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#### Courts cannot ‘expand’ antitrust law

George Bibikos 19, Founder of GA Bibikos LL.C., J.D. from Widener Commonwealth Law School; Supreme Court of Pennsylvania, “Commonwealth of Pennsylvania, Appelle, vs. Chesapeake Energy Corporation et al., Appellants,” <https://paforciviljusticereform.org/wp-content/uploads/2020/11/PCCJR-Chesapeake.pdf>

The court’s decision therefore (a) alters the rights of parties in Pennsylvania accused of engaging in anticompetitive behavior to defend against those claims in federal court, (b) creates new causes of action under the Consumer Protection Law, and (c) creates new remedies for antitrust violations that defendants would not face in federal court. These decisions are inherently legislative in nature. See, e.g., State v. Philip Morris, Inc., Nos. 96122017 and CL211487, 1997 WL 540913, at \*6 (Md. Cir. Ct. May 21, 1997) (“Altering common law rights, creating new causes of action, and providing new remedies for wrongs is generally a legislative function, not a judicial function.”). If these decisions are legislative in nature, then they are outside the purview of the courts and the executive.

Moreover, when the General Assembly prescribes specific statutory duties and remedies, those provisions must be strictly followed, 1 Pa.C.S. § 1504, and the courts cannot “expand coverage to subsume other remedies.” See Nat’l R. R. Passenger Corp. v. Nat’l Ass’n of R.R. Passengers, 414 U.S. 453, 458 (1974) (“A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.”). If the Consumer Protection Law is designed to protect buyers in consumer transactions and sets forth specific remedies, the courts are unable to expand the statute to subsume antitrust remedies.

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#### “Prohibit” means to forbid a given practice

Kennard 93 – Judge, California Supreme Court

Joyce L. Kennard, THEODORE R. HOWARD et al., Plaintiffs and Appellants, v. GEORGE H. **BABCOCK** et al., Defendants and Respondents. No. S027061., Supreme Court of California, 1993, https://law.justia.com/cases/california/supreme-court/4th/6/409.html

As I pointed out earlier, the majority's conclusion is at odds with the great weight of authority. Also, in determining reasonableness based on the relationship between or among attorneys, the majority gives little regard to the relationship between the attorney and the client. Moreover, the majority fails to recognize that restrictive covenants are intended to and do restrict the practice of law. Rule 1-500 proscribes agreements that "restrict" the practice of law, not just those that prohibit "altogether" the practice of law. (Contra, Haight, Brown & Bonesteel v. Superior Court (1991) 234 Cal.App.3d 963, 969 [285 Cal.Rptr. 845] [rule 1-500 "simply provides that an attorney may not enter into an agreement to refrain altogether from the practice of law"].) To "restrict" means to restrain, to confine within bounds. (Webster's New Collegiate Dict. (9th ed. 1988) p. 1006.) To "prohibit" means to prevent, to [\*\*164] [\*\*\*94] forbid. (Id. at p. 940.) The terms are not synonymous.

#### “Increase” means to make greater

Merriam-Webster ND

“increase,” Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/increase

transitive verb

1: to make greater : AUGMENT

2obsolete : ENRICH

### OFF

#### The United States Supreme Court ought to, deploying the technique utilized in Great Northern Railway Company v. Sunburst Oil and Refining Company:

#### decline to rule to limit the state action immunity doctrine on the basis that such a decision would undermine judicial deference to reliance interest

#### announce that existing precedent in this area is no longer reliable and that relevant parties should be on notice that the reliance interests that caused it to be upheld in this case will not apply to future challenges

#### not deny certiorari in challenges on the issue

#### CP solves and avoids - sunbursting avoids the downfalls of an unpredictable decision but causes legal change

Faure 14 – Michael Faure, Professor of International and Comparative Environmental Law at Maastricht University and Professor of Comparative Private Law and Economics at the Rotterdam Institute of Law and Economics (RILE), Erasmus School of Law, Morag Goodwin, Associate Professor in European and International Law, Tilburg Law School, and Franziska Weber, Junior Professor for Civil Law & Law and Economics at the Institute of Law and Economics, University of Hamburg, “THE REGULATOR'S DILEMMA: CAUGHT BETWEEN THE NEED FOR FLEXIBILITY & THE DEMANDS OF FORESEEABILITY. REASSESSING THE LEX CERTA PRINCIPLE”, Albany Law Journal of Science and Technology, 24 Alb. L.J. Sci. & Tech. 283, Lexis

Prospective overruling is a judicial technique in which a [\*349] previous precedent or authority is overruled without the new ruling having retrospective effect. n386 It thus represents a departure from the fundamental notion that judicial decisions that develop or change the law necessarily have retroactive effect. n387 It is, or has been, used by a court wishing to overturn or amend bad law, but is wary of the consequences of the retrospective application of their finding. Such consequences may include the inherent unfairness that would result to an individual who had relied on the existing law in good faith n388 or because of reasons of practicality, where the decision would have sweeping consequences for the operation of the judicial system. n389 Although appearing similar, prospective overruling differs from obiter dicta in two significant ways. Firstly, while judges can use obiter dicta to declare certain rules to be bad law or to comment on the likely direction of necessary legal reform, such comments do not entail that the decision in the case before them will be inconsistent with a future case. n390 Secondly, obiter dictum, while possibly highly influential, does not benefit from stare decisis and therefore is not binding. n391

There are a number of different ways in which a court can use prospective overruling. n392 Firstly, a court can announce a new rule or standards that will apply only to future cases, i.e., not to the case before it in the instant dispute. The old rule would also govern any cases that arose from action taken prior to the [\*350] announcement of the new rule but determined after it. n393 This has been called "pure" prospective overruling. n394 A second approach would be to announce a new rule that is only applicable to future cases that arise after the announcement but, as an exception, to apply it to the instant case. n395 A third alternative is to apply the new rule not only to the case at hand but to all other cases already pending at the time of announcement. This third approach excludes those cases in which the action that motivated them predates the announcement but where proceedings had not already been commenced at the moment of declaration of the new rule. n396 Finally, a fourth possibility would be for a court to announce a new rule not having retroactive effect but to suspend the entry into force of that new rule until a future date. n397 This technique is used to allow those actors likely to be affected by the change to adapt their behavior accordingly and to give the legislature the opportunity to enact a different rule should they so wish. n398 Traynor termed this form of prospective overruling "prospective-prospective overruling." n399 In this version of prospective overruling, the new rule does not apply to the case in which it is announced, or to any other cause of action that arises before the delayed entry into force of the new rule. n400 The Court of Justice of the European Union, for example, has accepted the need to place temporal limitations on its rulings in the interests of justice, although it has declared that it does so only in exceptional circumstances. n401 A variation on this form of [\*351] prospective overruling has been suggested by Advocate General Jacobs, whereby both the retrospective and prospective effect of a ruling of the Court of Justice of the European Union could be subject to a temporal limitation; in that case until the Member State concerned has had a reasonable opportunity to consider the introduction of amending legislation. n402

In addition to the European Union, a number of jurisdictions have used or accepted the possibility, if only in principle, of prospective overruling in exceptional circumstances, including the United States, n403 India, n404 New Zealand, n405 Canada, n406 the United Kingdom n407 and Germany. n408 The European Court of Human Rights has been understood to issue prospective rulings, n409 although there is some doubt as to whether its "dynamic" approach to convention interpretation is properly classified as such; n410 however, it certainly accepts such rulings in domestic courts as compatible with the rule of law. n411 At its apogee in the United States, the United States Supreme Court ruled in the case of Linkletter v. Walker, that in both criminal and civil cases, "the accepted rule today is that in appropriate cases the Court may in the interests of justice make the rule prospective." n412 However, since the 1970s, the use of retrospective overruling in the United States has been in retreat. While it remains unclear as to whether the use of "pure" prospective overruling (where the new rule does not apply to the case at hand) has been abandoned in civil cases, n413 the Supreme Court [\*352] has overturned its earlier enthusiasm and now prohibits prospective overruling in criminal cases n414 and the use of selective prospective overruling (i.e., "non-pure") in civil cases. n415 Yet, despite the discrediting of prospective overruling as a technique in the US more than twenty years ago, it continues to attract the interest of senior common law judges. n416 In a 2005 case, In re Spectrum Plus, the House of Lords found that it was theoretically possible to overrule a judgment with prospective effect only; n417 and in 2007, two members of the New Zealand Supreme Court accepted the same possibility. n418

3. The Pros and Cons of Prospective Overruling

Given that the heyday of prospective overruling has, until recently, been behind us, what reasons are there for being suspicious of the technique? There are, it seems, two main reasons for rejecting prospective overruling in its entirety. The first has been articulated by the Australian High Court in its emphatic refusal to countenance the use of prospective overruling and concerns an understanding of the nature of judicial interpretation. In the case of Ha v. New South Wales, the Court ruled that, "it would be a perversion of judicial power to maintain in force that which is acknowledged not to be the law." n419 In this reading, where a court determines that the rule they are required to apply is bad law, i.e., that the "real law" is actually now a different standard, it is simply untenable to continue to apply the wrong standard, even where it results in a manifest injustice to one of the parties before it. n420 The notion that prospective overruling is "a perversion of judicial power" gains further credence from the commonly accepted understanding that the role of the judiciary is to interpret the law in light of the case before it, where the primary function of the courts is to [\*353] adjudicate between parties; going beyond the particular case by making a general statement about the law is seen by some as "blatantly legislative." n421 While the legislature looks forward, the proper direction of the courts' attention is backwards, applying the existing law to situations that have already happened. This view was echoed by the United States Supreme Court in Griffith v. Kentucky, in which it ruled, concurring with earlier minority opinions by Justice Harlan, that the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." n422

The second reason for critics to reject prospective overruling concerns the impact upon individuals of arbitrariness to which prospective overruling gives rise. In Griffiths v. Kentucky, the United States Supreme Court stated quite simply that "selective application of new rules violates the principle of treating similarly situated defendants the same." n423 Once a rule or practice has been declared bad law or unconstitutional, it violates the central notion of equality before the law if the new rule is applied to benefit one individual but not another. n424 These concerns can be somewhat alleviated by applying the new rule to all cases stemming from action arising at or after the time of the cause of action of the case in which the new rule is announced, i.e., by limiting the normal retrospective effect of rulings only marginally, but to do so would be to reduce considerably the possible benefits of prospective overruling. n425 In effect, those parties who had relied in good faith on the previous standard in such actions would be held to a new, stricter standard and thus their legitimate expectation of and right to legal certainty would [\*354] be compromised. n426

What, then, are the benefits? In particular, would other, less dramatic, techniques do the same job without encountering the hostility that prospective overruling can inspire? Obiter dicta could be used, for example, to indicate a likely direction of legal reform without actually introducing a new rule. n427 However, it is in large part the binding nature of a prospective decision that makes it such a useful technique in balancing flexibility and foreseeability. n428 While obiter dicta could be used in a similar way, although such statements lack the ability to bind future courts, they reduce the foreseeability of parties the same way incentives for operators to adapt their behavior are reduced. Operators may instead play a waiting game in which they fail to carry out adaptations in the hope that a different court will continue to apply the existing standard. Prospective overruling, we suggest, cannot be replaced by the less controversial tool of obiter dictum. Moreover, obiter dictum would obviously only provide a solution in those legal systems where it exists, which is not the case for many civil law systems. n429

The first main benefit of prospective overruling follows from the assertion that it is a perversion of judicial power to uphold a law that is understood to be unsound. n430 Courts are rightly reluctant to overturn a precedent, even where they are convinced of the unsoundness of the rule in question, where the harm caused by retrospective change is greater than the supposed benefits. n431 Thus, Justice Traynor suggested, in his classic article on the topic, that the main benefit of the technique of prospective overruling is that it enables courts to "change[] bad law without upsetting the ... expectations of those who [have] relied upon it." n432 For Traynor, prospective overruling, in direct contrast to its critics, is a necessary tool for the proper administration of justice. n433 Allowing bad law to stand simply to overturn a [\*355] precedent would entail unacceptable and unreasonable hardship for one of the parties concerned is an equally perverse understanding of the judicial role. n434

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#### The United States, through a limited constitutional convention, ought to increase prohibitions on anticompetitive business practices by the private sector by limiting the state action immunity doctrine.

#### Conventions can change Antitrust law – avoids politics

**Berry, 87** (Mary Frances Berry, Geraldine R. Segal Professor of American Social Thought at the University of Pennsylvania and a member of the United States Commission on Civil Rights., 9-13-1987, accessed on 6-19-2021, The New York Times, "AMENDING THE CONSTITUTION; How Hard It Is To Change", https://www.nytimes.com/1987/09/13/magazine/amending-the-constitution-how-hard-it-is-to-change.html)//Babcii

The purpose of **Article V's convention** provision is to make it **possible** **for** amendments to be proposed that Congress does not want proposed, and it would be illogical indeed to assume that Congress could bind a convention's agenda. Even if the Congress decided to call a convention for the sole purpose of proposing amendments to balance the budget, and even if the convention agreed to this overall goal, the gathering **would** still **have great freedom**. The participants might decide that Congressional budgetary authority should be limited to support for the national defense. They could delete support for the general welfare from the Constitution, thus precluding such items as Social Security, Medicaid and Medicare. They could decide to amend Congressional power to regulate commerce, which now allows for such activities as environmental regulation, labor regulation **and antitrust enforcement**. This would, after all, abolish a whole series of Federal agencies and decrease the budget.

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#### Text: The fifty states and all relevant United States territories should:

#### - Announce and bind themselves that they will no longer pursue conduct legal under the state action immunity doctrine.

#### - End active supervision of policy or activity legal under the state action immunity doctrine

#### Plank 2 solves private sector conduct

Wex ND (Wex is a free legal dictionary and encyclopedia sponsored and hosted by the Legal Information Institute at the Cornell Law School. “State action antitrust immunity”, Cornell Law School, https://www.law.cornell.edu/wex/state\_action\_antitrust\_immunity)//babcii

Under the state-action doctrine elucidated in Parker v. Brown, 317 U.S. 341 (1943), state and municipal authorities are **immune from federal antitrust lawsuits** for actions taken pursuant to a clearly expressed state policy that, when legislated, had foreseeable anticompetitive effects. When a state approves and regulates certain conduct, even if it is anticompetitive under FTC or DOJ standards, the federal government must respect the decision of the state. Therefore, if a state sanctions anticompetitive conduct, the state is immune from investigation and possible prosecution by the FTC.

This doctrine can apply to provide immunity to non-state actors as well if a two-pronged requirement is met: (1) there must be a clearly articulated policy to displace competition; and (2) there must be active supervision by the state of the policy or activity.

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#### The aff is sua sponte – it makes a decision in absence of arguments presented before the court – that crushes court legitimacy

Milani & Smith 02 (Adam and Michael, both are Assistant Professors, Mercer University School of Law, “Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts,” 69 Tenn. L. Rev. 245, Winter, lexis)

The heart of the American legal system is the adversary process in which trained advocates present the parties’ facts and arguments to neutral decision makers. The fundamental premise of the adversary process is that these advocates will uncover and present more useful information and arguments to the decision maker than would be developed by a judicial officer acting on his own in an inquisitorial system.3 The adversary process is also said to “promote[] litigant and societal acceptance of decisions rendered by the courts”4 because a party who “is intimately involved in the adjudicatory process and feels that he has [they have] been given a fair opportunity to present his case . . . is likely to accept the results whether favorable or not.”5 Indeed, the Joint Conference on Responsibility of the American Bar Association and the Association of American Law Schools stated that “[i]n a very real sense it may be said that the integrity of the adjudicative process itself depends upon the participation of the advocate.”6 Accordingly, most lawyers probably never think about the possibility that a court will decide a case on an issue that the court itself raises and which was neither briefed nor argued by the parties. But we all know it happens. We even have a name for such a decision: [is] sua sponte. Translated from its original Latin, “sua sponte” means “on his or its own motion.”7 In the legal setting, sua sponte describes a decision or action undertaken by a court on its own motion8 as opposed to an action or decision done in response to a party’s request or argument. As such, the concept of “sua sponte” is an important exception to two basic [the] principles of our adversary system of adjudication: (1) that the parties will control the litigation, and (2) that the decision maker will be neutral and passive.9 One of the clearest manifestations of these principles is that the parties themselves, not the decision maker, determine what issues will be adjudicated. In the context of judicial decision making, a court deviates from its traditional “passive” role in the adjudicatory process when it raises an issue not identified by the parties but which it deems relevant to the legal controversy before it. Nonetheless, raising issues sua sponte is not an uncommon practice.10 In fact, legal scholars have identified several kinds of issues that are commonly raised by courts on their own. First, both trial and appellate courts often raise jurisdictional issues such as standing, subject matter jurisdiction, and mootness sua sponte.1

#### Court legitimacy is key to effectively combat terrorism

Shapiro 3 (Jeremy, Nonresident Senior Fellow at the Brookings institute - Foreign Policy, Center on the United States and Europe, Project on International Order and Strategy, 3-1-2003, “French Lessons: The Importance of the Judicial System in Fighting Terrorism”, The Brookings Institute, https://www.brookings.edu/articles/french-lessons-the-importance-of-the-judicial-system-in-fighting-terrorism/)

The unique nature of terrorism means that maintaining the appearance of justice and democratic legitimacy will be much more important than in past wars. The terrorist threat is in a perpetual state of mutation and adaptation in response to government efforts to oppose it. The war on terrorism more closely resembles the war on drugs than World War II; it is unlikely to have any discernable endpoint, only irregular periods of calm. The French experience shows that ad-hoc anti-terrorist measures that have little basis in societal values and shallow support in public opinion may wither away during the periods of calm. In the U.S., there is an enormous reservoir of legitimacy, established by over 200 years of history and tradition, in the judiciary. That reservoir represents an important asset that the U.S. government can profit from to maintain long-term vigilance in this type of war.

#### Nuclear terrorism causes extinction

Hellman 8 (Martin, emeritus prof of engineering @ Stanford, “Risk Analysis of Nuclear Deterrence” SPRING 2008 THE BENT OF TAU BETA PI, http://www.nuclearrisk.org/paper.pdf)

The threat of nuclear terrorism looms much larger in the public’s mind than the threat of a full-scale nuclear war, yet this article focuses primarily on the latter. An explanation is therefore in order before proceeding. A terrorist attack involving a nuclear weapon would be a catastrophe of immense proportions: “A 10-kiloton bomb detonated at Grand Central Station on a typical work day would likely kill some half a million people, and inflict over a trillion dollars in direct economic damage. America and its way of life would be changed forever.” [Bunn 2003, pages viii-ix]. The likelihood of such an attack is also significant. Former Secretary of Defense William Perry has estimated the chance of a nuclear terrorist incident within the next decade to be roughly 50 percent [Bunn 2007, page 15]. David Albright, a former weapons inspector in Iraq, estimates those odds at less than one percent, but notes, “We would never accept a situation where the chance of a major nuclear accident like Chernobyl would be anywhere near 1% .... A nuclear terrorism attack is a low-probability event, but we can’t live in a world where it’s anything but extremely low-probability.” [Hegland 2005]. In a survey of 85 national security experts, Senator Richard Lugar found a median estimate of 20 percent for the “probability of an attack involving a nuclear explosion occurring somewhere in the world in the next 10 years,” with 79 percent of the respondents believing “it more likely to be carried out by terrorists” than by a government [Lugar 2005, pp. 14-15]. I support increased efforts to reduce the threat of nuclear terrorism, but that is not inconsistent with the approach of this article. Because terrorism is one of the potential trigger mechanisms for a full-scale nuclear war, the risk analyses proposed herein will include estimating the risk of nuclear terrorism as one component of the overall risk. If that risk, the overall risk, or both are found to be unacceptable, then the proposed remedies would be directed to reduce which- ever risk(s) warrant attention. Similar remarks apply to a number of other threats (e.g., nuclear war between the U.S. and China over Taiwan). his article would be incomplete if it only dealt with the threat of nuclear terrorism and neglected the threat of full- scale nuclear war. If both risks are unacceptable, an effort to reduce only the terrorist component would leave humanity in great peril. In fact, society’s almost total neglect of the threat of full-scale nuclear war makes studying that risk all the more important. The cosT of World War iii The danger associated with nuclear deterrence depends on both the cost of a failure and the failure rate.3 This section explores the cost of a failure of nuclear deterrence, and the next section is concerned with the failure rate. While other definitions are possible, this article defines a failure of deterrence to mean a full-scale exchange of all nuclear weapons available to the U.S. and Russia, an event that will be termed World War III. Approximately 20 million people died as a result of the first World War. World War II’s fatalities were double or triple that number—chaos prevented a more precise deter- mination. In both cases humanity recovered, and the world today bears few scars that attest to the horror of those two wars. Many people therefore implicitly believe that a third World War would be horrible but survivable, an extrapola- tion of the effects of the first two global wars. In that view, World War III, while horrible, is something that humanity may just have to face and from which it will then have to recover. In contrast, some of those most qualified to assess the situation hold a very different view. In a 1961 speech to a joint session of the Philippine Con- gress, General Douglas MacArthur, stated, “Global war has become a Frankenstein to destroy both sides. … If you lose, you are annihilated. If you win, you stand only to lose. No longer does it possess even the chance of the winner of a duel. It contains now only the germs of double suicide.” Former Secretary of Defense Robert McNamara ex- pressed a similar view: “If deterrence fails and conflict develops, the present U.S. and NATO strategy carries with it a high risk that Western civilization will be destroyed” [McNamara 1986, page 6]. More recently, George Shultz, William Perry, Henry Kissinger, and Sam Nunn4 echoed those concerns when they quoted President Reagan’s belief that nuclear weapons were “totally irrational, totally inhu- mane, good for nothing but killing, possibly destructive of life on earth and civilization.” [Shultz 2007] Official studies, while couched in less emotional terms, still convey the horrendous toll that World War III would exact: “The resulting deaths would be far beyond any precedent. Executive branch calculations show a range of U.S. deaths from 35 to 77 percent (i.e., 79-160 million dead) … a change in targeting could kill somewhere between 20 million and 30 million additional people on each side .... These calculations reflect only deaths during the first 30 days. Additional millions would be injured, and many would eventually die from lack of adequate medical care … millions of people might starve or freeze during the follow- ing winter, but it is not possible to estimate how many. … further millions … might eventually die of latent radiation effects.” [OTA 1979, page 8] This OTA report also noted the possibility of serious ecological damage [OTA 1979, page 9], a concern that as- sumed a new potentiality when the TTAPS report [TTAPS 1983] proposed that the ash and dust from so many nearly simultaneous nuclear explosions and their resultant fire- storms could usher in a nuclear winter that might erase homo sapiens from the face of the earth, much as many scientists now believe the K-T Extinction that wiped out the dinosaurs resulted from an impact winter caused by ash and dust from a large asteroid or comet striking Earth. The TTAPS report produced a heated debate, and there is still no scientific consensus on whether a nuclear winter would follow a full-scale nuclear war. Recent work [Robock 2007, Toon 2007] suggests that even a limited nuclear exchange or one between newer nuclear-weapon states, such as India and Pakistan, could have devastating long-lasting climatic consequences due to the large volumes of smoke that would be generated by fires in modern megacities. While it is uncertain how destructive World War III would be, prudence dictates that we apply the same engineering conservatism that saved the Golden Gate Bridge from collapsing on its 50th anniversary and assume that preventing World War III is a necessity—not an option.

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#### Healthcare Antitrust is under the radar but top of the FTC agenda

Levine, 21 - master’s degree from the Columbia University Graduate School of Journalism and a bachelor of arts in English from the University of Pennsylvania. She is also an alumna of the Fellowships at Auschwitz for the Study of Professional Ethics, a program in Germany and Poland that explores the ethics of reporting on politics, war and genocide (Alexandra, “How Biden's tech trustbuster could change health care,” *Politico*, 8-25-2021, <https://www.politico.com/newsletters/future-pulse/2021/08/25/how-bidens-tech-trustbuster-could-change-health-care-797333>)

Lina Khan’s Federal Trade Commission has its eyes on health care. The agency known for efforts to rein in Big Tech companies like Facebook and Amazon is also enmeshed in high-stakes health care and health tech battles that extend well beyond Silicon Valley. Case in point: The FTC trial that kicked off yesterday examining monopoly concerns in the market for cancer screening technology. (More on that below.) That closely watched antitrust case — involving the giant Illumina and startup Grail — predates Khan’s confirmation as FTC chair. But it underscores how health issues are looming over the agenda, particularly heading into the pandemic's second year. The way health care companies and consumer health apps handle sensitive data “is an area that I'm sure [Khan’s] very, very interested in,” said Jessica Rich, former director of the FTC’s consumer protection bureau, adding that the Biden administration's FTC will also be closely scrutinizing hospital mergers. “I expect her and the commission to take a very bold approach to what constitutes harm for both,” Rich said. “I expect her to pay close attention to algorithms and potential discrimination in health care, both denials and pricing issues which the FTC's laws can address.” The FTC’s jurisdiction touches nearly the entire health economy. While its competition bureau looks at health care mergers like the Illumina-Grail deal, its consumer protection side is focused on health privacy and data security issues, as well as fighting bogus medical claims on everything from weight loss to Covid cures. When Congress passed the Covid-19 Consumer Protection Act last year, the agency was granted new authority to police Covid scams. Although Khan hasn't spoken publicly about her health care agenda, she's likely to take issue with health apps and companies whose business models maximize, incentivize and monetize data collection. Of particular concern is how firms disclose what they’re doing with consumers’ data — and whether it may still be deceptive or unfair.

**Antitrust enforcement saps up FTC resources and personnel, which are finite**

Tara L. **Reinhart, et al. 21**. \*\*Head of Skadden, Arps, Slate, Meagher & Flom LLP’s Antitrust/Competition Group. \*\*Steven C. Sunshine, Co-head of Skadden, Arps, Slat, Meagher & Flom LLP’s Antitrust/Competition Group. \*\*David P. Whales, antitrust lawyer with over 25 years of experience in both private and public sectors. \*\*Julia Y. York, partner at Skadden, Arps, Slat, Meagher & Flom LLP. \*\*Bre Jordan, associate at Skadden, Arps, Slat, Meagher & Flom LLP focusing on antitrust law. “Lina Khan’s Appointment as FTC Chair Reflects Biden Administration’s Aggressive Stance on Antitrust Enforcement.” 6/18/21. https://www.skadden.com/insights/publications/2021/06/lina-khans-appointment-as-ftc-chair

Second, like all antitrust enforcers, Ms. Khan and the FTC will face resource constraints. Bringing **antitrust litigation is an expensive and laborious process**, often requiring millions of dollars for expert fees and a large army of FTC staff attorneys and taking many months or even years to accomplish. Typically, the FTC can only litigate a **handful of antitrust matters** at a time. It seems likely that Congress will provide more funding to the FTC in the current environment, but even with these extra resources, the **FTC will still have to pick its cases carefully** and cannot challenge every deal or every instance of alleged unlawful conduct.

#### Intervention in healthcare consolidation is key to innovation

Richman et. al 17 (Barak, Professor of Law, Duke University Law School; \* Elena Vidal, Professor of Strategic Management at University of Toronto, Will Mitchell, Rotman School of Business; Assistant Professor of Management, Baruch, and Kevin Schulman, College/CUNY, Zicklin School of Business; Professor of Medicine, Duke University Medical School. “Pharmaceutical M&A Activity: Effects on Prices, Innovation, and Competition” p. 798-799 <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6441&context=faculty_scholarship>]

Perhaps even more important than the potential impact on prices, some observers and theorists suggest that M&A activity in the pharmaceutical sector might reduce innovative activity in the industry. Commentators not only worry that industry consolidation increases prices, but also that it reduces incentives to innovate.34 These commentators express concern that large pharmaceutical firms exhibited diminishing R&D productivity—producing fewer discoveries, generating less valuable discoveries, and creating discoveries that represent more incremental and duplicative innovations.35 In parallel, commentators suggest that the recent merger trend contributed to big pharma’s diminishing innovation, in part because mergers are often followed by layoffs in R&D personnel, changes in management and research priorities, and reductions in total R&D spending.36

#### innovation solves disease, bioterror, and ABR.

Sonja Marjanovic and Carolina Feijao 20. \*Sonja Marjanovic; Director, Healthcare Innovation, Industry and Policy, RAND Europe. \*Carolina Feijao; Ph.D. in biochemistry, University of Cambridge; M.Sc. in quantitive biology, Imperial College London; B.Sc. in biology, University of Lisbon. “Pharmaceutical Innovation for Infectious Disease Management” RAND Corporation. 2020. https://www.rand.org/content/dam/rand/pubs/perspectives/PEA400/PEA407-1/RAND\_PEA407-1.pdf

As key actors in the healthcare innovation landscape, pharmaceutical and life sciences companies have been called on to develop medicines, vaccines and diagnostics for pressing public health challenges. The COVID-19 crisis is one such challenge, but there are many others. For example, MERS, SARS, Ebola, Zika and avian and swine flu are also infectious diseases that represent public health threats. Infectious agents such as anthrax, smallpox and tularemia could present threats in a bioterrorism context. The general threat to public health that is posed by antimicrobial resistance is also well-recognised as an area in need of pharmaceutical innovation. Innovating in response to these challenges does not always align well with pharmaceutical industry commercial models, shareholder expectations and competition within the industry. However, the expertise, networks and infrastructure that industry has within its reach, as well as public expectations and the moral imperative, make pharmaceutical companies and the wider life sciences sector an indispensable partner in the search for solutions that save lives. This perspective argues for the need to establish more sustainable and scalable ways of incentivising pharmaceutical innovation in response to infectious disease threats to public health. It considers both past and current examples of efforts to mobilise pharmaceutical innovation in high commercial risk areas, including in the context of current efforts to respond to the COVID-19 pandemic. In global pandemic crises like COVID-19, the urgency and scale of the crisis – as well as the spotlight placed on pharmaceutical companies – mean that contributing to the search for effective medicines, vaccines or diagnostics is essential for socially responsible companies in the sector. It is therefore unsurprising that we are seeing industry-wide efforts unfold at unprecedented scale and pace. Whereas there is always scope for more activity, industry is currently contributing in a variety of ways. Examples include pharmaceutical companies donating existing compounds to assess their utility in the fight against COVID19; screening existing compound libraries in-house or with partners to see if they can be repurposed; accelerating trials for potentially effective medicine or vaccine candidates; and in some cases rapidly accelerating in-house research and development to discover new treatments or vaccine agents and develop diagnostics tests. Pharmaceutical companies are collaborating with each other in some of these efforts and participating in global R&D partnerships (such as the Innovative Medicines Initiative effort to accelerate the development of potential therapies for COVID-19) and supporting national efforts to expand diagnosis and testing capacity and ensure affordable and ready access to potential solutions. The primary purpose of such innovation is to benefit patients and wider population health. Although there are also reputational benefits from involvement that can be realised across the industry, there are likely to be relatively few companies that are ‘commercial’ winners. Those who might gain substantial revenues will be under pressure not to be seen as profiting from the pandemic. In the United Kingdom for example, GSK has stated that it does not expect to profit from its COVID-19 related activities and that any gains will be invested in supporting research and long-term pandemic preparedness, as well as in developing products that would be affordable in the world’s poorest countries. Similarly, in the United States AbbVie has waived intellectual property rights for an existing combination product that is being tested for therapeutic potential against COVID-19, which would support affordability and allow for a supply of generics. Johnson & Johnson has stated that its potential vaccine – which is expected to begin trials – will be available on a not-for-profit basis during the pandemic. Pharma is mobilising substantial efforts to rise to the COVID-19 challenge at hand. However, we need to consider how pharmaceutical innovation for responding to emerging infectious diseases can best be enabled beyond the current crisis. Many public health threats (including those associated with other infectious diseases, bioterrorism agents and antimicrobial resistance) are urgently in need of pharmaceutical innovation, even if their impacts are not as visible to society as COVID-19 is in the immediate term. The pharmaceutical industry has responded to previous public health emergencies associated with infectious disease in recent times – for example those associated with Ebola and Zika outbreaks. However, it has done so to a lesser scale than for COVID-19 and with contributions from fewer companies. Similarly, levels of activity in response to the threat of antimicrobial resistance are still low. There are important policy questions as to whether – and how – industry could engage with such public health threats to an even greater extent under improved innovation conditions.

### Advantage 1

#### China won’t win the race

Frey and Osborne, 20 (CARL BENEDIKT FREY is Oxford Martin Citi Fellow and Future of Work Director at the Oxford Martin School at Oxford University and the author of The Technology Trap: Capital, Labor, and Power in the Age of Automation, MICHAEL OSBORNE is Professor of Machine Learning at the University of Oxford, a Fellow at the Oxford Martin School, and Co-Founder of Mind Foundry, “China Won’t Win the Race for AI Dominance”, Foreign Affairs, June 19, 2020, https://www.foreignaffairs.com/articles/united-states/2020-06-19/china-wont-win-race-ai-dominance)//babcii

As scholars who study the applications and implications of artificial intelligence, we respectfully disagree. China, if anything, looks less likely to overtake the United States in artificial intelligence than Japan looked to dominate in computers in the 1980s. For while China is rich in data and has excelled in refining technology invented elsewhere, much impedes it from becoming the site of the next big breakthrough that artificial intelligence sorely needs. DATA ALONE ARE NOT ENOUGH China made international headlines by effectively leveraging its surveillance technology for contact tracing in response to COVID-19, the disease caused by the novel coronavirus. And yet the country’s alleged data advantage is hugely overblown. One reason is that data are highly domain specific and don’t often solve more than the problem for which they were gathered. China’s disregard for privacy enables it to snoop on its citizens, but not much else. And an abundance of surveillance data doesn’t give China an advantage in applying artificial intelligence to such ends as drug discovery or self-driving cars, for example. The puzzle of artificial intelligence lies not in the quantity of data to which its algorithms have access but in the efficiency with which it learns from that data. Even with huge amounts of data, artificial intelligence systems are easily tricked into making errors. The Google researcher Christian Szegedy and his collaborators [proved this point](https://www.nature.com/articles/d41586-019-03013-5) by fooling an algorithm that had once confidently and correctly classified images of dogs and school buses. The researchers manipulated the pixels of images in a manner that would have been completely undetectable to the human eye—but that led the algorithm to classify both dogs and school buses as ostriches. Artificial intelligence algorithms can often identify objects, but they lack any conceptual understanding of the relationships between those objects or of their respective properties. As the deep learning researcher Yoshua Bengio has [warned](https://books.google.com/books?id=65iEDwAAQBAJ&pg=PT62&lpg=PT62&dq=%22We+can%E2%80%99t+realistically+label+everything+in+the+world+and+meticulously+explain+every+last+detail+to+the+computer%22&source=bl&ots=bDk91gna75&sig=ACfU3U0SNS1VFf5a6hmE_2Q-YeFlmWjV_g&hl=en&sa=X&ved=2ahUKEwjpsbTV0PLpAhUNj3IEHUAtAJIQ6AEwAHoECAYQAQ#v=onepage&q=%22We%20can%E2%80%99t%20realistically%20label%20everything%20in%20the%20world%20and%20meticulously%20explain%20every%20last%20detail%20to%20the%20computer%22&f=false), “We can’t realistically label everything in the world and meticulously explain every last detail to the computer.” Artificial intelligence systems are easily tricked into making errors. Many think of China as “the Saudi Arabia of data.” But if data are the new oil, they might just be China’s natural resource curse. For example, in the early twentieth century, electric cars looked more promising than gasoline-powered cars. Huge oil discoveries, among other things, tipped the balance in favor of the internal combustion engine. A century later, we are trying to get back into electric cars. The current focus on data-thirsty AI applications could lead to a similar lock-in into the wrong sort of AI. We have seen this movie before. In the 1980s, the grand promises and overwhelming focus on symbolic AI prompted immense funding and media hype. This meant that funding for “deep learning” dried up. But deep learning has its own problems and has recently caused companies to focus on easy AI problems, such as classifying cats and dogs, where data are abundant. This approach alone is likely to run into diminishing returns that could even prompt another AI winter. Data efficiency is the holy grail of further progress in artificial intelligence. The reason most people associate the steam engine with James Watt and not Thomas Newcomen (who developed a coal-powered steam engine decades earlier) is that Watt’s separate condenser first made the technology energy efficient. Artificial intelligence is still waiting for its separate condenser moment. Indeed, to learn enough to win a game of Go against [Lee Sedol](https://www.nytimes.com/2019/08/01/opinion/peter-thiel-google.html), a champion of the strategic board game, DeepMind’s AlphaGo software first had to play many millions of games against itself. It learned to play far slower than any human. Humans are incredibly data efficient; recent breakthroughs in artificial intelligence are much less so. Whether the United States or China will lead the world in artificial intelligence depends far less on who controls the most data than on who will be the first to innovate past this impasse. EXPERIMENTATION DRIVES INNOVATION Those who warn of China’s inexorable advance in the field of artificial intelligence worry that because the technology is by nature centralizing, authoritarian governments are better able to encourage AI innovation than democratic ones—and that AI technology, in turn, will advantage authoritarian governments. The concern recalls a belief about electricity that held sway a century ago—and like that belief, today’s is also misplaced. In 1923, the pioneering electrical engineer Charles Steinmetz—whose work for the General Electric Company around the turn of the twentieth century made him [a celebrity](https://www.smithsonianmag.com/history/charles-proteus-steinmetz-the-wizard-of-schenectady-51912022/) of the time—[predicted](https://books.google.com/books?id=Ka8eAQAAIAAJ&pg=PA116&lpg=PA116&dq=charles+Steinmetz+electricity+collectivism&source=bl&ots=OWNEd5KOra&sig=ACfU3U32eUBKLQazyEAqq4JcwspEtwis6g&hl=en&sa=X&ved=2ahUKEwjrpazI0IjqAhWBQzABHXgUDXcQ6AEwEnoECAsQAQ#v=onepage&q=charles%20Steinmetz%20electricity%20collectivism&f=false) that electricity would give rise to a more collectivist society. Steinmetz argued, somewhat circularly, that the development of a national electrical grid would lead to socialism, because only a socialist system could effectively manage the new interdependencies that progress toward a national grid would require. The Rural Electrification Act of 1936 did indeed provide funds to rural cooperatives that had been neglected by major private power companies. But the real transition to electrical power came out of capitalist competition, in the form of experimentation on the factory floor. When engineers figured out how to equip every machine with its own electrical motor, rather than relying on one central power source, they could sequence the machines according to the natural flow of production—a breakthrough that gave rise to mass production. Decentralized experimentation and decision-making are critical to harnessing the benefits of AI. Decentralized experimentation and decision-making will likewise be critical if the world is to harness the benefits of artificial intelligence. China is at a disadvantage in this regard. The country’s recent surge in [patent filings](https://www.natlawreview.com/article/china-s-upsurge-patent-filings-continue-post-coronavirus-lockdown) is often cited as evidence of its innovativeness, but simply counting patents isn’t a good way to measure innovation: studies [show](https://link.springer.com/chapter/10.1007/978-1-4757-3750-9_13) that ten percent of patents account for roughly 90 percent of total patent value, meaning that the vast majority are of little value. Patent citations offer a more useful indicator, and if we look at the 100 most cited patents since 2003, not a single one comes from China. Moreover, China’s leading artificial intelligence companies, including Tencent, Alibaba, and Baidu, are merely copies of Facebook, Amazon, and Google, tailored to the Chinese market. As the late economic historian Alexander Gerschenkron observed, when a country lags behind the technological frontier, imitation and the adoption of foreign technology can take it a long way—and, in general, the further a country has fallen behind, the greater the role the state must play in driving industrial catch-up. Thanks to state investment in mass production technology, the Soviet Union grew rapidly during much of the Cold War, as did Japan, South Korea, and Taiwan. Indeed, numerous scholars have attributed the “Asian Miracle” to state-driven industrial catch-up. But while they were successful in closing some of the gap, these countries never managed to overtake the United States. Unlike imitation, which can be planned and coordinated, innovation is a voyage of exploration into the unknown, to paraphrase the economist and philosopher Friedrich von Hayek. And switching from imitation to innovation is hard: if it were easy, most countries would be innovating at the technological frontier. By observing that China is unlikely to overtake the United States in technological innovation, we mean in no way to downplay China’s tremendous economic achievements since Deng Xiaoping came to power in 1978. China has plenty of talent, but the fact remains that, so far, Chinese innovation has mainly focused on incrementally improving technologies that were conceived elsewhere. Chinese companies currently lead the world in the [development of 5G](https://www.wsj.com/articles/in-the-race-to-dominate-5g-china-has-an-edge-11567828888), for example, but their work builds on several previous generations of telecommunications technology. What Huawei demonstrates is that China has significant engineering capabilities, just like Japan and indeed the Soviet Union. DYNAMISM VERSUS STABILITY Artificial intelligence is not yet a mature technology, and continued progress will require radical innovation on multiple fronts. Breakthroughs will happen the way they usually do: through serendipity and recombination, as inventors and entrepreneurs interact and exchange ideas. China’s strong state and collectivist structure have significant advantages in swiftly building infrastructure or mounting a coherent response to a pandemic. But radical innovation is a different matter, and historically, the most innovative societies have always been those that allowed people to pursue controversial ideas. As the eminent economic historian Joel Mokyr has argued, that is why the Industrial Revolution happened in the West rather than in China in the first place. China’s efforts to restrict the flow of ideas on the Internet and elsewhere are likely to hold back innovation. Since [September 2019](http://prod-upp-image-read.ft.com/ec34d7aa-70e6-11ea-95fe-fcd274e920ca), China and Huawei have been proposing [radical changes](https://www.ft.com/content/c78be2cf-a1a1-40b1-8ab7-904d7095e0f2) to the Internet infrastructure that underpins networks worldwide. If implemented, the changes would likely splinter the Internet and further reduce Chinese citizens’ exposure to new ideas from outside the country. The initiative underlines Beijing’s preference for maintaining the political status quo, even if that means slower innovation and less dynamism.

#### US-China war won’t escalate

Gombert et al 16 – \*Distinguished Visiting Professor for National Security Studies at the United States Naval Academy and former Principal Deputy Director of National Intelligence. He holds a Bachelor of Science degree in Engineering from the U.S. Naval Academy and a Master of Public Affairs degree from the Woodrow Wilson School, Princeton University. \*\*M.A. in China studies from the Johns Hopkins School of Advanced International Studies (SAIS) and a graduate certificate from the Hopkins-Nanjing Center for Chinese and American Studies. [Gompert\*, David C., Astrid Cevallos and Cristina L. Garafola\*\*, RAND, War with China: Thinking Through the Unthinkable, <http://www.rand.org/pubs/research_reports/RR1140.html#download>, accessed 10/14/16, ge/kmc]

We postulate that a war would be regional and conventional. It would be waged mainly by ships on and beneath the sea, by aircraft and missiles of many sorts, and in space (against satellites) and cyberspace (against computer systems). We assume that fighting would start and remain in East Asia, where potential Sino-U.S. flash points and nearly all Chinese forces are located. Each side’s increasingly far-flung disposition of forces and growing ability to track and attack opposing forces could turn much of the Western Pacific into a “war zone,” with grave economic consequences. It is unlikely that nuclear weapons would be used: Even in an intensely violent conventional conflict, neither side would regard its losses as so serious, its prospects so dire, or the stakes so vital that it would run the risk of devastating nuclear retaliation by using nuclear weapons first. We also assume that China would not attack the U.S. homeland, except via cyberspace, given its minimal capability to do so with conventional weapons. In contrast, U.S. nonnuclear attacks against military targets in China could be extensive. The time frame studied is 2015 to 2025. The need to think through war with China is made all the more important by developments in military capabilities. Sensors, weapon guidance, digital networking, and other information technologies used to target opposing forces have advanced to the point where both U.S. and Chinese military forces seriously threaten each other. This creates the means as well as the incentive to strike enemy forces before they strike one’s own. In turn, this creates a bias toward sharp, reciprocal strikes from the outset of a war, yet with neither side able to gain control and both having ample capacity to keep fighting, even as military losses and economic costs mount. A Sino-U.S. conflict is unlikely to involve large land combat. Moreover, the unprecedented ability of U.S. and Chinese forces to target and destroy each other—conventional counterforce—could greatly deplete military capabilities in a matter of months. After that, the sides could replenish and improve their forces in an industrial technological-demographic mobilization contest, the outcome of which depends on too many factors to speculate, except to say that costs would continue to climb.

#### Infectious diseases don’t cause extinction

Owen Cotton-Barratt 17, et al, PhD in Pure Mathematics, Oxford, Lecturer in Mathematics at Oxford, Research Associate at the Future of Humanity Institute, 2/3/2017, Existential Risk: Diplomacy and Governance, https://www.fhi.ox.ac.uk/wp-content/uploads/Existential-Risks-2017-01-23.pdf

For most of human history, natural pandemics have posed the greatest risk of mass global fatalities.37 However, there are some reasons to believe that natural pandemics are very unlikely to cause human extinction. Analysis of the International Union for Conservation of Nature (IUCN) red list database has shown that of the 833 recorded plant and animal species extinctions known to have occurred since 1500, less than 4% (31 species) were ascribed to infectious disease.38 None of the mammals and amphibians on this list were globally dispersed, and other factors aside from infectious disease also contributed to their extinction. It therefore seems that our own species, which is very numerous, globally dispersed, and capable of a rational response to problems, is very unlikely to be killed off by a natural pandemic.

One underlying explanation for this is that highly lethal pathogens can kill their hosts before they have a chance to spread, so there is a selective pressure for pathogens not to be highly lethal. Therefore, pathogens are likely to co-evolve with their hosts rather than kill all possible hosts.39

### Advantage 2

#### AI doesn’t cause extinction

Shermer 17 — Michael Shermer (Publisher of Skeptic magazine, a monthly columnist for Scientific American, and a Presidential Fellow at Chapman University), April 2017, “Why Artificial Intelligence Is Not an Existential Threat,” Skeptic, vol. 22, no. 2, pp. 29–35.

Why AI is not an Existential Threat First, most AI doomsday prophecies are grounded in the false analogy between human nature and computer nature, or natural intelligence and artificial intelligence. We are thinking machines, but natural selection also designed into us emotions to shortcut the thinking process because natural intelligences are limited in speed and capacity by the number of neurons that can be crammed into a skull that has to pass through a pelvic opening at birth, whereas artificial intelligence need not be so restricted. We don't need to compute the caloric value of foods, for example, we just feel hungry. We don't need to calculate the waist-to-hip ratio of women or the shoulder-to-waist ratio of men in our quest for genetically healthy potential mates; we just feel attracted to someone and mate with them. We don't need to work out the genetic cost of raising someone else's offspring if our mate is unfaithful; we just feel jealous. We don't need to figure the damage of an unfair or non-reciprocal exchange with someone else; we just feel injustice and desire revenge. Emotions are proxies for getting us to act in ways that lead to an increase in reproductive success, particularly in response to threats faced by our Paleolithic ancestors. Anger leads us to strike out, fight back, and defend ourselves against danger. Fear causes us to pull back, retreat, and escape from risks. Disgust directs us to push out, eject, and expel that which is bad for us. Computing the odds of danger in any given situation takes too long. We need to react instantly. Emotions shortcut the information processing power needed by brains that would otherwise become bogged down with all the computations necessary for survival. Their purpose, in an ultimate causal sense, is to drive behaviors toward goals selected by evolution to enhance survival and reproduction. AIs -- even AGIs and ASIs -- will have no need of such emotions and so there would be no reason to program them in unless, say, terrorists chose to do so for their own evil purposes. But that's a human nature problem, not a computer nature issue. To believe that an ASI would be "evil" in any emotional sense is to assume a computer cognition that includes such psychological traits as acquisitiveness, competitiveness, vengeance, and bellicosity, which seem to be projections coming from the mostly male writers who concoct such dystopias, not features any programmer would bother including, assuming that it could even be done. What would it mean to program an emotion into a computer? When IBM's Deep Blue defeated chess master Garry Kasparov in 1997, did it feel triumphant, vengeful, or bellicose? Of course not. It wasn't even "aware" -- in the human sense of self-conscious knowledge -- that it was playing chess, much less feeling nervous about possibly losing to the reigning world champion (which it did in the first tournament played in 1996). In fact, toward the end of the first game of the second tournament, on the 44th move, Deep Blue made a legal but incomprehensible move of pushing its rook all the way to the last row of the opposition side. It accomplished nothing offensively or defensively, leading Kasparov to puzzle over it out of concern that he was missing something in the computer's strategy. It turned out to be an error in Deep Blue's programming that led to this fail-safe default move. It was a bug that Kasparov mistook as a feature, and as a result some chess experts contend it led him to be less confident in his strategizing and to second-guess his responses in the subsequent games. It even led him to suspect foul play and human intervention behind Deep Blue, and this paranoia ultimately cost him the tournamentt.[ 13] Computers don't get paranoid, the HAL 9000 computer in 2001 notwithstanding. Or consider Watson, the IBM computer built by David Ferrucci and his team of IBM research scientists tasked with designing an AI that could rival human champions at the game of Jeopardy! This was a far more formidable challenge than Deep Blue faced because of the prerequisite to understand language and the often multiple meanings of words, not to mention needing an encyclopedic knowledge of trivia (Watson had access to Wikipedia for this). After beating the all-time greatest Jeopardy! champions Ken Jennings and Brad Rutter in 2011, did Watson feel flushed with pride after its victory? Did Watson even know that it won Jeopardy!? I put the question to none other than Ferrucci himself at a dinner party in New York in conjunction with the 2011 Singularity Summit. His answer surprised me: "Yes, Watson knows it won Jeopardy!" I was skeptical. How could that be, since such self-awareness is not yet possible in computers? "Because I told it that it won," he replied with a wry smile. Sure, and you could even program Watson or Deep Blue to vocalize a Howard Dean-like victory scream when it wins, but that is still a far cry from a computer feeling triumphant. This brings to mind the "hard problem" of consciousness -- if we don't understand how this happens in humans, how could we program it into computers? As Steven Pinker elucidated in his answer to the 2015 Edge Question on what to think about machines that think, "AI dystopias project a parochial alpha-male psychology onto the concept of intelligence. They assume that superhumanly intelligent robots would develop goals like deposing their masters or taking over the world." It is equally possible, Pinker suggests, that "artificial intelligence will naturally develop along female lines: fully capable of solving problems, but with no desire to annihilate innocents or dominate the civilization."[ 14] So the fear that computers will become emotionally evil are unfounded, because without the suite of these evolved emotions it will never occur to AIs to take such actions against us. What about an ASI inadvertently causing our extinction by turning us into paperclips, or tiling the entire Earth's surface with solar panels? Such scenarios imply yet another emotion -- the feeling of valuing or wanting something. As the science writer Michael Chorost adroitly notes, when humans resist an AI from undertaking any form of global tiling, it "will have to be able to imagine counteractions and want to carry them out." Yet, "until an AI has feelings, it's going to be unable to want to do anything at all, let alone act counter to humanity's interests and fight off human resistance." Further, Chorost notes, "the minute an A.I. wants anything, it will live in a universe with rewards and punishments -- including punishments from us for behaving badly. In order to survive in a world dominated by humans, a nascent A.I. will have to develop a humanlike moral sense that certain things are right and others are wrong. By the time it's in a position to imagine tiling the Earth with solar panels, it'll know that it would be morally wrong to do so."[ 15] From here Chorost builds on an argument made by Peter Singer in The Expanding Circle (and Steven Pinker in The Better Angels of Our Nature[ 16] that I also developed in The Moral Arc[ 17] and Robert Wright explored in Nonzero[ 18]), and that is the propensity for natural intelligence to evolve moral emotions that include reciprocity, cooperativeness, and even altruism. Natural intelligences such as ours also includes the capacity to reason, and once you are on Singer's metaphor of the "escalator of reason" it can carry you upward to genuine morality and concerns about harming others. "Reasoning is inherently expansionist. It seeks universal application," Singer notes.[ 19] Chorost draws the implication: "AIs will have to step on the escalator of reason just like humans have, because they will need to bargain for goods in a human-dominated economy and they will face human resistance to bad behavior."[ 20] Finally, for an AI to get around this problem it would need to evolve emotions on its own, but the only way for this to happen in a world dominated by the natural intelligence called humans would be for us to allow it to happen, which we wouldn't because there's time enough to see it coming. Bostrom's "treacherous turn" will come with road signs ahead warning us that there's a sharp bend in the highway with enough time for us to grab the wheel. Incremental progress is what we see in most technologies, including and especially AI, which will continue to serve us in the manner we desire and need. Instead of Great Leap Forward or Giant Fall Backward, think Small Steps Upward. As I proposed in The Moral Arc, instead of Utopia or dystopia, think protopia, a term coined by the futurist Kevin Kelly, who described it in an Edge conversation this way: "I call myself a protopian, not a Utopian. I believe in progress in an incremental way where every year it's better than the year before but not by very much -- just a micro amount."[ 21] Almost all progress in science and technology, including computers and AI, is of a protopian nature. Rarely, if ever, do technologies lead to either Utopian or dystopian societies. Pinker agrees that there is plenty of time to plan for all conceivable contingencies and build safeguards into our AI systems. "They would not need any ponderous 'rules of robotics' or some newfangled moral philosophy to do this, just the same common sense that went into the design of food processors, table saws, space heaters, and automobiles." Sure, an ASI would be many orders of magnitude smarter than these machines, but Pinker reminds us of the AI hyperbole we've been fed for decades: "The worry that an AI system would be so clever at attaining one of the goals programmed into it (like commandeering energy) that it would run roughshod over the others (like human safety) assumes that AI will descend upon us faster than we can design fail-safe precautions. The reality is that progress in AI is hype-defyingly slow, and there will be plenty of time for feedback from incremental implementations, with humans wielding the screwdriver at every stage."[ 22] Former Google CEO Eric Schmidt agrees, responding to the fears expressed by Hawking and Musk this way: "Don't you think the humans would notice this, and start turning off the computers?" He also noted the irony in the fact that Musk has invested $1 billion into a company called OpenAI that is "promoting precisely AI of the kind we are describing."[ 23] Google's own DeepMind has developed the concept of an AI off-switch, playfully described as a "big red button" to be pushed in the event of an attempted AI takeover. "We have proposed a framework to allow a human operator to repeatedly safely interrupt a reinforcement learning agent while making sure the agent will not learn to prevent or induce these interruptions," write the authors Laurent Orseau from DeepMind and Stuart Armstrong from the Future of Humanity Institute, in a paper titled "Safely Interruptible Agents." They even suggest a precautionary scheduled shutdown every night at 2 AM for an hour so that both humans and AI are accustomed to the idea. "Safe interruptibility can be useful to take control of a robot that is misbehaving and may lead to irreversible consequences, or to take it out of a delicate situation, or even to temporarily use it to achieve a task it did not learn to perform or would not normally receive rewards for this."[ 24] As well, it is good to keep in mind that artificial intelligence is not the same as artificial consciousness. Thinking machines may not be sentient machines. Finally, Andrew Ng of Baidu responded to Elon Musk's ASI concerns by noting (in a jab at the entrepreneur's ambitions for colonizing the red planet) it would be "like worrying about overpopulation on Mars when we have not even set foot on the planet yet."[ 25] Both Utopian and dystopian visions of AI are based on a projection of the future quite unlike anything history has given us. Yet, even Ray Kurzweil's "law of accelerating returns," as remarkable as it has been has nevertheless advanced at a pace that has allowed for considerable ethical deliberation with appropriate checks and balances applied to various technologies along the way. With time, even if an unforeseen motive somehow began to emerge in an AI we would have the time to reprogram it before it got out of control. That is also the judgment of Alan Winfield, an engineering professor and co-author of the Principles of Robotics, a list of rules for regulating robots in the real world that goes far beyond Isaac Asimov's famous three laws of robotics (which were, in any case, designed to fail as plot devices for science fictional narratives).26 Winfield points out that all of these doomsday scenarios depend on a long sequence of big ifs to unroll sequentially: "If we succeed in building human equivalent AI and if that AI acquires a full understanding of how it works, and if it then succeeds in improving itself to produce super-intelligent AI, and if that super-AI, accidentally or maliciously, starts to consume resources, and if we fail to pull the plug, then, yes, we may well have a problem. The risk, while not impossible, is improbable."[ 27]

#### No Nano ---

#### 1. fuel --- can’t self replicate, but if they can it doesn’t cause extinction

Shere 16 (Jeremy Shere, “Grey Goo Attack”, 4/2/2016, http://indianapublicmedia.org/amomentofscience/grey-goo-attack-2/)

Attack of the Killer Robots Nanotechnology scientists dream of some day creating robots the size of molecules, or even turning molecules into machines that could roam the human body and perform all sorts of useful tasks. But some nanotechnology theorists and science fiction aficionados imagine a more ominous possibility. What if one of these tiny robots were given the ability to self-replicate? All it would take is a single malfunction and the robots would consume everything in the galaxy as they multiply out of control until all that was left was a shapeless, robotic mass called “grey goo.” Worst Case Scenario Now, before you go heading for the hills with a year’s supply of water and a survival guide, understand that the death-by-robot scenario is just that—a scenario, and a pretty fanciful one to boot. First, we’re nowhere near the point of being able to create a self-replicating nano-machine. But even if such machines do one day exist, they would have a hard time taking over the universe for one simple reason: fuel. Even microscopic machines need an energy source. Inorganic matter such as rocks and minerals wouldn’t do the trick because they just don’t contain stuff that the machines could break down and use for power. But what if a mad scientist created a robot that fed on organic materials such as sunlight and living things? Not to worry. Natural life forms have had around four billion years of training to compete for resources; the killer robots probably wouldn’t stand much of a chance against such streamlined competitors. Plus, if the robots were made from organic materials, they might be preyed on by bacteria or other predators.

#### 2. physics --- even if they can replicate, they’d be too slow to spread

**Easterbrook 3** (Gregg, Senior Fellow – New Republic, “We’re All Gonna Die!”, Wired Magazine, July, http://www.wired.com/wired/archive/11.07/doomsday.html?pg=1&topic=&topic\_set=)

5. Runaway nanobots! Eric Drexler, the father of nanotechnology, calls it "gray goo": the state of things in the wake of microscopic machines capable of breaking down matter and reassembling it into copies of themselves. Nanobots could swarm over Earth like intelligent locusts, Drexler fears, then buzz out into the cosmos devouring everything they encountered. Michael Crichton's latest novel, Prey, describes a last-ditch attempt by scientists to destroy such contraptions before they take over the world. Set aside the fact that, for all the nanobot speculation you've seen (including in Wired), these creatures do not, technically speaking, exist. Suppose they did. As the visionary scientist Freeman Dyson pointed out in his New York Review of Books critique of Prey, not only wouldn't nanobots be able to swarm after helpless victims as they do in the novel, they'd barely be able to move at all. Laws of physics dictate that the smaller something is, the greater its drag when moving through water or air. "The top speed of a swimmer or flyer is proportional to its length," Dyson notes. "A generous upper limit to the speed of a nanorobot flying through air or swimming through water would be **a tenth of an inch per second**, barely fast enough to chase a snail.

#### Tech fear mongering is always wrong

Brad Allenby, December 2015. Lincoln Professor of Engineering and Ethics; President’s Professor of Civil, Environmental, and Sustainable Engineering, and of Law; and founding chair of the Consortium for Emerging Technologies, Military Operations and National Security at Arizona State University. “Emerging technologies and the future of humanity.” Bulletin of the Atomic Scientists 71(6): 29-38. Emory Libraries.

Although it was not clear at the time, Bill Joy’s article warning of the dangers of emerging technologies was to spawn a veritable “dystopia industry.” More recent contributions have tended to focus on artificial intelligence, or AI; electric car and space technology entrepreneur Elon Musk has warned that AI is “summoning the demon” (Mack, 2015), while physicist Stephen Hawking has argued that “the development of full artificial intelligence could spell the end of the human race” (Cellan-Jones, 2014). The Future of Life Institute (2015) recently released an open letter signed by many scientific and research notables urging a ban on “offensive autonomous weapons beyond meaningful human control.” Meanwhile, the UN holds conferences and European activists mount campaigns against what they characterize as “killer robots” (see, e.g., Human Rights Watch, 2012). Headlines reinforce a sense of existential crisis; in the military and security domain, cyber conflict runs rampant, with hackers accessing millions of US personnel records, including sensitive security clearance documents. Technologies such as uncrewed aerial vehicles, commonly referred to as “drones,” are highly contentious in both civil and conflict environments, for many different reasons. A recent US Army Research Laboratory report foresees genetically and technologically enhanced soldiers networked with their battlespace robotic partners and remarks that “the presence of super humans on the battlefield in the 2050 timeframe is highly likely because the various components needed to enable this development already exist and are undergoing rapid evolution” (Kott et al., 2015: 19). How is one to think about this outpouring of analysis, hypothesis, events, and existential angst? A useful first step is to realize that there are three levels to such discussions of technology.2 Level I is the instrumental level: a gun shoots a bullet and kills someone; a watch is used to tell time; a vaccine is used to prime an individual’s immune system to protect against a disease. Level II is the systems level: an uncrewed aerial vehicle conducting surveillance is part of a battlefield intelligence system; watches function in a globally standardized time system that was only institutionalized in the United States by an act of Congress in 1918; vaccinations are part of a public health system. Level III, the effect of a technology on individual psychology, society and culture, economic patterns, geopolitical status, and other Earth systems, is unpredictable and uncertain. One of the major drivers for standardized time, for example, was railroad technology, which was certainly not foreseen by those who first began developing steam locomotives. It is important to remember, however, that even if the specifics of Level III impacts cannot be predicted a priori, they will occur. Level I effects are usually not difficult to figure out: They are the reasons that a technology is commercialized. For example, the Level I effect of a bomb-dismantling robot is clear: It helps save the lives of soldiers who would otherwise have to be doing that job. Level II effects can be more complex and may point in different directions than first-order effects. A robotic hummingbird surveillance device may have entirely beneficial effects if used in counterinsurgency, because it can improve targeting and thus reduce collateral damage (Level I effect). But if the same technology becomes widely available to political parties and divorce lawyers, it could have very negative effects on privacy and public discourse (a Level II effect). And, hypothetically, robotic bugs and hummingbirds, combined with data-mining software and massive databases, could become important tools of techno-totalitarian elites, a possible, but hypothetical, Level III effect. This distinction among Level I, Level II, and Level III is useful because much of the confusion regarding emerging technologies comes from conflating relatively predictable Level I aspects of an emerging technology with highly unpredictable Level III hypotheticals, and treating them as equally valid insights into future technological trajectories. Not so. A concern about the use of drones to attack human targets in countries that are not participants in a conflict is qualitatively different than polemics against “killer robots,” and while conflating the two for purposes of argumentation may be effective, it is profoundly misleading. We have historical and operational data that enable us to evaluate the former; we don’t even know what a “killer robot” really is, except as an evocative term, and virtually no idea what would happen if such technologies became widespread in the real world. An analogous analytical mistake occurs when a particular use of a technology is treated as if it were separable from the technology itself. A medical advance in computer-brain interfaces in prosthetics, for example, is the same technology that might be used in the near future to directly connect a soldier to a remote weapons system. Any effort to ban “military AI” will fail because “military AI” is not a relevant technology category; rather, it is the advance of the underlying technology as a whole that ensures at some point that AI will be integrated into military devices. (Notably and presumably unintentionally, the proselytizing against “military AI” fails to admit that such a policy implicitly favors powers, such as Russia and ISIS, that are operating under doctrines of asymmetric warfare that privilege non-traditional tactics, technologies, and conflict.) It is precisely this confusion that one notes in the language used in many of the comments on and critiques of emerging technologies, including some of the examples given above. It is not so much a question of whether these popular dystopian visions are accurate predictions: They almost certainly are not, because the ability to predict the future paths and implications of complex and powerful technology systems is simply nonexistent. Level I assertions of knowledge are being extended to inherently unpredictable Level III systems without understanding that an important conceptual shark has been jumped. But it is useful to explore the assumptions underneath the current rage for dystopian visions of emerging technologies, which are not as implausible as some have suggested. To reduce such confusion, let me be clear from the beginning. Because much recent commentary regarding emerging technologies is generic and apocalyptic, that is what this essay will focus on. In other words, I will not concern myself with whether a particular weapon system, or smart phone app, or cyber worm, or AI tool is good or bad or competitively successful, a Level I question. Nor will I address the foreseeable Level II effects, an analysis which, as in the case of Level I, would focus on particular technological artifacts or applications and their systemic effects. Rather, since apocalyptic tends to be Level III stuff, that’s where we’ll go. Emerging technologies as an Earth system The first question to ask about emerging technologies is deceptively simple: Is today really that different? Is there something about today’s emerging technologies—which for purposes of this analysis include nanotechnology, biotechnology, information and communication technology (ICT), robotics, applied cognitive science, humtech (design and engineering of the human as a foundational emerging technology), and their various combinations and permutations—that is qualitatively different from those that characterized other eras of technological change? If there isn’t, much of today’s dramatic language can be understood as simply a reflection of the emphasis that all humans give to the particular era and landscape and culture within which they exist. Each generation tends to overemphasize the degree of change that it experiences, partly because of the immediacy of the stresses to which it is exposed, and partly because it is easy to underestimate how difficult and unpredictable life was in the past**,** since when one looks back at history it seems to flow logically and necessarily. Indeed, apocalyptic fears have been common when many major technology systems first emerged because of this immediacy, even as subsequent generations grew to view the technology as banal, even boring. In the early days of railroads, for example, there was a widespread belief that traveling at the heretofore unimaginable speed of 25 miles per hour would kill the passengers, in part because such technology was against the obvious will of God. As an Ohio school board put it, If God had designed that His intelligent creatures should travel at the frightful speed of 15 miles an hour by steam, He would have foretold it through His holy prophets. It is a device of Satan to lead immortal souls down to Hell. (Nye, 1994: 57)3 In this case, however, a strong argument can be made that emerging technologies today are different not just in degree, but in kind, from those of the past. To begin with, the scope, scale, and speed of technological change are unprecedented. Where previous waves of technological change have involved a few core technologies, such as railroads or electrification, today technological evolution is occurring across the entire technological frontier. Partially as a result of such technologies rippling across a population of seven billion people, we now live on a terraformed planet, the first world we know of anywhere that has been shaped by the deliberate activities of a single species. That is not a discontinuous process, but it is qualitatively new. Moreover, as the discussion of the engineered warrior of 2050 suggests, the human itself has become a design space. It is certainly true that people have always changed themselves in many ways, from consuming intoxicants of all kinds, to medicine, to education, but there is little question that the direct interventions that are now possible, combined with accelerating advances in fields such as neuroscience, genetics and molecular biology, and prosthetics, make virtually all aspects of the human, including cognitive and psychological domains, potentially subject to design. That the designer is not just engineering external systems, but him- or herself, adds a degree of reflexivity, nonlinearity, and complexity that makes simple predictions about particular technologies tangential and irrelevant at best. It is worth emphasizing in passing that the argument that humans are at risk from emerging technologies is in an important sense circular. Humans are increasingly both designer and designed; they are, in other words, increasingly an emerging technology in their own right. People are many things, but they are now, and certainly will be in the future, a design project. Thus, in a meaningful way the argument that people are at risk from emerging technologies becomes the argument that emerging technologies are at risk from emerging technologies, which makes little sense, and isn’t very helpful analytically, or in guiding policy or practice. Additionally, technological evolution is accelerating, which has significant implications. Past rates of technological change were slow enough that psychological, social, and institutional adjustments were possible, but today technology changes so rapidly that technology systems decouple from governance mechanisms of all kinds. All these factors, operating together, synergistically increase the impact, speed, and depth of change. Any technology potent enough to be interesting will inevitably destabilize existing institutions, power relationships, social structures, reigning economic and technological systems, and cultural assumptions. Previous waves of technological change—from steam and coal, to electricity, to rail and automotive technologies—have destabilized and restructured human and natural systems at all scales, interacting unpredictably with contemporary natural, human, and built systems. Railroads, for example, opened up continental interiors, creating the underlying transportation infrastructure necessary to support industrialized agriculture, which, coupled to advances in production of artificial fertilizers and innovation in farm machinery, created the potential for dramatic increases in global human population. It also dramatically changed ecologies and landscapes; the American Midwest is an agricultural breadbasket, not a large swamp, because railroads provided the link between that farming region and the demand of the East Coast and, via steamship, Europe. The Earth’s atmosphere has been in part restructured by development of internal combustion engine technology coupled to a psychologically potent automotive technology, which is in turn based on a massive fossil fuel infrastructure. Proposals to address climate change through so-called “geoengineering technologies,” from designing the atmosphere to reflect incoming sunlight to deploying devices that capture carbon dioxide in the atmosphere, are explicitly intended to engineer major natural systems and cycles. In short, major new technologies are not just about artifacts; rather, they represent an unpredictable, sometimes apparently discontinuous, shift in the structure of integrated Earth systems. Moreover, these shifts are not predictable a priori; railroads, for example, required new systems of time, of communication, and, more subtly, of finance and of corporate management. Development of a mass consumption economy, with washing machines from new merchandising giants and cars from Detroit, required innovation in the development of consumer credit, and massive coupled innovation in everything from road systems to supply-chain management. Widespread consumer credit, in turn, generated an ability to consume, and a concomitant quality of life, that was beyond imagining for those generations of humans that lived prior to the 20th century. It is thus highly likely that the first implicit assumption of the dystopian perspective is correct: Things are indeed different today, and the difference is fundamental and qualitative, not simply one of degree. Emerging technologies are making everything from individual molecules, to the human, to the planet itself, design spaces. Moreover, it is also likely that technological evolution, and all the concomitant changes in coupled institutional, social, economic, and cultural systems, will be more challenging and complex than anything humans have yet experienced. The remaining two issues, then, are: First, what can we do about it; and second, is this the end of humanity? What can we do about it? Precisely because new technologies are disruptive, they inevitably call forth opposition, both by conservative social forces and by threatened economic interests. Historical examples abound. With railroad technology, for example, conservative states such as the Austro-Hungarian Empire and Russia resisted rapid deployment, in part because it was feared that railroads might create social unrest in the still somewhat feudal and highly stratified cultures that characterized such countries; the French held back because of concerns it would destroy rural culture. The predictable result was that modernizing states that realized the commercial and military potential of railroad technology, such as Prussia, rapidly overtook the laggards in building rail infrastructure, with an eventual shift in geopolitical stature. In the United States, railroads were bitterly opposed by river transportation interests; in fact, Abraham Lincoln, when still a practicing lawyer, argued and won the seminal case for the Rock Island Railroad.4 (River shippers at the time were arguing that any railroad bridge over a river was an unlawful obstruction of commerce; had they been successful, railroads would have been limited to operating between rivers and streams, but not crossing them.) A more recent example is provided by the thousands of people sued by the Recording Industry Association of America in its vain effort to defend a technologically obsolete business model for the distribution of music. There are plenty of reasons, in other words, why emerging technologies might be regarded as dangerous and disruptive, and thus worth stifling. History, however, indicates that while local opposition can be successful, it will not halt the evolution of technology. Consider, for example, the Japanese attempt to limit gunpowder technology to preserve traditional Samurai culture; successful in the short term, it left Japan open to subjugation by Western naval forces with gunpowder technology. Similarly, environmentalists and governments in Europe have aggressively opposed genetic engineering (GMOs, or “genetically modified organisms”) in agriculture. Outside Europe, however, GMO technology has been one of the most rapidly adopted agricultural technologies in history. Efforts to regulate the proliferation of nuclear weapon technology have been somewhat successful, but it appears unrealistic to assume that the technology can be uninvented. Especially given today’s globalized culture, and the strategic and military advantages that emerging technologies can provide, it is highly unlikely that meaningful constraints on technological evolution, whether derived from cultural, competitive, or religious foundations, will be successful. That is particularly true as all players in the global Great Game understand that leadership in science and technology domains is a necessary, if not sufficient, prerequisite for dominance. Moreover, given the complexity of many emerging technology systems, especially as they co-evolve with other natural, built, and human systems, it is unfortunately also likely that projecting their effects and evolutionary paths before they are actually adopted and become embedded in their social and cultural context is not just hard, but for all practical purposes impossible. One can, and should, generate scenarios. But exhortations that purport to elevate hypotheticals to predictions and implications of certainty about future states are misplaced. In short, there is no certainty, and the genie is well and truly out of the bottle. However, that doesn’t necessarily imply that we can’t modulate future technological evolution, but that the way we think about it today may be too simple, and our institutions too slow and maladaptive, to be up to the task. Beyond simplistic dystopianism This analysis suggests that, as dystopians might argue, emerging technologies are indeed potent, and that, especially as the human is becoming an active design space, if AI doesn’t destroy humanity, something will. But this is a grossly incomplete perspective. Humanity, as it appears at any particular time, is always doomed. Foragers and hunter-gatherers were doomed, as were the serfs of medieval Europe with their small plots and lives lived within a radius of a few miles of where they were born. And so, in our turn, are we. Doom is, in other words, evolution, and it is unlikely that we will stop it—or, really, that we should want to. In fact, the images that we cling to, personally and institutionally and culturally, are already obsolete. The ethics and values that we insist we will impose on the future are not only historically and culturally contingent, but already obsolete as well. We want the physical and cultural landscape we live in now to propagate into tomorrow, because we all unconsciously privilege the present, but that is not how complex systems work. They evolve, and indeed our world is evolving at a remarkable and accelerating clip. The fallacy of the dystopians, then, is not in their analysis of the power of technology, or the accelerating and destabilizing rates of change. The fallacy is in equating evolution with dystopia, and, without admitting it, privileging the present over the promise and inevitability of the future. What is at risk is the limited mental model of “human” that all of us carry with us, not “humans” as an ongoing process. This is actually a common category mistake in modern discourse: Sustainability advocates and environmental activists often claim that “the planet is at risk,” but of course it is not. The planet is a large mass of rock and a film of various carbon compounds, and that is not at risk at all. What is at risk is a particular mental model of what the world should look like, a constructed snapshot. That does not mean that there aren’t many environmental issues that require attention; of course there are. But, as in the case of the emerging technology discourse, it does mean that existential catastrophe language is not only invalid, but can actually prevent seeking constructive adaptations to accelerating change. Our only recourse is neither technological fatalism nor ethical relativism. It is true that we have not yet appreciated, much less begun to respond to, the challenge of a future that will indeed be more complex and difficult than anything we have experienced as a species. Nonetheless, we can already identify several important principles. For example, we need to stop thinking of “problems” with “solutions,” and think more in terms of “conditions” that will require long-term, adaptive management. Challenges such as ISIS and climate change will not be solved, but they can and must be managed in light of other relevant goals. In this, the experience with nuclear weapons is instructive: They are not a problem that can be unmade, but they are a condition that can be, and has so far been, relatively successfully managed. We also need to focus on creating option spaces—portfolios of social, institutional, and technological choices that can be adaptively and flexibly deployed in complex environments. Similarly, we need to play with scenarios: If dystopian pronouncements are instead taken as scenarios—“What would you do if…?”—they are far more useful and informative than suggestions of doom. Socially and institutionally, we need to become more agile and adaptive. This is uncomfortable for many, because it implies a degree of contingency and uncertainty, but that is precisely why such skills are necessary. The rate of technological change is unforgiving and has already decoupled to a large extent from traditional governance mechanisms. So we need to develop new ones. Individually, we need to become far more humble about our ability to visualize and prognosticate on a complex and dynamic future. Cautionary scenarios and hypotheticals are welcome exercises in practicing to adjust to the unknowable that lies in front of us, but they are not appropriate foundations for policy or legal action in the present. Nightmares are seldom reality, and when bad things do happen they are seldom the ones we thought about. Fear and anger in the face of change are popular responses—witness the rise of far right and far left factions, and fundamentalisms of all stripes, around the world—but they are maladaptive, and those in responsible positions at least cannot afford such luxuries.

# 2NC

## T --- Courts

#### Our interpretation is that topical affs cannot be court action --- Courts cannot ‘expand’ antitrust law – that bibikos 19

#### 1. Courts cannot create “antitrust law” and cannot “increase prohibitions”

Kalbfleisch 61 – Kalbfleisch, District Court judge. [Paul M. Harrod Co. v. A. B. Dick Co., 194 F. Supp. 502 (N.D. Ohio 1961)]//babcii

Defendant asserts that the term ‘antitrust laws,’ as used in the above section and as defined in 15 U.S.C.A. § 12, does not include a judgment or decree entered in connection with an antitrust case filed by the Government. Plaintiff, on the other hand, asserts that ‘the violation of the earlier decree of this court in itself gives rise to an independent cause of action under Section 4 of the Clayton Act.’ 15 U.S.C.A. § 15. Plaintiff's Brief, p. 7. Plaintiff concedes that ‘as far as he has been able to ascertain, this contention raises issues which have never before been decided by any appellate court.’ Plaintiff's Brief, p. 5. In Nashville Milk Co. v. Carnation Co., 1958, 355 U.S. 373, 78 S.Ct. 352, 2 L.Ed.2d 340, the Supreme Court held that the Robinson-Patman Act, 15 U.S.C.A. §§ 13-13b, 21a, was not included among the ‘antitrust laws' defined in Section 1 of the Clayton Act (15 U.S.C.A. § 12) and that ‘the definition contained in § 1 of the Clayton Act is exclusive.’ Id., 355 U.S. at page 376, 78 S.Ct. at page 354. The definition of ‘antitrust laws' in 15 U.S.C.A. § 12, clearly embraces only the statutes described therein. Even without such a definition the term ‘antitrust laws' could not be construed as pertaining to a judgment or decree entered by a court in connection with an antitrust case filed by the Government. Such decrees do not necessarily reflect the **prohibitions** of the antitrust laws but may, by their terms, seek to dissipate the effects of the past conduct of the parties and, to this end, frequently enjoin performance of acts lawful in themselves. To permit a private party to recover damages for violation of any provision of such a decree is so obviously beyond the scope of the term ‘antitrust laws,’ as used in the statute, as to require no further discussion. Defendant's motion to dismiss that part of the complaint based on alleged violations of the 1948 consent decree in United States v. A.B. Dick Company will be sustained.

#### 2. ‘Prohibitions’ must be legislative enactments

Benjamin Hill 7, Judge on the Georgia Appeals Court, “Rose v. State”, Court of Appeals of Georgia, 1 Ga. App. 596, 601-602, 58 S.E. 20, 22-23, 1907 Ga. App. LEXIS 47, 4/11/1907

The words "otherwise prohibited," relied on by the State, really mean nothing in this statute. When the legislature used the words "prohibited by law," it exhausted the subject, and the addition of the words "high license or [\*\*\*11] otherwise" was "wasteful and ridiculous excess." These general words are sometimes added to specific enumeration in statutes out of abundance of caution, but they usually mean nothing. Certainly such words must be "restricted to the same genus as the things enumerated," and the use of the word "otherwise," following the words "prohibited by law," meant that the "otherwise" prohibition of the sale of liquor was to be a legal prohibition, that is, prohibited by the law of high license, or otherwise prohibited by law. But we do not think this general word means anything in this statute. Whatever it was intended to mean, it could not by any rule of logic give to the failure of the commissioners to grant licenses the force and effect of a positive enactment prohibiting the sale. The word "prohibit" is an active, transitive verb. As defined by the Standard Dictionary, it means "to forbid, especially by authority or legal enactment; interdict; as, to prohibit liquor-selling, or a person from selling liquor." The word "prohibit," [\*\*23] in its legal sense, implies some legislative enactment forbidding something. "The laws of England, from the early Plantagenets, sternly prohibited the [\*\*\*12] conversion of malt into alcohol." "Prohibition," in the United States, specifically means "the forbidding [\*602] by legislative enactment of the manufacture and sale of alcoholic liquors for use as beverage." Giving, therefore, to the word "prohibited" its ordinary signification and its technical meaning, as applied to the particular subject-matter of the sale of spirituous liquors, it must involve some positive act done by authority.

#### 3. AND “the scope of antitrust law” is not governed by court action

**Utah Law Review, 63** (Utah Law Review, Leading law review for the university of Utah, 1963, accessed on 7-20-2021, Utah Law Review, "CASES NOTED" “GOVERNMENT CONTEMPT ORDER PROVIDES POSSIBLE PRIMA FACIE CASEFOR PRIVATE ANTITRUST ACTION", https://collections.lib.utah.edu/dl\_files/e6/34/e6346be7b172efa1c6d32d6e15d4f5094339c121.pdf)//Babcii

It does not, however, necessarily follow that the same is true for the purposes of a private litigant. It must be recognized that the private litigant's rights exist only by virtue of section 5. The term "antitrust laws" has been narrowly construed to **include only** the **statutory provisions** of the Sherman and Clayton Acts **and to exclude other** statutes which apply **broad antitrust policies** to specific segments of business. 22 If this interpretation be accepted, it is arguable that the term "antitrust laws" as used in section 5 excludes antitrust decrees on which the contempt violation was based. 23 Further, the statutory language here involved, "a final **judgment or decree** . . . rendered . . . under the antitrust laws to the effect that a defendant has violated said laws . . ." does not bear out the interpretation given the section by the instant court. From the literal language of the section it would appear that the complaint in the instant case was based upon a criminal contempt citation brought for violation of a court order and not for violation of the antitrust laws. In a similar case, another Federal District Court stated that "**the term 'antitrust laws' could not be construed as** pertaining to a judgment or decree entered by **a court** in connection with an antitrust case." 24

#### 4. AND Resolved implies a legislative instrument

LA House 5 (Lousiana House of Representatives, <http://house.louisiana.gov/house-glossary.htm>)

Resolution A legislative instrument that generally is used for making declarations, stating policies, and making decisions where some other form is not required. A bill includes the constitutionally required enacting clause; a resolution uses the term "resolved". Not subject to a time limit for introduction nor to governor's veto. ( Const. Art. III, §17(B) and House  Rules 8.11 , 13.1 , 6.8 , and 7.4)

#### Courts cannot create “antitrust law” and cannot “increase prohibitions”

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## Sunbursting CP

### 2NC --- AT: Doesn’t Solve

#### Sunbursting solves - facilitates, not mandates, binding application, applies prospectively, and escapes disturbing caselaw

Horneman et al ’13 [Hosea, Steven Blickensderfer, and Trevor Jones; 2013; Law clerk for Florida’s Fifth District Court, J.D. from Liberty University; Stetson Law Review, “A Catch-22 Of Cert Review: How Florida's "Clearly Established Law' Requirement Stifles Caselaw Development, And How Sunbursting Can Help The Sunshine State,” Vol. 42; RP]

2. Questions from District Court to Supreme Court A district court may certify a question of great public importance to the Florida Supreme Court. 52 Thus, in either the issue-of-first-impression or Pardo scenario, a district court can attempt to avoid the clearly-established-law problem by denying relief yet certifying the merits issue to the Supreme Court.53 This procedure allows the Supreme Court to decide the merits issue without the constraints of certiorari. It also has the benefit of allowing a decision that is binding throughout the state. Nevertheless, as with county court certified questions, this solution is easier said than done. The district court must first be persuaded that the issue is actually one of great public importance.5 4 Although a district court is more likely to certify a question if it has certain attributes, 5 5 the court's discretion is absolute,5 6 and few questions are actually certified.5 ' Likewise, the Florida Supreme Court has absolute discretion in deciding whether to accept the case.58 Overall, the Court has been accepting comparatively fewer questions over the last couple of decades, 9 and the chance of acceptance is perhaps fifty percent. 60 The Court is unlikely to accept an unusual, nonrecurring legal issue.6 1 And it is not clear that the procedural difficulties created by the clearly-established-law problem are enough to transform a substantively unimportant issue into one of great public importance.62 In summary, each of the existing solutions to the clearly-established-law problem has some benefits but also important drawbacks. Next, we propose a comprehensive solution that resolves the problem without these limitations. V. OUR PROPOSED SOLUTION: "SUNBURSTING" To overcome the caselaw-development hindrances caused by the clearly-established-law requirement, Florida's district courts of appeal should adopt a judicial decision-making approach known as "sunbursting." Under this approach, a reviewing court reaches a holding on the merits in a case without applying that holding to the parties. In effect, the court's decision operates prospectively. Utilizing that technique in the certiorari context, a district court would grant or deny relief based on whether the lower court followed clearly established law, while also ruling on the merits of the issue raised for review. By sunbursting, the district courts could refine and develop caselaw where it is needed, while faithfully adhering to the traditional understanding of the clearly-established-law requirement. In other words, sunbursting would allow courts to escape the clearly-established-law conundrum. In this Part, we first explain more fully what sunbursting is and how it has developed as an alternative decision-making approach. Then, we illustrate how the sunbursting concept has been applied in a closely analogous area of law-federal Section 1983 tort cases. Finally, we explain in more detail how district courts can apply sunbursting to the clearly-established-law problem.

### 2NC --- AT: PDCP

#### [2] - Resolved means certain – the counterplan isn’t because there’s the possibility the court refuses to follow up on their initial ruling

**OED 89** (Oxford English Dictionary, “Resolved,” Volume 13, p. 725)

Of the mind, etc.: **Freed from doubt or uncertainty**, fixed, settled. Obs.

#### “Should” means must – its mandatory

Foresi 32 (Remo Foresi v. Hudson Coal Co., Superior Court of Pennsylvania, 106 Pa. Super. 307; 161 A. 910; 1932 Pa. Super. LEXIS 239, 7-14, Lexis)

As regards the mandatory character of the rule, the word 'should' is not only an auxiliary verb, it is also the preterite of the verb, 'shall' and has for one of its meanings as defined in the Century Dictionary: "Obliged or compelled (to); would have (to); must; ought (to); used with an infinitive (without to) to express obligation, necessity or duty in connection with some act yet to be carried out." We think it clear that it is in that sense that the word 'should' is used in this rule, not merely advisory. When the judge in charging the jury tells them that, unless they find from all the evidence, beyond a reasonable doubt, that the defendant is guilty of the offense charged, they should acquit, the word 'should' is not used in an advisory sense but has the force or meaning of 'must', or 'ought to' and carries [\*\*\*8] with it the sense of [\*313] obligation and duty equivalent to compulsion. A natural sense of sympathy for a few unfortunate claimants who have been injured while doing something in direct violation of law must not be so indulged as to fritter away, or nullify, provisions which have been enacted to safeguard and protect the welfare of thousands who are engaged in the hazardous occupation of mining.

#### [3] - Should means immediate – the counterplan is not because it has to wait until new case law is taken up

Summers 94 (Justice – Oklahoma Supreme Court, “Kelsey v. Dollarsaver Food Warehouse of Durant”, 1994 OK 123, 11-8, http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker3fn13)

The legal question to be resolved by the court is whether the word "should"[13](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker3fn13) in the May 18 order connotes futurity or may be deemed a ruling in praesenti.[14](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker3fn14) The answer to this query is not to be divined from rules of grammar;[15](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker3fn15) it must be governed by the age-old practice culture of legal professionals and its immemorial language usage. To determine if the omission (from the critical May 18 entry) of the turgid phrase, "and the same hereby is", (1) makes it an in futuro ruling - i.e., an expression of what the judge will or would do at a later stage - or (2) constitutes an in in praesenti resolution of a disputed law issue, the trial judge's intent must be garnered from the four corners of the entire record.[16](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker3fn16) [13](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker2fn13) "Should" not only is used as a "present indicative" synonymous with ought but also is the past tense of "shall" with various shades of meaning not always easy to analyze. See 57 C.J. Shall § 9, Judgments § 121 (1932). O. JESPERSEN, GROWTH AND STRUCTURE OF THE ENGLISH LANGUAGE (1984); St. Louis & S.F.R. Co. v. Brown, 45 Okl. 143, 144 P. 1075, 1080-81 (1914). For a more detailed explanation, see the Partridge quotation infra note 15. Certain contexts mandate a construction of the term "should" as more than merely indicating preference or desirability. Brown, supra at 1080-81 (jury instructions stating that jurors "should" reduce the amount of damages in proportion to the amount of contributory negligence of the plaintiff was held to imply an obligation and to be more than advisory); Carrigan v. California Horse Racing Board, 60 Wash. App. 79, [802 P.2d 813](http://www.oscn.net/applications/oscn/deliverdocument.asp?box1=802&box2=P.2D&box3=813) (1990) (one of the Rules of Appellate Procedure requiring that a party "should devote a section of the brief to the request for the fee or expenses" was interpreted to mean that a party is under an obligation to include the requested segment); State v. Rack, 318 S.W.2d 211, 215 (Mo. 1958) ("should" would mean the same as "shall" or "must" when used in an instruction to the jury which tells the triers they "should disregard false testimony"). [14](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker2fn14) In praesenti means literally "at the present time." BLACK'S LAW DICTIONARY 792 (6th Ed. 1990). In legal parlance the phrase denotes that which in law is presently or immediately effective, as opposed to something that will or would become effective in the future [in futurol]. See Van Wyck v. Knevals, [106 U.S. 360](http://www.oscn.net/applications/oscn/deliverdocument.asp?box1=106&box2=U.S.&box3=360), 365, 1 S.Ct. 336, 337, 27 L.Ed. 201 (1882).

#### Substantial means at the present time

Words and Phrases 64 (40 W&P 759) (This edition of W&P is out of print – The page number no longer matches up to the current edition and I was unable to find the card in the new edition. However, this card is also available on google books, Judicial and statutory definitions of words and phrases, Volume 8, p. 7329)

The words “outward, open, actual, visible, substantial, and exclusive,” in connection with a change of possession, mean substantially the same thing. They mean not concealed; not hidden; exposed to view; free from concealment, dissimulation, reserve, or disguise; in full existence; denoting that which not merely can be, but is opposed to potential, apparent, constructive, and imaginary; veritable; genuine; certain; absolute; **real at present time**, as a matter of fact, not merely nominal; opposed to form; actually existing; true; not including admitting, or pertaining to any others; undivided; sole; opposed to inclusive. Bass v. Pease, 79 Ill. App. 308, 318.

### 2NC --- AT: L2NB (Sua Sponte)

#### It's the best method for avoiding instability

Fairchild ’68 [Thomas; 1968; Attorney, L.L.B. from the University of Wisconsin; Marquette Law Review, “Limitation of New Judge-Made Law to Prospective Effect Only: "Prospective Overruling" or Sunbursting,” <https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2556&context=mulr>; RP]

It is commonplace, in the current period, that the high courts of the states and of the United States make abrupt changes in rules of common law and in constitutional interpretation. The pressure of social needs which induces such changes, sometimes described by saying that the law must be in tune with the times, and must respond to newly emerging conditions of society,' wars with the proposition that stability in the law is important to society, capsuled in the rule of stare decisis. These opposing forces generate uneasiness, yea struggle, in the minds of appellate judges. The subject of this article is a technique, most often called "prospective overruling," which facilitates change by limiting the undermining of stability which a judicially pronounced change would otherwise produce. Prospective overruling is a device whereby a court limits the effect of a new rule to future transactions only, or, more commonly, to future transactions plus the case before the court which presents the opportunity for the announcement of the change. Really, though the device is usually called prospective the distinctive feature of it is the denial or limitation of overruling, retroactive application of a judicial decision. If every judicial departure from precedent were limited to prospective operation, this would fit a philosophy that any judicial decision, at least of a court of last resort, makes law which remains in effect until a later decision conflicts with it. But we do not really follow that philosophy, and we more commonly accept the classical doctrine that a decision which overrules a previous one is accorded retroactive effect, at least until it collides with a statute of limitations, an accord and satisfaction, or res judicata. We employ the technique of prospective overruling as an exceptional expedient when the traditional retroactivity would wreak more havoc in society than society's interest in stability will tolerate. Whatever explanation we may make of prospective overruling in terms of judicial philosophy, clear it is that the use of the technique makes change less disruptive, and thereby makes an appellate court less apprehensive about making a change when it considers a new rule to be more sound than the old. Prospective overruling is sometimes dubbed "sunbursting," a term with a degree of aptness, but which came to apply through sheer coincidence. What practicing lawyer would realize that "sunbursting" refers to a technique in the work of an appellate judge? who has ever imagined himself an eavesdropper on a conference of justices, and hearing one remark to another, "How about it, Joe, shall we sunburst this one?" If one thinks of a judicially pronounced new rule of law as the rosy dawn of a new day, "sunbursting" has an appropriate connotation. The word arrived on the scene, however, as the" name.of a party to litigation which reached the Supreme Court of the United in 1932, Great Northern Railway Company v. Sunburst Oil & Refiting Company.2 Sunburst, a shipper, had sued Great Northern in Montana for refund of excessive charges. Sunburst recovered, relying on a rule of law announced by the Supreme Court of Montana in 1921. When the Sunburst case reached the Montana high court, the court overruled the 1921 decision, but limited the change to cases arising in the future.3 This was prospective overruling in its purest form. New law was announced for cases arising out of future events, but the old rule was applied to the case at hand, arising out of events which had occurred while the old rule was the latest word. 4

## 2NC --- Advantage 1

### 2NC --- No disease

#### No disease extinction --- empirics and isolated populations

Nick Beckstead 14, Research Fellow at the Future of Humanity Institute, citing Peter Doherty, recipient of the 1996 Nobel Prize for Medicine, PhD in Immunology from the University of Edinburgh, Michael F. Tamer Chair of Biomedical Research at St. Jude Children’s Research Hospital, “How much could refuges help us recover from a global catastrophe?” in Futures, published online 18 Nov 2014, Science Direct

That leaves pandemics and cobalt bombs, which will get a longer discussion. While there is little published work on human extinction risk from pandemics, it seems that it would be extremely challenging for any pandemic—whether natural or manmade—to leave the people in a specially constructed refuge as the sole survivors. In his introductory book on pandemics (Doherty, 2013, p. 197) argues:¶ “No pandemic is likely to wipe out the human species. Even without the protection provided by modern science, we survived smallpox, TB, and the plagues of recorded history. Way back when human numbers were very small, infections may have been responsible for some of the genetic bottlenecks inferred from evolutionary analysis, but there is no formal proof of this.”¶ Though some authors have vividly described worst-case scenarios for engineered pandemics (e.g. Rees, 2003 and Posner, 2004; and Myhrvold, 2013), it would take a special effort to infect people in highly isolated locations, especially the 100+ “largely uncontacted” peoples who prefer to be left alone. This is not to say it would be impossible. A madman intent on annihilating all human life could use cropduster-style delivery systems, flying over isolated peoples and infecting them. Or perhaps a pandemic could be engineered to be delivered through animal or environmental vectors that would reach all of these people.

## 2NC --- Advantage 2

### 2NC --- No Tech

#### No emerging tech impact.

Sechser et al., 8-22 — \*Todd S. Sechser is the Pamela Feinour Edmonds and Franklin S. Edmonds, Jr. Discovery Professor of Politics and Public Policy at the University of Virginia and Senior Fellow at the Miller Center of Public Affairs. Dr. Sechser was previously a Stanton Nuclear Security Fellow at the Council on Foreign Relations and a John M. Olin National Security Fellow at Harvard University. He received his Ph.D. in political science from Stanford University. \*\*Neil Narang is an Associate Professor of Political Science at the University of California, Santa Barbara, and Senior Research Scholar at the Institute for Global Conflict and Cooperation at the University of California. From 2015-2016, he served as a Senior Advisor in the Office of the Secretary of Defense for Policy on a Council on Foreign Relations International Affairs Fellowship. Previously, he held positions at the Center for International Security and Cooperation at Stanford University, the University of Pennsylvania, and the Los Alamos National Laboratory. He received his Ph.D. in Political Science from the University of California, San Diego. \*\*\*Caitlin Talmadge is Associate Professor of Security Studies in the School of Foreign at Georgetown University, as well as Senior Non-Resident Fellow in Foreign Policy at the Brookings Institution. Dr. Talmadge was previously a Stanton Nuclear Security Fellow at the Council on Foreign Relations and a John M. Olin National Security Fellow at Harvard University, as well as a consultant to the Office of Net Assessment at the U.S. Department of Defense. She is a graduate of Harvard (A.B., Government) and the Massachusetts Institute of Technology (Ph.D., Political Science). (“Emerging technologies and strategic stability in peacetime, crisis, and war;” *Journal of Strategic Studies*, 42:6; pg. 728-729; //GrRv)

Yet the history of technological revolutions counsels against alarmism. Extrapolating from current technological trends is problematic, both because technologies often do not live up to their promise, and because technologies often have countervailing or conditional effects that can temper their negative consequences. Thus, the fear that emerging technologies will necessarily cause sudden and spectacular changes to international politics should be treated with caution. There are at least two reasons to be circumspect. First, very few technologies fundamentally reshape the dynamics of international conflict. Historically, most technological innovations have amounted to incremental advancements, and some have disappeared into irrelevance despite widespread hype about their promise. For example, the introduction of chemical weapons was widely expected to immediately change the nature of warfare and deterrence after the British army first used poison gas on the battlefield during World War I. Yet chemical weapons quickly turned out to be less practical, easier to counter, and less effective than conventional high-explosives in inflicting damage and disrupting enemy operations.6 Other technologies have become important only after advancements in other areas allowed them to reach their full potential: until armies developed tactics for effectively employing firearms, for instance, these weapons had little effect on the balance of power. And even when technologies do have significant strategic consequences, they often take decades to emerge, as the invention of airplanes and tanks illustrates. In short, it is easy to exaggerate the strategic effects of nascent technologies.7 Second, even if today’s emerging technologies are poised to drive important changes in the international system, they are likely to have variegated and even contradictory effects. Technologies may be destabilising under some conditions, but stabilising in others. Furthermore, other factors are likely to mediate the effects of new technologies on the international system, including geography, the distribution of material power, military strategy, domestic and organisational politics, and social and cultural variables, to name only a few.8 Consequently, the strategic effects of new technologies often defy simple classification. Indeed, more than 70 years after nuclear weapons emerged as a new technology, their consequences for stability continue to be debated.9

# 1NR

### O/V

#### Even a regional war causes nuclear winter --- guarantees extinction

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Nuclear warfare could have devastating impacts on millions of people, yet it has been suggested that regional or global nuclear conflict may be possible in the future (Toon et al., 2019). In addition to the calamitous impacts of nuclear conflict on a local level, research conducted with a range of climate models finds a global cooling in response to various conflict scenarios (Coupe et al., 2019; Malone et al., 1985; Mills et al., 2014; Pausata et al., 2016; Robock et al., 2007; Turco et al., 1983). This global cooling is driven by fires started by the nuclear weapons. These fires inject smoke into the upper troposphere, where rapid lofting can spread the sunlight-absorbing soot particles into the stratosphere (Turco et al., 1983). Recent research implies that even a small nuclear conflict may have impacts on the global climate system, affecting the state and circulation of the atmosphere (Robock et al., 2007), increasing the sea ice extent in both hemispheres (Mills et al., 2014), and reducing plant productivity and crop yields in regions far from the conflict location (Özdogan et al., ˘ 2013; Toon et al., 2019; Xia & Robock, 2013). While less studied, the potential impacts of nuclear conflict on the ocean are many. Numerous physical, chemical, and biological processes in the ocean are temperature dependent, and sunlight is a critical ingredient for photosynthesizing phytoplankton at the base of the marine food web. Using a climate model with an interactive ocean, Mills et al. (2014) evaluated the ocean physical response to a potential India/Pakistan nuclear war that lofts 5 Tg of black carbon particles into the stratosphere; they find a 0.8◦ C decrease in globally averaged sea surface temperature, with smaller temperature reductions at depth. Recently Toon et al. (2019) used an Earth system model that includes a representation for phytoplankton to evaluate the ocean biological response to nuclear conflict; they report a 5–15% decrease in phytoplankton productivity under a range of conflict scenarios. Such findings prompt further investigation into how nuclear conflict and the resulting global cooling may alter the chemical state of the ocean. Perturbations in the ocean's carbonate chemistry are of particular interest, owing to their importance for ocean acidification. Ocean acidification is an ongoing, large-scale environmental problem driven by fossil fuel emissions of carbon dioxide (CO2). Cumulatively since the preindustrial era, the ocean has absorbed 41% of the carbon emitted by human industrial activities (McKinley et al., 2017). While this ocean absorption of carbon has partially mitigated anthropogenic global warming, it has fundamentally altered the carbonate chemistry of the ocean, increasing the concentration of hydrogen ions ([H+]) while decreasing the concentration of carbonate ions ([CO2− 3 ]). Observations collected at time series sites across the global ocean find statistically significant reductions in the potential hydrogen (pH = −log([H+])) and the saturation state of the calcium carbonate mineral aragonite (Ωarag, which is proportional to [CO2− 3 ]) over the past few decades (Bates et al., 2014). These changes are a direct consequence of the ocean absorption of anthropogenic carbon; carbonate chemistry dictates that the excess carbon will react with water and CO2− 3 to decrease ocean pH and Ω (Feely et al., 2004). Both of these changes may have negative consequences for marine organisms, in particular for those that precipitate calcium carbonate shells (e.g., coccolithophores, pteropods, foraminifera, corals, molluscs, and echinoderms), as the precipitation is hindered by low pH, and because decreases in Ω favor shell dissolution (Doney et al., 2009). To date, there have been no studies of the effects of nuclear conflict on ocean acidification, though past modeling studies on the ocean's response to volcanic forcing and to proposed geoengineering schemes have intimated that ocean carbonate chemistry is highly sensitive to these types of external forcings. Using a fully coupled carbon-climate model, Frölicher et al. (2011) find that volcanic-induced cooling following the 1991 Mt. Pinatubo eruption led to immediate increases in the flux of carbon from atmosphere to ocean and consequently, increases in the total dissolved inorganic carbon (DIC) concentration in the surface ocean. Eddebbar et al. (2019) demonstrate that air-to-sea CO2 fluxes are significantly enhanced following the eruptions of Agung, El Chichón, and Pinatubo in a large ensemble of simulations with an Earth system model. Matthews et al. (2009) conduct solar radiation management climate engineering simulations with an intermediate complexity model of the coupled climate-carbon system; they find changes in ocean pH and Ωarag as a result of the anomalous cooling. Similarly, Lauvset et al. (2017) indicate that radiation management geoengineering leads to changes in North Atlantic pH in a fully coupled Earth system model, but they do not explore changes in Ωarag. While these studies are suggestive of the carbonate chemistry response to nuclear conflict, the external forcing perturbations are of a different magnitude and duration than those imposed by nuclear conflict. Further, it is difficult to mechanistically understand the ocean carbonate chemistry response to such external forcing perturbations in fully coupled models, where the terrestrial response to forcing additionally influences the atmospheric CO2 concentration. Here, we use a state-of-the art Earth system model to simulate the ocean carbonate chemistry response to a range of nuclear conflict scenarios. We decouple the ocean carbon cycle from that of the terrestrial carbon cycle via a direct prescription of the atmospheric CO2 boundary condition used for air-sea CO2 flux, that is, changes in the terrestrial biosphere have no influence on the atmospheric CO2 that the ocean sees. As we will demonstrate, we find large perturbations in ocean pH and Ωarag as a result of nuclear conflict. These perturbations have relatively long duration (order of 10 years) and are driven by decreases in temperature and subsequent increases in the ocean carbon inventory. 2. Methods We analyse output generated by the Community Earth System Model (CESM) version 1.3, a state-of-the-art coupled climate model consisting of atmosphere, ocean, land, and sea ice components (Hurrell et al., 2013). The atmosphere component of CESM in our simulations is the Whole Atmosphere Community Climate Model (WACCM; Marsh et al., 2013) with nominal 2◦ resolution, 66 vertical levels, and a model top at ∼145 km; it uses the Rapid Radiative Transfer Model for GCMs (RRTMG; Iacono et al., 2000) for the radiative transfer. The Community Aerosol and Radiation Model for Atmospheres (Bardeen et al., 2008) is coupled with WACCM to simulate the injection, lofting, advection, and removal of soot aerosols in the troposphere and stratosphere, and their subsequent impact on climate (Coupe et al., 2019; Toon et al., 2019). The ocean component of CESM is the Parallel Ocean Program version 2 (Danabasoglu et al., 2012) with nominal 1◦ resolution and 60 vertical levels. The biogeochemical ocean component of CESM is the Biogeochemical Elemental Cycling model that represents the lower trophic levels of the marine ecosystem, full carbonate system thermodynamics, air-sea CO2 fluxes, and a dynamic iron cycle (Doney et al., 2006; Moore et al., 2004, 2013; Moore & Braucher, 2008; Long et al., 2013; Lindsay et al., 2014). LOVENDUSKI ET AL. 2 of 9 Geophysical Research Letters 10.1029/2019GL086246 The ocean in the coupled CESM simulation is initialized from rest with World Ocean Circulation (WOCE) temperature and salinity (Gouretski & Koltermann, 2004). Biogeochemical tracers are initialized to observationally based climatologies where possible (Lauvset et al., 2016); where these were not available (such as dissolved iron and phytoplankton biomass), the model is initialized with fields interpolated from an existing CESM simulation. The new, fully coupled simulation was spun up for 4 years to an approximate steady state with a constant atmospheric CO2 mixing ratio of 370 ppm, representative of the mixing ratio in the year 2000. Due to the relatively short spin-up period, the globally integrated air-sea CO2 flux is not in steady state (drifting at a rate of 0.14 Pg C year−2) when the perturbation forcing is applied. We therefore present our results as anomalies from the drifting control integrations. Three control simulations of 20-year duration are generated using round-off level differences in atmospheric initial conditions. As each of these control simulations has different phasing of internal variability (e.g., El Niño-Southern Oscillation), we use the standard deviation across this ensemble to identify statistically significant perturbations due to nuclear conflict. We report on the anomalies generated from four simulations of nuclear conflict with varying amounts of soot injection: three India/Pakistan conflict scenarios that inject 5, 27, and 47 Tg of soot, respectively, and one US/Russia conflict scenario that injects 150 Tg of soot. The initial soot injection amounts are generated from plausible scenarios for nuclear conflict following advice from a number of military and policy experts; the reader is referred to Toon et al. (2019) for further details on scenario development. In each case, we prescribe that the conflict begins on 15 May of the 5th year of the first control simulation, and we integrate the model for a 15-year period following the injection. We assume that the smoke generated by mass fires from nuclear conflict is injected into the upper troposphere above the target sites (in the U. S./Russia case, smoke is spread evenly over the two nations), as in Toon et al. (2019). WACCM lofts much of this smoke higher into the stratosphere via solar heating of black carbon aerosols in the smoke, where the black carbon aerosols persist for about a decade. The resulting annual mean, post-conflict (May to the following April) anomalies in aerosol optical depth are shown in Figure 1a. These optical depth changes result in a 10–40% reduction in incoming solar energy (Toon et al., 2019). While we discuss the anomalies generated from all four of these conflict simulations, we describe two in greater detail throughout this manuscript: the U. S./Russia case, as it is the largest climate perturbation overall, and the India/Pakistan 47-Tg case, as it is the largest climate perturbation generated by a regional nuclear conflict. Ocean biogeochemistry in the version of CESM used for our simulations has been extensively validated in the literature (Brady et al., 2019; Freeman et al., 2018; Harrison et al., 2018; Krumhardt et al., 2017; Lindsay et al., 2014; Lovenduski et al., 2015, 2016; Long et al., 2013, 2016; Moore et al., 2013; McKinley et al., 2016; Negrete-García et al., 2019). Of particular note for our study, the simulated surface ocean carbonate ion concentration from a long, preindustrial control simulation of CESM compares favorably with reconstructed observations, albeit with lower interannual variance than has been measured at subtropical time series sites (Lovenduski et al., 2015). In Figure S1 in the supporting information, we illustrate the comparison between observationally based estimates of surface ocean pH and Ωarag (from GLODAPv2; Lauvset et al., 2016) and the CESM control ensemble mean. In this comparison, we note that the observational estimates have been extensively interpolated and are intended to represent year 2002 carbonate chemistry parameters, whereas CESM has been integrated under an atmospheric CO2 mixing ratio that corresponds to year 2000 forcing. We find high correspondence between the spatial patterns of modeled and observed pH and Ωarag, giving us confidence that CESM is capable of representing the mean state of these two variables. 3. Results Globally averaged surface ocean pH increases in response to each of the nuclear conflicts, where the magnitude of the pH anomaly scales with the amount of soot injected (Figure 1b). In each case, the pH anomaly exceeds the interannual standard deviation of pH in the control ensemble mean (gray shading in Figure 1b). We observe the largest increases in surface ocean pH in response to the U. S./Russia 150-Tg case; here the globally averaged surface ocean pH anomaly exceeds 0.05, corresponding to a ∼10% decrease in the global mean hydrogen ion concentration. Under each scenario, the pH anomaly peaks 2–4 years after the conflict and persists for ∼10 years. With the exception of the high-latitude oceans, the pH increase following the nuclear conflict is pervasive across the surface ocean (Figures 2a– 2c). In the 47-Tg India/Pakistan scenario, we observe local pH anomalies exceeding 0.06 units on average in years 2–5 post conflict (Figure 2c); the anomalies are largest in the North Atlantic, North Pacific, and Equatorial Pacific. These large, abrupt changes in surface ocean pH may have important consequences for calcifying organisms, as shell precipitation can be affected by the ambient hydrogen ion concentration in seawater (Kroeker et al., 2013). Since the beginning of the industrial revolution, global ocean pH has dropped by an estimated 0.1 units (Ciais & Sabine, 2013). The anomalies in pH generated by our simulations exceed 50% of this historical change and occur over a much shorter time period. Whether and how organisms respond to the initial and rapid alleviation of low pH, followed by an immediate return to the current pH state in the global ocean, is as yet unknown (see, e.g., Haigh et al., 2015). In contrast to our results for pH, we observe decreases in surface ocean Ωarag following nuclear conflict (Figure 1c), which should tend to inhibit the maintenance of shells and skeletons in calcified organisms. While minimal changes in Ωarag are simulated for the 5-Tg India/Pakistan case, the other three cases produce large decreases in saturation state, on the order of 0.1 to 0.3 units (Figure 1c). In each of these three cases, the anomalies exceed the interannual standard deviation of Ωarag in the control ensemble mean (gray shading in Figure 1c). The peak response in these three cases occurs 3–5 years post conflict, a year or so later than the pH response. While for pH the globally averaged anomaly is negligibly small, 10-years post conflict; anomalies in globally averaged Ωarag persist beyond our 15-year simulation time frame for all conflict scenarios. The decreases in aragonite saturation state span the tropics and subtropics, with the exception of the central and eastern Equatorial Pacific region (Figures 2d– 2f). Local decreases in saturation state exceed 0.5 units in the western North Atlantic and western North Pacific under the 47-Tg India/Pakistan scenario (Figure 2f). Importantly, the simulated decreases in saturation state are highly pronounced in regions that host diverse coral reef ecosystems (for instance, the western and southwestern Pacific and the Caribbean), and like pH, the changes in saturation state occur fairly rapidly. Projections from climate models suggest that coral reef ecosystems across the world will experience aragonite saturation state declines from their preindustrial value of 3.5 to 3.0 by the end of the century (Ricke et al., 2013); alarmingly, our simulations project similar Ωarag declines over a 3- to 5-year period, which then persist for years after the initial forcing dissipates. The opposite-signed anomalies in pH and Ωarag induced by nuclear conflict seem puzzling at first, as for "typical" anthropogenic ocean acidification scenarios, both of these variables simultaneously decrease. Why would nuclear conflict cause opposing responses in pH and saturation state? To understand these opposing responses, we need to consider the carbonate chemistry system in seawater and its sensitivity to changing temperature. Gaseous CO2 reacts with seawater to form carbonic acid (H2CO3), which then dissociates to form H+ and bicarbonate (HCO− 3 ). The hydrogen ion then reacts with CO2− 3 to form additional HCO− 3 , CO2 + H2O− ↽−−−−−−⇀−H2CO3. (1) H2CO3− ↽−−−−−−⇀−H+ + HCO− 3 . (2) H+ + CO2− 3 − ↽−−−−−−⇀−HCO− 3 . (3) The equilibrium constants for these reactions (typically expressed as K0, K1, and K2, respectively; Sarmiento & Gruber, 2006) are sensitive to changes in temperature, for example, the cooling induced by nuclear conflict. We need to also consider the dissolution reaction for mineral calcium carbonate (CaCO3) in seawater, CaCO3(s)− ↽−−−−−−⇀−Ca2+ sat + CO2− 3,sat, (4) where [Ca2+]sat and [CO2− 3 ]sat are the concentrations of dissolved calcium and carbonate in equilibrium with mineral CaCO3, and the solubility product (Ksp) for this reaction is also sensitive to temperature (Sarmiento & Gruber, 2006). Further, the saturation state for a calcium carbonate mineral in seawater (here: aragonite), can be expressed as Ωarag = [Ca2+][CO2− 3 ] Ksp , (5) where both [CO2− 3 ] and Ksp are affected by changes in temperature (Ca2+ is highly abundant in seawater, and thus changes in temperature do not affect its concentration enough to matter for CaCO3 dissolution; Emerson & Hedges, 2008; Sarmiento & Gruber, 2006). Thus, we can decompose the anomalies in pH and Ωarag into the component driven by temperature-induced changes in the carbonate chemistry equilibrium constants (K0, K1, K2, and Ksp) and the component driven by all other changes to the carbonate chemistry system, such as changes in the DIC concentration, the alkalinity, or the salinity. We approximate the temperature sensitivity of the equilibrium constants using a program developed for CO2 system calculations (CO2SYS; van Heuven et al., 2011) via finite difference approximation. The component driven by all other changes to the carbonate system is computed as the residual of the other two terms. The pH response to nuclear conflict is the sum of two opposing drivers: an increase in pH driven by a decrease in sea surface temperature that alters the carbonate chemistry equilibrium constants and a decrease in pH driven by an increase in the DIC concentration of the upper ocean. Figure 1b illustrates the temporal evolution of the components of the global pH anomalies from the India/Pakistan 47-Tg simulation driven by changes in the equilibrium constants versus all other changes in the carbonate chemistry system. The equilibrium constant-driven pH anomaly is positive, peaking 2–3 years after the conflict, whereas the “other” component of the pH anomaly is negative, peaking 3–5 years after the conflict. The resulting total pH anomaly is positive, indicating that it is more strongly influenced by changes in the equilibrium constants than other changes. In the India/Pakistan 47-Tg case, globally averaged temperature reaches a minimum 2 to 3-years post conflict; the model initially produces 3.5◦C–4◦C anomalies at the surface that rewarm toward pre-conflict values for the duration of the simulation (Figure 3a). In contrast, surface ocean salinity-normalized DIC anomalies peak 3 to 5-years post conflict (Figure 3b), mainly as a result of the enhanced solubility of CO2 in colder seawater. While decreasing biological export production also contributes to increased DIC in the surface ocean, this signal is small relative to the change driven by enhanced air-to-sea CO2 flux (e.g., Figure S2). The delay in DIC relative to temperature anomalies is a result of the long (order months to years) timescale for CO2 to fully equilibrate with the surface mixed layer (Emerson & Hedges, 2008). The cold, high DIC surface anomalies slowly propagate into the global ocean thermocline; we observe 1◦ C and 10 mmol m−3 anomalies in temperature and DIC, respectively, at a depth of 300 m that persist beyond the length of our simulation (Figure 3). As there are no significant anomalies in global mean alkalinity or salinity post conflict (not shown), we conclude that the DIC perturbation drives the “other” component of the pH anomalies. We find similar behavior for these components in the other conflict scenarios (not shown). The negative Ωarag anomalies post conflict are driven by a combination of lower temperatures and higher DIC concentrations. Colder surface temperatures tend to increase Ksp, while higher surface DIC concentrations tend to decrease [CO2− 3 ], resulting in lower Ωarag values post conflict. Figure 1c illustrates that the DIC (other) component dominates the total Ωarag anomaly for the India/Pakistan 47-Tg simulation. As for pH, the equilibrium constant component peaks earlier than the other component; this is due to the timing of the temperature and DIC perturbations (Figure 3). The spatial patterns of the post-conflict surface pH and Ωarag anomalies in the India/Pakistan 47-Tg scenario (Figures 2c and 2f) result from perturbations in local surface ocean temperature and DIC (Figure S3). Negative temperature anomalies and positive DIC anomalies are pervasive in the tropics and extratropics, with the exception of the eastern Equatorial Pacific, where a large and long-lasting El Niño-like event develops following the conflict (Coupe, et al., manuscript in review). This strong reduction in the equatorial trade winds greatly weakens upwelling in the cold tongue region, producing near-zero surface temperature anomalies and a reduction in vertical DIC supply here (Figure S3). In the Southern Ocean, temperature and DIC are not much affected by the nuclear conflict, likely a result of enhanced upwelling of warm water from the subsurface (Harrison, et al., manuscript in preparation). Taken together, the aforementioned changes in temperature and DIC lead to increases in pH and decreases in Ωarag over most of the ocean surface (Figure S4). The changes in surface ocean pH that we simulate for nuclear conflict resemble the simulated response of pH to volcanic eruptions, but are an order of magnitude larger. Figure S5 illustrates the anomaly in surface ocean pH in the first year following the eruptions of Agung, El Chichón, and Mt. Pinatubo, as estimated by the CESM Large Ensemble (Kay et al., 2015), which uses the same physical and biogeochemical ocean components as in our nuclear conflict simulations. The ensemble mean isolates the evolution of the Earth system under historical external forcing, including the aerosol loading following volcanic eruptions (Eddebbar et al., 2019), and averages across the various representations of internal variability (Deser et al., 2012; we note that ensembles are not necessary for the nuclear conflict scenarios since the much larger magnitude of forcing provides a higher signal-to-noise ratio). The anomaly in the ensemble mean shown here thus cleanly captures the response of surface ocean pH to volcanic eruptions. Here we show the anomaly in preindustrial pH (pH anomalies in equilibrium with preindustrial atmospheric CO2, which is computed simultaneously with contemporary pH at model run time), as the contemporary pH anomalies include also the response to increasing atmospheric CO2 from one year to the next. The similarity in the spatial patterns of volcanically induced pH anomalies and those produced under nuclear conflict is striking (cf. Figures S5 and 2c), suggesting that volcanic forcing produces similar temperature, DIC, and thus pH anomalies (including the El Niño-like response to volcanic forcing in the eastern Equatorial Pacific, described in Eddebbar et al., 2019). However, the eruption-driven pH anomaly is both smaller (an order of magnitude) and of shorter duration (∼2 years) than in the India/Pakistan 47-Tg simulation. Unfortunately, a similar analysis of volcanic Ωarag anomalies in the CESM Large Ensemble was not possible as preindustrial [CO2− 3 ] was not saved to disk. 4. Conclusions and Discussion We report on the surface ocean pH and Ωarag anomalies generated from four simulations of nuclear conflict using the CESM with full ocean carbonate system thermodynamics. Globally averaged surface ocean pH increases in response to each conflict, with the largest increases in the North Atlantic, North Pacific, and Equatorial Pacific Ocean. The pH anomalies persist for 10 years post conflict and are primarily driven by changes in the carbonate chemistry equilibrium constants as a result of decreases in sea surface temperature. In contrast, CESM simulates globally averaged decreases in surface ocean Ωarag in response to nuclear conflict, with the largest decreases in the tropics and subtropics. The Ωarag anomalies persist beyond the length of our 15-year simulations and are driven by a combination of changes in the carbonate chemistry equilibrium constants and the solubility-driven increases in DIC. We further demonstrate that the surface pH anomalies induced by nuclear conflict resemble those induced by volcanic eruptions in the same modeling system. The simulated changes in global and regional pH and Ωarag as a result of nuclear conflict are large and abrupt. In the most extreme forcing scenario (U. S./Russia 150 Tg), over a period of ∼5 years, global surface ocean pH increases by 0.06 units, and Ωarag decreases by 0.3 units. To put these numbers into perspective, this simulated rate of change of pH is 10 times larger than the rate of change we have observed over the past two decades as a result of ocean acidification (−0.0018 year−1; Lauvset et al., 2015). Worryingly, surface ocean Ωarag decreases more than six times faster than has been observed in the open ocean over the past three decades (−0.0095 year−1 at the Bermuda Atlantic time series; Bates et al., 2014). While the cooling associated with nuclear conflict rapidly and briefly alleviates the decline in pH associated with ocean acidification, the increase in solubility causes the ocean to absorb ∼11 Pg of excess carbon in a 10-year period, leading to a rapid drop in Ωarag. Whether and how calcifying organisms might respond to such rapid and opposing changes in pH and Ωarag is as yet unknown. In order to measure organism response to ocean acidification, a majority of laboratory studies perform CO2 bubbling perturbation experiments, which simultaneously decrease the pH and Ωarag in the surrounding seawater solution (Pörtner et al., 2014). This simultaneous change in two carbonate chemistry parameters challenges our ability to isolate the organism response to changes in pH or changes in Ωarag alone. A recent laboratory sensitivity study of marine bivalve larvae used chemical manipulation experiments to decouple these two parameters; they found that larval shell development and growth were negatively impacted by decreasing Ω and unaffected by changes in pH (Waldbusser et al., 2014). If these sensitivities are sustained in other organisms, we might conclude that calcifying organisms would be severely affected by nuclear conflict. Our findings shed light on the ocean biogeochemical response to other forms of extreme external forcing, such as volcanic eruptions (Eddebbar et al., 2019; Frölicher et al., 2011) and solar radiation management climate engineering (Lauvset et al., 2017; Matthews et al., 2009). They may further inform the study and understanding of the role of ocean acidification in marine extinction following the Chicxulub impact event (Henehan et al., 2019). Importantly, our results suggest that even a regional nuclear conflict can have an impact on global ocean acidification, adding to the list of the many, far-reaching consequences of nuclear conflict for global society.

#### Turns solvency because the ruling is perceived as illegitimate.

Luke Ryan, Summer 2017 [J.D., 2017, Fordham University School of Law “How The Party Presentation Rule Limits Judicial Discretion” St. Thomas journal of Complex Litigation <https://www.stu.edu/Portals/law/docs/academics/student-orgs/jcl/volumes/Volume%204/RyanLuke-EssayThePartyPresentationRule.pdf> //DMcD]

The party presentation rule—also known as the “norm against judicial issue creation” or “norm against sua sponte decision-making”—flows out of a judge’s neutral role in the adversarial system as one “who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties.” 15 While outside factual research is highly controversial and strongly discouraged because it raises evidentiary and due process concerns and infects the trial record that is vital on an appeal,16 outside legal research is not per se discouraged because of the judge’s unique responsibility to know the law and apply it to the facts correctly.17 Outside legal research and sua sponte decision-making becomes controversial, however, when judges disregard party autonomy and raise new legal arguments that were intentionally or accidentally omitted by the litigants.18 Such unilateral actions have the effect of helping one party at the expense of another and feed into the damaging narrative that “courts are more likely to raise an issue sua sponte if they think a case is really important or if the judges really want to reach a particular result.” 19 While most judges and legal scholars agree that sua sponte decision-making is not justified when used to help one side in an adversarial proceeding or to promote a judge’s personal agenda, many judges (and some legal scholars) believe the party presentation rule does not prohibit judicial creation of new legal arguments that support a litigant’s existing claims.20 Federal judges (and the federal courts21) have two important roles. First, in their “dispute resolution” capacity, judges are required to resolve concrete conflicts, between individual parties, involving particularized facts.22 Second, in their “law pronouncement” or “public values” role, judges are required “to make accurate statements about the meaning of the law that govern beyond the parameters of the parties and their dispute.” 23 Courts are usually able to perform each function without conflict, but tensions arise when an individual dispute that is poorly or insufficiently litigated has the potential to have an impact on precedent. In such circumstances, legal scholars, judges, and litigants will sometimes disagree about which role is supreme.24 The dispute resolution capacity provides the strongest justifications for an absolute party presentation rule. When viewing a judge’s responsibilities from this vantage, the rule preserves the essential and unique roles adversarial litigants and neutral judges play in the American legal system.25 “[J]udges are more likely to reach the ‘right’ legal answer when two parties, each with a stake in the matter, compete to present the most persuasive case to the court.” 26 Absolute preservation of the adversarial roles also creates buy-in by the parties and results in greater acceptance of a final judgment because the parties believe that they received a fair opportunity before the court.27 A second justification rests on principles of due process by ensuring that the parties have notice and an opportunity to respond to all issues and arguments considered by the judge.28 Here again, an absolute rule helps avoid the one-sided inconsistency that occurs when courts refuse to consider a party’s arguments that were not raised at the first opportunity, but remain free to entertain their own post-briefing ideas.29 Finally, the rule has beneficial practical effects to dispute resolution by conserving scarce judicial resources, preventing judicial activism and agenda setting, and ensuring efficient resolution of cases by identifying all relevant matters early in the litigation.30

#### Judicial weakness destroys soft power.

Sidhu ’11 (Dawinder S; J.D. from George Washington University, M.A. from Johns Hopkins University, B.A. from the University of Pennsylvania, attorney at Shook, Hardy & Bacon, Professor of Law at the University of New Mexico, Visiting Professor at the University of Baltimore, former fellow at the Supreme Court of the United States, former law clerk to U.S. District Judge David G. Campbell, former Special Assistant to the Chair of the U.S. Sentencing Commission; 2011; “Judicial Review as Soft Power: How the Courts Can Help Us Win the Post-9/11 Conflict”; <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1003&context=nslb>; American University National Security Law Brief, Vol. 1, Issue 1, Article 4; accessed 4/4/18; TV)

Part I will distinguish between “hard power,” which generally constitutes the ability to attain favorable foreign policy outcomes by way of military force or economic coercion, and “soft power,” defined as the ability to achieve those outcomes by way of attraction.27 Though soft power generally is thought to include a nation’s values, social norms, and culture, academic studies have not fully demonstrated that a nation’s legal dimensions—specifically its legal institutions and adherence to the rule of law—are also a form of soft power.28 This part will attempt to make this showing, citing to aspects of the American constitutional design that may be attractive to people of other communities, including Muslims.29 The legal principles established by the Framers and enshrined in the Constitution are a source of attraction only if we have meaningfully adhered to them in practice. Part II will posit that the Supreme Court’s robust evaluation of cases in the wartime context suggests that the nation has been faithful to the rule of law even in times of national stress. As support, this part will provide examples of cases involving challenges to the American response to wars both before and after 9/11, the discussion of which will exhibit American respect for the rule of law. While the substantive results of some of these cases may be particularly pleasing to Muslims, for instance the extension of habeas protections to detainees in Guantánamo,30 this part will make clear that it is the legal process—not substantive victories for one side or against the government—which is the true source of American legal soft power. If it is the case that the law may be an element of soft power conceptually and that the use of the legal process has reflected this principle in practice, the conclusion argues that it would benefit American national security for others in the world to be made aware of the American constitutional framework and the judiciary’s activities related to the war. Such information would make it more likely that other nations and peoples, especially moderate Muslims, will be attracted to American interests. This Article thus reaches a conclusion that may seem counterintuitive—that the judicial branch, in the performance of its constitutional duty of judicial review, furthers American national security and foreign policy objectives even when it may happen to strike down executive or legislative arguments for expanded war powers to prosecute the current war on terror and even though the executive and legislature constitute the foreign policy branches of the federal government.

#### Causes extinction – China, warming, pandemics, and cyber.

Nye ’17 (Joseph S; University Distinguished Service Professor and former Dean of the Kennedy School of Government at Harvard University, Ph.D. in Political Science from Harvard, B.A. from Princeton, Rhodes Scholarship from Oxford, ranked as the most influential scholar on American foreign policy by a survey of 2700 IR scholars, named one of the top 100 Global Thinkers by Foreign Policy, fellow of the American Academy of Arts and Sciences, the British Academy, and the American Academy of Diplomacy, recipient of Princeton University’s Woodrow Wilson Award and the Charles Merriam Award from the American Political Science Association, former deputy Undersecretary of State, chair of the National Intelligence Council, Assistant Secretary of Defense for International Security Affairs; Jan/Feb 2017; “Will the Liberal Order Survive?”; <https://www.foreignaffairs.com/articles/2016-12-12/will-liberal-order-survive>; Foreign Affairs; DOA: 2/8/17)

And **as for soft power**, the ability to attract others, a recent index published by Portland, a London consultancy, ranks the United States first and China 28th. And as China tries to catch up, the United States will not be standing still. It has favorable demographics, increasingly cheap energy, and the world's leading universities and technology companies. Moreover, China benefits from and appreciates the existing international order more than it sometimes acknowledges. It is one of only five countries with a veto in the UN Security Council and has gained from liberal economic institutions, such as the World Trade Organization (where it accepts dispute-settlement judgments that go against it) and the International Monetary Fund (where its voting rights have increased and it fills an important deputy director position). China is now the second-largest funder of UN peacekeeping forces and has participated in UN programs related to Ebola and climate change. In 2015, Beijing joined with Washington in developing new norms for dealing with climate change and conflicts in cyberspace. On balance, China has tried not to overthrow the current order but rather to increase its influence within it. The order will inevitably look somewhat different as the twenty-first century progresses. China, India, and other economies will continue to grow, and the U.S. share of the world economy will drop. But no other country, including China, is poised to displace the United States from its dominant position. Even so, the order may still be threatened by a general diffusion of power away from governments toward nonstate actors. The information revolution is putting a number of transnational issues, such as financial stability, climate change, terrorism, pandemics, and cybersecurity, on the global agenda at the same time as it is weakening the ability of all governments to respond. Complexity is growing, and world politics will soon not be the sole province of governments. Individuals and private organizations--from corporations and nongovernmental organizations to terrorists and social movements--are being empowered, and informal networks will undercut the monopoly on power of traditional bureaucracies. Governments will continue to possess power and resources, but the stage on which they play will become ever more crowded, and they will have less ability to direct the action. Even if the United States remains the largest power, accordingly, it will not be able to achieve many of its international goals acting alone. For example, international financial stability is vital to the prosperity of Americans, but the United States needs the cooperation of others to ensure it. Global climate change and rising sea levels will affect the quality of life, but Americans cannot manage these problems by themselves. And in a world where borders are becoming more porous, letting in everything from drugs to infectious diseases to terrorism, nations must use soft power to develop networks and build institutions to address shared threats and challenges. Washington can provide some important global public goods largely by itself. The U.S. Navy is crucial when it comes to policing the law of the seas and defending freedom of navigation, and the U.S. Federal Reserve undergirds international financial stability by serving as a lender of last resort. On the new transnational issues, however, success will require the cooperation of others--and thus empowering others can help the United States accomplish its own goals.

### 2AC --- 2

#### A similar case is not a perfect case – which means the court will have to decide it sua sponte

Krimbel, 89 – JD at Chicago-Kent College of Law (Rosemary, 65 Chi.-Kent L. Rev. 919, “REHEARING SUA SPONTE IN THE U.S. SUPREME COURT: A PROCEDURE FOR JUDICIAL POLICYMAKING,” lexis)  
Indeed, the Court hears only a small proportion of the thousands of cases that request Supreme Court review. n159 Which cases the Court chooses to decide indicates its policies and priorities as well as the extent of its influence upon the political discourse both in our government and among citizens. Despite this considerable discretion, the Court is still limited to the cases and issues which the litigants choose to present. This limitation assures that an activist Court may not reach out and decide just any issue of its choice. In other words, even an activist Court must bide its time waiting for the "perfect" case. This control of the issues by the litigants is central to our adversarial system of law. The Constitution embodies the adversarial system in section two of Article III which extends the judicial power to all "Cases" or "Controversies." n160 It does not extend the power to all "issues of interest to the Justices." In addition to this constitutional constraint on the Court's jurisdiction, the Court has created rules of self-restraint, including the doctrine of advisory opinions, ripeness, standing, and mootness. n161 Both the constitutional limitation of case or controversy and the [\*942] judicially created doctrines comport with the Court's duty to avoid constitutional questions unless necessary. n162

### 2AC --- 3

#### **The plan decides the case in advance of the arguments presented from either side - crushes the rule of law**

Colbert 6 (Douglas, Professor of Law – University of Maryland, “Coming Soon to a Court Near You - Convicting the Unrepresented at the Bail Stage: An Autopsy of a State High Court's Sua Sponte\* Rejection of Indigent Defendants' Right to Counsel”, Seton Hall Law Review, 36 Seton Hall L. Rev. 653, Lexis)

Even then, an activist court's readiness to decide a question not briefed or fully argued may subject the ruling to considerable skepticism and doubt. Understandably, litigants and the public are less  [\*696]  willing to accept a judicial holding that has ignored their viewpoint than one that invited them to share knowledge and perspective. [238](http://www.lexis.com/research/retrieve?_m=7530df293f645bba1288ead44f7455d4&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzb-zSkAA&_md5=58c3c85fa9c839edfb125eeb0d6fb678#n238) Additionally, the missing input and perspective from adversaries and affected parties makes a court more susceptible to deciding a case wrongly. [239](http://www.lexis.com/research/retrieve?_m=7530df293f645bba1288ead44f7455d4&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzb-zSkAA&_md5=58c3c85fa9c839edfb125eeb0d6fb678#n239) Circuit Court of Appeals Judge Richard Posner described the increased judicial risk as "taking a leap into the unknown." [240](http://www.lexis.com/research/retrieve?_m=7530df293f645bba1288ead44f7455d4&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzb-zSkAA&_md5=58c3c85fa9c839edfb125eeb0d6fb678#n240) Other commentators condemn a practice whereby an appellate court reaches decisions without hearing from the parties most affected, charging that it is "both illegal and imprudent for appellate courts to "play God.'" [241](http://www.lexis.com/research/retrieve?_m=7530df293f645bba1288ead44f7455d4&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzb-zSkAA&_md5=58c3c85fa9c839edfb125eeb0d6fb678" \l "n241" \t "_self) These commentators urge courts to follow the adversarial process in an effort to reduce the possibility that reviewing judges will be uninformed and will reach decisions by relying on "assumptions that simply [are] incorrect and were not raised." [242](http://www.lexis.com/research/retrieve?_m=7530df293f645bba1288ead44f7455d4&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzb-zSkAA&_md5=58c3c85fa9c839edfb125eeb0d6fb678" \l "n242" \t "_self) The Fenner court, for instance, seemed less troubled about  [\*697]  denying Fenner counsel or Miranda advisements because it "assumed" he had spoken before a sitting judge, in open court, where the public and impartial observers were present. [243](http://www.lexis.com/research/retrieve?_m=7530df293f645bba1288ead44f7455d4&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzb-zSkAA&_md5=58c3c85fa9c839edfb125eeb0d6fb678" \l "n243" \t "_self) Had a knowing advocate challenged these wishful assumptions and explained that indigent defendants, like Fenner, remain in jail and "appear" through video broadcast only, the Court of Appeals might have been hard-pressed to overlook counsel's importance. [244](http://www.lexis.com/research/retrieve?_m=7530df293f645bba1288ead44f7455d4&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzb-zSkAA&_md5=58c3c85fa9c839edfb125eeb0d6fb678" \l "n244" \t "_self) The force and legitimacy of criticism against appellate courts' activism is exemplified by Fenner, where the sua sponte holding deprived other similarly situated defendants of the same constitutional right to counsel without an opportunity to present argument. [245](http://www.lexis.com/research/retrieve?_m=7530df293f645bba1288ead44f7455d4&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzb-zSkAA&_md5=58c3c85fa9c839edfb125eeb0d6fb678" \l "n245" \t "_self) At these moments, an appellate court must control any activist impulses to abandon the adversarial process and insist upon "a vigorous defense," as well as a "vigorous prosecution." [246](http://www.lexis.com/research/retrieve?_m=7530df293f645bba1288ead44f7455d4&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzb-zSkAA&_md5=58c3c85fa9c839edfb125eeb0d6fb678" \l "n246" \t "_self) To do otherwise and rule without hearing from both sides, and without protecting the class of indigent defendants, jeopardizes that court's reputation and respect within the legal community. In 1993, Justice Souter recognized the institutional danger of an appellate court deciding a constitutional issue without ensuring equal adversarial participation when the Justice observed that a "constitutional rule announced sua sponte is entitled to less deference than one addressed on full briefing and  [\*698]  argument." [247](http://www.lexis.com/research/retrieve?_m=7530df293f645bba1288ead44f7455d4&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzb-zSkAA&_md5=58c3c85fa9c839edfb125eeb0d6fb678" \l "n247" \t "_self) Justice Souter cautioned appellate courts to refrain from sua sponte decision-making because he feared that the legal community would give less import to a broad "rule of law unnecessary to the outcome of a case, especially one not put into play by the parties." [248](http://www.lexis.com/research/retrieve?_m=7530df293f645bba1288ead44f7455d4&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzb-zSkAA&_md5=58c3c85fa9c839edfb125eeb0d6fb678" \l "n248" \t "_self) The Justice noted that courts that engage in this brand of judicial activism produce "the sort of "dicta ... which may be followed if sufficiently persuasive but which are not controlling.'" [249](http://www.lexis.com/research/retrieve?_m=7530df293f645bba1288ead44f7455d4&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzb-zSkAA&_md5=58c3c85fa9c839edfb125eeb0d6fb678" \l "n249" \t "_self)

#### **[2] – Issue creation – Court legitimacy is dependent on its view as a legal body – the aff changes that by allowing the court to take up any issue that they want to irrespective of anything else**

Epstein 98 (Lee, Professor of Political Science and Professor of Law – Washington University, The Choices Justices Make, p. 160-161)

This story suggests that a particular variant of the sua sponte doctrine, namely the practice of disfavoring the creation of issues not raised in the record before the Court, is a norm.1 We can speculate on why the major­ity of the Court was so taken aback by Goldberg's memo and why it took the action it did: because the memo deviated from a norm the justices had come to accept, they "sanctioned" Goldberg by rejecting his invitation to reconsider the constitutionality of capital punishment.'4¶ Framed this way. the norm disfavoring the creation of issues is as vital to the functioning of the Court as the institutions we have discussed here and in Chapter Four. If the norm of sua sponte did not exist, the justices would be free to raise any issue they wished in any case, even if the attorneys had not briefed the issue. The implications of such behavior are enormous. Justices would act a good deal more like members of Congress, who are free to engage in "issue creation," and less like jurists, who must wait for issues to come to them. We could imagine rational, policy-seeking justices attempting, as a matter of course, to append new issues to cases that had been accepted, briefed, and argued as a way to manipulate case outcomes, just as members of Congress add riders to legislative proposals.35¶ Additional implications of a Court operating free from a norm disfa­voring issue creation are easy to develop. 1 But the general point is simple: without this norm the Court would no longer resemble a legal body in the way that scholars, attorneys, and jurists—not to mention Article 111 of the U.S. Constitution—contemplate such fora. More to the point, regular deviations from this norm would undermine the Courts legitimacy. The public believes that the Court's legitimate judicial function involves resolv­ing the issues before it, not the creation of new issues.36 As one scholar put it, "When the parties choose issues, there is little opportunity for judges to pursue their own agendas and, as a consequence, the proceedings are not only fairer, but are perceived to be fairer," But, if the Court departs from this practice, it raises questions as to the impartiality of |its| actions, and such speculation tarnishes the Courts legitimacy. Litigant control of the issues is important to satisfy not only the parties, but society as well…When the Court [dis­covers] issues that the litigants have not presented, the Court erodes its credibility and trespasses on the soul of the [adversarial](http://adversari.il) system.'7

#### Issue creation undermines judicial legitimacy – eliminates perception of impartiality

Miller, 98 – JD, University of Chicago (Eric, “Should Courts Consider 18 USC § 3501 Sua Sponte?.” 65 U. Chi. L. Rev. 1029, Summer, lexis)

Third, it may be unseemly for a court actively to seek out its own issues to consider. n116 This is perhaps what then-Judge Scalia  [\*1051]  meant when he referred to "the premise of our adversarial system," thereby inviting comparison to other systems in which judges are much more active. n117 The legitimacy of the antimajoritarian power of judicial review, for example, depends in part on the fact that judges typically exercise the power only as it is necessary to decide disputes between litigants. This legitimacy could be eroded if judges were perceived as pursuing their own agendas by seeking out issues to consider. Viewed in this way, the refusal to make sua sponte consideration a routine practice is an important doctrine of judicial restraint.

### 2AC --- 4

#### There’s a distinction between raising an issue and deciding a case sua sponte – courts actively avoid issuing sua sponte rulings.

Hills ’20 [Blake R; Prosecuting Attorney in Utah, former appellate clerk for the Tennessee Court of Criminal Appeals; 2020; “Sua Sponte Dismissals: Is Efficiency More Important than Procedural Fairness?”; <https://heinonline.org/HOL/Page?handle=hein.journals/umkc89&div=14&g_sent=1&casa_token=>; UMKC Law Review; accessed 9/15/21; TV]

There is a tremendous difference between a court raising an issue sua sponte and a court deciding an issue sua sponte. In the first instance, the court raises an issue it considers to be important and gives the parties an opportunity to respond before a ruling is made. In the second, the court raises an issue itself and rules on the issue without providing notice and an opportunity to respond. The first procedure is sometimes appropriate, the second is not-especially when it comes to dismissals.

Jurisdiction is the primary issue for a court to raise sua sponte.156 Indeed, the Supreme Court has stated, "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press." 5 7 Likewise, courts should also raise the issues of ripeness 58 and standing'5 9 sua sponte.

Although jurisdiction is arguably the most important issue for a court to raise sua sponte, there are several others. For example, courts can raise the issue of sovereign immunity sua sponte.160 It may also be appropriate to raise an issue sua sponte to protect a litigant who is proceeding pro se. 161 A court may raise an issue sua sponte in order to prevent a miscarriage of justice.16 2 It may also be appropriate for courts to raise issues sua sponte when necessary to fulfill the courts' duties to define the law and to avoid exceeding the scope of the judicial role, to preserve judicial independence, to enforce constitutional restrictions on other branches of the government, and to effectuate constitutional exercises of legislative power.163 Essentially, courts should feel free to raise issues sua sponte when necessary to protect the integrity of the judicial system or to promote the ends of justice. As stated by Justice Stevens:

Trial judges are kept busy responding to motions, objections, and requests by the litigants. It is quite wrong, however, to assume that a judge is nothing more than a referee whose authority is limited to granting or denying motions advanced by the parties. As Learned Hand tersely noted, a "judge, at least in a federal court, is more than a moderator; he is affirmatively charged with securing a fair trial, and he must intervene sua sponte to that end, when necessary." That duty encompasses not only the avoidance of error before it occurs, but the correction of error that may have occurred earlier in a proceeding. 164

Justice Stevens is correct. A court is not simply a moderator who waits silently like a potted plant. But neither are the parties, and they should have an opportunity to respond to any issue raised by the court, especially an issue that could result in dismissal. A court can certainly raise issues sua sponte, but for the reasons discussed below, it should not decide issues sua sponte.

#### 2. That’s a distinction with a difference --- The plan is unprecedented

Frost ‘9 (Amanda; Professor of Law at the American University Washington College of Law, former clerk for Judge A. Raymond Randolph on the U.S. Court of Appeals for the D.C. Circuit, affiliated researcher at Oxford University’s Border Criminologies, Academic Fellow at the Pound Civil Justice Institute, member of the National Constitution Center’s Coalition of Freedom Advisory Board, J.D. from Harvard Law School; December 2009; “The Limits of Advocacy”; <http://www.jstor.org/stable/20684812>; Duke Law Journal, Vol. 59, No. 3; accessed 4/3/18; TV)

B. Issue Creation and the Goals of the Adversarial System Judicial issue creation is consistent with the rationales cited in support of the adversarial system, discussed in detail in Part I.185 Issue creation can enhance truth seeking without sacrificing a judge's impartiality or undermining litigant autonomy. Indeed, permitting a judge to introduce legal issues might answer, at least in small part, the most persistent criticism of adversarial procedure—that it fails when the parties' skills and resources are not evenly matched. The pages that follow seek to justify issue creation on adversary theory's own terms by demonstrating that the adversarial nature of dispute resolution can be maintained, along with the benefits that are claimed to arise from it, even when judges play a role in developing legal arguments. 1. Enhancing Truth Seeking. The adversarial system has been touted as the best method of determining the truth of the matter in dispute, and thus of reaching the right result in each case.186 The basic characteristics of adversary procedure—such as notice, a hearing, and an opportunity to present evidence and test an opponent's evidence— are lauded as essential to reaching the correct outcome.187 As the Supreme Court declared: "[0]ur legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error."188 And yet to achieve this goal, there must be at least a rough equality in the resources and presentation skills of the advocates for either party—what Professor Frank Michelman, among others, refers to as "equipage equality"—that all too often does not exist. As one legal scholar observed, [o]ur adversary system is premised upon the idea that the most accurate and acceptable outcomes are produced by a real battle between equally-armed contestants; thus the adversary system requires, if it is to achieve these goals, some measure of equality in the litigants' capacities to produce their proofs and arguments.189 Without equipage equality, "the stronger case might not necessarily be the better case."190 When the resources and abilities of opposing parties are lopsided, the adversarial system will fail to produce accurate results. The wealthier, sophisticated, repeat-player litigants will usually win; the poorer, outgunned, one-shot litigants will lose, regardless of the merit of their cases.191 Indeed, critics cite this problem as one of the adversarial system's major flaws, and note that the other claimed benefits of adversarial presentation—the dignity and participation values, for example—are small compensation for the inevitable losses suffered by the weaker party.192 As one prominent critic of the adversarial system commented: "The simple truth is that very little in our adversary system is designed to match combatants of comparable prowess, even though adversarial prowess is a main factor affecting the outcome of litigation."193 By raising overlooked issues and legal authority, a judge can ameliorate the imbalances that undermine the adversarial system. For that very reason, judges have a tradition of assisting pro se litigants with case presentation. The same rationale that permits judges to depart from the party presentation rule in pro se cases should apply in cases in which one lawyer is clearly outgunned. This exception to the principle of party presentation should be viewed not as a deviation from adversary theory, but rather as a means of promoting adversarialism by ensuring that it works as best it can. The judge can make the adversary system more efficient at reaching just and accurate outcomes by helping to right the imbalance in opposing lawyers' skills and resources. Allowing judges to raise issues is not equivalent to transforming the judge into an advocate for one side or the other. An advocate finds facts and legal precedents that help only the one party he has been charged to represent, and then uses them to make arguments on that party's behalf. But judges need not go so far to correct an imbalance in the system. If a judge realizes that there is an important legal argument that has been overlooked, or valuable precedent that has gone uncited, the judge does not act as advocate if she points out the missing information and provides both parties with an opportunity to address the issues she has identified. If neither party chooses to do so, the court can obtain guidance from an amicus assigned to make the relevant arguments. In short, the line between judge and advocate can be firmly maintained even when a judge takes on a more active role in framing the case.

### 2AC --- 6

#### The Texas decision/shadow docket put legitimacy on the brink. Future overruling of precedent will confirm it’s dead.

Hull ‘9/1 [Gordon; Associate Professor of Philosophy and Public Policy at UNC Charlotte; 9/1/21; “When does the Supreme Court lose its legitimacy?”; <https://www.newappsblog.com/2021/09/when-does-the-supreme-court-lose-its-legitimacy.html>; New Apps; accessed 9/15/21; TV]

And what does that mean? Now is a good time to ask. The Court has let stand a 5th Circuit decision upholding a Texas law that is plainly unconstitutional under current SCOTUS jurisprudence (it bans abortion at 6 weeks) and involves an enforcement mechanism that comes straight from Stalin’s playbook (it allows individuals to sue people they suspect of assisting a woman of obtaining an abortion). This piece on Vox runs through how deeply perverse the Texas law in question in, how thoroughly Trump has corrupted the 5th Circuit, and how alarming SCOTUS inaction is.

In Planned Parenthood v. Casey – which, along with Roe is apparently being overruled in Texas without a hearing and without a reasoned opinion – the Court favorably cites earlier opinion to the effect that the Court is supposed to give reasons when it overturns its precedent:

"A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve"

Justice O’Connor adds:

“The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands. The underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation” (emphasis added)

O’Connor adds that if “the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in Roe” that “only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance.”

The Court’s so-called “shadow docket” – consequential decisions rendered in orders for cases not heard, as for example prioritizing religious claims over public health – has been on the rise over the last couple of years, and commentators have worried about the damage this does to the rule of law as an institution. In the case of abortion, the Court has a case on the docket that would give it the opportunity to overturn Roe; it could have waited until then (and avoided the need to validate Texas’ enforcement mechanism). You could argue that the Court didn’t “decide” anything last night, but it was faced with a clearly erroneous 5th Circuit decision that it let stand. I don’t see how last night’s failure to enjoin the Texas law doesn’t utterly gut its legitimacy in the sense articulated in Casey. Texas just banned abortion, and SCOTUS offered no justification at all in letting the law stand.

Again, Casey: “to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.” Court legitimacy is important:

“It is true that diminished legitimacy may be restored, but only slowly. Unlike the political branches, a Court thus weakened could not seek to regain its position with a new mandate from the voters, and even if the Court could somehow go to the polls, the loss of its principled character could not be retrieved by the casting of so many votes. Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.”

### 2AC --- 7

#### 4. A sua sponte decision would permanently erode judicial legitimacy.

Hills ’20 [Blake R; Prosecuting Attorney in Utah, former appellate clerk for the Tennessee Court of Criminal Appeals; 2020; “Sua Sponte Dismissals: Is Efficiency More Important than Procedural Fairness?”; <https://heinonline.org/HOL/Page?handle=hein.journals/umkc89&div=14&g_sent=1&casa_token=>; UMKC Law Review; accessed 9/15/21; TV]

In addition to violating due process, sua sponte dismissals reduce respect for judicial decisions. This is because "[a]ppearances matter tremendously in court. The legal system shouldn't just be fair, it should also appear to be fair."77 As stated by Lord Chief Justice Heward in the Sussex Justice case, "justice should not only be done, but should manifestly and undoubtedly be seen to be done."1 78

The principle that the legal system must be fair and must be seen to be fair is known as "procedural justice."1 79 This principle is important because research has shown that "the manner in which disputes are handled by the courts has an important influence upon people's evaluations of their experience in the court system."180 Indeed, "[t]hey accept 'losing' more willingly if the court procedures used to handle their case are fair."' 8 ' A fair proceeding is one in which all litigants have the opportunity to present their argument and have it considered by the court. 8 2 Under this principle, sua sponte dismissals do not have the appearance of fairness because the litigants do not have the opportunity to respond to dispositive issues and have their arguments considered by the court.

The adversary system is built on the premise that allowing litigants to address the court on dispositive issues both increases the accuracy of the decision and "increases the parties' sense that the court's process and result are fair.". 3 As stated by the Supreme Court, "[f]airness can rarely be obtained by secret, onesided determination of facts decisive of rights.... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." 84

Sua sponte dismissals reduce "societal acceptance of courts' decisions because the losing party will feel that he has not been given a fair opportunity to present his case when he had neither notice of, nor the chance to present, arguments on the issue that the court found determinative. " As one commentator has noted: "If the grounds for the decision fall completely outside the framework of the argument, making all that was discussed or proved at the hearing irrelevant-the adjudicative process has become a sham, for the parties' participation in the decision has lost all meaning." 186 This is a real problem:

Indeed, one study revealed that even lawyers who won a case based on an issue decided sua sponte did not like the practice: "[T]hey said the cases should have been decided on issues they had argued. Perhaps they felt it did not reflect well on their advocacy." A lawyer who lost a case on a sua sponte decision was more blunt: "The case became somewhat personal to me. I felt, one, [the client] got screwed. Two, I got screwed. He got screwed, that's pretty bad. Me getting screwed, that's an imposition up with which I shall not put."187

The bottom line is that courts should recognize that there are negative consequences that result from sua sponte dismissals. Whatever the situation may have been in the past, courts currently operate "in an environment in which people have generally lower levels of trust and confidence in all forms of governmental authority."188 Modern courts should "care about the public appearance of their actions because abstract truth is not the criterion of legitimacy for legal obligations; legal obligations must be justified as authentic."1 89 There is an easy way to do this:

[Courts] can provide evidence that they are listening to people and considering their arguments by giving people a reasonable chance to state their case, by paying attention when people are making that presentation, and by acknowledging and taking account of people's needs and concerns when explaining their decisions. This is true even if the [courts] cannot accept those arguments and give people what they feel they deserve.190

In sum, courts must recognize that they cannot dismiss cases sua sponte without causing the public to lose respect for those decisions.