## 2AC

**Extra-T**

**2. Counter-Interpretation: On means “in close proximity with”—it is not exclusive**

**Merriam-Webster No Date** “On” http://www.merriam-webster.com/dictionary/on

c —**used as a function word to indicate position in close proximity with** <a village on the sea> <stay on your opponent>

### Blowback

**Allied relations key to leadership**

Joseph S. **Nye** Jr., Professor, JFK School of Government, Harvard University, “American Power in the 21st Century Will Be Defined by the ‘Rise of the Rest’,” WASHINGTON POST, 6—28—**13**, <http://articles.washingtonpost.com/2013-06-28/opinions/40255646_1_american-power-u-s-economy-united-states>, accessed 8-16-13.

In the last century, the United States rose from the status of second-tier power to being the world’s sole superpower. Some worry that the United States will be eclipsed in this century by China, but that is not the problem. There is never just one possible outcome. Instead, there are always a range of possibilities, particularly regarding political change in China. Aside from the political uncertainties, China’s size and high rate of economic growth will almost certainly increase its strength in relation to the United States. But even when China becomes the world’s largest economy, it will lag decades behind the United States in per-capita income, which is a better measure of an economy’s sophistication. Moreover, given our energy resources, the U.S. economy will be less vulnerable than the Chinese economy to external shocks. Growth will bring China closer to the United States in power resources, but as Singapore’s former prime minister Lee Kwan Yew has noted, that does not necessarily mean that China will surpass the United States as the world’s most powerful country. Even if China suffers no major domestic political setbacks, projections based on growth in gross domestic product alone ignore U.S. military and “soft power” advantages as well as China’s geopolitical disadvantages in the Asian balance of power. The U.S. culture of openness and innovation will keep this country central in an information age in which networks supplement, if not fully replace, hierarchical power. The United States is well positioned to benefit from such networks and alliances if our leaders follow smart strategies. In structural terms, it matters that the two entities with per-capita income and sophisticated economies similar to that of the United States — Europe and Japan — are both allied with the United States. In terms of balances-of-power resources, that makes a large difference for the net position of American power, but only if U.S. leaders maintain the alliances and institutional cooperation. In addition, in a more positive sum view of power with, rather than over, other countries, Europe and Japan provide the largest pools of resources for dealing with common transnational problems. On the question of absolute — rather than relative — American decline, the United States faces serious domestic problems in debt, secondary education and political gridlock. But these issues are only part of the picture. Of the many possible futures, stronger cases can be made for the positive over the negative. Among the negative futures, the most plausible is one in which the United States overreacts to terrorist attacks by turning inward and closing itself off to the strength it obtains from openness. But barring such mistaken strategies, there are, over a longer term, solutions to the major problems that preoccupy us. Of course, for political or other reasons, such solutions may remain forever out of reach. But it is important to distinguish between situations that have no solutions and those that, at least in principle, can be solved. Decline is a misleading metaphor and, fortunately, President Obama has rejected the suggested strategy of “managing decline.” As a leader in research and development, higher education and entrepreneurial activity, the United States is not in absolute decline, as happened in ancient Rome. In relative terms, there is a reasonable probability that the United States is likely to remain more powerful than any single state in the coming decades. We do not live in a “post-American world,” but neither do we live any longer in the “American era” of the late 20th century. In terms of primacy, the United States will be “first” but not “sole.” No one has a crystal ball, but the National Intelligence Council (which I once chaired) may be correct in its 2012 projection that although the unipolar moment is over, the United States probably will remain first among equals among the other great powers in 2030 because of the multifaceted nature of its power and legacies of its leadership. The power resources of many states and non-state actors will rise in the coming years. U.S. presidents will face an increasing number of issues in which obtaining our preferred outcomes will require power with others as much as power over others. Our leaders’ capacity to maintain alliances and create networks will be an important dimension of our hard and soft power. Simply put, the problem of American power in the 21st century is not one of a poorly specified “decline” or being eclipsed by China but, rather, the “rise of the rest.” The paradox of American power is that even the largest country will not be able to achieve the outcomes it wants without the help of others.

#### Postel cites interviews with capture, Scheinin ccites other mech

### Crt Ptx

**Huge number of hot-botton cases—either thumps the link or the internal to their specific case**

Marcia **Coyle**, “Fireworks Expecte at High Court,” NATIONAL LAW JOURNAL, **12—16**—13, [http://www.nationallawjournal.com/id=1202633249898/Fireworks%20Expected%20at%20High%20Court%3Fmcode=0&curindex=0&curpage=ALL#](http://www.nationallawjournal.com/id%3D1202633249898/Fireworks%20Expected%20at%20High%20Court%3Fmcode%3D0%26curindex%3D0%26curpage%3DALL)

As the U.S. Supreme Court begins a monthlong holiday recess, c**ourt watchers await the unwrapping of decisions in some of the term's hot-button cas**es.

The justices began the October 2013 term with two of its potentially biggest cases being argued in the first two weeks. But despite the early start, no decisions have been issued yet in the challenge to federal aggregate limits on campaign contributions in McCutcheon v. Federal Election Commission, and in Michigan's defense of its constitutional amendment banning racial preferences in education in Schuette v. Coalition to Defend Affirmative Action.

The term may seem a little blockbuster-light compared with back-to-back historic terms involving health care, immigration, same-sex marriages and voting rights. But ther**e are a number of headline grabbers and the new year brings two possible game changers for the executive branch.**

"This is an amazing time in the Supreme Court, with term after term the court deciding some of the most controversial and important questions facing society," said Erwin Chemerinsky, dean of the University of California, Irvine School of Law. "This term, **there are major issues about the separation of church and state and separation of powers and so much more**. For better or worse, this is a court that wants to take on the hardest and most important questions."

In January, **the court will hear the term's most significant political case** — a challenge to President Obama's use of the recess appointments power in **N**ational **L**abor **R**elations **B**oard **v.** Noel C**anning. And not yet scheduled are arguments in two cases related to the new federal health care law th**at raise the religious objections of for-profit business owners to providing contraceptive insurance coverage.

In the 34 cases already argued, the court has issued six signed decisions and two unsigned per curiam rulings. Not surprisingly, because it is still early in the term, the signed decisions and one per curiam have been unanimous.

The justices divided only in dismissing a closely watched labor case, Unite Here Local 355 v. Mulhall. That case asked whether neutrality agreements between an employer and union seeking to organize workers violate the Labor Management Relations Act. Justice Stephen Breyer wrote a dissent that justices Sonia Sotomayor and Elena Kagan joined.

"One of the most interesting aspects of the court's current caseload is how small it is, even by Roberts Court standards," said Carolyn Shapiro, director of the Institute on the Supreme Court of the United States at the Illinois Institute of Technology Chicago-Kent College of Law. "I am not one who thinks that the court should simply take cases to fill up their docket, but it is striking how few they currently have — and, even so, they have 'dismissed as improvidently granted' two cases already. As Justice Breyer pointed out in his dissent in Mulhall, that was not the court's only option."

The biggest news of the new term, ironically, has been in what the justices decided they did not want to do in three abortion-related cases. Last month, the justices turned away two Oklahoma cases involving abortion. They had granted review in the state's appeal of the invalidation of its law restricting the use of medication abortions. The Oklahoma Supreme Court struck down the law as violating U.S. Supreme Court abortion decisions.

In an unusual move, the justices, after granting review, asked the Oklahoma Supreme Court to clarify the meaning and effect of the law. After the state court responded, the justices dismissed the state's appeal, which left in place the state supreme court decision.

ULTRASOUND DECISION

In the second Oklahoma case, the justices denied review of another state supreme court decision striking down Oklahoma's law requiring doctors, an hour before an abortion, to perform an ultrasound, either vaginally or abdominally, and to describe "the dimensions of the embryo or fetus, the presence of cardiac activity, if present and viewable, and the presence of external members and internal organs, if present and viewable."

However, abortion-rights advocates lost their effort to block part of a Texas law requiring physicians who perform abortions to have hospital admitting privileges within 30 miles of the abortion facility. They sought reinstatement of a stay while an appeal in a challenge to the law was pending in the U.S. Court of Appeals for the Fifth Circuit. Once that appeal is decided, the Texas case is likely to return to the high court on the merits.

What follows is a quick look at some of the more **significant cases awaiting decision or to be argued in 2014.**

• **Campaign finance/affirmative action. In McCutcheon**, watch to see whether the justices, for the first time, strike down limits on thus far sacrosanct limits on campaign contributions.

And, will they accept Michigan's arguments in **Schuett**e that voters can ban racial preferences in education and not violate equal protection? (Argued Oct. 8 and 15, respectively.)

• Revenge and power. The facts **in Bond** v. United States — a woman seeking revenge on a friend impregnated by the woman's husband — are soap-opera-ish, but **the legal issue is "serious business**," in the words of Solicitor General Donald Verrilli Jr. **Did Congress exceed its powe**r in enacting a law that implements a chemical weapons treaty but was used to prosecute Carol Bond for what usually would have been a state offense? (Argued Nov. 5.)

• **God and government**. In Town of Greece, N.Y. v. Galloway, the high court revisits prayers during government meetings. Thirty years ago, the justices upheld legislative prayers at the opening of Nebraska legislative sessions based on the nation's long history of legislative prayer. Will they do it again? (Argued Nov. 6.)

• **Traveling pollution**. In Environmental Protection Agency v. EME Homer City Generation, the EPA is appealing a D.C. Circuit decision striking down its so-called transport rule, designed to alleviate the tricky problem of cross-state air pollution. (Argued Dec. 10.)

• **Securities schemes**. It doesn't seem like a Supreme Court term without a securities case. Three consolidated cases (Chadbourne & Parke v. Troice; Proskauer Rose v. Troice; Willis of Colorado Inc. v. Troice) ask the justices whether the Securities Litigation Uniform Standards Act precludes a state-law class action alleging fraud that involves misrepresentations about transactions in covered securities. (Argued Oct. 7.)

• **Health insurance and religion**. No argument dates have been set yet for Sebelius v. Hobby Lobby Stores and Cones­toga Wood Specialty Corp. v. Sebelius. The for-profit company owners argue that their free exercise rights and the Religious Freedom Restoration Act are violated by the Affordable Care Act's inclusion of contraceptive coverage in employees' health insurance plans.

• **Recess fun?** The D.C. Circuit threw another major roadblock in the president's often-thwarted efforts to put his appointees into their positions. The court held that President Obama violated the Constitution's recess appointments clause with his recess appointments of three members of the National Labor Relations Board. The federal appellate court not only defined "recess" differently from the president, but also took a different view of when vacancies arise under that clause. (Arguments Jan. 13.)

• **Greenhouse gases**. Under attack by multiple industry groups is the EPA's decision that its authority to regulate greenhouse-gas emissions from new motor vehicles allows it also to regulate stationary sources that emit greenhouse gases. Six cases (beginning with Utility Air Regulatory Group v. EPA) have been consolidated for arguments on Feb. 24.

The court returns for arguments on Jan. 13, with the recess appointments clause case as its first argument of the new year.

#### Recess appointments, same-sex marriage, campaign finance, Obamacare, and abortion thump

Phillips 1-13-14 (Amber, staff writer, "5 controversial issues the Supreme Court will debate this year" Redwood Times) [www.redwoodtimes.com/nationandworldnews/ci\_24901278/5-controversial-issues-supreme-court-will-debate-this](http://www.redwoodtimes.com/nationandworldnews/ci_24901278/5-controversial-issues-supreme-court-will-debate-this)

The Supreme Court has a busy year ahead. Opening arguments start Monday on a 200-year-old debate if the president can make appointments when Congress is in recess. It's one of several high-profile cases the court plans to debate in 2014, which observers say is already shaping up to be "a remarkable period in the court's history." Here are the top five issues the court is debating this year: Are states' bans on same-sex marriage constitutional? A car flies a gay-pride flag through Salt Lake City, Utah, in protest. (Getty Images) Married and engaged same-sex couples in Utah are in limbo as state officials appeal a December district court decision essentially legalizing same-sex marriage in Utah. But in January, the Supreme Court stepped in to temporarily stop same-sex marriages until state officials can appeal the decision to a higher court. The Supreme Court hasn't decided to take up Utah's ban, but observers believe the court is showing signs that it eventually will. Can the president make appointments when Congress is not really in session? The Supreme Court is looking at Obama's appointment of Richard Cordray, among other nominees. (Getty Images) For 200 years, the court has avoided ruling on a provision in the Constitution that states the president can appoint people to top government jobs when Congress is in recess. But in 2010, Barack Obama tried to end a debate with Republicans by appointing people to the National Labor Relations Board while Senate Republicans held pro-forma sessions, keeping the Senate in session with just a handful of people. The Supreme Court has agreed to take up the case. Can people contribute as much as they want to candidates and parties? How much money can donors give to political candidates? (Getty Images) In October, the Supreme Court heard arguments on a case that would again loosen federal campaign finance laws by erasing overall limits, allowing donors to contribute as much as they want to political candidates and parties over a two-year period. The case furthers the court's controversial 2010 Citizens' United decision that allows corporations and unions to spend unlimited amounts on advertising. A decision in this case could come any day. Do corporations have rights of religious freedom? The owner of Hobby Lobby wants his company protected for his religious beliefs. (Getty Images) Can corporations be exempt from laws based on the owners' religious beliefs? That's what the Supreme Court is deciding in this latest challenge to a key provision in Obamacare, known as the birth-control mandate. The Christian owner of the arts and crafts chain Hobby Lobby says he shouldn't have to provide employees with health insurance that covers birth control because it violates his freedom of religion. Is a ban on protests near abortion clinics constitutional? Protesters pray at the border of an abortion clinic in Massachusetts. (Getty Images) A Massachusetts law says abortion protesters must stay at least 35 feet away from the entrance to the clinic where they are protesting. But the Supreme Court is hearing a challenge that the law infringes on protesters' freedom of speech. In 2000, the court upheld a similar law in Colorado, and its decision this year could affect other states' bans on protesters.

**Empirics prove the Court doesn’t consider capital**

**Schauer 04** [Frederick, Law prof at Hravard, “Judicial Supremacy and the Modest Constitution”, California Law Review, July, 92 Cal. L. Rev. 1045, ln //uwyo-kn]

Examples of the effects of judicial supremacy hardly occupy the entirety of constitutional law. As the proponents of popular constitutionalism properly claim, it is simply not plausible to argue that all of the Supreme Court's decisions are counter-majoritarian, nor that the Court is unaware of the potential repercussions if a high percentage of its decisions diverges too dramatically from the popular or legislative will. Nevertheless, **there is no indication that the Court uses its vast repository of political capital only to accumulate more** political capital, and in many areas judicial supremacy has made not just a short-term difference, but a long-term difference as well. Perhaps most obvious is school prayer. For over forty years the Court has persisted in its view that organized prayer in public schools is impermissible under the Establishment Clause 59 despite the fact that public opinion is little more receptive to that view now than it was in 1962. 60 So too with flag burning, where the Court's decisions from the late 1960s 61 to the present have remained dramatically divergent from public and legislative opinion. 62 Or consider child pornography, where the Court's decision in Ashcroft v. Free Speech Coalition 63 flew in the face of an overwhelming congressional majority approving the extension of existing child pornography laws to virtual child pornography. Similarly, in the regulation of "indecency," **the Court has spent well over a decade repeatedly striking down acts of Congress that enjoyed overwhelming public and** [\*1059] **congressional support**. 64 Most dramatic of all, however, is criminal procedure, where the Supreme Court's decision in Dickerson v. United States, 65 invalidating a congressional attempt to overrule Miranda v. Arizona, 66 underscores the persistent gap in concern for defendants' rights between Congress and the public, on the one hand, and the Supreme Court, on the other.

**Winners win**

**Law 09** (David, Professor of Law and Professor of Political Science, Washington University in St. Louis, Georgetown Law Journal, March 2009, 97 Geo. L.J. 723; “A Theory of Judicial Power and Judicial Review,” Lexis, rwg)

Part IV of this Article discusses a counterintuitive implication of a coordination-based account of judicial power. **Conventional wisdom suggests that courts secure compliance with their decisions by drawing upon their store of legitimacy, which is undermined by decisions that are unpopular, controversial, or lack intellectual integrity. n25 Part IV argues that precisely the opposite is true: an unpopular or unpersuasive decision can, in fact, enhance a court's power in future cases, as long as it is obeyed. Widespread compliance with a decision that is controversial,** unpopular, or unpersuasive **serves only to strengthen the widely held expectation that others comply with judicial decisions. This expectation, in turn, is self-fulfilling**: those who expect others to comply with a court's decisions will find it strategically prudent to comply themselves, and the aggregate result will, in fact, be widespread compliance. Part IV illustrates these strategic insights--and the Supreme Court's apparent grasp of them--by contrasting [\*734] Bush v. Gore n26 with Brown v. Board of Education n27 and Cooper v. Aaron. n28

**Issues are compartmentalized**

**Redish and Cisar 91** prof law @ Northwestern and Law clerk to US Court of Appeals, 1991

(MARTIN H. REDISH, prof law and public policy @ Northwestern; ELIZABETH J. CISAR, Law Clerk to Chief Judge William Bauer, United States Court of Appeals, Seventh Circuit, Dec 1991, “CONSTITUTIONAL PERSPECTIVES: ARTICLE: "IF ANGELS WERE TO GOVERN" \*: THE NEED FOR PRAGMATIC FORMALISM IN SEPARATION OF POWERS THEORY.”41 Duke L.J. 449)

**Choper's assumption that the judiciary's institutional capital is transferable from structural cases to individual rights cases is no more credible**. Common sense should tell us that **the public's reaction to con- troversial individual rights cases**-for example, cases **concerning abor- tion**,240 school prayer,241 busing,242 **or criminal defendants' rights**243- **will be based largely, if not exclusively, on the basis of its feelings con- cerning those particular issues. It is unreasonable to assume that the public's acceptance or rejection of these individual rights rulings would somehow be affected by anything the Court says about wholly unrelated structural issues.**

**Decision is announced in May, after the DA**

**SCOTUS 12** (Supreme Court of the United States, 7/25/2012 “The Court and Its Procedures,”

http://www.supremecourt.gov/about/procedures.aspx, Accessed 7/25/2012, rwg)

**The Court maintains this schedule each Term until all cases ready for submission have been heard and decided. In May and June the Court sits only to announce orders and opinions.** The Court recesses at the end of June, but the work of the Justices is unceasing. During the summer they continue to analyze new petitions for review, consider motions and applications, and must make preparations for cases scheduled for fall argument.

**Public supports the plan**

**Reuters 13** (Quoting John McCain, Republican Senator, 6-9-13, "Support growing to close Guantanamo prison: senator" Reuters) www.reuters.com/article/2013/06/09/us-usa-obama-guantanamo-idUSBRE9580BL20130609

Republican Senator John **McCain said** on Sunday **there is increasing public support for closing the military prison at Guantanamo** Bay, Cuba, and moving detainees to a facility on the U.S. mainland. **"There's renewed impetus. And I think that most Americans are more ready," McCain**, who went to Guantanamo last week with White House chief of staff Denis McDonough and California Democratic Senator Dianne Feinstein, **told CNN's "State of the Union" program. McCain**, a senior member of the Senate Armed Services Committee, **said he and fellow Republican Senator** Lindsey **Graham,** of South Carolina, **are working with** the **Obama** administration **on plans that could relocate detainees** to a maximum-security prison in Illinois. "We're going to have to look at the whole issue, including giving them more periodic review of their cases," McCain, of Arizona, said. President Barack **Obama has pushed to close Guantanamo**, saying in a speech in May it "has become a symbol around the world for an America that flouts the rule of law."

**That boosts capital**

**Durr et al 2K** (Robert, “Ideological Divergence and Public Support for the Supreme Court,”, American Journal of Political Science, Volume 44, No. 4, October, p. 775)

We expect our improve measure of aggregate Supreme Court support will be useful to other students of the Court. Unlike support for other institutions, interest in Supreme Court support is driven not by a hypothesized electoral linkage, but by the expectation that **the Court** necessarily **depends on public support as a source of** institutional legitimacy and **political capital. The level of support the Court enjoys has long been viewed as a crucial resource**, both by helping engender a positive response to the Court’s decisions and by encouraging the successful execution of its proclamations, necessarily carried out by other actors and institutions (Caldeira 1986).

**Legitimacy is resilient**

**Gibson 06** (James L. Professor of Government & Professor of African, June, 15, “The Legitimacy of the United States Supreme Court in a Polarized Polity,” Pa24, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=909162)

Conventional political science wisdom holds that contemporary American politics is characterized by deep and profound partisan and ideological divisions. Unanswered is the question of whether those divisions have spilled over into threats to the legitimacy of the United States Supreme Court. **Since the Court is often intimately involved in making policy in many policy areas that divide American**s, including the contested 2000 presidential election, **it is reasonable to hypothesize that loyalty toward the institution depends upon policy and/or ideological agreement and partisanship. Using data stretching from 1987 through 2005, the analysis reveals that Court support has not declined. Nor is it connected to partisan and ideological identifications.** Instead, **support is embedded within a larger set of relatively stable democratic values. Institutional legitimacy** may not be obdurate, but it **does not seem to be caught up in the divisiveness that characterizes** so much of **American politics** - at least not at present.

**Plan is key to boost court legitimacy**

**Vaughns 13** (Katherine, Professor of Law, University of Maryland, "Of Civil Wrongs and Rights: Kiyemba v. Obama and the Meaning of Freedom, Separation of Powers, and the Rule of Law Ten Years After 9/11" Asian American Law Journal, Lexis)

Why is **the Supreme Court's refusal to consider Kiyemba** of such significance? It has, as counsel for the Uighurs noted, **left the D.C. Circuit's Kiyemba I ruling "cemented in place," and rendered Boumediene** v. Bush **"of little practical relevance."** n267 Indeed, **"without further enforcement by [the Supreme] Court of Boumediene's unmistakable mandate, the D.C. Circuit's contrary approach will lead to further protracted delay in the resolution of Guantanamo detainees' rights and continued failure by the courts to follow Boumediene**'s teaching with regard to extraterritorial application of the Constitution." n268 **This is** [\*46] precisely **what has happened - if not worse. Review in the D.C. federal courts**, the sole adjudicators of the rights of the Guantanamo Bay detainees, n269 **is halted by the uncertainty of the remedy to be provided to a successful habeas petitioner.** n270 Indeed, **some Guantanamo detainees "are denied hearings altogether, as courts conclude that they have no judicial remedy power beyond Executive discretion."** n271 **Thus, Guantanamo detainees can expect no relief whatsoever other than what the Executive provides. So, we return to where we started: with an unchecked Executive and a judicial branch that knowingly refuses to intervene.** Perhaps the Court's unwillingness to entertain Kiyemba on the merits signals its desire to no longer be involved in the political debate surrounding the detainees. n272 Indeed, Boumediene was, arguably, decided only after it became clear that the Court could no longer avoid the constitutional issue - pressed previously in Hamdan and Rasul. Thus, with the entry of a new, theoretically enlightened administration, **perhaps the Court was prepared to bow out gracefully, hoping that the need to bring the judiciary into the wartime power debate, and consequently jeopardizing its institutional reputation,** n273 **would be reduced. But, the decision to bow out gracefully had the very opposite effect - undermining the Court's credibility and costing the Court its moral high ground.** Recognizing the role that practical and political factors can potentially influence courts, arguably such external factors may have guided the Court in its review of the Kiyemba cases. In any event, the Court refused to "go to bat" when the going got tough.

**Abstention in one area spills over, depletes capital**

**Redish & Drizin 87** [Marin H. & Karen L., Professor of Law, Northwestern University. A.B., 1967, University of Pennsylvania; J.D., 1970, Harvard University & Law Clerk to the Honorable Seymour Simon, Illinois Supreme Court. A.B., 1974, Grinnell College; A.M., 1976, University of Chicago; J.D., 1986, Northwestern University, “The Role of Textual Analysis”, New York University Law Review, April, 62 N.Y.U. L. Rev. 1,

Even if one were to concede discretion to the Court to decline to exercise review power in the federalism area, it is by no means clear that as a practical matter the Court should exercise that discretion. It is our view that Dean Choper is incorrect both in his assertion that refusal to exercise review power in the federalism area would save "institutional capital" for individual rights cases and in his view that abstention in the federalism area would produce no significant harms. a. The fallacy of the concept of fungible institutional capital. The basis for Dean Choper's suggested judicial abstention on issues of federalism is the desire "to ease the commendable and crucial task of judicial review in cases of individual consitutional liberties. It is in the latter that the Court's participation is both vitally required and highly provocative." Judicial efforts in the federalism area, he asserts, "have expended large sums of institutional capital. This is prestige desperately needed elsewhere." Dean Choper's fundamental assumption, then, is that Supreme Court abstention on issues of constitutional federalism would somehow increase, or at least curtail loss of, limited capital for the more vital area of individual liberty. However, even if one were to concede that judicial review is more fundamental to our constitutional scheme in the area of individual liberty than in matters of federalism, acceptance of Dean Choper's proposal would not necessarily follow. The problem is that it is neither intuitively nor empirically clear that the Court's so-called capital is transferable from one area of constitutional law to another. As one of the current authors has previously argued: It is difficult to imagine . . . that the widespread negative public reactions to Miranda v. Arizona, Engle v. Vitale, or Roe v. Wade would have been affected at all by the Court's practices on issues of separation of powers and federalism. Rather, public reaction in each seems to have focused on the specific, highly charged issues of rights for criminals, prayer in public schools, and abortions. It is doubtful that the Court would have had an easier time if it had chosen to stay out of interbranch and intersystemic conflicts. Indeed, the fallacy of Dean Choper's assumption is underscored by the very individual rights decisions to which he points to illustrate the Court's loss of institutional capital, most of which came down after the Court had already retreated dramatically from interference with the exercise of federal power. It can hardly be suggested, then, that the widespread negative public reaction to these individual rights decisions would somehow have been reduced had the Court formally abstained in cases raising issues of constitutional federalism. In fact, it is at least conceivable that the Court's failure to provide meaningful constitutional protection to states against federal encroachment actually exacerbated negative public reaction in the individual rights cases to which Dean Choper points. It does not take substantial empirical research to realize that many of those who reacted negatively to expansive individual rights decisions are the very same people who have historically decried the erosion of states' rights by the expansion of federal power. As a general matter, an account opposite to Dean Choper's is equally plausible. **The Court's capital in cases in which it believes it is needed may actually be undermined by open abstention in other areas of constitutional law. If the Court declines to exercise review in one instance on the basis of wholly pragmatic considerations, it will have a more difficult time justifying its refusal to abstain in other politically sensitive cases.**

#### Acid rain impact empirically denied

**Ridley 12** – Ridley 8/17/12 [Matt Ridley, columnist for The Wall Street Journal and author of The Rational Optimist: How Prosperity Evolves, “Apocalypse Not: Here’s Why You Shouldn’t Worry About End Times,” <http://www.wired.com/wiredscience/2012/08/ff_apocalypsenot/all/>]

In the 1980s it was acid rain’s turn to be the source of apocalyptic forecasts. In this case it was nature in the form of forests and lakes that would bear the brunt of human pollution. The issue caught fire in Germany, where a cover story in the news magazine Der Spiegel in November 1981 screamed: “THE FOREST DIES.” Not to be outdone, Stern magazine declared that a third of Germany’s forests were already dead or dying. Bernhard Ulrich, a soil scientist at the University of Göttingen, said it was already too late for the country’s forests: “They cannot be saved.” Forest death, or waldsterben, became a huge story across Europe. “The forests and lakes are dying. Already the damage may be irreversible,” journalist Fred Pearce wrote in New Scientist in 1982. It was much the same in North America: Half of all US lakes were said to be becoming dangerously acidified, and forests from Virginia to central Canada were thought to be suffering mass die-offs of trees.¶Conventional wisdom has it that this fate was averted by prompt legislative action to reduce sulphur dioxide emissions from power plants. That account is largely false. There was no net loss of forest in the 1980s to reverse. In the US, a 10-year government-sponsored study involving some 700 scientists and costing about $500 million reported in 1990 that “there is no evidence of a general or unusual decline of forests in the United States and Canada due to acid rain” and “there is no case of forest decline in which acidic deposition is known to be a predominant cause.” In Germany, Heinrich Spiecker, director of the Institute for Forest Growth, was commissioned by a Finnish forestry organization to assess the health of European forests. He concluded that they were growing faster and healthier than ever and had been improving throughout the 1980s. “Since we began measuring the forest more than 100 years ago, there’s never been a higher volume of wood … than there is now,” Spiecker said. (Ironically, one of the chief ingredients of acid rain—nitrogen oxide—breaks down naturally to become nitrate, a fertilizer for trees.) As for lakes, it turned out that their rising acidity was likely caused more by reforestation than by acid rain; one study suggested that the correlation between acidity in rainwater and the pH in the lakes was very low. The story of acid rain is not of catastrophe averted but of a minor environmental nuisance somewhat abated.

#### Nuc war causes the env impact, that’s Starr, prefer our impacts

**Amend CP: 2AC**

**Perm do both—solves the link**

**Denning 2** (Brannon P, Assistant Professor of Law – Southern Illinois University School of Law; John R. Vile, Chair of Political Science – Middle Tennessee State University; November, 77 Tul. L. Rev. 247, Lexis)

The Article V process is, as the Framers intended, rigorous. **The supermajority provisions for both proposal and ratification almost always guarantee that additions will not be made to the Constitution without both deep and broad support. Though some have criticized the necessity of such supermajorities, 127 holding additions to the Constitution in abeyance until it is clear that support is broad generally prevents populous regions from dominating less populous ones. This, in turn, allows the amendment to become part of the Constitution with a near-conclusive presumption of legitimacy. This legitimacy, then, helps free the other branches (courts, for example) to enforce it vigorously; indeed, such enforcement would likely be expected after an amendment makes it through Article V's arduous process.** And if, after popular expectations were raised through the debates over proposal and ratification, the amendment is not enforced, institutions responsible for the foot-dragging may again face costs for evasion. This legitimization element is so crucial that the examples Strauss cites of amendments that, he argues, did not do anything immediately (the Reconstruction Amendments) or are not likely to have a significant effect despite their eventual ratification (the Twenty-Seventh Amendment), 128 could be cited as proof of what [\*279] happens when attempts are made to short-circuit (or play games with) Article V's procedural requirements. 129

**Judicial review is key to solve**

Christopher P. **Manfredi**, Professor of Political Science, McGill University, “Why Do Formal Amendments Fail?: An Institutional Design Analysis” World Politics, v. 50, April 19**98**, p. 377-400.

Perhaps because of the rigidity of its amending process**, the U.S. Constitution is** also **characterized by interpretive fluidity. This characteristic stems** not only from the broad, indeterminate language in which most constitutional provisions are written but also **from the willingness of courts to exercise the power of judicial review in order to derive more policy-specific rules from those provisions.** Although the U.S. Supreme Court established the constitutionality of judicial review in 1803, the interpretive fluidity of the U.S. Constitution has been most evident since 1954. Indeed, between 1889 and 1953 the Court overturned on average about one act of Congress and seven state laws every year. By contrast, since 1954 the judicial nullification rate has approximately doubled to almost two acts of Congress and twelve state laws per year. Especially throughout the 1960s, litigants took advantage of judicial openness toward the Constitution's interpretive fluidity to persuade U.S. courts to participate actively in shaping and administering policy in areas such as zoning and land-use planning, housing, social welfare, transportation, education, and the operation of complex institutions like prisons and mental health facilities. While this may make the document's rigid amending process less burdensome on the constitutional order, **the ability and willingness of courts to extend formal rules in unexpected directions heightens redistributive indeterminacy.** Finally, both the rigid amending process and the interpretive fluidity of the U.S. Constitution generate a high degree of institutional inclusiveness. On the one hand, interpretive fluidity provides society-based actors with a wide range of opportunities to institutionalize specific policy preferences by manipulating and transforming formal constitutional rules through litigation. Interpretive fluidity promotes institutional inclusiveness by allowing society-based actors to alter the policy impact of constitutional rules without the constraints imposed by the formal amending process. On the other hand, the requirement that ratification succeed in eighty-seven legislative chambers unconstrained by strict party discipline provides numerous points of influence for social actors wary of the policy consequences of proposed amendments. **The institutional inclusiveness of U.S. constitutional politics** thus **provides** both incentives to oppose constitutional change and**the means of carrying out that opposition successfully.**

**Courts will ignore the amendment**

**Segal & Spaeth ‘02** [The Supreme Court and the Attitudinal Model Revisted, p. 5-6]

If action by the Congress to undo the Court’s interpetation of one of its laws does not subert judicial authority, a fortiori neither does the passage of a constitutional amendment, for example, the Twenty-Sixth Amendment reducing the voting age to eighteen and thereby undoing the decision in Oregon v. Mitchell, which held that Congress could not constitutionally lower the voting age in state elections. Furthermore, not only does a constitutional amendment not subvert judicial authority, courts themselves—ultimately, **the Supreme Court—have the last word when determining the** sanctioning **amendment’s meaning**. Thus, **the Court is free to construe any amendment**—whether or not it overturns one of its decisions—**as it sees fit, even though its construction deviates** appreciably **from the language or purpose of the amendment.** Consider, for example, the fourteenth and Sixteenth Amendments. The former clearly overturned the Court’s decision in Scott v. Sandford and was meant to give blacks legal equality with whites. Scholars disagree about other objectives the amendment may have had, but it does appear that the prohibition of sex discimination was not among them. Nonetheless, in 1871 the Court held that the equal protection clause of the Fourteenth Amendment encompassed women. As for the Sixteenth Amendment, it substantially, but not completely, reversed the Court’s decisions in Pollock v. Farmers’ Loan and Trust Co., which declared unconstitutional the income tax that Congress had enacted in 1894. In 1913, the requisite number of states ratified an amendment that authorized Congress to levy a tax on income “from whatever source derived.” The language is unequivocal. Yet for the next twenty-six years the [6] Supreme Court ruled that this language excluded the salaries of federal judges. Why the exclusion? Because Article III, section I, of the original Constitution orders that judges’ salaries “not be diminished during their continuance in office.” Though it is an elementary legal principle that later language erases incompatible earlier language, the justices ruled that any taxation of their salaries, and those of their lower court colleagues, would obviously diminish them. Finally, in 1939 the justices overruled their predecessors and magnaminously and unselfishly allowed themselves to be taxed.

**They don’t solve – amendments only apply moving forward, don’t solve current cases**

Jill E. **Fisch**, Professor and Director, Center for Corporate, Securities, and Financial Law, Fordham Law School, “The Implications of Transition Theory for Stare Decisis,” JOURNAL OF CONTEMPORARY LEGALISSUES v. 13, 200**3**, p. 97-98.

The second alternative when stare decisis does not permit a court to change the law by overruling is for another lawmaker to effect the change. Congress can enact new legislation to overrule decisions involving statutory interpretation or common law rulemaking. The **Amendment process** provided by Article V **provides a mechanism to overrule constitutional decisions**. Some constitutional decisions can also be effectively overruled by other means; for example, states can overturn the Supreme Court's decision to limit federal constitutional rights by interpreting their own constitutions to provide such rights. **There is an important distinction, however, between overruling and these lawmaking alternatives. When a court overrules a precedent, the new legal rule is applied retroactively to all pending and future cases. Parties that relied upon the old rule are not accorded transition relief. In contrast, statutory changes and constitutional amendments generally apply prospectively.**

**No solvency --- delay**

**Duggin 5** (Sarah, Professor of Law – Catholic University of America, and Mary Collins, Law Clerk, Boston University Law Review, February, 85 B.U.L. Rev. 53, Lexis)

**The process of amending the Constitution is often a lengthy one – the Twenty-seventh Amendment was adopted more than two hundred years after it was first proposed. 513 Recent Congresses have generally provided self-executing, seven-year sunset provisions in the resolutions proposing constitutional amendments, 514 but even an amendment on the fast track is likely to take several years to become part of the Constitution.** Preparations for Presidential elections begin long before the actual events, and the threat of a national crisis is all too immediate. Congress should take interim measures to decrease the impact of the uncertainty created by the natural born citizenship proviso over the eligibility of Congressional leaders and cabinet members to assume the office of Acting President.

**Judicial decisions solve comparatively better than amendments**

**Strauss, ‘01** [David A., Harry N. Wyatt Professor of Law, The University of Chicago, “The Irrelevance of Constitutional Amendments”, Harvard Law Review, March, 114 Harv. L. Rev. 1457, ln]

Alternatively, it may be that majoritarian acts (or **judicial decisions**), precisely because they do not require that the ground be prepared so thoroughly, **can force the pace of change in a way that supermajoritarian acts cannot**. A coalition sufficient to enact legislation might be assembled - or **a judicial decision** rendered - at a point when a society for the most part has not changed, but the legislation, once enacted (or the decision, once made), **might** be an important factor in **bring**ing **about more comprehensive change**. The difference between majoritarian legislation and a supermajoritarian constitutional amendment is that the latter is far more likely to occur only after the change has, for all practical purposes, already taken place. Whatever one thinks of these broader speculations, however, they certainly do not entail a general skepticism about whether political activity matters at all. On the contrary, legislation and **judicial decisions** - as well as activity in the private realm that may not even be explicitly political - **can accumulate to bring about fundamental and lasting changes that are then,** sometimes, **ratified in a textual amendment**. Sustained political and nonpolitical activity of that kind is precisely what does bring about changes of constitutional magnitude. My claim is that such changes seldom come about, in a mature democracy, as the result of a formal amendment adopted by a supermajority.

**CP spurs future amendments --- undermines rule of law**

**Sullivan 95** (Kathleen M., Professor of Constitutional Law, Stanford Law School, and author of the influential Sullivan & Gunther Constitutional Law Casebook, Fall, “Constitutional Amendments”, American Prospect, http://www.albionmonitor.com/1-12-96/amendmentitis.html)

2. The Rule of Law. The very idea of a constitution turns on the separation of the legal and the political realms. **The Constitution** sets up the framework of government. It also **sets forth a few fundamental political ideals** (equality, representation, individual liberties) that place limits on how far any short-term majority may go. This is our higher law. **All the rest is left to politics. Those who lose** in the short run of **ordinary politics obey the winners** out of respect for the long-run rules and boundaries set forth in the Constitution. **Without such respect for the constitutional framework**, the **peaceful** operation of ordinary **politics would degenerate into fractious war.** Frequent **constitutional amendment can** be expected to **undermine this respect** by breaking down the boundary between law and politics**. The more you amend the Constitution, the more it seems like ordinary legislation. And the more the Constitution is cluttered up with specific regulatory directives, the less it looks like a fundamental charter of government. Picture the Ten Commandments with a few parking regulations thrown in. This is why opponents of new amendments often argue that they would tend to trivialize or politicize the Constitution.** They trivialize it in the sense that they clutter it up and diminish its fundamentality. **Consider** the experience of the **state constitutions**. Most state constitutions are amendable by simple majority, including by popular initiative and referendum. While the federal Constitution has been amended only 27 times in over 200 years, **the** fifty **state constitutions have had a total of** nearly **6,000 amendments** added to them. **They have** thus **taken on what Marshall called** in McCulloch "**the prolixity of a legal code**" -- a vice he praised the federal Constitution for avoiding. **Many** of these state constitutional amendments **are products of pure interest-group politics**. State constitutions thus are **difficult to distinguish from** general state **legislation, and they water down the notion of fundamental rights in** the process: The California constitution, for example, protects not only the right to speak but also the right to fish. **Amendments politicize** a constitution **to the extent that they embed** in it **a controversial substantive choice**. Here the experience of Prohibition is instructive: **The only modern amendment to enact a social policy** into the Constitution, it **is also the only** modern amendment **to have been repealed. Amendments that embody a specific and controversial** social or economic **policy allow one generation to tie the hands of another**, entrenching approaches that ought to be revisable in the crucible of ordinary politics.

**Agamben K: 2AC**

**Without political solutions and ways to lessen human suffering in the short term, the alt is radically incomplete—only the perm solves**

Robert **Sinnerbrink**, Professor of Philosophy at Macquarie University, **05**, Critical Horizons, Vol. 6, No. 1, p. 258-259

**Foucault and Agamben leave us with a stark alternative: either to take the ethical turn towards practices of freedom compatible with neo-liberalist governmentality, or accelerate biopolitical nihilism in the hope that a messianic overcoming of the breach between bare life and sovereign power will institute a redeemed human community.** In short, affirm pragmatic practices of ethical self-formation, or prepare for the messianic overcoming of biopolitical domination. **These alternatives**, however, **seem partial and inadequate**. Foucault’s turn to ethics and liberalism underplays the political urgency of confronting societies of biopolitical control; this is a point not lost on Deleuze and taken up by Hardt and Negri in their neo-Marxist version of biopolitical production.70 **Agamben’s despairing account of biopolitical nihilism**, on the other hand, **overemphasises the ontological ‘sameness’ of biopower regimes, and retreats from concrete politics into a metaphysical messianism** prophetically gesturing towards a utopian community to come. What **my** brief **genealogy of biopower** and biopolitics **suggests**, then, is **the need to find a path between these alternatives. We should retain the Foucaultian emphasis on a critical analysis of biopower without acquiescing to an ethical accommodation with neo-liberalism. And we ought to affirm Agamben’s profound questioning of the biopolitical foundations of modernity without succumbing to a utopian metaphysical messianism**. We also need to question the Heideggerian metaphysical critique of modernity that has profoundly marked both Foucaultian and Agambenian conceptions of biopower and biopolitics. Finally, **this genealogy suggests the need to restore the experience of injustice, the suffering of human beings, to any philosophical account of biopolitics, and to articulate political responses to biopower that go beyond ethical acquiescence and metaphysical longing**.

**Sovereignty not inherently violent—the plan’s manipulation of sovereignty avoids the worst forms of violence**

 **Connolly** chair of political science @ Johns Hopkins, **07** p. 29-30

(William, Sovereignty and Life Ed. By Calarco and DeCaroli)

**Agamben contends that biopolitics has become intensified today. This intensification translates the paradox of sovereignty into a potential disaster.** The analysis that he offers at this point seems not so much wrong to me as overly formal. It reflects a classical liberal and Arendtian assumption that there was a time when politics was restricted to public life and biocultural life was kept in the private realm. **What a joke. Every way of life involves the infusion of norms, judgments, and standards into the affective life of participants at both private and public levels. Every way of life is bioculrural and biopolitical**. Aristode, Epicurus, Lucretius, Augustine, Spinoza, Rousseau, and Hegel, writing during different periods, all appreciate the layering of culture into different layers of biological life and the concomitant mixing of biology into culture. They treat the biological not as merely the genetic or fixed, bur as zones of corporeality infused with cultural habits, dispositions, sentiments, and norms. Bioculturallife has beell intensified today with the emergence of new technologies of infusion. Bur **the shift is not as radical as Agamben makes it out to be**. In late-modern life, new technologies enable physicians, biologists, geneticists, prison systems, advertisers, media talking heads, and psychiatrists to sink deeply into human biology. They help to shape the cultural being of biology, although not always as they intend to do. Agamben's review of new medical technologies to keep people breathing after their brains have stopped functioning captures something of this change, showing why a sovereign authority now has to decide when death has arrived rather than lerting that outcome express the slow play of biocultural tradition. Numerous such judgments, previously left to religious tradition in predominantly Christian cultures, have now become explicit issues of technology and sovereignty in religiously diverse states. Agamben tends to describe the state as the "nation-state." He does not ask whether disturbing developments in the logic of sovereignty are bound, not merely to a conjunction between biopolitics and sovereignty, but to a conjunction between them and renewed attempts to consolidate the spirituality of the nation during a time when it is ever more difficult to do so. **As the reactive drive to restore the fictive unity of a nation is relaxed, it becomes more possible to negotiate a generous ethos of pluralism that copes in more inclusive ways with the nexus between biology, politics, and sovereignty**. More than anything else, the dubious drive to translate deep plurality into nationhood translates sovereignty into a punitive, corrective, exclusionary, and marginalizing practice4 The **shape of the ethos infusing the practice of sovereignty is therefore critical, and not a mere conjugation of sovereignty and biopolitics.**

**Alt causes totalitarianism—utopian faith in justice without the law is the foundation of fascism**

**Kohn 06** [Margaret, Asst. Prof. Poli Sci @ Florida, “Bare Life and the Limits of the Law,”.Theory and Event, 9:2, <http://muse.jhu.edu/journals/theory_and_event/v009/9.2kohn.html>, Retrieved 9-26-06//uwyo-ajl]

\*\*this card edited for ableist language\*\*

Is there an alternative to this nexus of anomie and nomos produced by the state of exception? Agamben invokes genealogy and politics as two interrelated avenues of struggle. According to Agamben, "To show law in its nonrelation to life and life in its nonrelation to law means to open a space between them for human action, which once claimed for itself the name of 'politics'." (88) In a move reminiscent of Foucault, Agamben suggests that breaking the discursive lock on dominant ways of seeing, or more precisely not seeing, sovereign power is the only way to disrupt its hegemonic effects. **Agamben** clearly **hopes that his theoretical analysis could contribute to the political struggle against authoritarianism, yet he only offers tantalizingly abstract hints about how this might work.** Beyond the typical academic conceit that theoretical work is a decisive element of political struggle, **Agamben seems to embrace a utopianism that provides little guidance for political action**. He imagines, "One day humanity will play with law just as children play with disused objects, not in order to restore them to their canonical use but to free them from it for good." (64) **More troubling is his messianic suggestion that "this studious play" will usher in a form of justice that cannot be made juridical. Agamben might do well to consider Hannah Arendt's warning that the belief in justice unmediated by law was one of the characteristics of totalitarianism**. It might seem unfair to focus too much attention on Agamben's fairly brief discussion of alternatives to the sovereignty-exception-law nexus, but it is precisely those sections that reveal the flaws in his analysis. It also brings us back to our original question about how to resist the authoritarian implications of the state of exception without falling into the liberal trap of calling for more law. **For Agamben, the problem with the "rule of law" response to the war on terrorism is that it ignores the way that the law is fundamentally implicated in the project of sovereignty** with its corollary logic of exception. **Yet the solution that he endorses reflects a similar ~~blindness~~ [failure].** Writing in his utopian-mystical mode, he insists, "the only truly political action, however, is that which severs the nexus between violence and law."(88) Thus **Agamben**, in spite of all of his theoretical sophistication, ultimately **falls into the trap of hoping that politics can be liberated from law, at least the law tied to violence and the demarcating project of sovereignty**.

**Agamben’s rejection of all law as inherently violent is based on misreadings of political theory and false generalizations – not all law is violent, and we shouldn’t assume that it is**

Jean-Philippe **Deranty**, Professor of French and German Philosophy at Macquarie University, **04**, online: http://www.borderlandsejournal.adelaide.edu.au/vol3no1\_2004/deranty\_agambnschall.htm, accessed September 11, 2005

28. All this explains why **Agamben chooses to focus on the decisionistic tradition (Hobbes, Heidegger, Schmitt**). With it, he wants to isolate the pure essences of all juridical orders and thus highlight the essential violence structuring traditional politics. Since the law essentially appears as a production and capture of bare life, the political order that enunciates and maintains the law is essentially violent, always threatening the bare life it has produced with total annihilation. Auschwitz is the real outcome of all normative orders. 29. **The problem** with this strategic use of the decisionistic tradition **is that it does not do justice to the complex relationship** that these authors establish **between violence and normativity**, that is, in the end the very normative nature of their theories. In brief, **they are not saying that all law is violent**, in essence or in its core, **rather that law is dependent upon a form of violence for its foundation. Violence can found the law, without the law itself being violent**. In Hobbes, the social contract, despite the absolute nature of the sovereign it creates, also enables individual rights to flourish on the basis of the inalienable right to life (see Barret-Kriegel 2003: 86). 30. In Schmitt, the decision over the exception is indeed "more interesting than the regular case", but only because it makes the regular case possible. The "normal situation" matters more than the power to create it since it is its end (Schmitt 1985: 13). What Schmitt has in mind is not the indistinction between fact and law, or their intimate cohesion, to wit, their secrete indistinguishability, but the origin of the law, in the name of the law. This explains why the primacy given by Schmitt to the decision is accompanied by the recognition of popular sovereignty, since the decision is only the expression of an organic community. Decisionism for Schmitt is only a way of asserting the political value of the community as homogeneous whole, against liberal parliamentarianism. Also, the evolution of Schmitt’s thought is marked by the retreat of the decisionistic element, in favour of a strong form of institutionalism. This is because, if indeed the juridical order is totally dependent on the sovereign decision, then the latter can revoke it at any moment. Decisionism, as a theory about the origin of the law, leads to its own contradiction unless it is reintegrated in a theory of institutions (Kervégan 1992). 31. In other words, **Agamben sees these authors as establishing a circularity of law and violence, when they want to emphasise the extra-juridical origin of the law, for the law’s sake.** Equally, Savigny’s polemic against rationalism in legal theory, against Thibaut and his philosophical ally Hegel, does not amount to a recognition of the capture of life by the law, but aims at grounding the legal order in the very life of a people (Agamben 1998: 27). For Agamben, it seems, the origin and the essence of the law are synonymous, whereas the authors he relies on thought rather that the two were fundamentally different.

**Whatever being is impossible to realize—we can only empty out the concept of rights if there is a concrete alternative**

**Daly 04** (<http://www.borderlandsejournal.adelaide.edu.au/vol3no1_2004/daly_noncitizen.htm>,

The non-citizen and the concept of 'human rights', Frances Daly, Australian National University

2004).

What it is that we might want a human potentiality to mean is, of course, a complex, difficult and open-ended issue. But **it is important for us to ask whether a human potentiality must start from emptiness. Agamben repeatedly refers to the need to begin from a place of 'amorphousness' and 'inactuality', assuming that there is something that will necessarily follow from the simple fact of human existence – but why should we assume this**? What might constitute or form this potentiality is surely concerned with what is latent but as yet unrealized. For Agamben, there is nothing latent that is not already tainted by a sense of a task that must be done (Agamben, 1993: 43). **There is no ability to achieve any displacement with what is present within values of community and justice, there is only an immobilizing nothingness that assumes a false essence, vocation or destiny. If the 'whatever' being that he contends is indeed emerging, and it possesses, as he argues, "an original relation to desire", it is worthwhile asking what this desire is for** (Agamben, 1993: 10). If it is simply life itself, then it is not clear why this should be devoid of any content. **Any process of emptying out, of erasing and abolishing, such as that which Agamben attempts, is done for a reason - it involves critique and rejection, on the basis, necessarily, that something else is preferable. But Agamben provides us with very little of what is needed to understand how we might engage with this option**.

**Agambens “camp” is disastrous political strategy—its impossible and only a convenient rationalization to make theorists feel secure**

Slavoj **Zizek**, Professor of Sociology at the Institute for Sociology, Ljubljana University, 20**03**, The Puppet and the Dwarf: The Perverse Core of Christianity, p. 152-56

So let us return to the scene of a small child violently tearing apart and discarding the chocolate ball in order to get at the plastic toy— is he not the emblem of so-called “totalitarianism,” which also wants to get rid of the “inessential” historical contingent coating in order to liberate the “essence” of man? Is not the ultimate “totalitar­ian” vision that of a New Man arising out of the debris of the violent annihilation of the former corrupted humanity? Paradoxically, then, liberalism and “totalitarianism” share the belief in Factor X, the plas­tic toy in the midst of the human chocolate coating. The problematic point of this Factor X that makes us equal in spite of our differences is clear: **beneath the deep humanist insight that, “deep within our­selves, we are all equal, the same vulnerable humans,” is the cynical question “why bother to fight against surface differences when, deep down, we already are equal?**”—like the proverbial millionaire who poignantly discovers that he feels the same passions, fears, and loves as a destitute beggar. However, does the ontology of subjectivity as lack, the pathetic assertion that we all have “a nigger’s head,” really provide the final answer? Is not Lacan’s basic materialist position that the lack itself has to be sustained by a minimum of material leftover, by a contingent, indivisible re­mainder which has no positive ontological consistency, but is simply a void embodied? **Does not the subject need an irreducible patho­logical supplement? This is what the formula of fantasy** ($ — a, the divided subject coupled with the object-cause of desire) **indicates**. Such a convoluted structure (an object emerges as the outcome of the very operation of cleansing the field of all objects) is clearly dis­cernible in what is the most elementary rhetorical gesture of tran­scendental philosophy: that of identifying the essential dimension (Factor X) by erasing all contingent content. Perhaps **the most seductive strategy with regard to this Factor X is to be located in a favorite twentieth-century intellectual exercise: the urge to “catas­trophize” the situation: whatever the actual situation, it had to be denounced as “catastrophic**,” and the better it appeared, the more it encouraged this exercise—**in this way, irrespective of our “merely ontic” differences, we all participate in the same ontological catas­trophe**. Heidegger denounced the present age as that of the high­est “danger,” the epoch of accomplished nihilism; Adorno and Horkheimer saw in it the culmination of the “dialectic of enlighten­ment in the “administered world”; Giorgio **Agamben defines the twentieth-century concentration camps as the “truth” of the entire Western political project**. Recall the figure of Max Horkheimer in 1950s West Germany: while denouncing the “eclipse of reason” in the modern Western consumer society, he simultaneously defended this same society as the sole island of freedom in the sea of totalitari­anisms and corrupt dictatorships all around the globe. **It was as if Winston Churchill’s old ironic quip about democracy** (the worst political regime, but none of the others is any better) **was repeated** here **in a serious form: Western “administered society” is barba­rism in the guise of civilization, the highest point of alienation**, the disintegration of the autonomous individual, and so forth—**how­ever, all other sociopolitical regimes are worse**, so that, in compar­ison, one nonetheless has to support it. . . . I shall propose a radical reading of this syndrome: **what if what these unfortunate intel­lectuals cannot bear is the fact that they lead a life which is basi­cally happy, safe, and comfortable, so that, in order to justify their higher calling, they have to construct a scenario of radical catas­trophe?** And, in fact. Adorno and Horkheimer are oddly close to Heidegger here: The most violent “catastrophes” in nature and in the cosmos are nothing in the order of Un­heimlichkeit in comparison with that Un­heimlichkeit which man is in himself and which, insofar as man is placed in the midst of beings as such and stands for beings, consists in forgetting being, so that for him das Heimische becomes empty erring, which he fills up with his dealings. The Un­heimlichkeit of the Un­heimlichkeit lies in that man, in his very essence, is a katastrophe—a reversal that turns him away from the genuine essence. Man is the only catastrophe in the midst of beings.2 The first thing that cannot fail to strike a philosopher here is the im­plicit reference to the Kantian Sublime: just as, for Kant, the most vi­olent eruptions in nature are nothing in comparison with the power of the moral Law, for Heidegger, the most violent catastrophes in na­ture and social life are nothing in comparison with the catastrophe which is man himself—or, as Heidegger would have put it in his other main rhetorical figure, **the essence of catastrophe has nothing to do with ontic catastrophes, since the essence of catastrophe is the catastrophe of the essence itself its withdrawal**, its forgetting by man. (Does this also apply to the Holocaust? Is it possible to claim, in a nonobscene way, that the Holocaust is nothing in comparison with the catastrophe of the forgetting of being?) The (ambiguous) difference is that while, for Kant, natural violence expresses the sub­lime dimension of the moral Law in a negative way, for Heidegger, the other term of the comparison is the catastrophe that is man him­self The further ambiguous point is that Kant sees a positive aspect of the experience of the catastrophic natural eruptions: in witness­ing them, we experience in a negative way the incomparable sub­lime grandeur of the moral Law; while for Heidegger. it is not clear that we need the threat (or fact) of an actual ontic catastrophe in or­der to experience the true catastrophe that pertains to human es­sence as such in a negative way (Is this difference linked to the fact that, in the experience of the Kantian Sublime, the subject assumes the role of an observer perceiving the excessive natural violence from a safe distance, not being directly threatened by it, while this distance is lacking in Heidegger?) It is easy to make fun of Heidegger here—there is, however, a “rational kernel” to his formulations. Although Adorno and Horkheimer would dismiss these formulations with scathing laugh­ter, are they not caught in the same predicament? **When they de­lineate the contours of the emerging late-capitalist “administered world** [verwaltete Welt] ,“ **they are presenting it as coinciding with bar­barism, as the point at which civilization itself returns to barbarism, as a kind of negative telos of the whole progress of Enlightenment**, as the Nietzschean kingdom of the Last Men: “One has one’s little pleasure for the day and one’s little pleasure for the night: but one has a regard for health. ‘We have invented happiness,’ say the last men, and they blink.”13 **At the same time, however, they nonetheless warn against more direct “ontic” catastrophes** (different forms of terror, etc.) .**The liberal-democratic society of Last Men is thus liter­ally the worst possible, the only problem being that all other soci­eties are even worse, so that the choice seems to be between Bad and Worse**. The ambiguity here is irreducible: on the one hand, the “ad­ministered world” is the final catastrophic outcome of the Enlight­enment; on the other, the “normal” tenor of our societies is continually threatened by catastrophes, from war and terror to eco­logical disasters, **so** that **while we should fight these “ontic” catas­trophes, we should simultaneously bear in mind that the ultimate catastrophe is the very “normal” tenor of the “administered world” in the absence of any “ontic” catastrophe**.’4 The aporia here is gen­uine: the solution of this ambiguity through some kind of pseudo­-Hegelian “infinite judgment” asserting the ultimate coincidence between the subjects of late-capitalist consumerist society and the victims of the Holocaust (“Last Men are Muslims”) clearly does not work. **The problem is that no pathetic identification with the Mus­lims (the living dead of the concentration camps) is possible—one cannot say “We are all Muslims” in the same way as**, ten years ago, **we** often **heard the phrase “We all live in Sarajevo**,” things went too far in Auschwitz. (And, in the opposite sense, it would also be ridicu­lous to assert one’s solidarity with 9/11 by claiming: “We are all New Yorkers!”—millions in the Third World would say: “Yes!”..) **How, then, are we to deal with actual ethical catastrophes?** When, two decades ago, Helmut Kohl, in order to sum up the predicament of those Germans born too late to be involved in the Holocaust, used the phrase “the mercy of the late birth [die Gnade des spaten Geburt] many commentators rejected this formulation as a sign of moral ambiguity and opportunism, implying that today’s Germans can dismiss the Holocaust as simply outside the scope of their re­sponsibility However, Kohl’s formulation does touch a paradoxical nerve of morality baptized by Bernard Williams “moral luck.”15 Williams evokes the case of a painter, ironically called “Gauguin,” who left his wife and children and moved to Tahiti in order to de­velop his artistic genius fully—was he morally justified in doing this, or not? Williams’s answer is that **we can answer this question only in retrospect, after we have learned the final outcome of his risky decision**: did he develop into an artist of genius, or not? As Jean-Pierre Dupuy has pointed out,’6 **we encounter the same dilemma apropos of the urgency to do something about today’s threat of var­ious ecological catastrophes: either we take this threat seriously, and decide today to do things that, if the catastrophe does not occur, will appear ridiculous, or we do nothing and lose everything in the case of the catastrophe. The worst case is** here **the choice of a middle ground**, of taking a limited number of measures—**in this case, we will fail whatever happens** (that is to say, the problem is that there is no middle ground when it comes to an ecological catastrophe: either it will happen or it won’t).

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 (University of Missouri adjunct professor of Peace Studies and a member of The Missouri University Nuclear Disarmament Education Team, author book about nuclear disarmament education (Bill, 4/11/10, “Threat of ‘nuclear winter’ remains New START treaty is step in right direction.” <http://www.columbiatribune.com/news/2010/apr/11/threat-of-nuclear-winter-remains/>)

In addressing the environmental consequences of nuclear war, Columbian Steve Starr has written a summary of studies published by the Bulletin of the International Network of Engineers and Scientists Against Proliferation, which concludes: “U.S. researchers have confirmed the scientific validity of the concept of ‘nuclear winter’and have demonstrated that any conflict which targets even a tiny fraction of the global arsenal will cause catastrophic disruptions of the global climate.” In another statement on his Web site, Starr says: “If 1% of the nuclear weapons now ready for war were detonated in large cities, they would utterly devastate the environment, climate, ecosystems and inhabitants of Earth. A war fought with thousands of strategic nuclear weapons would leave the Earth uninhabitable.”