic askesis" in particular, in the context of a society that, by Heyes's own account, obsessively and successfully markets forms of selfcare that produce compliant and often solipsistic selves? Why should one believe that Heyes's preferred example of good somatic self-discipline, yoga, is somehow safe from the normalizing influences so well documented in her treatments of sex reassignment surgery, organized weight loss, and cosmetic surgery? Like Connolly, Heyes seems to neglect the way in which even the best-intentioned calls for care of the self may still be too complicit with an American culture that celebrates and aggressively markets depoliticizing modes of self-care.

Still, the appeal of therapeutic ethics is undeniable. It soothes with the promise that one need not get tangled up in the messy, fraught world of intersubjective political struggle in order to engage in politically meaningful action. Whether tending to the self is seen as synonymous with politics, as in the popularized version of therapeutic ethics, or whether it is understood as a precursor to collective endeavors, as in Connolly's view, the suggestion that one ought to begin with focused attention on oneself is comforting. It spares one the challenges of attempting to address a public problem by acting in solidarity with and in opposition to other citizens, where there may be no assurance of success and when fatigue, disappointment, and frustration are likely. When the political landscape looks bleak-because there are few opportunities for ordinary citizens to govern themselves, because of growing corporate influence over politics at all levels, or because of any number of other depressing facts-therapeutic ethics reassures with the idea that one can be an engaged citizen all by oneself.

### 1NC—Trust

**Epistemic deference to individuals based off of experience and identity is counter-productive and undermines the 1ac’s goals – it privileges bodies that happen to be in a particular room and makes marginalized people responsible for fixing everyone’s problems**

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A fuller and fairer assessment of what is going on with deference and standpoint epistemology would go beyond technical argument, and contend with the emotional appeals of this strategy of deference. Those in powerful rooms may be “elites” relative to the larger group they represent, but this guarantees nothing about how they are treated in the rooms they are in. After all, a person privileged in an absolute sense (a person belonging to, say, the half of the world that has secure access to “basic needs”) may nevertheless feel themselves to be consistently on the low end of the power dynamics they actually experience. Deference epistemology responds to real, morally weighty experiences of being put down, ignored, sidelined, or silenced. It thus has an important non-epistemic appeal to members of stigmatized or marginalized groups: it intervenes directly in morally consequential practices of giving attention and respect. The social dynamics we experience have an outsize role in developing and refining our political subjectivity, and our sense of ourselves. But this very strength of standpoint epistemology – its recognition of the importance of perspective – becomes its weakness when combined with **deferential practical norms**. Emphasis on the ways we are marginalized often matches the world as we have experienced it. But, from a structural perspective, the rooms we never needed to enter (and the explanations of why we can avoid these rooms) might have more to teach us about the world and our place in it. If so, the deferential approach to standpoint epistemology actually prevents “centring” or even hearing from the most marginalized; **it focuses us on the interaction of the rooms we occupy, rather than calling us to account for the interactions we don’t experience**. This fact about who is in the room, combined with the fact that speaking for others generates its own set of important problems (particularly when they are not there to advocate for themselves), eliminates pressures that might otherwise trouble the centrality of our own suffering – and of the suffering of the marginalized people that do happen to make it into rooms with us. The dangers with this feature of deference politics are grave, as are the risks for those outside of the most powerful rooms. **For those who are deferred to, it can supercharge group-undermining norms**. In Conflict is Not Abuse, Sarah Schulman makes a provocative observation about the psychological effects of both trauma and felt superiority: while these often come about for different reasons and have very different moral statuses, they result in similar behavioural patterns. Chief among these are misrepresenting the stakes of conflict (often by overstating harm) or representing others’ independence as a hostile threat (such as failures to “centre” the right topics or people). These behaviours, whatever their causal history, have corrosive effects on individuals who perform them as well as the groups around them, especially when a community’s norms magnify or multiply these behaviours rather than constraining or metabolizing them. **For those who defer, the habit can supercharge moral cowardice**. The norms provide social cover for the abdication of responsibility: it **displaces onto individual heroes**, a hero class, or a mythicized past the work that is ours to do now in the present. Their perspective may be clearer on this or that specific matter, but their overall point of view isn’t any less particular or constrained by history than ours. More importantly, **deference places the accountability that is all of ours to bear onto select people** – and, more often than not, a hyper-sanitized and thoroughly fictional caricature of them. The same tactics of deference that insulate us from criticism also insulate us from connection and transformation. They prevent us from engaging empathetically and authentically with the struggles of other people – prerequisites of coalitional politics. As identities become more and more fine-grained and disagreements sharper, we come to realize that “coalitional politics” (understood as struggle across difference) is, simply, politics. Thus, the deferential orientation, like that fragmentation of political collectivity it enables, is ultimately anti-political. Deference rather than interdependence may soothe short-term psychological wounds. But it does so at a steep cost: it can undermine the epistemic goals that motivate the project, and it entrenches a politics unbefitting of anyone fighting for freedom rather than for privilege, for collective liberation rather than mere parochial advantage.

### 1NC—Antitrust Good

#### Antitrust law can either ossify OR counter systemic racism and 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.

### 1NC—Competition Not Bad

#### Understanding and debating competition is vital to any analysis of politics, social systems, governance, and imperialism.

John Bellamy Foster et al 2011, PhD, professor of sociology at the University of Oregon and editor of the Monthly Review, and Robert W. McChesney, Gutgsell Endowed Professor of Communication at the University of Illinois at Urbana-Champaign, and R. Jamil Jonna, PhD in sociology at the University of Oregon, “Monopoly and Competition in Twenty-First Century Capitalism”, Monthly Review, April 1, https://monthlyreview.org/2011/04/01/monopoly-and-competition-in-twenty-first-century-capitalism/

We believe that the phase of monopoly capitalism that has emerged since the mid-1970s is best characterized as global monopoly-finance capital. The larger political implications of this were recently spelled out by Samir Amin: “The following phenomena are inextricably linked to one another: the capitalism of oligopolies; the political power of oligarchies; barbarous globalization; financialization; U.S. hegemony; the militarization of the way globalization operates in the service of oligopolies; the decline of democracy; the plundering of the planet’s resources; and the abandoning of development for the South.”95

Our hope is that there can be a greater recognition of the monopoly issue in general, and far greater study and debate about it, by all principled scholars and economists who believe in reality-based social science. This is particularly important for scholars on the left. Radical economists quickly grasped the sharp growth in economic inequality wrought by neoliberalism, and did the most to examine its causes and effects and publicize its existence. Over the past one or two decades, a number of exceptional left political economists gradually have come to appreciate and assess the growing importance of financialization and debt for the economy.96 Reconsideration of the question of monopoly is the next link in the chain, and indispensable for a meaningful and comprehensive understanding of both inequality and financialization, not to mention twenty-first century capitalism. The research to date has barely scratched the surface of what is needed.97

In our view, the stakes are high. Understanding monopoly power is not only indispensable to understanding how the capitalist system works and the problems of stagnation and financialization; it is also vital to understanding the real world of politics and governance, and to any meaningful analysis of imperialism. The struggle for democracy requires that we face up to the reality of ever more concentrated political and economic power held by a plutocracy that owns and controls the giant monopolistic corporations. We on the left must learn to speak intelligibly and effectively to people who experience the consequences of this power in their lives each and every day—or reconcile ourselves to irrelevance.