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### T USFG

#### Our interpretation is the 1AC must include a defense of the federal government prohibiting anti-competitive business practices

#### A – Antirust ‘prohibitions’ are federal and legal and distinct from private action

Boner and Krueger, ‘91 (Roger Alan and Reinald, World Bank, “The Basics of Antitrust Policy”, *World Bank Technical Paper No 160,* <https://documents1.worldbank.org/curated/en/606101468764357774/pdf/multi-page.pdf>, DoA 5/31/2021, DVOG)

Of all nations, none has a longer history of active intervention in marketplace competition through antitrust policy than the United States. The statutory basis of antitrust policy in the U.S. rests on three federal laws--the Sherman Act of 1890, the Clayton Act of 1914, and the Federal Trade Commission Act of 1914. Significant amendments occurred in the Robinson Patman Act of 1936 and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which provided for pre-merger notification.A1 These antitrust statutes apply to interstate commerce and are enforced at the federal level by two agencies, the Department of Justice, an executive agency, and the Federal Trade Commission.0 In addition, enforcement actions can be brought by the attorneys general of the fifty states and by private parties who have suffered injury owing to violations of the antitrust laws. Approximately 96% of the civil antitrust suits in the U.S. are brought by private parties.YJ The antitrust statutes of the United States, reflecting a pattern often repeated elsewhere, were written into law following a period of marked economic expansion with numerous mergers and consolidations. A variety of restraints on competition, widely employed by large businesses, caused great popular resentment. In response, the Sherman Act was enacted in 1890 to inhibit a variety of practices viewed as injurious restraints on competition. Section 1 of the Act prohibits contracts, combinations, and conspiracies in restraint of trade, section 2 prohibits monopolization, attempts to monopolize, and combinations or conspiracies to monopolize, and section 7 (later superceded by Section 4 of the Clayton Act) permits private parties injured by Sherman Act violations to sue for recovery of three times the amount of damages. The ability of private parties to recover treble damages for antitrust violations is unusual among the surveyed jurisdictions and constitutes a comparatively strong deterrent to violating the antitrust law.9 Though the Sherman Act was designed to enjoin a broad variety of anticompetitive business practices, the Act was not effectively enforced for a number of years. Moreover, the Sherman Act applies strictly to the conduct of business, and the prosecution of violations requires that enforcers meet the high standard of showing that particular conduct was motivated by the restraint of competition or monopolization of a market. To broaden the scope of antitrust legislation, the Clayton Act was passed to cover other potentially anti competitive practices and to prohibit conduct likely to support the restraint of trade. Section 2 of the Clayton Act (later amended by the Robinson Patman Act) prohibits price discrimination in support of the restraint of trade or monopolization of a market, and Section 3 prohibits tying and exclusive dealing contracts in restraint of competition. More important, the Clayton Act serves to discourage the development of certain structural pre-conditions of anticompetitive behavior: Section 7 prohibits mergers tending to substantially lessen competition, and Section 8 prohibits interlocking directorates among competing firms.& The Federal Trade Commission Act was passed in part to streamline the procedures for enforcing the antitrust laws. Whereas the Department of Justice, as the primary federal law enforcement agency, has broad responsibilities to enforce federal law, the Federal Trade Commission Act created the Federal Trade Commission as an administrative agency with special expertise in business and commerce and with quasi-judicial authority to enforce the antitrust laws.!V Section 5 of the FTC Act prohibits "unfair methods of competition," which includes acts illegal under the Sherman and Clayton acts. In addition, judicial decisions have found section 5 to cover practices that offend public policy or cause substantial injury to consumers, potentially extending the applicability of the FTC Act beyond that of the other antitrust statutes. The Department of Justice and Federal Trade Commission have dual responsibility to enforce the federal antitrust laws, a situation unique among the surveyed jurisdictions. Both criminal and civil cases can be brought by the Department of Justice and decided in federal district courts, with appeal to the appellate courts and the Supreme Court. In contrast, the FTC can bring only civil cases and can adjudicate cases through independent administrative law judges, with appeal to the federal courts and the Supreme Court.§9 To some extent, the FTC and the Department of Justice coordinate their activities in areas of overlapping responsibility, as in merger review for which each agency has developed particular areas of expertise. Otherwise, the dual enforcement approach of the U.S. provides for a broad, interventionist application of antitrust laws, since potentially anticompetitive actions can be challenged by either the Department of Justice or the Federal Trade Commission. The 1936 Robinson-Patman Act, written to amend Section 2 of the Clayton Act, is a more complex and comprehensive statute prohibiting resale price maintenance. Section 2 of the Robinson-Patman Act prohibits discriminating in price between different buyers, limits the brokerage and other compensatory fees between a buyer and seller, and prohibits the use of discriminatory advertising or promotional allowances by sellers. Buyers as well as sellers are subject to the prohibitions, and Section 3 of the Act provides criminal sanctions for certain kinds of discriminatory pricing. 1 With respect to other surveyed economies, several features of U.S. antitrust law stand out. The U.S. is the only one maintaining separate government agencies that share parallel authority to enforce the antitrust laws; federal enforcement, shared by the Department of Justice and the Federal Trade Commission, operates alongside enforcement by the attorneys general of the fifty states and is substantially augmented by private enforcement**.** The treble damages available to private litigants constitute a very strong financial deterrent against antitrust violations as well as a strong incentive for private litigation. Finally, though a variety of activities are exempted from antitrust law, the selective granting of exemptions is used very seldom and is not an important feature of antitrust law enforcement in the USA.

#### B – ‘Its’ means 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.

1 belonging or relating to a thing, idea, place, animal, etc. when it has already been mentioned or when it is obvious which one you are referring to

The chair lay on its side.

We were eager to see Las Vegas and all its many attractions.

The bull had a ring through its nose.

Synonyms and related words

Determiners: a, an, certain...

Explore Thesaurus

#### C – That means the aff must modify federal law

Jon M Ericson 3, Dean Emeritus of the College of Liberal Arts – California Polytechnic U., et al., The Debater’s Guide, Third Edition, p. 4

The Proposition of Policy: Urging Future Action In policy propositions, each topic contains certain key elements, although they have slightly different functions from comparable elements of value-oriented propositions. 1. An agent doing the acting ---“The United States” in “The United States should adopt a policy of free trade.” Like the object of evaluation in a proposition of value, the agent is the subject of the sentence. 2. The verb should—the first part of a verb phrase that urges action. 3. An action verb to follow should in the should-verb combination. For example, should adopt here means to put a program or policy into action through governmental means. 4. A specification of directions or a limitation of the action desired. The phrase free trade, for example, gives direction and limits to the topic, which would, for example, eliminate consideration of increasing tariffs, discussing diplomatic recognition, or discussing interstate commerce. Propositions of policy deal with future action. Nothing has yet occurred. The entire debate is about whether something ought to occur. What you agree to do, then, when you accept the affirmative side in such a debate is to offer sufficient and compelling reasons for an audience to perform the future action that you propose.

#### The affirmative doesn’t propose a hypothetical government action – vote negative –

#### First is clash – stable ground and limits enable contestation and is vital to the neg effectively researching and refuting the 1AC, including by utilizing their 1AC on the negative. That turns any offense they can access because engagement is necessary for actualizing their strategy.

#### There’s no link to most Ks of framework – we are not defending the resolution as a ceiling, end point, or total limit, but as a floor and starting point to ensure the neg knows what to research and disprove.

#### Second is limits:

#### Some predictable limit is the only way to give the neg a chance to win – radical aff choice with no floor puts the aff too far ahead. Pre-tournament negative preparation is structured around disproving the resolution as a point of offense, and obviating that research structurally favors the affirmative.

#### Fairness is an intrinsic good – debate can be more than a game and also a game, and games always requires effective competition expectations – the only way for any benefit to be produced from debate is if the judge can make an objective decision between two sides who have had a relatively equal chance to research.

#### This precedes substance – our ability to refute any argument cannot be disentangled from our inability to research it – be skeptical of whether an argument of was ‘dropped’ or whether it was simply impossible to prepare to defeat.

#### Third is antitrust debates – studying antitrust law via switch-side debate is vital to interdisciplinary skills that both spill up *and* allow us to better understand the historical and social foundations of antitrust

Biester, 11 – Edward, partner in the Philadelphia office of the law firm of Duane Morris LLP, and co-chair of the firm’s Antitrust and Competition Practice Group. “Understanding Antitrust Laws, Competition, the Economy, and Their Impact on Our Everyday Lives,” Social Education 75(2), pp 68–72, <https://www.americanbar.org/content/dam/aba/images/public_education/lookingatthelaw_marapril.pdf> -- Iowa

Looking at the Law: Why should antitrust law and economic regulation be important parts of a high school social studies curriculum?

E.B.: These topics bring together many disciplines and allow students to imagine and experience their application to real world scenarios, at a time when students are learning and questioning just how the world works. Studying antitrust law and economic regulation will introduce students to concepts like the branches of government and how laws are made, enforced, and effect social policy. They allow students to take an historical view and observe how certain economic principles have emerged as economies and markets evolved. Students can decide why one rule or another would be positive or negative in scenarios that deal with their individual economic interests. These concepts also introduce students to the globalization of markets, trade, and legal governance, which will only become more important with time.

#### T is best evaluated under competing interpretations to reduce judge intervention.

#### Several versions of a TVA –

#### TVA – the FTC should strengthen enforcement authority to counter algorithmic bias.

#### It’s an impact to skills – studying the law and ways for the FTC to beef up penalties are vital to countering algorithmic bias

James V. Fazio 21. Special counsel in the Intellectual Property Practice Group at Sheppard, Mullin, Richter & Hampton LLP, with Liisa M. Thomas, 3/11. “What Is FTC’s Course Under Biden?” https://www.natlawreview.com/article/what-ftc-s-course-under-biden

The new acting FTC chair, Rebecca Kelly Slaughter, recently signaled that the FTC may increase enforcement and penalties in the privacy and data security realm. Slaughter pointed to several areas of focus for the FTC this year, which companies will want to keep in mind: Notifying Consumers About FTC Allegations: Slaughter referred favorably to two recent cases: (1) the Everalbum biometric settlement from earlier this year (which we wrote about at the time); and (2) the Flo Health settlement over alleged deceptive data sharing practices (which we also wrote about at the time). In drawing on these two cases, Slaughter indicated that in future cases the FTC intends to include as part of any settlement a requirement to notify customers of any FTC allegations. This, she said, would allow consumers to “vote with their feet” and help them decide whether to recommend their services to others. FTC Intent to Plead All Relevant Violations: According to Slaughter, another lesson the FTC is taking from the Flo case is to include in the cases it brings all potentially applicable violations of all relevant privacy-related laws. In the Flo case, Slaughter said the FTC should have pleaded a violation of the Health Breach Notification Rule, which requires that vendors of personal health records notify consumers of data breaches. Focus on Ed Tech and COPPA: Given the explosive growth of education technology during COVID-19, the FTC is conducting an industry sweep of the industry. Related to this, the FTC is reviewing its Children’s Online Privacy Protection Act Rule. This goes beyond the refresh the agency did of their FAQs earlier in the pandemic (which we wrote about at the time). For now, Slaughter reminds companies that parental consent is needed before collecting information online from children under the age of 13. Examination of Health Apps: The FTC will take a closer look at health apps, including telehealth and contact tracing apps, as more and more consumers are relying on such apps to manage their health during the pandemic. Overlap Between Competition and Privacy: Slaughter also indicated that it is worth looking at situations where there may be not only privacy concerns, but antitrust as well. Because the FTC has a dual mission (consumer protection and competition) she notes that it has a “structural advantage” over other regulators in that it can look at these issues, especially since -she states- “many of the largest players in digital markets are as powerful as they are because of the breadth of their access to and control over consumer data.” Racial Equality and AI/Biometrics/Geotracking: Slaughter noted that COVID-19 is exacerbating racial inequities. She pointed to the unequal access to technology, as well as algorithmic discrimination (the idea that discrimination offline becomes embedded into algorithmic system logic). The FTC intends to focus on algorithmic discrimination, as well as on the discrimination potentially embedded into facial recognition technologies. (This mirrors concerns that gave rise to the recent Portland facial recognition law, which we recently wrote about). Finally, Slaughter commented on the use of location data to identify characteristics of Black Lives Matter protesters, and said she is concerned about the misuse of location data to track Americans engaged in constitutionally protected speech. Putting it Into Practice: Companies that operate health apps, that are in the education technology space, or that use algorithms or facial recognition tools will want to keep in mind that these are areas of focus for the FTC. And for everyone, keep in mind that the FTC has indicated it will beef up privacy law penalties and will ask for more notification to injured consumers.

#### Even if some elements of inequality, surveillance, and suffering are inevitable, algorithmic bias makes them much worse

Mike Thomas 20. Quoting AI experts including MIT Physics Professors, Senior Features Writer for BuiltIn. THE FUTURE OF ARTIFICIAL INTELLIGENCE: 7 ways AI can change the world for better ... or worse, Updated: April 20, 2020, <https://builtin.com/artificial-intelligence/artificial-intelligence-future>

Klabjan also puts little stock in extreme scenarios — the type involving, say, murderous cyborgs that turn the earth into a smoldering hellscape. He’s much more concerned with machines — war robots, for instance — being fed faulty “incentives” by nefarious humans. As MIT physics professors and leading AI researcher Max Tegmark put it in a 2018 TED Talk, “The real threat from AI isn’t malice, like in silly Hollywood movies, but competence — AI accomplishing goals that just aren’t aligned with ours.” That’s Laird’s take, too. “I definitely don’t see the scenario where something wakes up and decides it wants to take over the world,” he says. “I think that’s science fiction and not the way it’s going to play out.” What Laird worries most about isn’t evil AI, per se, but “evil humans using AI as a sort of false force multiplier” for things like bank robbery and credit card fraud, among many other crimes. And so, while he’s often frustrated with the pace of progress, AI’s slow burn may actually be a blessing. “Time to understand what we’re creating and how we’re going to incorporate it into society,” Laird says, “might be exactly what we need.” But no one knows for sure. “There are several major breakthroughs that have to occur, and those could come very quickly,” Russell said during his Westminster talk. Referencing the rapid transformational effect of nuclear fission (atom splitting) by British physicist Ernest Rutherford in 1917, he added, “It’s very, very hard to predict when these conceptual breakthroughs are going to happen.” But whenever they do, if they do, he emphasized the importance of preparation. That means starting or continuing discussions about the ethical use of A.G.I. and whether it should be regulated. That means working to eliminate data bias, which has a corrupting effect on algorithms and is currently a fat fly in the AI ointment. That means working to invent and augment security measures capable of keeping the technology in check. And it means having the humility to realize that just because we can doesn’t mean we should. “Our situation with technology is complicated, but the big picture is rather simple,” Tegmark said during his TED Talk. “Most AGI researchers expect AGI within decades, and if we just bumble into this unprepared, it will probably be the biggest mistake in human history. It could enable brutal global dictatorship with unprecedented inequality, surveillance, suffering and maybe even human extinction. But if we steer carefully, we could end up in a fantastic future where everybody’s better off—the poor are richer, the rich are richer, everybody’s healthy and free to live out their dreams.”

#### TVA – the FTC should aggressively challenge fraud by monopolies which targets racialized groups.

#### That solves Dillon much better than the aff – Dillon is a K of the structures of racial capitalism – challenging heteronormative notions of time does nothing to transform the material configurations that promote racial capitalism, but using the FTC to aggressively prosecute **big business which disproportionately preys on Black and Latino communities CAN disrupt those material configurations – the FTC has a duty to ramp up surveys, outreach, data, and enforcement**

Rich, 21 – Jessica, Distinguished Fellow - Institute for Technology Law and Policy, Georgetown University Law Center. "Five reforms the FTC can undertake now to strengthen the agency," Brookings, <https://www.brookings.edu/blog/techtank/2021/03/01/five-reforms-the-ftc-can-undertake-now-to-strengthen-the-agency/> -- Iowa

Fraud can have a disproportionate effect on certain communities, such as seniors, veterans, African Americans, and Latinos. As a result, during my tenure at the FTC, we created and scaled up an ambitious project called Every Community, the goal of which was to ensure that the agency was reaching and protecting the diverse communities victimized by fraud.

The project included consumer surveys, outreach to community organizations, and data analysis by BE. Among BE’s findings was that Black and Latino communities experienced fraud at higher rates than white communities but reported fraud to the FTC at lower rates—in other words, they were underreporting fraud, highlighting a key challenge for the FTC in reaching and protecting these communities. In making its findings, BE staff had to perform a detailed analysis of fraud and census data, since the FTC’s complaint database contained very limited demographic data.

The FTC should expand this program, especially in light of the recent Executive Order on racial equity and underserved communities, Acting Chairwoman Rebecca Slaughter’s commitment to these issues, and the enhanced data protection mission proposed above. As part of this expanded program, the FTC should collect more demographic data (with appropriate safeguards) to enable the type of analysis discussed above, and task BE with additional studies of the FTC’s reach and impact on different communities. The FTC also should consider hiring experts on racial equity and inclusion to assist with this important work.

## Case

### Case – 1NC

#### Presumption:

#### Vote neg, they haven’t met their burden of proof. Interpersonal methods fail against structures of power that perpetuate violence. The ballot is not key to solvency. Either; A) affirming interpersonal mappings of time alone is itself disruptive and there’s no reason that including a plan would disrupt the 1AC’s radical potential, or B) The mere expectation of also debating antitrust would be totally disruptive to the 1AC and voting aff can’t overcome the myriad of instances where the expectation is to debate USFG antitrust policy.

#### This is offense. Symbolically affirming their method despite its lack of ties to material resistance strengthens power.

Rigakos and Law, 9—Assistant Professor of Law at Carleton University AND PhD, Legal Studies, Carleton University (George and Alexandra “Risk, Realism and the Politics of Resistance,” Critical Sociology 35(1) 79-103, dml)

McCann and March (1996: 244) next set out the ‘justification for treating everyday practices as significant’ suggested by the above literature. First, the works studied are concerned with proving people are not ‘duped’ by their surroundings. At the level of consciousness, subjects ‘are ironic, critical, realistic, even sophisticated’ (1996: 225). But McCann and March remind us that earlier radical or Left theorists have made similar arguments without resorting to stories of everyday resistance in order to do so. Second, everyday resistance on a discursive level is said to reaffirm the subject’s dignity. But this too causes a problem for the authors because they:

query why subversive ‘assertions of self’ should bring dignity and psychological empowerment when they produce no greater material benefits or changes in relational power … By standards of ‘realism’, … subjects given to avoidance and ‘lumping it’ may be the most sophisticated of all. (1996: 227)

Thus, their criticism boils down to two main points. First, everyday resistance fails to tell us any more about so-called false consciousness than was already known among earlier Left theorists; and second, that a focus on discursive resistance ignores the role of material conditions in helping to shape identity.

Indeed, absent a broader political struggle or chance at effective resistance it would seem to the authors that ‘powerlessness is learned out of the accumulated experiences of futility and entrapment’ (1996: 228). A lamentable prospect, but nonetheless a source of closure for the governmentality theorist. In his own meta-analysis of studies on resistance, Rubin (1996: 242) finds that ‘discursive practices that neither alter material conditions nor directly challenge broad structures are nevertheless’ considered by the authors he examined ‘the stuff out of which power is made and remade’. If this sounds familiar, it is because the authors studied by McCann, March and Rubin found their claims about everyday resistance on the same understanding of power and government employed by postmodern theorists of risk. Arguing against celebrating forms of resistance that fail to alter broader power relations or material conditions is, in part, recognizing the continued ‘real’ existence of identifiable, powerful groups (classes). In downplaying the worth of everyday forms of resistance (arguing that these acts are not as worthy of the label as those acts which bring about lasting social change), Rubin appears to be taking issue with a locally focused vision of power and identity that denies the possibility of opposing domination at the level of ‘constructs’ such as class.

Rubin (1996: 242) makes another argument about celebratory accounts of everyday resistance that bears consideration:

[T]hese authors generally do not differentiate between practices that reproduce power and those that alter power. [The former] might involve pressing that power to become more adept at domination or to dominate differently, or it might mean precluding alternative acts that would more successfully challenge power. … [I]t is necessary to do more than show that such discursive acts speak to, or engage with, power. It must also be demonstrated that such acts add up to or engender broader changes.

In other words, some of the acts of everyday resistance may in the real world, through their absorption into mechanisms of power, reinforce the localized domination that they supposedly oppose. The implications of this argument can be further clarified when we study the way ‘resistance’ is dealt with in a risk society.

Risk theorists already understand that every administrative system has holes which can be exploited by those who learn about them. That is what makes governmentality work: the supposed governor is in turn governed – in part through the noncompliance of subjects (Foucault, 1991a; Rose and Miller, 1992). For example, where employees demonstrate unwillingness to embrace technological changes in the workplace, management consultants can create:

a point of entry, but also a ‘problem’ that their ‘packages’ are designed to resolve. … In short, consultants readily constitute certain forms of conduct as ‘resistance to technology’ as this gives them some purchase on its reform by identifying a space in which expertise can be brought to bear in the exercise of power. Resistance consequently plays the role of continuously provoking extensions, revisions and refinements of those same practices which it confronts. (Knights and Vurdubakis, 1994: 80)

This appears to be a very different kind of resistance from that contemplated by Rubin, but perhaps not so different from that of the authors whom he and McCann and March critique: those whose analysis ends at the discursive production of noncompliance. Instead, the above account is of a resistance that almost invariably helps power to work better. A conclusion in the present day that ominously foreshadows the futuristic, dystopic risk assemblage described by Bogard (1996).

Another example of the ‘resolution’ of resistance proposed above is the institution of a tool library described by Shearing (2001: 204–5). In this parable, a business deals with the issue of tool theft on the part of workers by installing a ‘lending library’ of tools instead of engaging in vigorous prosecution and jeopardizing worker morale. While the parable is meant to indicate a difference between actuarial and more traditional (moral) forms of justice, it also demonstrates how an act that may be considered ‘resistant’ is incorporated without conflict into the workplace loss-prevention scheme – an eminently preferable, ‘forward-looking’ solution within the logic of risk management. The same is possible in the case of more discursive forms of resistance. If I do not see myself as a Guinness man, for example, market researchers will do their best to adapt Guinness to the way I do see myself (Miller and Rose, 1997). The end result, of course, is that I purchase the beer. As manifested in a form of justice (Shearing and Johnston, 2005), it always consolidates, tempers emotions, cools the analysis, reconciles factions, and always relentlessly moves forward, assimilating as it grows. In this sense, therefore, Bogard’s ‘social science fiction’ actually pre-supposes and logically extends Shearing’s (2001) rather cheery and benevolent rendering of risk thinking. In this context of governmentality theory – as self-described and lauded for its political non-prescription by its own pundits – the acts or attitudes described as resistant are, in the end, absorbed by those who govern. Resistance as an oppositional force – that pushes against or has the potential to take power – is theoretically and politically neutralized. In the neutralization process, power is reproduced.

So, along with McCann and March’s observations that everyday resistance adds little to our understanding of false consciousness and that it denies the role of material factors in shaping identity, we can add Rubin’s two main criticisms of everyday resistance: it relies on an inaccurate understanding of power, and acts of resistance which supposedly emancipate actually may reinforce domination. All four of these criticisms demand the same thing: to know what is really going on, to get an adequate grasp of the social.

#### Political readings of futurity via things like the TVA and our model are good—we should work to create a world where queer imaginations aren’t tied off from political change—you can obviously resist heteronormative understandings of futurity and disturb normative time without ceding all projections of futurity to the right

Munoz 9 Muñoz prof/chair of performance studies @ NYU 2009 (José Esteban, Cruising Utopia: The Then and There of Queer Futurity)

We know that many of these white friends on the Lower East Side, such as O’Hara and Allen Ginsberg, were also a little lavender. The interview works as a mild disavowal of the play’s ending, a display of ambivalence that ignores its queer affect and tenor. The author’s need to justify his end as the appeasement of his immediate social world needs further scrutiny. A turn to Hegel via Judith Butler’s recent meditation on the longing for recognition can further explicate the stakes in this moment of contact and interracial intimacy.22 Butler tells a tale of recognition, made famous by G. W. F. Hegel in *The Phenomenology of Spirit.23* It is a representative moment that signals the spirit of German philosophical idealism in which Bloch and other utopian thinkers participate, and it further illuminates the play’s ending. Reflecting on the paradigm of the master and the bondsman, Butler outlines the relation to self and other: The moment in “Lordship and Bondage” when the two self-consciousnesses come to recognize one another is, accordingly, in the “life and death struggle,” the moment in which they each see the shared power they have to annihilate the Other and, thereby, destroy the condition of their own self-reflection. Thus, it is as a moment of fundamental vulnerability that recognition becomes possible, and need becomes self-conscious. What recognition does at such a moment is, to be sure, to hold destruction in check.24 The Hegelian narrative is enriched when we insert Frantz Fanon’s contribution to the very central philosophical thematic of self/other and the drama of recognition. If we consider the vicissitudes of the fact of blackness, the radical contingency that is epidermalization, the narrative fills out further and the tale of vulnerability is fleshed out. Recognition, across antagonisms within the social such as sex, race, and still other modalities of difference, is often more than simply a tacit admission of vulnerability. Indeed, it is often a moment of being wounded.25 In this sense I offer *The Toilet* as a tale of wounded recognition. It marks and narrativizes the frenzy of violence that characterizes our cross-identificatory recognition. *The Toilet* teaches us that the practice of recognition is a brutal choreography, scored to the discordant sounds of desire and hate. With that stated, its semidisowned ending speaks to the sticky interface between the interracial and the queer. The interracial and the queer coanimate each other, and that coanimation, which is not only about homosexuality but about blackness and how the two touch across space and time, takes the form of not only the amalgamation of movements that rate a seizure but also the fragmented gesture that signals an endurance/support, queerness’s being in, toward, and for futurity. Utopian hermeneutics like those invoked in the project of queer futurity consider the forward-dawning significance of the gesture. Thus, the play’s dramatic conclusion is not an end but, more nearly, an + Agambenian means without an end. Recognition of this order challenges theories of antirelationality that dominate queer criticism, such as Edelman’s and the Leo Bersani of “Is the Rectum a Grave?” and**,** to a lesser degree, *Homos.26***The act of accepting no future is dependent on renouncing** politics and various principles of hope that are, by their very nature, relational. By finishing on a note not of reconciliation but of the refusal of total repudiation—a gestural enduring/supporting—The *Toilet* shows us that relationality is not pretty, but the option of simply opting out of it, or describing it as something that has never been available to us, is imaginable only if one can frame queerness as a singular abstraction that can be subtracted and isolated from a larger social matrix. In *No Future* Edelman takes on Cornel West’s referencing of futurity in an op-ed for the *Boston Globe* that he wrote with Sylvia Ann Hewitt titled “A Parent’s Bill of Rights.”27 The title is disturbingly smug (as if biological parents of the middle class did not already have uncontested rights to their children!), and the editorial is a neoliberal screed on behalf of the culture of the child. But Edelman’s critique never considers the topic of race that is central to the actual editorial. West’s pro-children agenda aligns with his other concerns about the crises of African American youth. Edelman’s critique of the editorial, with which for the most part I am deeply sympathetic, is flawed insofar as it decontextualizes West’s work from the topic that has been so central to his critical interventions: blackness. In the same way all queers are not the stealth-universal-white-gay- man invoked in queer antirelational formulations, all children are not the privileged white babies to whom contemporary society caters. Again, there is for me a lot to like in this critique of antireproductive futurism, but in Edelman’s theory **it is enacted by the active disavowal of a crisis in afrofuturism.28** Theories of queer temporality that fail to factor in the relational relevance of race or class merely reproduce a crypto-universal white gay subject that is weirdly atemporal—which is to say a subject whose time is a restricted and restricting hollowed-out present free of the need for the challenge of imagining a futurity that exists beyond the self or the here and now. The question of children hangs heavily when one considers Baraka’s present. On August 12, 2003, one of his daughters, Shani Baraka, and her female lover, Rayshon Holmes, were killed by the estranged husband of Wanda Pasha, who is also one of Baraka’s daughters. The thirty-one- and thirty-year-old women’s murders were preceded a few months earlier by another hate crime in Newark, the killing of fifteen-year-old Sakia Gunn. Gunn was a black transgendered youth who traveled from Hoboken to Greenwich Village and the Christopher Street piers to hang out with other young queers of color. Baraka and his wife, Amina, have in part dealt with the tragic loss of their daughter by turning to activism. The violent fate of their child has alerted them to the systemic violence that faces queer people (and especially young people) of color. The Barakas have both become ardent antiviolence activists speaking out directly on LGBT issues. Real violence has ironically brought Baraka back to a queer world that he had renounced so many years ago. Through his tremendous loss he has decided to further diversify his consistent commitment to activism and social justice to include what can only be understood as queer politics. In the world of *The Toilet* there are no hate crimes, no lexicon that identifies homophobia per se, but there is the fact of an aggression constantly on the verge of brutal actualization. The mimetic violence resonates across time and to the scene of the loss that the author will endure decades later. This story from real life is not meant to serve as the proof for my argument. Indeed, the play’s highly homoerotic violence is in crucial ways nothing like the misogynist violence against women that befell the dramatist’s family or the transgenderphobic violence that ended Gunn’s young life. I mention these tragedies because it makes one simple point. The future is only the stuff of some kids. **Racialized kids, queer kids, are not the sovereign princes of futurity**. **Although Edelman does indicate that the future of the child as futurity is different from the future of actual children, his framing nonetheless accepts and reproduces this monolithic figure of the child that is indeed always already white.** He all but ignores the point that other modes of particularity within the social are constitutive of subjecthood beyond the kind of jouissance that refuses both narratological meaning and what he understands as the fantasy of futurity. He anticipates and bristles against his future critics with a precognitive paranoia in footnote 19 of his first chapter. He rightly predicts that some identitarian critics (I suppose that would be me in this instance, despite my ambivalent relation to the concept of identity) would dismiss his polemic by saying it is determined by his middle-class white gay male positionality. This attempt to inoculate himself from those who engage his polemic does not do the job. In the final analysis, white gay male crypto-identity politics (the restaging of whiteness as universal norm via the imaginary negation of all other identities that position themselves as not white) is beside the point. **The deeper point is indeed “political,” as, but certainly not more, political than Edelman’s argument. It is important not to hand over futurity to normative white reproductive futurity. That dominant mode of futurity is indeed “winning;’ but that is all the more reason to call on a utopian political imagination that will enable us to glimpse another time and place:** a “not-yet” where queer youths of color actually get to grow up. Utopian and willfully idealistic practices of thought are in order if we are to resist the perils of heteronormative pragmatism and Anglo-normative pessimism. Imagining a queer subject who is abstracted from the sensuous intersectionalities that mark our experience is an ineffectual way out. Such an escape via singularity is a ticket whose price most cannot afford. The way to deal with the asymmetries and violent frenzies that mark the present is not to forget the future. The here and now is simply not enough. Queerness should and could be about a desire for another way of being in both the world and time, a desire that resists mandates to accept that which is not enough.

#### Legal control over subjectivity is inevitable but so are strategic demands on the law—radical queer anti-statist politics are possible within the law

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But—following Matsuda—I think that Butler seems to miss an important point. Given the material force of the fantasy of legal sovereignty in the margins, “‘at the point[s]’” where power is “‘completely invested in its real and effective practices,’” 31 I argue that resistance to the idea of legal sovereignty must not preclude what Cathy Cohen might call a “practical”32 understanding of the presently inevitable reality of the sovereign rhetorical operations of the law. The political project of resistance to the performative sovereignty of judicial rhetoric in the United States must not deny (as Matsuda and Richard Delgado said in 1987 to the “crits” of Critical Legal Studies) the need to construct strategically informed and tactically sound responses to those “formal” structures of law that already act as and with the material power of sovereign authority––authority over the constraints that legal forms of subjectivity already impose on personhood.33 As Butler herself acknowledges in 2004,34 the absolute critique of legal sovereign performatives does not adequately consider how the effects of the fantasy of legal sovereignty are most often (and most often most terribly) felt by “those who have” actually “seen and felt the falsity of the liberal promise”35 of the U.S. judiciary as a shield against domination.¶ My experience of the law has occurred through my own participation in and observation of judicial sovereignty––both from a majoritarian perspective. I teach argumentation in a prison, a setting that emphasizes the paradoxical and simultaneous vitality and uselessness of rhetorical and argumentative interaction with those persons charged with enforcing the reasoned justification of judicial decision through coercive violence. In our present democratic state of laws, the production of legitimacy for judicial sovereignty through argument, and the production of legitimacy through force, work together in explicit and mutually supportive fashion. More happily, I was recently invited by two friends to officiate their wedding, at a ceremony in Rehoboth, Massachusetts. I agreed, and asked whether I should purchase an ordination online, so that I could legally perform the ceremony. There was no need— Massachusetts is unusual among U.S. states in maintaining a category of officiant called a “solemnizer.” Any person, with little qualification, can apply to be a solemnizer. The dichotomy between the “republican style”36 of the application process, and the quotidian ease with which I was granted the certificate made me think about the “sovereign performative”37 that I would stage in Rehoboth. The “I do” statement in a marriage ceremony is one of Austin’s core examples38 of an “illocutionary” performative, an utterance which “has a certain force” in the “saying” of it,39 but this example itself performs an interesting elision of the role of a state representative in a civil marriage ceremony. In Rehoboth, my friends would not be married until I pronounced them so publicly. That pronouncement would of course require other performative statements (“I do”) from my friends as a pre-requisite to its validity.40 But on the date and in the location specified by the solemnization certificate, I had, as a feature of the designation “solemnizer” bestowed on me by the Commonwealth of Massachusetts, absolute power over whether they would be married or not—on that date and in that location. In the narrow context of the two possible realities of my friends becoming married or not on that day and in that location, my role was to exercise the sovereign performative power of the Commonwealth as its judge-like representative. ¶ But in that exercise, I would also be performing two arguments: one for the sovereign legitimacy (and successful performativity)41 of my utterances and the illegitimacy of any others; and one for the value and significance of “married” as a position of legal subjectivity in Massachusetts and the United States. I bring up this example to emphasize the specifically illocutionary power of the judicial rhetorical constitution of subjects before law. Austin describes illocution as “‘in saying x I was doing y’ or ‘I did y,’”42 but judicial illocution might more accurately be described as “in saying x I did x.” When I said that these people were married, I made them married. The statement and the doing were one and the same. If a judge sentences a person to death, she does not depress the needle; the pronouncement of sentence is an illocutionary act in the first sense (x and y). But in pronouncing the sentence, the judge does redefine the convicted (of a death-eligible crime) person’s subjectivity before law from “convicted” and/or “criminal” and/or “felon” and/or “murderer” and/or “traitor” to, more primarily, “condemned.” This is an illocutionary act in the second sense (x and x).¶ If a judge rules that it is unconstitutional to require a trans\* person’s passport to list their gender contrary to that person’s “self-understanding,”43 this is a “perlocutionary” act (where the utterance effectively causes something to happen)44 in that the ruling enables the person who is trans\* to change the official designation of their gender. But it is also an x and x illocutionary act in the context of the petitioner’s subjectivity before law—the utterance of the ruling has changed their self-understanding of their own identity from “not real” to “real” in the eyes of the law. This would be even more evident if the ruling did not merely realize the truth of a trans\* person’s self-understanding as male or female, but went so far as to create, in the moment of the utterance itself, a legally recognized trans\* identity category. ¶ All of these examples are performatives enabled by the fantasy of the sovereign location of power in law. When asked, I considered (given my own views on marriage as an institution) declining to perform the ceremony—even in Massachusetts, whose marriage laws mean that the sexual orientation identity of the two people I married cannot be discerned from this story. I understood that my performative and the discourse of the ceremony surrounding it would contribute in a small way to the sovereign power of the state over human relational and sexual legitimacy. But this refusal would not have made the present sovereignty of the state over the determination of legally legitimate and illegitimate forms of relation any less inevitable.¶ Petitions to the law are inevitable; they will be made, often by people with no other recourse to save their life, or to preserve their life's basic quality. As Butler demonstrates, any such petition will have performative effect. I do not offer this brief critique of Butler’s theory of “sovereign performatives” to dispute the facticity of her arguments. I begin this project with the stipulation that politics of resistance to the “sovereign performative” must include actions of resistance to statist law itself—that is, the specific articulation of opposition, within progressive social movements, to strategies that privilege appeals for help from judges. But these politics must also acknowledge that those who undertake such strategies do not always do so without knowledge of the sovereign performative function of their actions—“recourse to the law” does not always or even usually “imagine” the law “as neutral.”45 These radical politics must also be undertaken with knowledge of the effects of the petitions to law-as-sovereign that will inevitably be made—and particularly with knowledge of the effects that flow from the (also performative and also inevitable) judicial rhetorical responses to these inevitable petitions. ¶ Austin teaches us that it is in the nature of performatives to not always work, and to produce effects in excess of their explicit ones. The judicial rhetorical constitution of subject and abject forms of being-in-relation to law operates through legal performatives that contain the possibilities for their own future “infelicity.”46 My project is an attempt to explore some future possibilities for the counter-sovereign articulation of subjectivity before U.S. law—possibilities that are both foreclosed and engendered in the argumentative justifications for judicial decisions. Specifically, I examine some key Supreme Court cases relating to sexual practice, race in education policy, and marriage. I perform a legal rhetorical criticism of critic-constructed “meta”-texts47 that form argumentative frameworks through which judges apply various legal doctrines to questions of sexual, racial, educational, and relational freedom.¶ Following Perelman, I understand judicial argument to be the explanatory justifications offered for judges’ authoritative interpretive application of legal doctrine to problems of public concern––problems that have been framed as legal, either by jurists themselves, petitioners to the courts, or both. In the United States, judicial arguments about constitutional interpretation have the privileged function of delimiting the grounds on which the authority of all other statist legal argument is based. Given the overwhelming salience of constitutional legal discourse in U.S. everyday life,48 this means that the judicial rhetoric of constitutional law plays a significant role in delimiting the grounds on which a person can base their claim—literally49––to existence and legitimacy in the U.S. polity.50 Jurists’ arguments from and about the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution in particular perform a final arbitration function in the ongoing and generally contentious process of the statist determination of what forms of racialized queer identity and relation will be eligible for recognized and legitimated status in U.S. public life. ¶ In this dissertation, I focus on the Fourteenth Amendment—due process and equal protection—rhetoric of U.S. Supreme Court Justice Anthony M. Kennedy. I read this rhetoric in terms of “genealogies of precedent,” or the argumentative possibilities for queer subjectivity before law that are brought into being by the doctrinal frameworks Kennedy and other judicial rhetors use in a given opinion. Each chapter offers a case study of opinions in several Federal and Supreme Court cases that are foundational to Kennedy’s development of a new constitutional jurisprudence of substantive due process and equality. I demonstrate that this jurisprudence is both productive of and violent to possibilities for practical and strategic sexually “progressive”51 interactions with U.S. constitutional law. These interactions, despite their practical or strategic formulation, can be undertaken and/or framed in terms of anti-statist and institutional radical queer political goals. Possibilities for the success of such radical framing of practical interaction are partially delimited in the argumentative choice of U.S. judicial opinions.

#### Politics is not reproductive futurity or normalization – their alt is too totalizing and doesn’t solve

Powers, Prof @ Roehampton University, 9

(Nina, “Non-Reproductive Futurism,” borderlands, vol.8 No.2, <http://www.borderlands.net.au/vol8no2_2009/power_futurism.pdf>)

Edelman’s desire to conflate all politics with reproductive futurism does an injustice to the politics behind some of the historical shifts in the way abortion, for example, has been conceived. Even in the examples Edelman himself gives of anti-reproductive movements, he is quick to state that these campaigns for abortion rights frame the argument in terms of a ‘fight for our future – for our daughters and sons’ (Edelman, 2004: 3). But, whilst it is true that the anti-abortion debate (especially in America) is often played out on the territory of the right (where the rhetoric of pro-life reigns), it is certainly not the case in other parts of the world that abortion is defended in the name of those children already born, i.e. trapped in the framework of reproductive futurity. Elsewhere, it is the rationality of the woman, her ability to make economic and pragmatic decisions that feature foremost in any debate about the rights and wrongs of abortion. Historically, too, discussions about abortion took place in broader contexts that stressed abortion alongside questions of the equal right to work, progressive notions of family structure and so on. Before Stalin repealed the laws, the Soviet Union under Lenin was the first to provide free and on demand abortions. These laws were couched not in terms of ‘life,’ but in terms of pragmatism predicated on a notion of political equality. As Wendy Z. Goldman puts it: Soviet theorists held that the transition to capitalism had transformed the family by undermining its social and economic functions. Under socialism, it would wither away and under communism, it would cease to exist entirely. (Goldman, 1993: 11) Unless the family is considered in its social and economic function, it makes no sense to speak of its power as an image, however powerful this image might be. Edelman ultimately concedes far too much to a very narrow ideological image of the family that, whilst pernicious, is easier to undo with reference to history and practice than he seems to think. As Tim Dean puts it: ‘the polemical ire that permeates No Future seems to have been appropriated wholesale from the rightwing rants to which he recommends we hearken’ (Dean, 2008: 126). In the first section I tried to identify some of the contradictions between the contemporary family and the demands of capitalism, while above I gave examples of politics not based on reproduction and reproduction not based on futurity: what follows from this is that there are important historical shifts in the way in which the family and the image of the child comes to shift in and out of focus. Take the discussions surrounding in vitro fertilisation. First viable as a reproductive practice in the late 1970s, early artificial insemination was regarded as a ‘paganistic and atheistic’ practice (Barrett and McIntosh, 1982: 11). Now, however, despite the wastage of potential viable embryos in the process, it is generally regarded as a practical option for infertile couples. Here the contradictions of contemporary social feeling towards children is exposed once again: reproductive futurism turns out not to be invested in all children, but only those it chooses to keep out of a pragmatism enabled by technology. Edelman talks about the ‘morbidity inherent in fetishization as such’ when opponents of abortion use photos of foetuses to highlight the proximity of the foetus to the ‘fully-formed child’ (Edelman, 2004: 41). He is right that morbidity and the politics of life seem to go hand-inhand, but then proceeds to argue that it is the queer alone that has a duty to remain true to this morbidity, to expose the ‘misrecognised’ investments of ‘sentimental futurism’: The subject … must accept its sinthome, its particular pathway to jouissance … This, I suggest, is the ethical burden to which queerness must accede in a social order intent on misrecognising its own investment in morbidity, fetishisation, and repetition: to inhabit the place of meaninglessness associated with the sinthome; to figure an unregenerate, and unregenerating, sexuality whose singular insistence on jouissance, rejecting every constraint imposed by sentimental futurism, exposes aesthetic culture – the culture of forms and their reproduction, the culture of Imaginary forms – as always already a “culture of death” intent on abjecting the force of a death drive that shatters the tomb we call life. (Edelman, 2004: 47-8) This does not exactly seem like a revelation. We live for the most part in pragmatic acceptance of this culture of death. It hardly shocks us when, for example, statistics reveal that, in 2004, 60% of women who had abortions had already given birth to at least one child (Sharples, 2008). Those people most identified with children – mothers – turn out, quite often, to deal with ‘life’ rather more pragmatically than we might otherwise believe. Edelman has to ignore historical and current examples of abortion rights campaigns, and other attitudes towards the family, in order to shoehorn all politics into a single vision to which he then opposes his notion of the queer. As Brenkman puts it: ‘To grant the Right the status of exemplary articulators of “the” social order strikes me as politically self-destructive and theoretically just plain wrong’ (Brenkman, 2002: 177). There are genuine moments of historical and political importance in terms of thinking about the family that seem to escape Edelman’s dismissal of politics as inevitably futural. We do not need to give up on politics altogether, whilst still accepting that the image of the child is a massive ideological obstacle. Rancière’s notion of political equality (‘Politics … is that activity which turns on equality as its principle’ (Rancière, 1999: ix)) neither concedes ground to politics as it appears (the ordering of the state, the police, a supposed consensus) nor does it think that politics is impossible or nondesirable, as Edelman does. We must ask: is all politics conservative by definition? Does negativity or resistance to existing power structures always translate back into some stable and positive form? The examples of the kibbutzim and the various contradictions in the ideology and practices of contemporary reproduction make it clear that Edelman, whilst having a strong argument about the shape that the ideology of the child takes, has to ignore the unstable compromises that the contemporary world has already made with itself regarding life and death in reproduction. Alan Sinfield has questioned whether we should really conflate all political aspirations with Edelman’s conception of reproductive futurism: ‘perhaps reproductive futurism is capturing and abusing other political aspirations and they should be reasserted’ (Sinfield, 2005: 50). It is not, then, that all politics is reproductively futural, but that this image has come to pervert other political desires, which may have a more complex relationship to children and a progressive conception of humanity. Edelman polemically dismisses the ‘left’ attitude to the queer, as ‘nothing more than a sexual practice in need of demystification’ (Edelman, 2004: 28). Whilst a certain strain of leftist thinking does pursue this demystificatory line (arguing, for example, that many forms of sexual expression are ‘natural’), Edelman reduces the left position on sexuality to a simple question of acceptance, as a way of arguing that the queer can mean nothing to the left. But there are, as indicated above, quite different ways of thinking about the family (in a non-futural, non-ideological way) and about politics, and the two together. When Rancière discusses the ‘subject of politics’, he makes it clear that: The subject of politics can precisely be identified neither with “humanity” and the gatherings of a population, nor with the identities defined by constitutional texts. They are always defined by an interval between identities, be these identities determined by social relations or juridical categories. (Rancière, 2006a: 59) Could this ‘interval between identities’ be the jouissance that Edelman aligns with the queer? Whilst Edelman’s psychoanalytic subject could in no way be understood as a similar (non)entity to Rancière’s ‘subject of politics,’ this idea of the interval seems to indicate a site of noncapture that could be described in a certain sense as ‘queer.’ In Edelman’s response to John Brenkman he states that: ‘Sexuality refuses demystification as society refuses queerness’ (Edelman, 2002: 181-5). By reifying sexuality as something that ‘refuses’ meaning, Edelman oddly substantialises it; Rancière’s way out of the identities determined by social relations or juridical categories is much less dependent on any pre-existing identity, even though he retains the very concept of politics that Edelman rejects. There seems to be no reason why the subject of politics for Rancière couldn’t be a ‘queer’ subject in Edelman’s sense, at the same time as reclaiming a notion of rationality away from the categories of the state. Before turning to a brief summary of this tentative queer rationalism, one more structural element of Edelman’s argument will be addressed: that of the death drive.

#### Even if every K of fiat is true, studying and challenging the details of public policy creates a portable toolkit for policymaking as power-building – only our model solves this – teaching debaters to repurpose existing literatures towards radical change is key

Rahman, 18 – K. Sabeel, Assistant Professor of Law, Brooklyn Law School; Visiting Professor of Law, Harvard Law School. “Policymaking as Power-Building,” Southern California Interdisciplinary Law Journal, Winter, 27 S. Cal. Interdis. L.J. 315, p. Lexis – Klab21

The problem of power - and in particular, balancing the differential power of different factions to preserve effective, accountable, and responsive republican government - has always been a central concern of constitutional and public law. In today's era of growing economic inequality, these age-old concerns about how institutional structures allocate power and protect against potentially excess influence of any one faction have become a renewed area of concern for scholars of constitutional law, public law, and law and inequality. n1 Indeed, a wide body of social science research has documented that economic wealth in particular generates troubling disparities in political power and influence, thereby skewing our ordinary processes of democratic governance: legislation is empirically more [\*318] responsive to the preferences of wealthier citizens; n2 legislators themselves are dependent on campaign funders and donors rather than constituents for winning office; n3 organized business interests have proven more resourced and sophisticated in building an influence ecosystem of lobbying, advocacy, and model legislation bodies that have major impact on state, local and federal legislatures, as well as regulatory bodies; n4 the shared social and cultural background among legislators, regulators, and economic elites induces more elite-friendly policies. n5 But the challenge of mitigating these disparities of political power is not just a question of macro-level constitutional or structural institutional design. Rather, public policy itself plays a role in shaping the balance of power between different constituencies in civil society - and their relative ability to exercise power and influence on public policy in the future. This power-shifting dimension of policy design is often overlooked in more substantively-oriented policy discussions. But a self-conscious use of policy design to balance disparities of political power can play an important role in these larger conversations about power, public law, and inequality today. This is what I call in this paper policymaking as power-building. I argue below that in an era of increasing (and increasingly interrelated) economic and political inequality, we must design public policies not only with an eye toward their substantive merits, but also in ways that rebalance disparities of power. In particular, public policy should be aimed at institutionalizing the countervailing power of constituencies that are often the beneficiaries of egalitarian economic policies, yet lack the durable, long-term political influence. Specifically, this paper makes three main arguments and contributions. First, the paper develops a theoretical framework for understanding power and power-building, drawing on and contributing to an overlapping set of literatures in public law, administrative law, social movements, and social science. In so doing, the paper develops implications for public law debates, policymakers, and social movement actors alike. Specifically, I suggest that [\*319] power distributions are not an intrinsic property of pure institutional design or of raw interest group resources. Rather, power is relational, emerging out from the dynamics of how civil society groups interface or interact with policymaking institutions. It is by altering and reshaping this state-society linkage that institutions create new forms and distributions of power. Second, I argue that this power-building orientation to policy and institutional design is of particular relevance in context of regulatory institutions and the administrative process. While we are accustomed to a long-standing debate about regulatory constraint and discretion, the relationship of administrative agencies to the separation of powers, and the balance between expertise and public input in regulatory policymaking, viewing the administrative process as a mode of constructing - and potentially remedying - power disparities suggests some valuable new approaches to policy and regulatory design. The administrative process is already one of more flexible and fluid public law arenas in which to experiment with approaches to balancing political power. n6 Nor is this administrative focus limited to the federal arena; arguably some of the most compelling experiments in administrative power-balancing has been taking place at the state and local level. n7 This orientation towards power provides a distinct lens that recasts and repurposes existing literatures in administrative law, to better address problems of inclusion, accountability, responsiveness

, and above all, political power. Third, the paper outlines a more generalizable toolkit through which policies can be designed to empower key constituencies, and to mitigate disparities of political power. This toolkit is also portable - easily applied to policy contexts from federal, state, or local arenas - and trans-substantive - adaptable in different policy areas. Highlighting and developing this strategy of power-building through policy design offers several valuable implications. For policymakers, these ideas could inform regulatory policies and designs that help mitigate disparities of influence, particularly between more well-connected and resourced interest groups and more diffuse or disempowered constituencies. For advocacy groups, these ideas suggest a way to strategically design public policy and regulatory initiatives in ways that forge tighter links to constituencies that may benefit from key policies, but might otherwise be [\*320] politically ill-equipped to defend them from rollback. If legal and social science scholarship have documented how economic inequality and political inequality reinforce one another as politically-powerful actors push for policies that exacerbate inequality, this paper suggests a way towards the inverse dynamic: in which policies aimed at promoting economic equality are made more durable and effective through policy designs that help create more political equality. These arguments are of particular concern in light of both the growing importance of regulatory agencies in driving the larger policy debates, and how this increased centrality of regulation places previous waves of regulatory process reform under strain. As this paper will suggest, as an empirical matter, federal regulatory agencies are already central to major policy initiatives, even above and beyond formal actions of Congress. This is in part because of the accumulation of delegations of agency authority, and in part because of the political incentives to make policy through the Executive Branch in the face of either divided government where different parties control the White House and the Congress, or sclerosis and gridlock within Congress itself - or both. The administrative state has long been subject to waves of institutional process reform from the passage of the Administrative Procedure Act to more recent attempts at leveraging new technological and online tools to improve agency processes. But the practical and political stakes of regulatory judgment today suggests the need for more far-reaching institutional design approaches.

#### The aff’s politics of transition emphasizes the chaotic and the new at the expense of strategies that appear stale and well-trodded, like state-centric advocacy and institutional engagement --- rejecting all of these ultimates cedes political terrain to libertarian strategies.

Dhawan 15. Nikita Dhawan, professor of political science at the University of Innsbruck (Austria), “Homonationalism and state-phobia: The post-colonial predicament of queering modernities, publication forthcoming, available via Academia.edu, 65

As Foucault himself warns state-phobia is deeply inscribed in liberal and neo-liberal ideas of civil society. The wickedness of the state is juxtaposed against the inherent goodness of civil society, so that the aim is the ‘whithering away of the state’. This anti-state-centric approach to political power locates radical politics in extra-state space of innovation. This is why Puar and others reject pragmatic politics of same-sex marriage or anti-discrimination legislations. In contrast they support civil society campaigns like pink-watching that increasingly deploy the strategy of surveillance for shaming states into good behavior. Even as one critiques the harnessing of gender and sexuality by neo-liberal capitalism, the rejection of all feminist- queer politics oriented towards the state as part of a biopolitical agenda is disingenuous state-phobic rhetoric.

Postcolonial-queer-feminists are caught in an ambivalent, double-bind vis-à-vis the state: On the one hand, the state has historically been the source of violence and repression through the criminalization and pathologization of non-normative sexual practices. And yet, queer strategies seek to instrumentalize the state to promote sexual justice. Even as the state is known to perpetuate heteronormative ideologies, which are founding myths of nations, the hope is that the state can function as a site of redress of gender and sexual inequality. Despite the problematic track-record with regard to sexual politics of all nation-states, whether European or non-European, it is dangerous to disregard the immense political implications of state-phobic positions, which are increasingly popular in radical discourses in the West.

As the recent re-criminalization of homosexuality in Uganda, India and Nigeria demonstrate, negotiations with state are indispensable and imperative for emancipatory queer politics in the global South. This is not a plea for statism; rather, one must be aware of the dangers of the replacement of state with non-state actors as motors of justice. Against this background, the recent anti-statist stance within postcolonial queer scholarship is alarming, as it ignores the importance of the state for those citizens who do not have access to transnational counterpublic spheres to address their grievances.

Decolonization, whether in USA, Israel or India, cannot be achieved merely through a strategy of shaming the state. Rather in the Gramscian- Spivakian sense, it is imperative to enable vulnerable disenfranchised individuals and groups to access the state (Dhawan 2013). Accordingly, instead of a for or against position vis-à-vis the state, the more challenging question is how to reconfigure the state, given that its institutions and policies are the mobile effect of a regime of multiple governmentalities. Thus the challenge is how to pursue a non-statephobic queer politics that at the same time neither rationalizes the biopolitical state project nor makes the queer bodies governable. In postcolonial contexts, the state is like a pharmakon, namely, both poison and medicine. Postcolonial queer politics must explore strategies of converting poison into counterpoison (Spivak 2007: 71).

Herein the ambivalent function of the state must be addressed. As Pharmakon, the inherent condradictions must be engaged with: Violence and justice, ideology and emancipation, law and discipline. If, following Foucault, the state has no stable essence, then it is marked by undecidability or doubleness. The sole focus on the negative aspects of the Pharmakon, namely the destructive and repressive traits, neutralizes and ignores the enabling and empowering aspects. Thus postcolonial-queer-feminist politics must transform poison into remedy and formulate critique of the state beyond state-phobia. A challenging task, but anything else would be too risky!

#### Transition as a politics is embedded within an anti-normative act that undermines the theoretical basis for politics---makes breaking down capitalism impossible.

Mari Ruti 17. Professor of critical theory and of sexual diversity studies, University of Toronto. The Ethics of Opting Out: Queer Theory’s Defiant Subjects. Columbia University Press. 37-9.

In Halberstam's world of queer failure, antinormativity has become a default politico-ethical stance to such an extent that what matters is not the practical viability but rather the sheer extremity (or rhetorical allure) of the arguments made. This is a problem that reaches well beyond Halberstam and that I will return to repeatedly in this book, namely, that the strand of queer theory that advocates various versions of the ethics of opting out often promotes the ideal of antinormativity so indiscriminately that one act of defiance seems just as good as any other, irrespective of the "content," let alone the outcome, of the act in question. I would say that this is, broadly speaking, one of the main shortcomings of contemporary progressive theory, including queer theory. In its eagerness to reach the next radical edge, the most hyperbolic position conceivable to stand on, this theory sometimes misses its aim, as I think Halberstam at points does, and as Edelman perhaps does in aligning queerness with the death drive and as Puar perhaps does in aligning queerness with suicide terrorism. This is a politics of negativity devoid of any clear political or ethical vision: it wants to destroy what exists without giving us much of a sense of what should exist. It may of course be that offering an alternative politicoethical vision is more or less impossible. Perhaps it is not the task of theory to define the future but merely to critique the present. In principle, I do not have a problem with the idea that the purpose of theory is to show us what is wrong rather than to tell us what to do. At the same time, I am more inclined to look for "real-life" referents for my theoretical paradigms than those who believe that theory is-or should be-an imaginative activity wholly divorced from the exigencies of lived reality. On the one hand, the latter attitude is freeing in the sense that suddenly anything is possible, including the idea that stupidity represents a radical politicoethical project. But on the other, it can lead to what Lacan calls "empty" speech, speech devoid of any meaning (pure rhetoric). It is from this partly unconvinced perspective that I would like to start putting pressure on three interrelated tendencies within recent queer theory. I will return to each of these tendencies in greater detail in later chapters. Here let me merely name them briefly. First, I do not think that the celebration of negativity for its own sake that characterizes some versions of queer theory amounts to much (besides explosive rhetoric). I prefer to work with negativity, to see what negativity can do for us. In the next two chapters, I will try to illustrate that this is what Lacan sought to do, despite Edelman's efforts to tell us otherwise. Second, I think that the semiautomatic-and therefore no longer honestly critical-attempt to annihilate "the subject" that runs through much of progressive theory, including queer theory, is a theoretical and politicoethical dead end. Though I understand the historical reasons for the assault on the humanist subject, I wonder about the almost ritualistic manner in which the slaughter of "the subject" gets undertaken from text to text, as if thinkers such as Lacan, Derrida, Foucault, and Deleuze somehow botched the job back in the 1960s and 1970s. 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### Turn

#### Their anti-state approach manifests itself as a cruel attachment to the threat of institutionalization—antinormativity performs an attachment to institutional transformation that actively prohibits change

Robyn Wiegman 2016 No Guarantee: Feminism’s Academic Affect and Political Fantasy, Atlantis 37:2

If conversations about institutionalization are magnetic scenes for rehearsing attachment and detachment alike, they obviously play a crucial role in redefining the political imaginary that governs the field. It might even be true to say that these conversations constitute the political imaginary as much as they perform it, which is why the repetition they enact can be so engaging, at least for those of us who find ourselves continually enthralled. Certainly, the contradictions we encounter in the university are overwhelming—and especially so when both our models and discourses about politics are so out of synch with the temporalities and political struggles endemic to institutional change. This situation, in which an attachment to an “object/scene of desire is itself an obstacle” to fulfillment, is what Lauren Berlant (2011) calls “cruel optimism” (227). According to Berlant, “[a]ll attachment is optimistic,” in part because optimism is “the force that moves you…into the world in order to bring closer that satisfying something that you cannot generate on your own” (1-2). Optimism becomes cruel “only when the object that draws your attachment actively impedes the aim that brought you to it” (1). It is both the value and force of Cruel Optimism that it focuses most intently on those optimisms that collate around sovereign fantasies of the good life and of normative political orders where, in the context of vicious neoliberal practices of attrition, people strive for objects that repeatedly fail to satisfy their material and psychic needs because alternatives are so difficult to invent and achieve. In their cruelly optimistic return to scenes of predictable disappointment, people confirm, Berlant writes, their “attachment to the system and thereby confirm the system and the legitimacy of the affects that make one feel bound to it” (227). This is the case even when the attachment “has the negative force of cynicism or the dark attenuation of political depression” (227). Whether in despair or guarded hope, then, optimism is most cruel when it is bound to those genres of living that conform to the failures we already know.

But how do we understand those instances when the predictable incapacity of the attachment to live up to the fantasy it cultivates is both a psychic and political necessity? This is the question that haunts the contemporary juncture in which our ongoing attachment to an object (the university) is only possible because we know it will not deliver what we most want from it. In this context, the cruelty of our optimism—to be attached to an object that “impedes the aim” that brought us to it— is a potent form of inoculation against the threat of institutional complicity. Or so it can seem in the affective atmosphere of the present when neoliberal rationalities are revising not only the role of the university, but the material structures in which its organization of learning and labor take shape. In her introductory remarks to the 2011 plenary panel on “The Multiple Futures of Gender and Sexuality Studies” held at Barnard College, Lisa Duggan offered a cogent summary of the contemporary situation in which corporate education envisions faculty as contingent labor, students as consumers, and learning as outcome oriented—a university whose entire ecology is being remade in the name of perpetual crisis. In this context, which to many observers is the most thoroughgoing revision of the academy in more than a century, Duggan asked panelists to turn their attention away from the struggles of everyday institutional life to speculate on the university they would build if the agency to make such decisions belonged to them. “If you suddenly had the power to remake the university in any way that you wanted,” she asked, “how would you institutionalize Gender, Women’s, LGBT, Postcolonial and Ethnic Studies?” No one needs to hear the audience’s laughter to register the unworldliness of this question and the future it envisions in which the study of race, gender, sexuality, and post/colonialism emerge, in Duggan’s words, “as central rather than marginal to the [university’s] academic mission.”

Duggan’s provocation was no laughing matter, of course, as she sought to counter political despondency by evoking an institutional relation for feminist scholars that was no longer optimistically cruel. In the ensuing discussion, panelists took up the charge in different but related ways. Kandice Chuh discussed forms of institutionalization that could resist “institutionality,” a term she borrowed from Roderick Ferguson (2012) who uses it to connote practices of inclusion that appropriate and domesticate the epistemological force of minority discourses, largely by marketing difference as uncritical multiculturalism. Ann Pellegrini described the importance of developing perverse pedagogies that would promote, against neoliberalism, a system of value that privileged the non-monetizable knowledges found in the humanities where creativity and alternative forms of collective world building now live. And for Sarita See, the promise of the power to remake the university meant learning how to create “a non-propertied space of decolonial knowledge production,” one that could nurture collaborative projects on race and colonialism without the master motive of owning knowledge. In these ways, the panelists engaged Duggan’s provocation by emphasizing the political commitments and analytic priorities of the fields in question while working hard to sidestep the various threats that becoming agents of institutionalization might pose. The distinctions that emerged— between appropriation and radicality, domestication and epistemological insurgency, and normalizing and perverse pedagogies—were as familiar as the paradox they engendered, as the leap into a future in which Gender, Women’s, LGBT, Postcolonial, and Ethnic Studies were central was figured by distinctly anti-institutional forms of teaching and learning.

In this context, where the future could be optimistically embraced only by resisting institutionalization, we might genuinely ask: is “the power to remake the university” the kind of power that scholars in any of the fields under discussion could ever want? I emphasize the word power here to draw attention to the condition of possibility that the organizing question quite significantly concealed. For in the postulation that one might “suddenly” have “the power” to transform the prevailing structure of the institution, the provocation allowed panelists to perform an attachment to institutional transformation without having to grapple with what it would mean not simply to seek institutional power, but to inhabit and wield it. In this way, the panel’s affective disposition conformed to the characteristics of political fantasy as Berlant (2011) describes it, splitting “attachment and expectation” in order to isolate “political optimism from the way things are” (228). For Berlant, of course, this cruelty is part of the impasse of the political present, an impediment to the creativity and risk she finds necessary to any project that aims to generate alternative social relations and the political sensorium necessary to sustain them. If her tracking of cruel optimism has concentrated on the conventionality of attachments in everyday worlds, this is because she has long been concerned with the anesthetizing lure of normative culture, which she reads as a cluster of genres that compel affective attachments to objects that tend to suffocate those who use them to survive. What has always intrigued me, as I have emphasized throughout this essay, is the conventionality that accompanies the rhetorics and routines of what we conventionally cast in professionalized genres of critical thought as unconventional: radicality, resistance, the alternative. Hence, I am not drawn to Berlant’s concept because of its potent utility in explaining the way that people continue to attach to social norms, laws, belief systems, intimacy cultures, majoritarian politics, and the like that repeatedly diminish, if not overtly impede, the satisfaction of their material and affective needs. My interest is in the protection that cruel optimism quite powerfully affords in managing the anxiety of political complicity that animates our relation to institutionalization.

This, then, is what cruel optimism offers as a description of the affective atmosphere of Gender, Sexuality, and Women’s Studies today: a way to repeat the attachment to political transformation that continues to compel us without incurring the risk of the condemnation of a future failure. To be sure, one of the distinct consequences of this affective disposition is an aversion to addressing the kinds of institutional power we already have and work, often aggressively, not to lose. The absence of such a discussion has value in soothing the contradiction between the status of identity knowledges within the university and the power that practitioners within these fields now hold, not only in relation to those professional practices that attend publication, employment, and all aspects of student training, but in the various informal networks that help establish and sustain a scholar’s career. No matter what we can say about ongoing threats to programs and departments in institutions where even the liberal language of diversity has failed to sustain already-reduced budgets, the fact remains that nearly all of the fields in question have a well-established academic infrastructure with journals, conferences, book series, postdoctoral fellowships, national organizations, and research institutes dedicated to their critical agendas. In these spaces, along with the social networks they generate, scholars not only build and protect their own academic careers, but offer access to younger cohorts by determining what—and who among them—counts as worthy and cutting edge. Unlike many other professional cultures, the left-leaning academy eschews one of the most materially significant facts of its own existence: that who you know matters.

The point, let me be clear, is not to indict the tenured class—those of us who populate the hiring committees, sit on the editorial boards, hold the departmental administrative positions, lead the professional organizations, and whose letters of recommendation are taken as the ones that truly count—as hypocritical or self-deluded, or to say that the authority we exert in and over our fields is unethical or duplicitous. These conclusions would merely repeat the narrative conventions that cruel optimism names by re-idealizing the distinction between complicity and the good politics of anti-institutional insurgency that organizes the field’s psychic world. As I see it, the issue at stake here is both more broad and more vexing, having to do with the very power that the disavowal of institutional power exerts within our field. For one thing, it actively prohibits conversations that could enhance our affective capacity to engage the university as a contradictory but resonant scene of political desire, one whose urgencies are far greater than the issues of self-representation that have so profoundly besieged us. This is especially necessary at the current juncture when very few resources exist in neoliberal cultures for claiming institutional spaces of any kind, a fact that undoubtedly accounts for the poverty of the choices that face us: take the imaginative leap into the impossible as the recourse for sustaining political belief or declare war on political fantasy by making peace with complacency. While there is no guarantee that such conversations will yield anything of lasting value, I remain engaged by the idea that repetition is exhausting only when we stop paying attention to what it enables us to perform.

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### Case

option of simply opting out of it, or describing it as something that has never been available to us, is imaginable only if one can frame queerness as a singular abstraction that can be subtracted and isolated from a larger social matrix. In *No Future* Edelman takes on Cornel West’s referencing of futurity in an op-ed for the *Boston Globe* that he wrote with Sylvia Ann Hewitt titled “A Parent’s Bill of Rights.”27 The title is disturbingly smug (as if biological parents of the middle class did not already have uncontested rights to their children!), and the editorial is a neoliberal screed on behalf of the culture of the child. But Edelman’s critique never considers the topic of race that is central to the actual editorial. West’s pro-children agenda aligns with his other concerns about the crises of African American youth. Edelman’s critique of the editorial, with which for the most part I am deeply sympathetic, is flawed insofar as it decontextualizes West’s work from the topic that has been so central to his critical interventions: blackness. In the same way all queers are not the stealth-universal-white-gay- man invoked in queer antirelational formulations, all children are not the privileged white babies to whom contemporary society caters. Again, there is for me a lot to like in this critique of antireproductive futurism, but in Edelman’s theory **it is enacted by the active disavowal of a crisis in afrofuturism.28** Theories of queer temporality that fail to factor in the relational relevance of race or class merely reproduce a crypto-universal white gay subject that is weirdly atemporal—which is to say a subject whose time is a restricted and restricting hollowed-out present free of the need for the challenge of imagining a futurity that exists beyond the self or the here and now. The question of children hangs heavily when one considers Baraka’s present. On August 12, 2003, one of his daughters, Shani Baraka, and her female lover, Rayshon Holmes, were killed by the estranged husband of Wanda Pasha, who is also one of Baraka’s daughters. The thirty-one- and thirty-year-old women’s murders were preceded a few months earlier by another hate crime in Newark, the killing of fifteen-year-old Sakia Gunn. Gunn was a black transgendered youth who traveled from Hoboken to Greenwich Village and the Christopher Street piers to hang out with other young queers of color. Baraka and his wife, Amina, have in part dealt with the tragic loss of their daughter by turning to activism. The violent fate of their child has alerted them to the systemic violence that faces queer people (and especially young people) of color. The Barakas have both become ardent antiviolence activists speaking out directly on LGBT issues. Real violence has ironically brought Baraka back to a queer world that he had renounced so many years ago. Through his tremendous loss he has decided to further diversify his consistent commitment to activism and social justice to include what can only be understood as queer politics. In the world of *The Toilet* there are no hate crimes, no lexicon that identifies homophobia per se, but there is the fact of an aggression constantly on the verge of brutal actualization. The mimetic violence resonates across time and to the scene of the loss that the author will endure decades later. This story from real life is not meant to serve as the proof for my argument. Indeed, the play’s highly homoerotic violence is in crucial ways nothing like the misogynist violence against women that befell the dramatist’s family or the transgenderphobic violence that ended Gunn’s young life. I mention these tragedies because it makes one simple point. The future is only the stuff of some kids. **Racialized kids, queer kids, are not the sovereign princes of futurity**. **Although Edelman does**

#### Transition as a politics is embedded within an anti-normative act that undermines the theoretical basis for politics---makes breaking down capitalism impossible.

Mari Ruti 17. Professor of critical theory and of sexual diversity studies, University of Toronto. The Ethics of Opting Out: Queer Theory’s Defiant Subjects. Columbia University Press. 37-9.

In Halberstam's world of queer failure, antinormativity has become a default politico-ethical stance to such an extent that what matters is not the practical viability but rather the sheer extremity (or rhetorical allure) of the arguments made. This is a problem that reaches well beyond Halberstam and that I will return to repeatedly in this book, namely, that the strand of queer theory that advocates various versions of the ethics of opting out often promotes the ideal of antinormativity so indiscriminately that one act of defiance seems just as good as any other, irrespective of the "content," let alone the outcome, of the act in question. I would say that this is, broadly speaking, one of the main shortcomings of contemporary progressive theory, including queer theory. In its eagerness to reach the next radical edge, the most hyperbolic position conceivable to stand on, this theory sometimes misses its aim, as I think Halberstam at points does, and as Edelman perhaps does in aligning queerness with the death drive and as Puar perhaps does in aligning queerness with suicide terrorism. This is a politics of negativity devoid of any clear political or ethical vision: it wants to destroy what exists without giving us much of a sense of what should exist. It may of course be that offering an alternative politicoethical vision is more or less impossible. Perhaps it is not the task of theory to define the future but merely to critique the present. In principle, I do not have a problem with the idea that the purpose of theory is to show us what is wrong rather than to tell us what to do. At the same time, I am more inclined to look for "real-life" referents for my theoretical paradigms than those who believe that theory is-or should be-an imaginative activity wholly divorced from the exigencies of lived reality. On the one hand, the latter attitude is freeing in the sense that suddenly anything is possible, including the idea that stupidity represents a radical politicoethical project. But on the other, it can lead to what Lacan calls "empty" speech, speech devoid of any meaning (pure rhetoric). It is from this partly unconvinced perspective that I would like to start putting pressure on three interrelated tendencies within recent queer theory. I will return to each of these tendencies in greater detail in later chapters. Here let me merely name them briefly. First, I do not think that the celebration of negativity for its own sake that characterizes some versions of queer theory amounts to much (besides explosive rhetoric). I prefer to work with negativity, to see what negativity can do for us. In the next two chapters, I will try to illustrate that this is what Lacan sought to do, despite Edelman's efforts to tell us otherwise. Second, I think that the semiautomatic-and therefore no longer honestly critical-attempt to annihilate "the subject" that runs through much of progressive theory, including queer theory, is a theoretical and politicoethical dead end. Though I understand the historical reasons for the assault on the humanist subject, I wonder about the almost ritualistic manner in which the slaughter of "the subject" gets undertaken from text to text, as if thinkers such as Lacan, Derrida, Foucault, and Deleuze somehow botched the job back in the 1960s and 1970s. It seems to me that this all-too predictable battering of the subject represents a theoretical repetition compulsion in the strictly Freudian sense, indicating, among other things, a traumatic fixation that keeps us from moving to new conceptual terrains, including the question of what it might mean to be a subject after the collapse of the unified, arrogant, and self-mastering subject of humanist metaphysics. Of all the recurring themes of queer theory, the assault on the subject is what, for me, gives the strongest impression of empty speech, for it seems to have virtually nothing to do with the personal realities of those who advocate it, most of whom live semicoherent, semicontinous lives in semiconsistent (usually tenured) lifeworlds. Third, I think that queer theory's antinormativity can all too easily lose track of the continued need for normative justice: the kind of justice that makes judgments about the "right" or "wrong" of things. 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#### Rahman

Rahman, 18 – K. Sabeel, Assistant Professor of Law, Brooklyn Law School; Visiting Professor of Law, Harvard Law School. “Policymaking as Power-Building,” Southern California Interdisciplinary Law Journal, Winter, 27 S. Cal. Interdis. L.J. 315, p. Lexis – Klab21

The problem of power - and in particular, balancing the differential power of different factions to preserve effective, accountable, and responsive republican government - has always been a central concern of constitutional and public law. In today's era of growing economic inequality, these age-old concerns about how institutional structures allocate power and protect against potentially excess influence of any one faction have become a renewed area of concern for scholars of constitutional law, public law, and law and inequality. n1 Indeed, a wide body of social science research has documented that economic wealth in particular generates troubling disparities in political power and influence, thereby skewing our ordinary processes of democratic governance: legislation is empirically more [\*318] responsive to the preferences of wealthier citizens; n2 legislators themselves are dependent on campaign funders and donors rather than constituents for winning office; n3 organized business interests have proven more resourced and sophisticated in building an influence ecosystem of lobbying, advocacy, and model legislation bodies that have major impact on state, local and federal legislatures, as well as regulatory bodies; n4 the shared social and cultural background among legislators, regulators, and economic elites induces more elite-friendly policies. n5 But the challenge of mitigating these disparities of political power is not just a question of macro-level constitutional or structural institutional design. Rather, public policy itself plays a role in shaping the balance of power between different constituencies in civil society - and their relative ability to exercise power and influence on public policy in the future. This power-shifting dimension of policy design is often overlooked in more substantively-oriented policy discussions. But a self-conscious use of policy design to balance disparities of political power can play an important role in these larger conversations about power, public law, and inequality today. This is what I call in this paper policymaking as power-building. I argue below that in an era of increasing (and increasingly interrelated) economic and political inequality, we must design public policies not only with an eye toward their substantive merits, but also in ways that rebalance disparities of power. In particular, public policy should be aimed at institutionalizing the countervailing power of constituencies that are often the beneficiaries of egalitarian economic policies, yet lack the durable, long-term political influence. Specifically, this paper makes three main arguments and contributions. First, the paper develops a theoretical framework for understanding power and power-building, drawing on and contributing to an overlapping set of literatures in public law, administrative law, social movements, and social science. In so doing, the paper develops implications for public law debates, policymakers, and social movement actors alike. Specifically, I suggest that [\*319] power distributions are not an intrinsic property of pure institutional design or of raw interest group resources. Rather, power is relational, emerging out from the dynamics of how civil society groups interface or interact with policymaking institutions. It is by altering and reshaping this state-society linkage that institutions create new forms and distributions of power. Second, I argue that this power-building orientation to policy and institutional design is of particular relevance in context of regulatory institutions and the administrative process. While we are accustomed to a long-standing debate about regulatory constraint and discretion, the relationship of administrative agencies to the separation of powers, and the balance between expertise and public input in regulatory policymaking, viewing the administrative process as a mode of constructing - and potentially remedying - power disparities suggests some valuable new approaches to policy and regulatory design. The administrative process is already one of more flexible and fluid public law arenas in which to experiment with approaches to balancing political power. n6 Nor is this administrative focus limited to the federal arena; arguably some of the most compelling experiments in administrative power-balancing has been taking place at the state and local level. n7 This orientation towards power provides a distinct lens that recasts and repurposes existing literatures in administrative law, to better address problems of inclusion, accountability, responsiveness,

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and above all, political power. Third, the paper outlines a more generalizable toolkit through which policies can be designed to empower key constituencies, and to mitigate disparities of political power. This toolkit is also portable - easily applied to policy contexts from federal, state, or local arenas - and trans-substantive - adaptable in different policy areas. Highlighting and developing this strategy of power-building through policy design offers several valuable implications. For policymakers, these ideas could inform regulatory policies and designs that help mitigate disparities of influence, particularly between more well-connected and resourced interest groups and more diffuse or disempowered constituencies. For advocacy groups, these ideas suggest a way to strategically design public policy and regulatory initiatives in ways that forge tighter links to constituencies that may benefit from key policies, but might otherwise be [\*320] politically ill-equipped to defend them from rollback. If legal and social science scholarship have documented how economic inequality and political inequality reinforce one another as politically-powerful actors push for policies that exacerbate inequality, this paper suggests a way towards the inverse dynamic: in which policies aimed at promoting economic equality are made more durable and effective through policy designs that help create more political equality. These arguments are of particular concern in light of both the growing importance of regulatory agencies in driving the larger policy debates, and how this increased centrality of regulation places previous waves of regulatory process reform under strain. As this paper will suggest, as an empirical matter, federal regulatory agencies are already central to major policy initiatives, even above and beyond formal actions of Congress. This is in part because of the accumulation of delegations of agency authority, and in part because of the political incentives to make policy through the Executive Branch in the face of either divided government where different parties control the White House and the Congress, or sclerosis and gridlock within Congress itself - or both. The administrative state has long been subject to waves of institutional process reform from the passage of the Administrative Procedure Act to more recent attempts at leveraging new technological and online tools to improve agency processes. But the practical and political stakes of regulatory judgment today suggests the need for more far-reaching institutional design approaches.