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KEEPING INFORMATION SECURE: THE FEDERAL TRADE COMMISSION'S ROLE IN DATA SECURITY

❖ NOTE ❖

*Brittany Wiegand**

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I. INTRODUCTION

Cybercrime damage costs will hit $6 trillion annually by 2021.[1] This represents the greatest transfer of economic wealth in history and is potentially more devastating than the global trade of all major illegal drugs combined.[2] Given advances in technology, law firms' data security is a growing concern. Though standards and frameworks have been laid out by federal agencies, they do not currently go far enough to adequately protect clients against cyber security threats. Regulations should be codified into law to prevent against the increasingly

[1] Steve Morgan, *Top 5 Cybersecurity Facts, Figures and Statistics for 2018* CSOONLINE (Jan. 23, 2018, 8:11 AM), https://www.csoonline.com/article/3153707/security/top-5-cybersecurity-facts-figures-and-statistics.html.
[2] *Id.*

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advanced capabilities of potential threats. The Federal Trade Commission has enforcement power over companies that fail to take basic precautions, but more needs to be done ex ante to prevent breaches and the loss of valuable information.

Part II of this Note will evaluate the context of current breaches, specifically regarding law firms. Part III will analyze two potential regulatory bodies, the NIST and the FTC, and argue that the FTC is in a better position to regulate to prevent future breaches. Lastly, Part IV will conclude that the FTC can and should promulgate regulation to prevent future security breaches.

II. ANALYSIS

In the past few years, several cyber security attacks targeted at large companies have made headlines, increasing consumer awareness of the importance of cyber security. Equifax, one of the largest credit bureaus in the United States, said in September 2017 that a weakness in an application led to a data breach that exposed approximately 143 million consumers.[3] eBay reported a cyberattack in May 2014 that exposed names, addresses, dates of birth, and encrypted passwords of all its 145 million users. Using the credentials of three corporate employees, the hackers got into the company network and had complete access inside the system for 229 days.[4]

Target Stores' December 2013 breach began before Thanksgiving, but was not discovered until several weeks later.[5] Hackers, gaining access through a third-party HVAC vendor, accessed its point-of-sale payment card readers and collected about 40 million credit and debit card numbers.[6] Yahoo announced in October 2017 that all 3 billion user accounts had been compromised, including personal information, such as names, dates of birth, email addresses, passwords, security questions and answers.[7] These few examples highlight a general need for greater

[3] Taylor Armerding, *The 16 biggest data breaches of the 21st century,* CSO ONLINE (Oct. 11, 2017, 5:31 AM), https://www.csoonline.com/article/2130877/data-breach/the-16-biggest-data-breaches-of-the-21st-century.html.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*

care to be taken with consumer information. Given the highly-sensitive nature of legal work, law firms need to take note and actively protect their systems from potential intrusions.

Law firms hold extremely private and sensitive information, and are not immune from cyberattacks. In 2015, TruShield, an IT security company, reported that the legal industry was the second most targeted sector for a cyberattack.[8] Law firms' data is particularly crucial because their servers hold valuable information, such as businesses' intellectual property, medical records, and bank information. Hackers looking to monetize this information can access a cache of information by breaching a single law firm.[9] The American Bar Association's 2017 *Legal Technology Survey Report* found that twenty-two percent of respondents experienced a cyberattack or data breach at some point, an increase of eight percentage points over the previous year.[10] The ABA Journal argued that cybersecurity was the biggest risk that law firms faced in 2017, and that protecting data is the most critical step all law firms must implement.[11] However, many firms put off taking precautions because they assume they will never be targeted.[12]

Some major law firms have been the targets of attacks: Cravath, Swaine & Moore and Weil Gotshal & Manges, two of the largest firms in the United States, were the target of a major cybersecurity breach in 2016.[13] Hackers broke into the files of these firms in an insider-trading scheme that involved planned mergers, and the hackers gained more than $4 million with the information obtained from

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[8] Nabeel Ahmed, *The 4 Biggest Cyber Security Challenges Facing Law Firms Today,* TRUSHIELD (June 22, 2017), https://trushieldinc.com/cnsg-and-trushield-security-solutions-inc-announce-integration-partnership-streamlining-connectivity-and-cybersecurity-solutions/.

[9] *See* Dan Steiner, *Hackers are Aggressively Targeting Law Firms' Data,* CIO.COM (Aug. 3, 2017, 5:38 AM), https://www.cio.com/article/3212829/cyber-attacks-espionage/hackers-are-aggressively-targeting-law-firms-data.html.

[10] Jason Tashea, *Digital Dangers: Cybersecurity and the Law*, ABA J. (Jan. 2018), http://www.abajournal.com/magazine/article/business_law_cybersecurity/.

[11] *Top 6 Cyber-Attacks on Law Firms,* Tritium Information Security (May 11, 2017), https://www.tritium-security.com/single-post/2017/05/16/Top-6-Cyber-Attacks-on-Law-Firm.

[12] *Id.*

[13] Julie Sobowale, *6 Major Law Firm Hacks in Recent History,* SIDEBAR, ABA J. (March 2017), http://www.abajournal.com/magazine/article/law_firm_hacking_history.

attack.[14] Evidence from *Fortune* showed that the attacks took place over a ninety-four day period starting in March of 2015.[15] Sources in law enforcement confirmed the role of China in the e-mail hacking campaign.[16] Additionally, DLA Piper was hit by a major cyber attack in 2017, resulting in over 100 million dollars in costs.[17] The ransomware attack originated in an office in Spain, and quickly spread to offices worldwide.[18]

In addition to data breaches from outside sources, the use of personal phones and devices for work increases the ways in which a hacker could obtain private information. The dynamic nature of the problem requires more creative and complex solutions. Federal regulation is lacking,[19] but it plays an important role since it can solve problems that markets cannot solve on their own. Since markets are typically focused on short-term profits, they do not solve collective action problems.[20] Furthermore, historical precedents exist for new technology usage leading to new government agencies and regulations.[21] The development of cars, airplanes, radio, and television have all led to government regulation.[22]

Since data security and technology are constantly changing and improving, any regulations that would be effective solutions must be applicable to the current problem as well as potential problems arising within the next several months and

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[14] *Id.*
[15] Jeff John Roberts, *Exclusive: China Stole Data from Major U.S. Law Firms,* FORTUNE (Dec. 7, 2016), http://fortune.com/2016/12/07/china-law-firms/
[16] *Id.*
[17] James Booth, *DLA Piper's Hack Attack Could Cost 'Millions',* LAW J. NEWSLETTERS, (Aug. 2017), http://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2017/08/01/dla-pipers-hack-attack-could-cost-millions/.
[18] Debra Cassens Weiss, *DLA Piper hit by 'Major Cyber Attack' Amid Larger Hack Spreading to US*, ABA J. (June 27, 2017, 12:27 PM), http://www.abajournal.com/news/article/dla_piper_is_hit_by_major_cyber_attack_amid_larger_hack_spreading_to_us/.
[19] See *New York's Cybersecurity Regulation Compliance Requirements Go Into Effect,* INSURANCE J. (Aug. 29, 2017), https://www.insurancejournal.com/news/east/2017/08/29/462646.htm.
[20] Sean Michael Kerner, *IBM's Schneier: It's Time to Regulate IoT to Improve Cyber-Security,* EWEEK (Nov. 15, 2017), http://www.eweek.com/security/ibm-s-schneier-it-s-time-to-regulate-iot-to-improve-cyber-security.
[21] *Id.*
[22] *Id.*

years. Businesses constantly use data in new ways, and security threats are continuously evolving; therefore, current best practices may not be relevant even six months to one year from the date they are created.[23] Regulations must be flexible to accommodate such change and evolve as technology advances.

III. RECOMMENDATION

Historically, industry-specific regulations have focused on consumer protection in healthcare and finance.[24] The Health Insurance Portability and Accountability Act (HIPAA) instructs the Department of Health and Human Services to promulgate regulations establishing information security standards for the handling of Protected Health Information.[25] It requires covered entities and their business associates to conduct risk assessments and develop plans and procedures to protect against administrative, technical, and physical risks.[26] Similarly, the Gramm-Leach-Bliley Financial Modernization Act of 1999 (GLBA) generally obligates organizations to develop information security plans to address administrative, technical, and physical risks.[27]

These regulations address some data and types of organizations. However, they are not broad enough to affect and protect law firms' clients. To protect data more generally, the scope of the regulations must be broader. Regulatory agencies, such as the National Institute of Standards and Technology and the Federal Trade Commission, provide two potential means of addressing cybersecurity within law firms.

A. NIST

In February 2013, President Barack Obama issued an executive order titled "Improving Critical Infrastructure Cybersecurity."[28] Citing the importance of the

[23] Fernando M. Pinguelo, *NIST Cybersecurity Framework: Not a Guarantee, but Still a Good Bet Against FTC Action,* 303 N.J. LAW. 44, 44 (2016).
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] Gramm-Leach-Bliley Act, Pub.L. 106-102, § 1811, 133 Stat. 1338, 1338 (1999).
[28] Exec. Order No. 13,636, 78 FR 11737 (Feb. 12, 2013).

Nation's critical infrastructure in ensuring the national and economic security of the United States, the executive order prompted the National Institute of Standards and Technology (NIST) to develop a framework for the nation's critical infrastructure.[29] The NIST, founded in 1901, is a part of the Department of Commerce, and is one of the nation's oldest physical science laboratories.[30]

In February 2014, the NIST released a set of industry standards and best practices that "assist organizations in identifying, protecting, detecting, responding to, and recovering from cybersecurity risks."[31] The framework developed by the NIST does not create new standards; rather, it was created through collaboration between the government and the private sector, and is based on existing practices and guidelines.[32] Employing common, easily understood language, the framework can be understood by those outside of information technology (IT departments).[33] Updated in December 2017, the framework "uses a common language to address and manage cybersecurity risk in a cost-effective way based on business needs, without placing additional regulatory requirements on businesses."[34] The framework is organized into five functions: identify, protect, detect, respond, and recover.[35]

The framework encourages organizations to improve cybersecurity risk, regardless of size, degree of risk, or sophistication. The text states,

> "Ideally, organizations using the framework will be able to measure and assign values to their risk *along with* the cost and benefits of steps taken to reduce risk to acceptable levels. The better an organization is able to measure its risk, costs, and benefits of cybersecurity strategies and steps, the more rational, effective, and valuable its cybersecurity approach and investments will be."[36]

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[29] *Id.*
[30] NATIONAL INSTITUTE OF SCIENCE AND TECHNOLOGY, https://www.nist.gov/about-nist (last visited Jan. 10, 2018).
[31] Pinguelo, *supra* note 10, at 45.
[32] *Id.*
[33] *Id.*
[34] NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY, CYBERSECURITY FRAMEWORK (2017).
[35] *Id.*
[36] *Id.*

Although the framework is helpful to organizations seeking to reduce cybersecurity risks, including law firms, its utility depends on a firm's willingness to thoroughly employ the strategies given within the framework.[37] The NIST Cybersecurity framework is merely a starting point.[38] The framework assists organizations interested in seeking protection from cybersecurity threats.[39] It is not an end in itself, since it does not contain specific "requirements, practices, or elements" that must be implemented.[40] Furthermore, because of the threat of new advances in technology, the framework is something that must be constantly revisited in light of new technologies. Though the framework provides helpful guidance, it does not go far enough in ensuring clients' data since it does not provide mandates for firms. Though the NIST has the potential to regulate the field, another stands in a better position to provide meaningful guidance and enforce penalties.

B. Federal Trade Commission Security Standards

The FTC as a regulatory agency is in a position to provide guidance and enforce penalties for firms. The Federal Trade Commission is the primary federal data security regulator in the US.[41] The FTC is the only federal agency with both consumer protection and competition jurisdiction in broad sectors of the economy.[42] Section 5 of the FTC Act provides the FTC with broad authority to protect consumers from unfair or deceptive trade practices in or affecting commerce (15 U.S.C. § 45(a)(1) and (2)).[43] Section 5 provides the FTC with three categories of authority: investigation, enforcement, and litigation.[44] Section 5 applies to most companies and individuals that do business in the United States,[45] thus providing potential regulations for law firms to ensure the security of their private information and their clients' data.

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[37] Pinguelo, *supra* note 10, at 45.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] ABOUT THE FTC, https://www.ftc.gov/about-ftc (last visited Jan. 10, 2018).
[43] Pinguelo, *supra* note 10, at 46.
[44] *Id.*
[45] *Id.*

1. Authority

Section 5 does not explicitly discuss data security or the authority to enforce inadequate data practices.[46] However, the FTC's authority had, until recently, not been challenged.[47] Companies chose to settle rather than litigate FTC actions against them. However, *Wyndham Wordwide Corp* and *LabMD* are two major exceptions; both challenged the FTC's authority in separate cases.

In 2012, the FTC alleged that Wyndham engaged in unfair trade practices by not employing appropriate measures to protect unauthorized access, breaches, and deceptive trade practices.[48] Wyndham represented to customers that it had implemented reasonable and appropriate measures to protect personal information when it had not done so.[49] In its response, Wyndham asserted that the FTC did not have authority under Section 5 to establish data security standards for the private sector and that it cannot exercise authority under Section 5 to regulate data security without first setting out regulations regarding data security based on traditional principles of fair notice.[50] The district court denied Wyndham's motion and rejected its claims, ruling that the FTC does not need to issue regulations before bringing enforcement actions and rejected the challenge to the FTC's authority.[51] The court also found that other federal laws complemented rather than precluded the FTC's authority to regulate unfair and deceptive practices in the area of data security.[52] The U.S. Court of Appeals for the Third Circuit affirmed the lower court's decision.[53]

The FTC filed a claim against LabMD after an insurance report allegedly containing personal information of over 9,000 clients was made available on an internet file-sharing network.[54] LabMD's motion to dismiss alleged that the FTC

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[46] *Id.*
[47] *Id.*
[48] F.T.C. v. Wyndham Worldwide Corp., 799 F.3d 236, 236 (3d Cir. 2015).
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] LabMD, Inc. v. F.T.C., 776 F.3d 1275, 1275 (11th Cir. 2015).

lacked authority to address private companies' data security practices as unfair, among other claims.[55] When LabMD sought relief in courts, the District Court and U.S. Court of Appeals for the Eleventh Circuit both rejected LabMD's claims as premature, since LabMD had not exhausted its administrative remedies and obtained a final FTC agency action. Additionally, the Eleventh Circuit did not address any of LabMD's substantive arguments regarding the FTC's actual enforcement authority.[56]

Despite a few challenges, the FTC has been successful in many enforcement actions against companies.[57] Thus, firms will likely not be able to escape the enforcement power of the FTC. Assuming the FTC has authority over law firms, the question becomes: is the FTC an effective regulator of cybersecurity in law firms?

2. Cybersecurity Watchdog

Assuming the FTC has regulatory power, how effective is the FTC in addressing and preventing attacks within law firms? FTC's data security complaints typically fall into three overlapping categories, including: complaints against organizations for inadequate security practices contributing to a data breach, complaints against companies for misrepresenting security practices, and complaints alleging security deficiencies in mobile applications.[58] The FTC's 2015 Start with Security, A Guide for Business: Lessons Learned from FTC Cases outlines ten steps companies can and should take in order to ensure data security.[59] The lessons, written in common language, such as "Don't use personal information when it's not necessary," explain the lesson in the context of past FTC cases and

[55] *Id.*
[56] *Id.*
[57] *See, e.g.*, In the Matter of Oracle Corp., No. 132 3115, 2016 WL 1360808 (F.T.C. Mar. 28, 2016). *See also* In the Matter of ASUSTeK Computer, Inc., No. 142 3156, 2016 WL 807981 (F.T.C. Feb. 22, 2016).
[58] FTC Data Security Standards and Enforcement, Practical Law Intellectual Property & Technology, Westlaw 8-617-7036.
[59] Fed. Trade Comm'n, Start with Security, A Guide for Business: Lessons Learned from FTC Cases (June 2015) https://www.ftc.gov/system/files/documents/plain-language/pdf0205-startwithsecurity.pdf.

allegations, while offering actions to implement in order to prevent a breach.[60] Though the lessons lack technical specificity, they do provide guidance that businesses may consult when developing data security programs.

In 2016, The FTC linked the Start with Security initiative and reasonableness standard to the voluntary NIST Cybersecurity Framework, aligning them, since both require organizations to assess and manage data security risks in the context of their own business. Though helpful for businesses seeking to develop a cybersecurity program, they are limited in their effectiveness because they are voluntary standards.

Businesses interested in protecting information will likely find the guidelines helpful. However, the onus is on the business or firm to do so. If a business fails to recognize the need for data security or chooses to forego the cost, their clients and information are at risk. Enforcement actions from the FTC could punish the business, but they fail to prevent the initial breach unless the firm takes it upon itself to take the steps within the Framework and constantly remain attuned to potential technological developments.

Additionally, the FTC's data security standards do not provide a strict blueprint, rather, they typically "describe the security safeguards the FTC requires using non-specific terms like 'reasonable,' 'appropriate,' 'adequate,' or 'proper.'"[61] Firms seeking to use the standards may struggle if more specific guidance is not given.

Though the FTC can regulate cybersecurity for law firms, stronger guidance is needed on the front end to ensure data security. The framework and standards should be codified in law so that businesses must meet minimum requirements. Enforcement actions happen after a breach has already occurred; firms' data security requires an earlier, more proactive approach that could prevent breaches in the first place. One potential solution is moving in a similar direction to the European Union, which is requiring that firms disclose data breaches to clients.[62]

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[60] *Id.*
[61] *Id.*
[62] Grubb, *infra* note 10.

By requiring disclosure and increasing transparency, businesses, policy makers and consumers would be able to make more informed decisions about how to manage cyberrisk.[63] If a company's stock price and/or reputation are on the line, they would be more likely to take preventative action, ideally preventing future attacks.

European law firms face increased scrutiny because the European Union's General Data Protection Regulation, going into effect in May 2018, will require law firms based in the EU as well as those with EU clients to disclose data breaches to clients. TechCrunch reported that Equifax's case could have resulted in a fine of around $62.9 million dollars if it had not reported the data breach it experienced multiple weeks sooner.[64]

IV. CONCLUSION

Computer security firm Fortinet predicts that 2018 will be the year that malicious software becomes even smarter and ransomware becomes more targeted and prevalent among big business.[65] Derek Manky, global security strategist, predicts:

> "We predict that cybercriminals will begin to combine artificial intelligence technologies with multi-vector attack methods to scan for, detect, and exploit weaknesses in a cloud provider's environment. The impact of such attacks could create a massive payday for a criminal organization and disrupt service for potentially hundreds or thousands of businesses and tens of thousands or even millions of their customers."[66]

Law firms have a financial and ethical obligation to counter cyberattacks and protect their data.[67] Furthermore, firms have ethical rules requiring

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[63] Denise Zheng, *YES: Companies Now Are Flying Blind When Closing Security Gaps*, WALL ST J. (May 22, 2016, 10:00 PM), https://www.wsj.com/articles/should-companies-be-required-to-share-information-about-cyberattacks-1463968801.
[64] Natasha Lomas, *Equifax Breach Disclosure Would Have Failed Europe's Tough New Rules*, TECHCRUNCH (Sep. 8, 2017), https://techcrunch.com/2017/09/08/equifax-breach-disclosure-would-have-failed-europes-tough-new-rules/.
[65] Ben Grubb, *'Swarm' Cyber Attacks, Crypto-Currency Stealing Malware Predicted for 2018*, THE SYDNEY MORNING HERALD (Jan. 8, 2018, 11:15 AM), http://www.smh.com.au/technology/innovation/swarm-cyber-attacks-crypto-currency-stealing-malware-predicted-for-2018-20180107-p4yyaz.html.
[66] *Id.*
[67] Model Code of Prof'l Conduct r. 1.6 (Am. Bar. Ass'n 2015).

confidentiality of attorney-client and work product data.[68] In addition to the highly private nature of law firm data, law firms have ethical obligations to their clients, necessitating an even higher level of data security.[69] The FTC stands in a unique position as the main federal data regulator in the United States, and should promulgate rules mandating minimum standards for law firms.

[68] *Id.*
[69] *Id.*

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HANDS OFF THE WHEEL: AN ANALYSIS OF ETHICAL AND LEGAL ISSUES FACING AUTONOMOUS AUTOMOBILES

❖ NOTE ❖

*George Cortina**

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I. INTRODUCTION

We have witnessed an evolution in automobile safety over the last several years. Safety features range from sensors that ensure a car remains in its proper lane, standard back-up cameras, adaptive cruise control systems, and pedestrian detection technologies. These features, designed to protect both the driver and the world around him, appear to be incremental steps to the advent of the day that we see fully autonomous cars. Many auto manufacturers and businesses are already embracing the idea of autonomous automobiles. In fact, Dominos has partnered

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with Ford and is using autonomous vehicles to deliver pizzas in Ann Arbor, Michigan.[70] The impetus in the automotive world appears to be fully embracing autonomous vehicles, however, it is unclear if our legal system is prepared for this change. There are many unanswered questions and potential issues that arise from the concept of a completely self-driving car that our legal system must address before we start taking our hands off the wheel.

Part II of this note provides background into some of the precursors to autonomous driving that exist today and the new autonomous driving functions that will be available in the near future. Part III analyzes the ethical and legal implications of this movement towards autonomous driving and outlines the types of questions that will need to be answered before self-driving cars can be on the road. Finally, Part IV provides recommendations on steps our legal system needs to take to begin addressing many of the issues in this newly developing field.

II. BACKGROUND

A. THE BEGINNINGS OF AUTONOMOUS DRIVING

Today, there are many features that automakers have installed in their vehicles that are the building blocks for autonomous cars. The combination of multiple features basically creates the experience of the car driving itself. For example, Cadillac's super cruise system engages the vehicles large array of safety features including adaptive cruise control, lane keep assist, and multiple sensors to allow the driver to remove his hands from the steering wheel in limited access freeways.[71] Additionally, the system requires the driver to be on a highway and remain focused and looking at the road ahead.[72] If the driver loses focus, the system automatically notifies the driver, and if he remains unresponsive, automatically

[70] David Meyer, *Domino's Self-Driving Delivery Quest Rolls On With Ford Test*, FORTUNE (Aug. 29, 2017), http://fortune.com/2017/08/29/dominos-ford-pizza-self-driving-autonomous/.
[71] *Introducing Cadillac Super Cruise™ The World's First True Hands-Free Driving System For The Freeway*, CADILLAC, http://www.cadillac.com/world-of-cadillac/innovation/super-cruise.html (last visited Mar. 11, 2018).
[72] *Id.*

disengages the system.[73] In other words, the car can make certain peripheral decisions while the driver maintains control of the vehicle.

Other companies have developed autonomous driving systems they claim are safer than humans driving. Tesla's autopilot system will use the vehicles eight cameras and twelve sensors to analyze the world around it and drive the car completely autonomously.[74] While the system appears promising, it has not been without controversy. In 2017, Tesla owners sued the company claiming that the system led cars to drive erratically and behave in an unstable manner.[75] Although the lawsuit did not claim any serious personal injuries to others as a result of autopilot, one of the issues with systems like this would be determining who is at fault in those situations.

B. THE FUTURE OF AUTONOMOUS DRIVING

Many individuals may welcome the idea of being able to take their hands completely off the wheel from their long commutes, but companies are equally invested in this endeavor as well. Ford has partnerships with companies like Lyft, Dominos, and Postmates to use autonomous vehicles for their services.[76] These partnerships include plans for Lyft to use autonomous vehicles to pick-up customers and drive to their locations automatically.[77] Furthermore, Ford states, "[i]n the future, when a consumer uses Postmates to place a purchase—whether for groceries, takeout or other goods—a self-driving vehicle could be what delivers her order."[78]

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[73] *Id.*
[74] *Full Self-Driving Hardware on All Cars*, TESLA, https://www.tesla.com/autopilot (last visited Mar. 11, 2018).
[75] Chris Woodyard, *Tesla's Autopilot Self-Driving System Slammed in Lawsuit*, USA TODAY (Apr. 19, 2017, 7:03 p.m.), https://www.usatoday.com/story/money/cars/2017/04/19/teslas-autopilot-self-driving-system-slammed-lawsuit/100670104/.
[76] Andrew Hawkins, *Ford Wants to be the Self-Driving OS for the Future of Transportation*, THE VERGE (Jan. 9, 2018 ,12:40 p.m.), https://www.theverge.com/2018/1/9/16868814/ford-self-driving-autonomous-vehicle-ces-2018.
[77] *Id.*
[78] *Id.*

Ford is not the only company partnering with others to launch autonomous vehicles. Toyota has recently announced its own autonomous vehicle, store-like concept, the e-Palette, and has already secured partnerships with Amazon, Pizza Hut, Uber, and DiDi.[79] The vehicle will debut during the 2020 Olympic games.[80]

Auto manufacturers are not the only industry developing autonomous vehicle technology. Computer chipmaker Nvidia is also producing chips to run neural networks in autonomous vehicles for Uber and will produce additional chips for Volkswagen to use in its new products.[81] This is a significant development in the automobile industry because it illustrates how a field once dominated by car manufacturers is now working with technology companies to secure the future of autonomous vehicles.

The automobile and service industries that depend on cars are clearly moving towards an autonomous driving future. The recent developments by large technology companies and automakers are precursors of what is coming in the near future. Sooner rather than later we may be stepping into a world where our pizzas are delivered by an autonomous vehicle, and we will be purchasing cars that can drive us without any input from the driver. A question that remains unanswered is how this rapidly developing field will be regulated and the ethical issues that arise from many of these advancements.

III. ANALYSIS

A. THE ETHICAL QUESTIONS OF AUTONOMOUS VEHICLES

There are various ethical quandaries surrounding the adaptation of autonomous vehicles on the roads. The legal status of autonomous vehicles is still murky in some states, and neither the National Highway Traffic Safety Administration (NHTSA) nor the Federal Motor Vehicle Safety Standards

[79] Chloe Aiello, *Toyota Shows Off its Futuristic Self-Driving Store, the 'e-Palette,' at CES*, CNBC (Jan. 8, 2018, 3:13 p.m.), https://www.cnbc.com/2018/01/08/toyota-unveils-e-palette-at-ces.html .
[80] *Id.*
[81] Moneywatch, *Nvidia Chips to Power Uber's Self-Driving Fleet, VW Vehicles*, CBSNEWS (Jan. 8, 2018), https://www.cbsnews.com/news/nvidia-chips-to-power-ubers-self-driving-fleet-vw-vehicles/.

(FMVSS) expressly prohibits them.[82] The U.S. Department of Transportation (USDOT) is partnering with states "and transportation stakeholders to encourage the safe development, testing and deployment of automated vehicle technology."[83] Therefore, it can be assumed that these self-driving cars would be permissible on our roads under federal regulations.

Despite not having a federal legal issue for operations, our laws remain ill-equipped to answer many of the ethical issues of autonomous vehicles.[84] Humans are forced to make many decisions while on the road including whether it is safe to change lanes or change speed in different terrain. These are elements that can likely be programmed into a car without much difficulty.

The issues arise with specific situations drivers may not typically encounter but nonetheless do occur. For example, "if an animal darts in front of our moving car, we need to decide: whether it would be prudent to brake; if so, how hard to brake; whether to continue straight or swerve to the left of right; and so on."[85] However, those same human instincts would now need to be programmed into an autonomous vehicle that could replicate those decisions.[86] The harsh reality is,

> [h]uman drivers may be forgiven for making an instinctive but nonetheless bad split-second decision, such as swerving into incoming traffic rather than the other way into a field. But programmers and designers of automated cars don't have that luxury, since they *do* have the time to get it right and therefore bear more responsibility for bad outcomes.[87]

While it is theoretically possible to program the correct decision, the question of the consequences of the liability for a wrong decision is still undetermined. If a driver in an autonomous vehicle hits a pedestrian on the road

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[82] Bryant Walker Smith, *Automated Vehicles Are Probably Legal in the United States*, 1 TEX. A&M L. REV. 411, 458 (2014).
[83] *USDOT Automated Vehicles Activities* U.S. DEP'T OF TRANSP. (Feb. 23, 2018), https://www.transportation.gov/AV.
[84] Patrick Lin, *The Ethics of Autonomous Cars*, THE ATLANTIC (Oct. 8, 2013), https://www.theatlantic.com/technology/archive/2013/10/the-ethics-of-autonomous-cars/280360/.
[85] *Id.*
[86] *Id.*
[87] *Id.*

because of a mistake in the car's programming or function, is the driver liable for the injury? This question remains unanswered and there are arguments to be made on either side. Due to this ethical difficulty, it is imperative to have a system of laws and regulations in place that can resolve these types of questions.

B. THE LAWS AND REGULATIONS OF AUTONOMOUS CARS

Some states have moved to fill-in the gaps caused by the limited federal involvement in autonomous vehicle regulation. In 2011, Nevada became the first state to recognize autonomous cars.[88] The legislation also specifies the minimum safety regulations, requiring "[a] consumer vehicle must additionally be 'capable of being operated in compliance with the applicable traffic laws,'" and additional licensing requirements necessary to operate a self-driving car.[89] In Florida, the state defined "autonomous vehicle" and issued a number of regulatory requirements for self-driving cars in the state.[90] In California, the state passed legislation defining autonomous vehicles and introduced a number of safety requirements for testing and operating these cars.[91] Other states appear to be following the course of the first three early adopters of autonomous vehicle regulations.

However, a number of legal issues remain unresolved. Aside from the actual requirements of licensing and safety of vehicle production, there is little information on what to do in situations of accidents or whenever the technology in an autonomous vehicle may fail. "[M]any of the regulations concerning today's vehicles assume that a human is driving the vehicle."[92] Of course, the objective of a completely autonomous vehicle is to remove the human element that may cause the accident in the first place. However, there is very little, if any, guidance as to who is potentially liable when there is an accident.

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[88] Smith, *supra* note 13, at 501.
[89] *Id.* at 501, 503.
[90] *Id.* at 506.
[91] *Id.* at 507.
[92] Julie Goodrich, *Driving Miss Daisy: An Autonomous Chauffeur System*, 51 HOUS. L. REV. 265, 279 (2013).

In cases of civil liability where the driver is at fault tort law applies.[93] However, it is unclear if the driver is at fault for an autonomous vehicle in an accident.

> The potential parties that could be at fault include: the operator (defined differently in the three states which have currently enacted legislation), the vehicle manufacturer (the manufacturer of the original nonautonomous vehicle), the automator (the modifier of the original vehicle into an autonomous vehicle or the creator of an autonomous vehicle from scratch), and the programmer (the person responsible for creating and coding the autonomous software).[94]

Some believe the automator should be held liable and products liability theory should apply.[95]

In criminal cases, similar uncertainty remains. If an autonomous vehicle violates a traffic law, it is unclear whether the operator or the vehicle either the programmer or automator should be held liable for the violation.[96] "For strict liability offenses, such as speeding or failing to use a turn signal, Nevada law seems to hold the operator, and not the automator, liable."[97] While this is a standard Nevada applies, this is an issue every state needs to address with autonomous vehicles. The possibility of a third-party hacking a vehicle and causing it to break traffic laws is another area that has yet to be addressed by our current criminal codes.[98]

Though limited in scope, the federal government has issued recommendations for states to follow when making laws for autonomous vehicles and rules to govern manufacturers development of these cars.[99] In 2016, the Obama Administration's USDOT issued a report outlining its plan for autonomous vehicles.[100] The plan laid out a set of guidelines for testing and producing autonomous vehicles, model state policies, a streamlined review process in the

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[93] *Id.* at 280.
[94] *Id.*
[95] *Id.*
[96] *Id.* at 281.
[97] *Id.* at 281-82.
[98] *Id.* at 282-83.
[99] BILL CANIS, CONG. RESEARCH SERV., R44940, ISSUES IN AUTONOMOUS VEHICLE DEPLOYMENT, 5 (2017).
[100] *Id.* at 4.

DOT to expedite autonomous vehicle production, and identified new tools and regulatory structures for NHTSA to promote autonomous vehicle production.[101] These rules, however, merely stated certain obvious regulations that automakers would have to comply with. For example, some guidelines urged manufactures "to ensure that their test vehicles meet applicable NHTSA safety standards and that their vehicles be tested through simulation, on test tracks, or on actual roadways."[102]

In September 2017, the Trump Administration made changes to USDOT's policies on autonomous vehicles.[103] "The new voluntary guidance, Automated Driving Systems 2.0: A Vision for Safety, clarifies for manufacturers, service providers, and states some of the issues raised in the Obama Administration's predecessor report and replaces some parts of the earlier guidance; the new policy recommendations took effect immediately."[104] The guidelines loosen restrictions for manufacturers. Under the 2016 requirements, manufacturers had to submit safety assessments that have now been made voluntary.[105] Additionally, the language stating that certain NHTSA rules may become mandatory have been replaced with language stating "assessments are not subject to federal approval."[106] The recommendations for considerations of privacy, ethics, and registration have also been removed.[107] Finally, "[US]DOT notes that it is not necessary that all state laws with regard to autonomous vehicles be uniform, but rather that they 'promote innovation and the swift, widespread, safe integration of ADSs.'"[108]

The federal government is interested in promoting the development of autonomous vehicles, but there remain many legal questions that need to be resolved as this process continues. Our current legal system appears unprepared to handle a future with autonomous vehicles. The lack of a coherent set of rules to govern self-driving cars is an issue that state and federal legislators need to address.

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[101] *Id.*
[102] *Id.*
[103] *Id.* at 6.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 7.
[107] *Id.* at 6.
[108] *Id.* at 7.

The level of safety and security in these vehicles are greater than those of traditional cars. Issues of liability varying between states may be troublesome. Though autonomous driving may seem like something that will come in a distant future, the reality is that automakers like Ford, Cadillac, and Tesla have already launched or will be launching autonomous vehicles in the near future.

IV. RECOMMENDATIONS

Legislators are in a difficult situation when it comes to regulating autonomous vehicles in trying to find the balance between rules that promote road safety and clarify aforementioned legal issues, while promoting the advancement and development of self-driving cars. One suggestion to ameliorate this issue is to provide legal immunity to automators in a similar way to how the National Childhood Vaccination Injury Act of 1986 (NCVI) does for vaccine manufacturers when a patient suffers an injury.[109] In order to allow injured parties to seek relief, regulators can create a court similar to the Vaccine Court created under the NCVI.[110] The Vaccine Court has effectively managed to protect vaccine manufacturers and encourage vaccine production, while providing those that suffered harm a means of recovery.[111] This form of regulation would definitely ease concerns that automators may have, while still encouraging development of a technology that can improve safety and providing consumers a means of recovery in cases of accidents.

Challenging questions of how to program an autonomous vehicle remain. Should a self-driving car stop to protect the driver in the car from an accident ahead at the expense of a driver that may be behind a car suffering an injury? Ethical questions such as this need to be addressed sooner rather than later. First, despite the introduction of autonomous vehicles, there will be a significant amount of time that will elapse before these vehicles will be the only vehicles on the road.

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[109] Goodrich, *supra* note 23, at 284.
[110] *Id.*
[111] Jennifer Keelan & Kumanan Wilson, *Balancing Vaccine Science and National Policy Objectives: Lessons From the National Vaccine Injury Compensation Program Omnibus Autism Proceedings*, 101 AM. J. PUB. HEALTH 2016 (2011).

Therefore, regulations must address the way an autonomous vehicle interacts with a car driven by a human. A potential solution is to regulate automated driving technologies in a similar fashion to federal rules on airbags and other safety features to ensure that all cars equipped with autonomous driving technology meet the same safety standards.

In order to address these concerns, legislators should take various steps to promote development of autonomous vehicles, while ensuring the safety of consumers. First, "interested entities within industry, academia, and government need to work together, especially when addressing interdisciplinary topics in an emerging field."[112] While autonomous vehicles are being rapidly developed and introduced into the market, cooperation between stakeholders and business leaders that can help address some of the ethical and legal questions surrounding self-driving cars is necessary to ensure that comprehensive and sensible regulations are introduced. Additionally, federal and state government partnerships will be helpful in creating uniform safety rules that address issues states may have with registration and licensing of these vehicles with concerns over safety.

In September of 2017, the U.S. House of Representatives passed H.R. 3388, bipartisan legislation to address several issues concerning autonomous vehicles.[113] The bill included provisions limiting states from regulating designs of autonomous vehicles, but most importantly it required the USDOT to issue a final rule to manufacturers addressing the safety of autonomous cars.[114] The legislation also required a cybersecurity plan to help prevent hacking into autonomous vehicles.[115] The bill also requires USDOT to issue a rule to requiring manufacturers to explain the capacities and limitations of an autonomous vehicle.[116]

This legislation has been met with resistance from state and local government associations and vehicle safety advocacy groups that argue that it is an

[112] Dr. Sven A. Beiker, *Legal Aspects of Autonomous Driving*, 52 SANTA CLARA L. REV. 1145, 1153 (2012).
[113] CANIS, *supra* note 30.
[114] *Id.* at 12.
[115] *Id.*
[116] *Id.* at 13.

overreach of federal government involvement and encroaches on states' rights to regulate vehicles.[117] However, vehicle safety advocacy groups argue the legislation does not go far enough. They believe the legislation allows too many loopholes for vehicles that do not meet safety criteria to be on the road, and the data collected from vehicle tests should be shared publicly.[118] Transportation for America believes the legislation was not developed properly because interested stakeholders were not consulted and that it would allow too many experimental vehicles on the road.[119] Both sides of this argument have valid points. But given that this is a rapidly growing field and that our current laws are not apt to address many of the concerns with autonomous vehicles it is a good place to start.

Another issue with this bill is that it does not address specific ethical issues that have been mentioned in this note. This is an area that will require cooperation with multiple groups. Language creating partnerships with stakeholders in the field can help address these concerns and begin to tackle some of the additional legal and ethical issues that remain to be addressed. This bill passed the House and is currently in the Senate.

V. CONCLUSION

Autonomous vehicles have a lot to offer in terms of safety and comfort for drivers. However, as we speed to a future with self-driving cars we find many legal and ethical questions that have yet to be addressed. A balance between protections for manufacturers to continue the development of autonomous vehicle and providing consumers an avenue for recovery is a potential legislative solution that has worked in the past. A cooperation between stakeholders, legislators, and businesses is necessary to resolve the ethical questions and liability issues that remain. Any legislation that can provide manufacturers, automators, and consumers guidelines for developing autonomous vehicles will be a useful first step in this

[117] *Id.*
[118] *Id.*
[119] *Id.*

process. Just as regulators introduced policies governing airbags, seatbelts, and headlights, so too must they begin to address self-driving cars.

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LEGISLATING LOW-WAGE NON-COMPETES: RECONCILING POLICY INTERESTS WITH COMMON LAW

❖ NOTE ❖

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I. INTRODUCTION

On October 25, 2017, the Illinois Attorney General's Office filed a lawsuit in state court against Checks into Cash LLC., a subsidiary of a national payday loan retailer.[120] In the lawsuit, the Attorney General alleged that the company required employees to enter into non-compete agreements that are now impermissible under Illinois state law.[121] While ruling on the enforceability of non-compete agreements is nothing new for Illinois state courts, this case would now require the court to

[120] Cara Salvatore, *Ill. AG Sues Payday Lender Over Noncompetes,* LAW360 (Oct. 25, 2017, 9:03 p.m.), https://www.law360.com/articles/978509/ill-ag-sues-payday-lender-over-employee-noncompetes.
[121] *Id*.

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apply a completely new standard of rules.[122] Illinois courts, employers, and employees relied on common law rules to determine the enforceability of non-compete agreements.[123] That changed in part at the start of 2017 when the Illinois General Assembly enacted the Illinois Freedom to Work Act ["Work Act"], which prohibits companies from entering into non-compete agreements with low-wage workers.[124] Thus, where a court previously would be able to use discretion in deciding whether the Check into Cash's non-competes with its low-wage employees ought to be enforceable, a court would now have to automatically nullify the ones that involved low-wage employees. This change illustrates the potential for a gap in certain instances between the common law approach to the enforceability of some non-compete agreements, and the approach under the Work Act. As a recommended means of resolving this potential discrepancy, the state legislature should amend the Work Act to allow for specific exceptions when non-compete agreements with low-wage workers could be enforceable if upheld by a state court, thus preventing the statute from being overly broad without sapping its ability to accomplish important policy objectives.

The purpose of this Note is to explore a possible means of improving the Work Act by incorporating a small amount of narrowly-defined exceptions when non-compete agreement ought to be enforceable. Part II of this Note will give a brief background about the history of the legal enforceability of non-compete agreements in under Illinois state law. Part III will analyze the policy motivations driving the state's ban on non-competes with low-wage employees, and how the passing of the Act could create a gap in some instances between the statutory and common law approach to whether a particular non-compete agreement should be enforceable. Lastly, Part IV will discuss a potential solution for reconciling these two conflicting ideologies so that the state can protect its citizens from unfair binding agreements without casting an overly broad restrictive net.

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[122] Illinois Freedom to Work Act, 820 ILL. COMP. STAT. 90/1 (2017).
[123] Matthew E Misichko, *Non-Compete Agreements in Illinois: Enhanced Inapplicability and Continuing Uncertainty*, CBA REC., July/Aug. 2017, at 34.
[124] Illinois Freedom to Work Act, 820 ILL. COMP. STAT. 90/1 (2017).

II. BACKGROUND

Non-compete agreements are contracts between employers and employees where the employee generally promises "not to engage in or in any way be connected with a competing organization or product or service within a specified geographic area, and for a specific period of time."[125] In exchange for the employee's promise not to compete, the employer often promises to continue to employ the employee for a reasonable period of time.[126] These types of agreements are important to companies because businesses often use them to protect trade secrets, reducing employee turnover, and protecting investments in employee training.[127]

Up until the beginning of 2017, common law governed the enforceability of all non-compete agreements between employer and employees in Illinois.[128] For a non-compete agreement to be enforceable under Illinois common law, the restraint on the employee must be reasonable, and the agreement must be supported by consideration.[129] To constitute a "reasonable" restraint, Illinois state courts require that it is "(1) reasonably necessary to protect the legitimate business interest of the employer, (2) ancillary to a relationship or valid contract, and (3) reasonably supported to supported by adequate consideration."[130]

For a restrictive covenant to satisfy the requirement of protecting a "legitimate business interest," employers must prove that the interest is reasonable based on total circumstances of the situation, which likely will depend on factors such as whether the employer's customer relationship is nearly permanent, whether the employee acquired confidential information during the employment, as well as the relevance of the restriction's form, duration, geographic scope, and type of

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[125] LAW J. PRESS, EMPLOYMENT LITIGATION § 3.05 (2018).
[126] Tracy Staidl, *The Enforceability of Noncompetition Agreements When Employment is At-Will: Reformulating the Analysis*, 2 EMPL. RTS. & EMPLOY. POL'Y J. 95 (1998).
[127] *Non-Compete Contracts: Economic Effects and Policy Implications, Office of Econ. Policy*, U.S. DEP'T. OF TREASURY (2016), https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf.
[128] Misichko, *supra* note 4, at 35.
[129] Reliable Fire Equip. Co. v. Arredondo, 965 N.E.2d 393, 396 (Ill. 2011).
[130] Misichko, *supra* note 4, at 35.

activity being restrained, toward the goal of appropriately protecting the employer's interest.[131] Additionally, in considering whether a restraint is "reasonably necessary," Illinois common law stipulates that courts should consider factors such as the hardship to the employee, the length of time for the employer obtain new customers or clients, and the non-compete agreement's effect on the public.[132] For example, when an insurance company contracted with an at-will employee not to interfere with the company's clients for two years after leaving said employment, an Illinois appellate court held that the restraint was reasonably necessary to protect the employer's "legitimate business interest," since the employee had a "near-permanent relationship" with the employee's clients.[133] Illinois courts have frequently come down on the other side of the "reasonableness" spectrum, however. In 2013 for example, an Illinois appellate court struck down an agreement between Pepsi and three low-level employees that required the employees not to compete or provide confidential information to competitors for two years, reasoning that the restraint was unreasonable since there was no evidence that the employees obtained any confidential information as a result of their employment.[134]

In addition to the restraint in a non-compete agreement needing to be reasonable and ancillary to the original employment agreement, Illinois common law also requires non-compete agreements to be supported by adequate consideration, meaning that the employee must receive something of value in return for promising not to compete. When it comes to agreements with at-will employees, whom the employer is free to dismiss at any time, Illinois courts have consistently held that continued employment for a "substantial period" following the signing of the agreement can serve as adequate consideration for the employee's promise not to compete.[135] The most prominent Illinois appellate decision regarding what constitutes a "substantial period" took place in *Fifield v. Premier Dealer Servs.,* where the court held that two years of continued employment following the signing

[131] *Id.*
[132] *Id.*
[133] Lyle R. Jager Agency v. Steward, 625 N.E.2d 397, 403 (Ill. App. 3d 1993).
[134] Pepsi MidAmerica, Inc. v. Mullinax, 2013 IL App (5th) 120396-U, at *25.
[135] LITTLER MENDELSON, LITTLER ON ILLINOIS EMPLOYMENT LAW, § 2.3 (2017).

of a non-compete is sufficient to constitute adequate consideration.[136] However, there has been some pushback from other courts over whether two years should be the bright line standard.[137]

The state's desire to legislate the prohibition of non-compete agreements with low-wage workers seemed to take off following a 2016 lawsuit in which the Illinois Attorney General, Lisa Madigan, sued Jimmy John's over the corporation's enforcement of non-compete agreements with nearly all of its departing employees, including with its lowest level employees such as sandwich makers and delivery drivers.[138] The agreements in dispute prohibited the employees, during and for two years after their employment, from working for any business located within two miles of any Jimmy Johns location anywhere that derives at least 10% of its revenue from selling sandwiches.[139] In its complaint, the Attorney General argued that Jimmy Johns had no "legitimate business interest" in imposing this particular restraint on shop employees and assistant managers, and that "the majority of individual signatories to these agreements unaware that the non-competition agreements are illegal and unenforceable and will continue to suffer economic harm as a result."[140] The two sides ultimately reached a pre-trial settlement that required that Jimmy Johns to promise to notify all current and former employees that their non-competes are void, and also promise that all future non-competes agreements with its employees will be based a "legitimate" and "narrowly tailored" business interest."[141] Regardless of the promises secured from Jimmy Johns, the legislature wanted to make sure similar unreasonable agreements with low-wage employees

[136] Fifield v. Premier Dealer Servs., Inc., 993 N.E.2d 938, 942 (Ill. App. 1st 2013).
[137] Misichko, *supra* note 4, at 35.
[138] Complaint, Illinois v. Jimmy John's Enterprises, No. 2016-CH-07746 (Ill. Cir. Ct. June 8, 2016).
[139] *Id*. at 2.
[140] *Id.* at 4.
[141] Daniel Wiessner, *Jimmy John's settles Illinois lawsuit over non-compete agreements*, REUTERS (Dec. 7, 2016, 12:55 PM), https://www.reuters.com/article/us-jimmyjohns-settlement/jimmy-johns-settles-illinois-lawsuit-over-non-compete-agreements-idUSKBN13W2JA.

would no longer occur statewide going forward.[142] As a result, the Illinois General Assembly moved quickly to enact the Work Act in August of 2016, less than a month after the Attorney General's Office formally announced its settlement agreement with Jimmy Johns.[143]

The Act prohibits employers from entering into covenants not to compete with low-wage employees, which the state defines as a private sector employee who makes either (a) the federal, state, or local minimum wage or (b) $13.00 per hour or less.[144] The statute defines a "Covenant not to compete" as "an agreement:

> (1) between a [private sector] employer and a low-wage employee that restricts such low-wage employee from performing: (A) any work for another employer for a specified period of time; (B) any work in a specified geographic area or; (C) work for another employer that is similar to such low-wage employee's work for the employer included as a party to the agreement; and (2) that is entered into after [January 1, 2017].[145]

Thus, when the Act went into effect, it meant that fulfilling the common law elements of an enforceable restrictive covenant was no longer sufficient in itself to uphold non-compete agreements between employers and low-wage workers in Illinois.[146]

The legislature's enactment of the Work Act is reflective of an initiative by policymakers nationwide to ensure that employers are not placing unreasonable restraints on the mobility of low-wage workers or abusing non-compete agreements. In accordance with this position, the White House published a report in May of 2016 detailing the benefits and harm created through non-compete agreements.[147] The report in part concluded that, while non-competes can sometimes be beneficial when they are an appropriate means of protecting an

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[142] Jenna Brownlee and Catilin Kelly, note, *Recent Development: To Compete or Not to Compete: Illinois' Movement to Eliminate Noncompete Agreements*, 48 LOY. U. CHI. L.J. 1233 (2017).
[143] Salvatore*, supra* note 1.
[144] *Id.*
[145] Illinois Freedom to Work Act, Ill. SB 3163 (2015)
[146] Illinois Freedom to Work Act, 820 ILL. COMP. STAT. 90/1 (2017)
[147] NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATE RESPONSES, THE WHITE HOUSE (2016), https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf

employer's trade secrets or protecting investments in employee training, they often times create an unreasonable restraint on job mobility, prevent departed employees from finding subsequent employment elsewhere, and preventing workers using the prospect of taking another job as leverage when bargaining for better terms.[148] The report also argues that non-competes can result in general economic harm by shrinking the labor pool of qualified candidates for other companies and discouraging innovation. To go along with the White House's 2016 report, the U.S. Department of Treasury issued a report of their own two months earlier, concluding that while non-compete agreements can provide "important social benefits" in some situations, "many of these benefits come at the expense of workers and the broader economy."[149]

III. ANALYSIS

When it comes to non-competes for low-wage workers, the reasoning to prohibit them altogether makes added sense since the risk of potential harm to employees often goes up while the chances of an agreement serving a legitimate business interest go down. To that end, those in favor of banning non-competes altogether with low-wage employees could point to the White House's finding in their 2016 report that "[f]ourteen percent of workers earning $40,000 or less have signed non-competes, although those workers possess trade secrets at less than half the rate of their higher-earning counterparts."[150] Additionally, the harm that non-competes can cause by preventing departing employees from finding new employment becomes even more significant for low-wage employees who lack marketable skills outside their employment area, and therefore would have decreased chances of finding a job in an alternative field.[151]

Thus, undoubtedly, there are a number of legitimate policy reasons that justify the Illinois General Assembly's interest in reforming the state's enforceability rules for non-compete agreements with low-wage employees.

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[148] *Id.* at 2.
[149] U.S. DEP'T. OF TREASURY, *supra* note 8, at 3
[150] THE WHITE HOUSE, *supra* note 28, at 8.
[151] *Id.*

However, while there is little disputing that regulating the enforceability of non-compete agreements is a valuable and arguably necessary tool that state legislature can use to prevent companies from abusively using non-compete agreements and to protect vulnerable workers from restraints on employment, it also does not necessarily follow that uniformly prohibiting all non-compete agreements with low-wage employees is the most optimal use of that tool. Although many, if not most, non-compete agreements with low-wage workers do not relate to a "legitimate business interest," it's also likely true that are at least some that do.[152] Additionally, while the White House report stated that fourteen percent of workers making $40,000 annually or less accrue trade secrets far less frequently than higher-paid workers, that also doesn't mean that such a thing never happens.

Consider, for example, if a small public relations firm hired a college student as a summer intern, and agreed to pay that intern a minimum wage salary, which compared to the zero salary many student interns receive, seems agreeable to the intern. Then, for three months, the employer trains the intern on how to follow their unique business model and tasks the intern with constantly engaging with a set of clients in efforts to promote their brand. In that situation, it seems reasonable that the employer may want to use a non-compete agreement to protect itself from that intern taking in the valuable training and knowledge of the firm's client base, and then departing to make use of that information with a competitor.

Before 2017, as long as this agreement was ancillary to the original employment agreement and supported by adequate consideration, an Illinois state court prior to 2017 would have had the ability to uphold agreements with low-wage employees, assuming it met the common requirements.[153] And now, in those rare cases where an employer could plausibly convince a court that it had a "legitimate business interest" in imposing an employment restraint on a low-wage employee, the Work Act would automatically bar them from doing so. As a result, one could argue that the Act creates the risk of prohibiting certain agreements with low-wage

[152] Reliable Fire Equip. Co. v. Arredondo, 965 N.E.2d 393 (Ill. 2011).
[153] Misichko, *supra* note 4, at 35.

workers that would be deemed reasonable based on common law principles for the purpose of deterring unreasonable ones.

Nonetheless, policymakers would likely respond to that critique by arguing that, even if courts would likely throw out a majority of non-compete agreements with low-wage workers, many of the employees affected by these agreements would be unlikely to realize that they would not likely hold up in court, or would prefer to not resort to taking legal action for various reasons. Additionally, companies might be less willing to try to effectuate these types of agreements if they are statutorily banned as opposed to just deterred by common law precedent that suggests the agreements would not hold up in court. Thirdly, forcing employees to take their dispute to court in order get it thrown out could likely further clog the court system and disadvantage employees who have limited funds available to hire legal representation. Finally, even if employers are unable to use non-compete agreements to protect their trade secrets, employers can also gain protection through Illinois state laws that impose liability on employees who "misappropriate" the employer's trade secrets.[154]

Those protections, however, do not protect the employer when the trade secret was acquired in a legitimate manner.[155] Thus, even if an employer still has option of suing, being able to prove that an employee violated trade secret laws is almost always costly and hardly ever a sure thing, making it reasonable to understand why an employer may want to use a non-compete agreement to protect itself from that risk in the first place. Additionally, if a major reason why Illinois still bans non-competes for low-wage workers even though they rarely hold up in court anyway is to prevent excessive litigation and disadvantaging employees who cannot pay for litigation, the same logic should apply for the small subset of employers who have a legitimate business interest in using a non-compete with a low-wage worker, and would prefer that litigation is not their only means of ensuring the protection of their trade secrets.

[154] Littler, *supra* note 16, at 1.
[155] *Id.*

As for how the Act as currently constructed stands to impact companies going forward, many companies will either have to abandon their use of non-compete agreements with low-wage workers altogether or start paying those workers more than $13 dollars an hour so that they can still enter into enforceable agreements with them. Those are unquestionably positive outcomes in the eyes of many citizens of Illinois. However, by making the ban of non-competes with low-workers absolute, there is also a possibility that it could lead to some negative consequences. For example, instead of choosing to pay an employee more, the ban on non-competes could potentially persuade some employers not to hire as many employees.[39] As an additional alternative to paying low-wage workers more, some employers may also choose to invest less resources in training low-wage employees and no longer entrust them with secrets and confidential information that could provide opportunities for enhanced growth within the company.[156]

IV. RECOMMENDATION

In all likelihood, the Work Act seems to do more harm than good for the people of Illinois. However, this note is optimistic that there may be a way to improve the statute to diminish the potential harm without diminishing any of the good that conceivably brings. In that sense, one possible solution to the Work Act casting slightly too wide of a net through the nondiscretionary scope of the statute would be to amend the statute to allow for a small set of narrowly-defined exceptions when a non-compete agreement with a low-wage worker may be enforceable. In that sense, Illinois would be following the blueprint of the statute that the state of Colorado has in place for all non-compete agreements in general.[157] Under Colorado's statutory rule, non-compete agreements are generally unenforceable – unless they fall under one of the statute's four specifically listed exceptions, which are for:

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[39] Jonathan Macey, *Obama's Pitch to Ban Non-Competes Would Make the Rich Richer*, FORTUNE (Nov. 4, 2016), http://fortune.com/2016/11/03/obama-non-compete-agreements/.

[156] *Id.*

[157] COLO. REV. STAT. § 8-2-113 (2017).

> (a) Any contract for the purchase and sale of a business or the assets of a business; (b) Any contract for the protection of trade secrets; (c) Any contractual provision providing for recovery of the expense of educating and training an employee who has served an employer for less than two years; and (d) Executive and management personnel and officers and employees who constitute professional staff to executive and management personnel.[158]

Something that Colorado's statute does well is that it seeks to eliminate much of the harm that can take place when companies abuse non-compete agreements while also preserving some of the key benefits that can result from ability to sign an employee to a restrictive covenant. Specifically, two central benefits listed by the White House and U.S. Treasury in their respective reports were the ability to protect trade secrets and the ability to protect companies from wasting valuable resources on training an employee that ends up departing soon thereafter.[159] In that sense, Colorado's statute takes the approach that legislating the enforceability of non-competes does not have to be a zero sum game where eliminating harm and preserving certain benefits are mutually exclusive.[160] Since every state has different needs and circumstances, and since the Illinois Freedom to Work Act only pertains to low-wage employees as of now, amending the Act to follow the Colorado blueprint wouldn't necessarily mean that the exceptions accompanying the Illinois' statute would be the same as the ones in the Colorado statute. Nonetheless, legislators could still look to the exemptions Colorado has put in place as a general baseline to start out with in terms of what has worked elsewhere.

Even so, proponents of keeping the Work Act as is may argue that adding specific exceptions when non-competes with low-wage workers may be enforceable would essentially cripple the statute's ability to actually accomplish its policy objectives. For example, if one of the exceptions that Illinois added to the

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[158] *Id.*

[159] THE WHITE HOUSE, *supra* note 23, at 8; U.S. DEP'T. OF TREASURY, *supra* note 8, at 3.

[160] Norman Bishara, *Covenants Not To Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment*, 27 BERKELEY J. EMP. & LAB. L. 287 (2006)

Act was for "Any contract for the protection of trade secrets," one could argue that it would make it too easy for employers to claim one of these exceptions, which bring back the same problem the state had before of companies overusing non-compete agreements. The legislators could largely prevent that issue by defining the exceptions very specifically so as to not create a wide umbrella under which employers can claim that the Work Act does not apply to them.

In defining these exceptions, legislators could look to the White House and U.S. Treasury 2016 reports that list instances when non-competes can provide social benefits, as well as consulting Illinois common law precedent when courts have found legitimately reasonable uses of non-compete agreements between employers and low-wage employees.[161] One of those exceptions could include situations where the employee engages heavily with client and makes constant use of the employer's confidential information regarding those companies, which was the basis for the Appeals Court of Illinois upholding a particular agreement during a case in 1993.[162]

Even if making these exceptions highly specific still leaves open some possibility of nullifying some agreements that would be reasonable under common law standards, that occurrence would now at least happen less often than it would have before. Hence, amending the Work Act to allow for certain highly specific exceptions when employers could enter into enforceable non-compete agreements with low-wage employees would shrink the gap between the legislatures approach to what agreements would be enforceable and the approach of Illinois common law toward what should be enforceable, while still keeping the "teeth" of the Act intact.

V. CONCLUSION

For decades, Illinois state courts had the exclusive task of determining whether individual non-compete agreements were enforceable. That all changed in August 2016 when the Illinois General Assembly enacted the Work Act, which prohibits non-compete agreements with private sector employees making less than

[161] THE WHITE HOUSE, *supra* note 23, at 8; U.S. DEP'T. OF TREASURY, *supra* note 8, at 3.
[162] Lyle R. Jager Agency v. Steward, 625 N.E.2d 397, 403 (Ill. App. 3d 1993)

$13 per hour altogether.[163] The policy reasons for invoking the Act are undoubtedly sound and rooted in an effort to prevent employers from taking advantage of vulnerable employees through unreasonably restrictive agreements.[164] However, banning these agreements with low-wage workers without any room for exception runs the risk of unnecessarily nullifying some agreements that actually are backed by a "legitimate business interest" and do not impose unreasonably restrictive restraints.[165] By incorporating a set of highly-specific, limited exceptions where a non-compete agreement with a low-wage could still be enforceable, as Colorado has done with their non-compete legislation across the board, the Illinois General Assembly could ensure a nearly identical level of protection for workers while also reducing instances where a business is flatly denied the opportunity to use a non-compete agreement despite having a uniquely legitimate reason to.

[163] Illinois Freedom to Work Act, Ill. SB 3163 (2015).
[164] Brownlee and Kelly, *supra* note 25, at 1248.
[165] COLO. REV. STAT. § 8-2-113 (2017).

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TO INFINITY & BEYOND: LEGAL IMPLICATIONS FOR SPACE TOURISM

❖ NOTE ❖

*Colin Mummery**

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INTRODUCTION

In 1903 the first powered and manned flight was successfully achieved at the then desolate Kill Devil Hills, North Carolina.[166] The Wright brothers perfected an innovation that would redefine the nature of human transport for centuries. Approximately a century later in 2004, *Mojave Aerospace Ventures* won the Ansari

[166] *See,* Tom Benson, *History of Flight,* NASA (June 12, 2014), https://www.grc.nasa.gov/www/k-12/UEET/StudentSite/historyofflight.html.

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X –Prize with their suborbital flight of *SpaceShipOne*.[167] The X-Prize garnered the attention and veneration of many as it marked the first privately funded venture into suborbital space.

After the successful demonstration of *SpaceShipOne,* Richard Branson, via his space company *Virgin Galactic*, partnered with *Scaled Composites* to develop a commercial space craft for space tourism.[168] The viability and prospect for space tourism ignited a private "arms race" in the United States.

There are now a plethora of companies eliciting private missions to space. The demand is significant with estimates the global space tourism market could reach upwards of $34 billion by 2021.[169] Indeed, a simple Google search reveals numerous options for low earth, lunar, and even Mars based missions starting as early as 2018.[170] The curious or even intrepid observer can't help but marvel at the possibility of paying for a "mission" to space. However, the equally skeptical observer cannot help but wonder if these ventures will manage to liftoff if legal barriers present a stronger deterrent than even that of Earth's gravity.

BACKGROUND

The list of companies planning or even offering space tourism opportunities are bountiful and varied. *SpaceX*, founded by Elon Musk in 2002, has several promised missions in place but the soonest mission is an anniversary orbit around

[167] The team was funded by Paul Allen and led by industry pioneer Burt Rutan of *Scaled Composites.* The X-Prize Foundation awarded $10 million to the first private company to launch a reusable space craft into space twice within a two-week window. *A Brief History of Human Spaceflight,* VIRGIN GALACTIC, https://www.virgingalactic.com/human-spaceflight/history-of-human-spaceflight/.

[168] *Id.*

[169] *See,* Jesse Maida, *Top 3 Emerging Trends Impacting the Global Space Tourism market from 2017-2021:Technavio,* BUSINESSWIRE (June 16, 2017), https://www.businesswire.com/news/home/20170616005756/en/Top-3-Emerging-Trends-Impacting-Global-Space.

[170] *See, SpaceX To Send Privately Crewed Dragon Spacecraft Beyond The Moon Next Year,* SPACEX (Feb. 27, 2017), http://www.spacex.com/news/2017/02/27/spacex-send-privately-crewed-dragon-spacecraft-beyond-moon-next-year.

the moon to mark the orbital trip of *Apollo 8*.[171] *SpaceX* has also made notorious headlines for their plans to colonize Mars.[172]

World View Enterprises plans to launch a helium balloon into low earth orbit with a capsule attached in order to demonstrate the curvature of the earth and the minor effects of gravity[173]. *Blue Origin*, founded buy *Amazon's* Jeff Bezos, appears to be heading into the space industry with unfettered determination given the rapid evolution of their design and testing.[174] There are even companies such as the *Zero Gravity Corporation* that currently offer space tourism like opportunities via trips to the upper atmosphere that simulate low gravity.[175] The company merely flies an old airliner into the upper atmosphere and then dives towards the earth to simulate low gravity for a few minutes.[176]

Given the drastic rise of numerous companies in the industry the prospects of viable and even cost-conscious space tourism appear to be in reach. This entirely new frontier promises immense rewards in terms of financial remuneration for the companies involved, but there are significant legal issues that remain entirely unanswered in the resounding body of case law. The companies involved may face significant legal headwinds or even complete failure if the risks are not adequately accounted for.

The age of the space race and the cold war gave rise to a global recognition for the need to regulate space missions. The first international treaty was signed in

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[171] *Id.*
[172] *See,* Nadia Drake, *Elon Musk: In 7 Years, SpaceX Could Land Humans on Mars,* NATIONAL GEOGRAPHIC (Sept. 29, 2017), https://news.nationalgeographic.com/2017/09/elon-musk-spacex-mars-moon-bfr-rockets-space-science/.
[173] *See, The Experience,* WORLD VIEW (2017), https://www.worldview.space/voyage/.
[174] The Blue Origin method utilizes a traditional rocket design in which a space capsule is launched into space via a large rocket. The rocket returns to Earth and lands itself to be reused again so as to reduce costs. *Recent Updates,* BLUE ORIGIN (2017), https://www.blueorigin.com/news.
[175] *See, How It Works,* ZERO G (2017), https://www.gozerog.com/index.cfm?fuseaction=Experience.How_it_Works.
[176] *Id*.

1967 as the Outer Space Treaty.[177] The treaty was designed to lay out straightforward principles regarding rules for space travel. The treaty provided for jurisdiction allocation and limits based upon the country a spacecraft originated from.[178] The treaty also expressly restricts any military activity in space.[179] Given the extremely limited scope of the Outer Space Treaty there have been several international agreements targeted at specific legal issues with space travel. The Convention on International Liability for Damage Caused by Space Objects addresses a few items of liability for travel to and from space.[180] The Convention agreement assigns liability to the nation from which a spacecraft originates.[181]

Finally, in 1984 the United States Congress passed the first significant piece of legislation specifically targeted at space travel. The Commercial Space Launch Activities Act provides various regulations for space travel and was amended in 2004.[182] The Act requires private space companies to obtain licenses, insurance, and compulsory registration of their spacecraft.[183] Finally, the amendment placed the entire umbrella of space regulation under the control of the Federal Aviation Administration (FAA).[184] But as Spencer Bromberg - an attorney and avid scholar of emerging businesses - points out the Commercial Space Act provides a basic legal framework and leaves many aspects of the industry in uncertain terms.[185] While the Act imposes requirements for insurance there is no guidance on issues such as the apportionment of liability. The other glaring issue with the Act and the

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[177] *See*, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205.
[178] *Id.*
[179] *Id.*
[180] *See,* Convention on International Liability for Damage Caused by Space Objects Mar. 29, 1972, 24. U.S.T. 2389.
[181] *Id.*
[182] *See,* Commercial Space Launch Act, 49 U.S.C. §§ 7010.1.
[183] *See,* Commercial Space Launch Amendments Act of 2004, Pub. L. No. 108-492, 118 Stat. 3974 (Dec. 23, 2004).
[184] *Id.*
[185] *See,* Spencer H. Bromberg, *Public Space Travel - 2005: A Legal Odyssey into the Current Regulatory Environment for United States Space Adventurers Pioneering the Final Frontier*, 70 J. Air L. & Com. 639 (2005).

enforcement by the FAA is the uncertainty of applying law intended for aviation within the realm of the space transportation industry.

For the purposes of this note it will be helpful for the reader to distinguish between different launch vehicle designs and methods. There are primarily two methods of launch: one being the mothership and space craft model utilized by *Virgin Galactic* and the other being the traditional rocket design. The *Virgin Galactic* method utilizes a large "mother ship" fixed wing airplane to carry a space ship attached below the aircraft to an altitude around 50,000 feet.[186] The space ship is then released and rockets ignite to carry the space ship into space.[187] The space ship remains in space for a few minutes and then proceeds to glide back to Earth and lands as a normal aircraft would.[188]

The traditional rocket method is slightly different. Here, a large rocket includes a crew capsule at the top of the rocket.[189] The rocket launches from the ground, and at a certain altitude the crew capsule separates.[190] The rocket returns back to Earth and commences a landing procedure so as to be recycled once again.[191] Meanwhile the crew capsule continues upwards via another propulsion system into space. [192]The crew capsule may enter an orbit around the Earth, or it may remain in space for a few minutes, but eventually falls back to Earth.[193]

The note proceeds with an analysis of the existing legal and regulatory framework including a discussion of the legal requirements for a company involved in space travel in the United States. Part c of the analysis includes a discussion of legal liabilities for private space tourism companies. Part four of the note will present recommendations. Part five will conclude.

ANALYSIS

[186] *A Brief History of Human Spaceflight, supra* note 2.
[187] *Id.*
[188] *Id.*
[189] *Recent Updates, supra* note 9.
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*

Given the regulatory nature of the space tourism industry under the FAA, there are several problems regarding the application of aviation law towards space law. The first issue is a clear definition of the altitude above the Earth's surface for which space starts. There is indeed some confusion regarding the precise delimitation of the space boundary.[194] The FAA defines the boundary of space for a pilot as being the point in which an aircraft can no longer generate aerodynamic lift and thus must be kept aloft by some type of propulsion system.[195] Unfortunately, such an altitude varies widely for different types of aircraft or spacecraft. NASA awards an individual the status of astronaut for a flight above 50 miles.[196] So, the FAA needs to create a very clear definition of where space starts. This will help to define whether aviation law applies or if space law applies.

A. LICENSURE

The Commercial Space Launch Amendment Act of 2004 requires an entity involved in space flight activities to obtain licensure.[197] In 2007 the FAA enacted further regulation for space flight operators.[198] The requirements for a space flight operator include several items aimed at safety and informed consent.[199] The licensee must provide a participant with written notice regarding the dangers of the operation. The participant must be given an opportunity to orally ask questions before flight. The operator must obtain from the participant written informed consent. The operator must also provide participants with training regarding the nature of the space flight as well as the implementation of security measures that ensure the participant doesn't jeopardize the safety of the other flight participants or the public broadly. These requirements may seem to be limited in scope upon first glance. However, these regulations are specifically targeted at the growing

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[194] *See,* Dan Kois, *Where Does Space Begin?,* SLATE (Sept. 30, 2004), http://www.slate.com/articles/news_and_politics/explainer/2004/09/where_does_space_begin.html.
[195] *Id.*
[196] *Id*.
[197] *See,* Commercial Space Launch Amendments, supra note 18.
[198] *See,* Human Space Flight Requirements for Crew and Space Flight Participants, 71 Fed. Reg. 75, 615 (Dec. 15, 2006).
[199] *Id.*

space tourism industry.[200] These rules are essential as they provide a minimum level of safety and security for the industry, which should in turn help to minimize legal risks in the future.

B. REGISTRATION

The registration of an aircraft helps to solve issues regarding the exercise and location of jurisdiction. According to the Chicago Convention an aircraft is considered to have nationality in the country in which it is registered and therefore jurisdiction is located in the country or state of registration.[201] The same seems to be implied from the nature of the Outer Space Treaty as it states the location of registration, "shall retain jurisdiction and control over such object, and over any person hereof, while in outer space."[202] Unfortunately, this needs some clarification and the FAA could provide further guidance regarding various definitions of spacecraft.

C. LIABILITY

The concern regarding liability is the most glaring issue for any entity interested in providing space tourism services. It is also the area of extreme legal uncertainty on an international scale. The legal framework for liability in the U.S. is generally accounted for via contractual liability, which can certainly serve to ensure the viability and growth of the space tourism industry.

Professor Hobe, Director of the Institute of Air and Space Law at the University of Cologne, points out the possibility of applying the Montreal Convention for passenger liability in which the operator has unlimited liability in the international transportation of persons by aircraft.[203] The issue with utilizing the Montreal Convention with space tourism is the notable distinction in which space

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[200] *Id.*
[201] *See,* Convention on International Civil Aviation ("Chicago Convention"), Dec. 7, 1944, 61 Stat. 1180, U.N.T.S. 295, Ninth Edition ICAO Doc. 7300/9 (Annex) (2006).
[202] *See,* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205.
[203] *See,* Stephan Hobe, *Legal Aspects of Space Tourism*, 86 Neb. L. Rev. 439, 458 (2007).

tourists are not traveling via aircraft, and the destination of outer space is not international as intended by the Convention terms. The primary historical source that addresses liability for space law is The Convention on International Liability for Damage Caused by Space Objects (Liability Convention).[204] The Liability Convention determines absolute liability for the launching state of a space craft for injury or damages caused by the space craft while not on the surface of the earth.[205] The Liability Convention is directed at third party liability for acts occurring in space and thus likely does not allow passengers or tourists to pursue compensation under the Liability Convention. Given the likely inapplicable nature of the Liability Convention, the next source of law for liability purposes can be found via the national laws of the United States. Fortunately, as will be discussed further below, the U.S. law of allowing for liability waivers is perhaps the best solution for startup space tourism companies. The previously mentioned U.S. legislation Human Space Flight Requirements for Crew and Space Flight Participants allows for a company to require space tourists to sign a waiver of liability as a precondition for travel.[206]

Third party liability may have applicability under the existing international law found in the Liability Convention.[207] Under the current law the United States could be held liable if a space craft crashes in Japan for instance.[208] The U.S., as the launching state, is liable to a third-party state but can pursue risk sharing, as the U.S. does via legislation.[209] Under Section 701 of Title 49 of the U.S. Code, a company is required to obtain $500 million in liability insurance or demonstrate financial responsibility for said amount.[210] The U.S. government assumes responsibility for valid claims ranging from $500 million to $1.5 billion, and the company is then again responsible for anything in excess of $1.5 billion.[211]

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[204] *See,* Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24. U.S.T. 2389.
[205] *Id.*
[206] Human, *supra* note 25.
[207] Convention, *supra* note 15.
[208] *Id.*
[209] *Id.*
[210] *See,* 49 U.S.C. § 70104-70105.
[211] *Id.*

The many aspects of liability for space tourism operators will be of great concern. There is also immense legal uncertainty as international law is largely inadequate, and legislation in the United States is minimal.[212] As discussed above, the course for U.S. space tourism companies is to establish liability via contract for damages to the passengers. The Liability Convention does provide needed third party liability between states and the U.S. provides itself a level of recourse against companies by requiring minimal levels of insurance in order to obtain licensure.[213] The areas of uncertainty including specific launch methods, devices, or aircraft and rocket system hybrids such as *Virgin Galactic,* will need to be resolved via further legislation or through the court system.

RECOMMENDATIONS

Under the current U.S. regulatory framework there is much left to be sorted out. The FAA should concern themselves with an immediate effort to clarify certain definitions and classifications for the space tourism industry. The first matter is a clear definition of where space begins. The FAA should also provide a revised cap on the Class A airspace where commercial airlines operate. The FAA should provide definitions regarding the various types of crewmembers and the distinction with space tourists or passengers. This note did not delve into the intricacies of the space craft and the launch method. The *Virgin Galactic* design is clearly an airplane while it travels to the launch altitude and the jettisoned *SpaceShip* is clearly a space craft. The FAA could easily provide guidance regarding the distinctions between air law and space law.

While the FAA does not require space tourism operators to obtain liability waivers, this is certainly the best option to safeguard the long-term success of the industry. It should not come as a surprise that a space tourism operator would require a participant to waive nearly all of their rights and relinquish the company of any liability as a necessary prerequisite for travel. Given the novelty, the price, and the obvious danger associated with launching a vehicle into space a participant

[212] Stephen Hobe, *supra* note 30.
[213] *Id.*

should be willing to assume all of the risk. The caveat is the pilots and other required employees for an expedition into space will not assume the risk themselves for repeated launches. It is also unlikely that a space tourism operator will merely compensate their employees with extremely high salaries to justify the risk. The Commercial Space Act is intended to protect the employees involved commercial space activities.[214] This note argues that such a regime is too strict. If a company is forced to assume strict liability for their employees then even a small accident could bankrupt the company and even threaten the viability of the industry. Instead, a hybrid solution of risk sharing should be maintained via the government, the employee, and the company. The government could act to assume some responsibility or mandate a minimum salary for certain types of commercial space employees. Such a structure could work harmoniously amidst the existing requirements for liability insurance.

CONCLUSION

As soon as this year humans may start to leave the bounds of the earth for purely private endeavors as tourists. While the industry is launching into orbit amidst many areas of legal uncertainty there is at least a minimal framework of regulation and contractual liability in which the companies can operate safely. The U.S. government should monitor these endeavors via the Department of Transportation and provide guidance to help maintain the growth, viability, and full-fledged success of the industry. As time progresses the industry will benefit with more legal certainty as various cases make their way through the courts. However, this will not be possible if any single entity has to bear all of the risk, which may well cause the industry to never achieve apogee.

[214] Commercial, *supra* note 17.

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LEAVING NAFTA: THE INSURMOUNTABLE LEGAL AND ECONOMIC CHALLENGES FACING THE TRUMP ADMINISTRATION

❖ NOTE ❖

*Sophie Park**

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I. INTRODUCTION

Labeled as a treaty that steals jobs from American workers, President Donald Trump has made his disdain for the North America Free Trade Agreement known long before his inauguration. "Since the deal came into force . . . thousands of factories have closed, and millions of Americans have found themselves stranded."[215] He labels NAFTA as "one of the worst deals ever made by any country

[215] Robert D. Blackwill, *Unpacking Trump's 'Alternative Facts' on NAFTA*, FOREIGN POLICY (Sep. 15, 2017, 3:00 PM), http://foreignpolicy.com/2017/09/15/unpacking-trumps-alternative-facts-on-nafta/.

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having to do with economic development,"[216] The question is whether the current President has the authority to arbitrarily withdraw from the agreement.

Part II of this Note will give a brief history of NAFTA and the uncertain future it is facing under the Trump Administration. Part III of this Note will analyze the legal and economic issues that President Trump should face and overcome, before existing the treaty. Part IV recommends that the President Trump should participate in renegotiation of the provisions of NAFTA to reach a superior deal that will help revitalize the already ailed U.S. economy.

II. BACKGROUND

NAFTA, currently the world's biggest free-trade bloc, came into effect on January 1, 1994.[217] The purpose of this multilateral agreement was to help and incentivize companies in the three countries of the North American Continent to do business across borders. To achieve this goal, NAFTA removed tariffs on imports on virtually all goods traded among the United States ("U.S."), Canada, and Mexico.[218]

However, opponents of NAFTA, including President Trump, have argued that the agreement permits the other parties to benefit at the expense of the U.S. According to its opponents, NAFTA hurts the American economy because Americans import more goods and services from Mexico and Canada than the other way around, creating a considerable trade deficit and imbalance.[219] Additionally, the opponents state that NAFTA is to blame for job losses in the U.S. as, allegedly, many manufacturing companies in the U.S. have chosen to move factories to Mexico where labor is cheaper.[220]

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[216] *Id.*
[217] Andréa Ford*, A Brief History of NAFTA,* TIME (Dec. 30, 2017), http://content.time.com/time/nation/article/0,8599,1868997,00.html.
[218] *Id.*
[219] John Brinkley, *Trump's NAFTA Focus Is In The Wrong Place: Trade Deficits Are Irrelevant*, FORBES (Oct. 10, 2017, 12:38 PM), https://www.forbes.com/sites/johnbrinkley/2017/10/10/trade-deficits-are-irrelevant/#365a8df67d8c.
[220] *Id.*

President Trump has made unabashed public threats aimed towards Canada and Mexico stating that, unless there are significant changes made to the terms of NAFTA, the U.S. will leave the treaty.[221] The President has made it clear that he considers terminating NAFTA the "best deal" to update the 24-year-old treaty.[222] Upon President Trump's insistence, the first round of renegotiations began in August 2017,[223] and have yet to reach a resolution as of the time this Note is written, and with little probability of doing so soon.

III. ANALYSIS

A. NAFTA ARTICLE 2205: WITHDRAWAL

One point President Trump has made abundantly clear is that he could arbitrarily withdraw the U.S. from NAFTA whenever he wishes. But is this true? The current situation is alarmingly analogous to Great Britain's decision, as well as the preceding discussion, to leave the European Union in 2016. Indeed, then Republican nominee Trump praised the narrow poll result to exit the European Union, tweeting that "[they] took their country back, just like we will take America back."[224]

However, there is great dissimilarity in the language of the Treaty on European Union ("EU Treaty") and NAFTA. While the EU Treaty provides a detailed procedure triggered by a member state's notice of withdrawal, NAFTA's language on withdrawal remains ambiguous and lacks the same degree of finality.

Upon exiting the agreement, the Treaty on European Union offers systematic procedure in details as follows:

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[221] Edward Helmore, *Trump warns it's 'possible' the US will drop out of NAFTA*, THE GUARDIAN (Oct. 12, 2017, 12:08 PM), https://www.theguardian.com/world/2017/oct/12/trump-warns-its-possible-the-us-will-drop-out-of-nafta.

[222] Jeff Mason, *Exclusive: Trump Says Terminating NAFTA Would Yield The 'Best Deal' In Renegotiations,* REUTERS (Jan. 17, 2018), https://www.reuters.com/article/us-usa-trump-nafta-exclusive/exclusive-trump-says-terminating-nafta-would-yield-the-best-deal-in-renegotiations-idUSKBN1F703Y.

[223] *The North American Free-Trade Agreement Renegotiation Begins*, THE ECONOMIST (Aug. 17, 2017), https://www.economist.com/news/finance-and-economics/21726711.

[224] Donald J. Trump (@realDonaldTrump), TWITTER (Jun. 24, 2016, 2:21 AM), https://twitter.com/realDonaldTrump/status/746272130992644096.

> 1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
> 2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
> 3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.[225]

In other words, once a country formally informs the European Council of its decision to withdraw, a two-year clock begins to count down. Once the time is up, the country is free to leave the treaty. Expectedly, Britain and the European Union will continue to engage in discussions and negotiation, but once the two-year deadline arrives, Britain will officially and legally cease to be a part of the European Union, with no remaining attachment or legal question.

In contrast, the corresponding part of NAFTA does not offer the same level of finality. Instead, NAFTA Article 2205 simply states that: "A Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties. If a Party withdraws, the Agreement shall remain in force for the remaining Parties."[226]

Here, the "Party" is the U.S. government. At first glance, this provision seems to allow the exiting party to go through the six-month withdrawal period without any specific requirements. However, the language of NAFTA states that a party "may withdraw" after the six months have passed. This is different from the EU Treaty's language that "[t]he Treaties shall cease to apply." Rather, "[u]nder the plain language of NAFTA Article 2205, providing a written notice of

[225] Treaty Establishing a Constitution for Europe, Dec. 14, 2004, 2004 O.J. (C 310) 46.
[226] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L. 605, 703 (1993).

withdrawal is simply a condition that a Party must fulfil before it proceeds to withdraw form NAFTA."[227] Complicating matters further, NAFTA does not provide what such proceeding should be. Thus, even if President Trump decides to pull out of the further renegotiations with Canada and Mexico, leaving the treaty would not be as simple and swift as he has made it sound.

B. FOREIGN AFFAIRS POWERS UNDER THE UNITED STATES CONSTITUTION

Still, President Trump's supporters argue that the president can arbitrarily cause the U.S. to terminate NAFTA despite the ambiguous language of NAFTA article 2205. They argue that the president can exercise executive actions under the U.S. Constitution to deal with national emergencies and balance of payments.[228] This argument is baseless as NAFTA has not created a national emergency where a presidential action to "prohibit transactions prohibit transactions involving property in which a foreign country" is allowed.[229]

The second argument made by President Trump's supporters is that, under Section 125 of the Trade Act of 1974, the president holds the authority to unilaterally withdraw from any trade agreement, including NAFTA.[230] However, this is not the case, as Congress enacted NAFTA by passing a federal law: the NAFTA Implementation Act.[231] This legislation effectuated NAFTA provisions by implementing removal of tariffs and other pro-trade measures. In other words, as NAFTA was sanctioned and adopted by Congress, Congress thus has the power to

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[227] Jon R. Johnson, *The Art of Breaking the Deal: What President Trump Can and Can't Do About NAFTA*, Commentary No. 464 On Trade & Intl' Policy, C.D. HOWE INST. (January 2017), https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/Commentary_464.pdf.

[228] Jason Luong, *Forcing Constraint: The Case for Amending the International Emergency Economic Powers Act*, 78 TEX. L. REV. 1181 (2000) (explaining that the National Emergency Act and the International Emergency Economic Powers Act can work together because a declaration of a national emergency under the former triggers the broad regulatory powers enumerated in the latter. When triggered, under the IEEPA, the president has the power to fully regulate trade with other nations.).

[229] 50 U.S.C. § 1706 (2012).

[230] 19 U.S.C. § 2251 (2012).

[231] Bestfoods v. United States, 165 F.3d 1371, 1374 (Fed. Cir. 1999).

approve or reverse a president's decision to withdraw from the agreement under the Commerce Clause.

To further this understanding, it is essential to delve into the constitutional language which provides foreign affairs powers to the executive branch and Congress respectively. Article II Section 1 of the U.S. Constitution offers that "[t]he executive Power shall be vested in a President of the United States of America."[232] At the time of drafting, "executive Power" was interpreted to include foreign affairs powers.[233] It was therefore not seen as necessary to expressly include foreign affair powers or enumerate specific executive powers.[234] Furthermore, the Treaty Clause provides that the President has the power to make treaties "by and with the Advice and Consent of the State . . . provided two thirds of the Senators present concur."[235]

Contrastingly, the Constitution provides Congress with explicitly identified powers. The Commercial Clause gives the Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."[236] Under Clause 18 of the same article, Congress has powers that are "necessary and proper" for "carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[237] The Necessary and Proper Clause thus authorizes Congress to use any reasonable means to effectuate the exercise of the enumerated powers, including regulation of commerce with foreign nations.

In approving NAFTA, Congress explicitly granted the terms upon which the commerce of the United States with each of Canada and Mexico is regulated. It is thus Congress that has the power to regulate NAFTA under the Commerce Clause. A decision to withdraw from NAFTA significantly changes the regulation of commerce between these countries. Therefore, without Congress's approval,

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[232] U.S. CONST. art. II, § 1.
[233] Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs,* 102 MICH. L. REV. 545, 549 (2004).
[234] *Id*.
[235] U.S. CONST. art. II, § 2, cl. 2.
[236] *Id.* art. I, § 8.
[237] *Id.* art. I, § 18.

President Trump's choice to withdraw from the pact will remain merely a "suggestion," and not the effective final decision.

Thus, under the powers given by the Commerce Clause, Congress is and should be involved in decisions regarding foreign affairs matters. In conclusion, the notion that the president holds and can exercise an arbitrary authority to decide whether the treaty is inoperative and should be terminated, without challenge by the Congress, is simply and fundamentally wrong.

IV. RECOMMENDATION

From the above discussion, President Trump will unquestionably face legal obstacles if he withdraws the U.S. from NAFTA. However, these legal challenges are not the only reason for the current renegotiations over NAFTA terms with Canada and Mexico. The U.S. would lose more than it would gain by withdrawing. One of the potential devastating effects of leaving the treaty is a tumultuous downturn in the stock market. The impact would be felt in almost every industry such as agriculture, car manufacturing, and energy. For example, the U.S. auto industry has relied heavily on cheap and quality auto parts manufactured and delivered from Mexico.[238] Also, in regards to agriculture, about three-quarters of high fructose corn syrup made in the U.S. is sold to Mexico.[239]

Pulling out of NAFTA may have some deterring effect on companies to outsource as the Trump Administration argued.[240] Yet, it would not instantly revitalize the economy either. The administration seems to be greatly dissatisfied with the great imbalance in trade with Mexico, with which the U.S. had a $60 billion trade deficit in one fiscal year.[241] However, it should be noted that most rural

[238] Alexia Fernandez Campbell, *The U.S., Canada, and Mexico are Renegotiating NAFTA—Here's What Each Country Wants*, VOX (Sep. 5, 2017, 11:13 AM), https://www.vox.com/policy-and-politics/2017/9/5/16156924/.
[239] *Id.*
[240] Daniel Dale, *NAFTA has 'Fundamentally Failed Americans, Says Trump's Top Trade Official*, METRO NEWS (Aug. 16, 2017), http://www.metronews.ca/news/canada/2017/08/16/nafta-fundamentally-failed-americans-trump-trade-official.html.
[241] Jeffry Bartash, *Trump Calls U.S.-Mexico Trade One-Sided—And Here's The Reality,* MARKET WATCH (Jan. 27, 2017), https://www.marketwatch.com/story/trump-calls-us-mexico-trade-one-sided-heres-the-reality-2017-01-26.

counties in the US, in which voters overwhelmingly chose President Trump,[242] rely on selling agricultural products to Mexico.[243] These supporters would not be pleased once duty-free access to the Mexican market under the treaty is no longer available. Indeed, current renegotiations and the possibility of withdrawing from NAFTA are causing serious concern among American manufacturers as to whether changes would negatively impact their business. They are especially worried about potential disruption in global supply chain and increased costs in manufacturing that would follow after the termination of NAFTA.[244] Therefore, terminating NAFTA and restoring tariffs to all trade transactions would simply hurt the already beleaguered American economy.

The best course of action for the Administration is to lead the negotiation and garner as much favorable terms to the United States as possible. The United States still has the leverage because Canada and Mexico understand that their economies would be hit harder should the treaty end because of their greater dependency on the trade with the U.S. market.[245] Reflecting worries felt in both Canadian and Mexican markets, in early January of 2018, when it was reported that President Trump was looking to end the negotiation, Canadian and Mexican Currencies plummeted almost immediately.[246] The Trump Administration must stop relying on the brash rhetoric and empty-handed, hostile threats, and start an

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[242] Danielle Kurtzleben, *Rural Voters Played a Big Part in Helping Trump Defeat Clinton*, NPR (Nov. 14, 2016), https://www.npr.org/2016/11/14/501737150/.
[243] Ted Genoways, *Farmers Voted Heavily for Trump. But His Trade Policies Are Terrible For Them*, WASH. POST (Oct. 24, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/10/24/farmers-voted-heavily-for-trump-but-his-trade-policies-are-terrible-for-them/?utm_term=.2d06ca0fac3f.
[244] Joseph Parilla, *How US States Rely On The NAFTA Supply Chain*, BROOKINGS.EDU (Mar. 30, 2017), https://www.brookings.edu/blog/the-avenue/2017/03/30/how-u-s-states-rely-on-the-nafta-supply-chain.
[245] Jacob M. Schlesinger, Commerce Secretary Ross: U.S. Has Leverage to Pressure Mexico, Canada in NAFTA Talks, WALL ST. J. (Nov. 14, 2017, 3:33 PM), https://www.wsj.com/articles/commerce-secretary-ross-u-s-has-leverage-to-pressure-mexico-canada-in-nafta-talks-1510691610.
[246] David Ljunggren, *Exclusive: Canada Increasingly Convinced Trump Will Pull Out Of NAFTA*, REUTERS (Jan. 10, 2018, 1:16 PM), https://www.reuters.com/article/us-trade-nafta-canada-exclusive/exclusive-canada-increasingly-convinced-trump-will-pull-out-of-nafta-idUSKBN1EZ2K4.

honest and sincere discussion to reach a superior deal, more favorable to the United States than the current provisions allow.

The Administration is facing immense pressure to win over NAFTA both to prove its capability in handling economic policy, and establish that their slogan of "American First" is nothing but empty words and braggadocio. Diane Swonk, chief economist at Grand Thornton noted that the three countries are "dangerously close to allowing an ill-informed group to lose all that NAFTA has delivered in terms of competitiveness of North American companies."[247] President Trump will need to make careful calculation and estimation on what could be achieved or lost from the outcome of the negotiations. Much more importantly, Trump administration should start addressing the truth about the U.S. market's inability to rebound, rather than blaming NAFTA for job losses and bad economy.

V. CONCLUSION

Even if President Trump eventually moves for withdrawal, he must deal with not only legal challenges but also enormous domestic economic consequences. President Trump should make use of various political and economic tactics to continue to have leverage in bargaining and achieving real results. The outcome could easily reshape the economy of the United States, which has grown increasingly dependent on trade with Canada and Mexico. Already burdened with innumerous legal battles to defend itself in just one year of presidency, the Trump Administration would not want to risk facing another disaster, which as may well have both legal and economic repercussions. Yet, if there is anything President Trump has proved of himself, it is that he is unpredictable. How the fate of NAFTA is decided will surely be an interesting journey to follow, as discussions continue in 2018.

[247] Anu Bararia, *NAFTA Talks Seen Ending Happily, Despite Growls From Trump*, REUTERS (Jan. 19, 2018, 7:25 AM), https://www.reuters.com/article/us-trade-nafta-poll/nafta-talks-seen-ending-happily-despite-growls-from-trump-idUSKBN1F81H3.

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SHARING IS NOT CARING: INTERNET SERVICE PROVIDERS SELLING CUSTOMER DATA WITHOUT CONSENT

❖ NOTE ❖

*Stuart G. Walker**

TABLE OF CONTENTS

I. INTRODUCTION

Jim uses his computer for everything: Shopping, talking to friends, running his business, keeping up with current events, and relaxing while watching YouTube. In the privacy of his own home, he assumes that everything he does on the computer is private. He frequents a website dedicated to managing a medical condition. He visits a website for substance abuse self-help. He visits a car website and looks up a specific model of car. At some point he notices he has started to get spam mail and emails about managing substance abuse, AA groups in his area, and local car dealerships. It cannot be a coincidence. He did not enter any of his personal

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information on these websites. How could they find his email or address? They didn't, but his Internet Service Provider knew those things all along.

People are uneasy about the large amounts of our data that corporations have and how they might be using it. Their concern, however, should be for the significant gaps in regulation of Internet Service Providers (ISPs).[248] Just as Telephone companies connect individuals' telephone calls, ISPs connect internet users to the internet, channeling their requests to access websites.[249] ISPs can share or sell their customers' internet information without consent.[250] This is a result of the Federal Communication Commission (FCC) policy, deficiencies in the Electronic Communications Privacy Act (ECPA) of 1986, and the inability of the FCC and Federal Trade Commission (FTC) to coordinate efforts to regulate the industry while protecting consumers.

This note explores the gap in regulation for ISPs and the likely outcome and privacy effects of recent litigation between the states and the FCC. The discussion will briefly summarize advertising and selling data on the Internet, the privacy limitations of ISPs, and administrative agencies responsible for regulating ISPs. Then the discussion will proceed and analyze recent litigation considering case law and its likely effect on ISP privacy regulation. Finally, this note will recommend a possible solution that balances business and user privacy interests.

II. BACKGROUND

ISPs have complete access to their user's web information. All user internet traffic passes through ISPs.[251] Like a telephone company switchboard, an ISP

[248] ISP's include Comcast, AT&T, Cox Communications, Time Warner Cable and Charter, to name a few.
[249] Tim Fischer, *Internet Service Provider (ISP) What Exactly Does An Internet Service Provider Do?*, LIFEWIRE (Dec. 1, 2017), https://www.lifewire.com/internet-service-provider-isp-2625924.
[250] Jon Brodkin, *How Isps Can Sell Your Web History—And How To Stop Them,* ARS TECHNICA (Mar. 24, 2017, 11:20 AM), https://arstechnica.com/information-technology/2017/03/how-isps-can-sell-your-web-history-and-how-to-stop-them/.
[251] Paul Ohm, *The Rise and Fall of Invasive ISP Surveillance*, U. ILL. L. REV. 1417, 1423 (2009).

directs requests for webpages, and transmits the content back to the user.[252] An ISP creates a record of every webpage the user visits as well as uploaded information such as YouTube videos, tweets, Facebook, instant messages, downloaded music, images, and emails.[253] ISPs' raw records include when users are online, where users are when they connect to the Internet, and how often users visit websites. All of this constitutes user information.[254] It can reveal an abundance of information about user habits.[255] For example, if a user looked up an abortion website, visited a planned parenthood website, accessed dcabortionfund.org, and then visited google maps, all within an hour, one could reasonably conclude the user was planning to have an abortion, was female, in the Washington D.C. area, and needed help paying for an abortion.[256]

ISPs can sell this wealth of raw information to marketing and data companies, generating revenue beyond their users' internet subscription fees.[257] Online advertising is a major source of revenue for internet companies.[258] This is because advertisements are more effective when they are tailored to the web

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[252] *Cf. Id*.

[253] *Id*. at 1438–39 ("It includes a replica copy of every web page visited and every e-mail message sent or received. It includes every instant message, video download, tweet, Facebook update, file transfer, VoIP conversation, and more.").

[254] "Information" is a general term. ISPs have subscribers information relating to their accounts such as names, billing information, addresses, service packages, IP addresses, web addresses visited, browser types like Chrome, Mozilla, Edge, as well as time, location, file size, and transmitted file names and many other pieces of information. *See generally*, *What ISPs Can See*, UPTURN (Mar. 2016), https://www.teamupturn.org/reports/2016/what-isps-can-see, (last visited Feb. 2, 2018).

[255] Darlene Storm, *What Can Your ISP Really See And Know About You?*, COMPUTER WORLD (Mar 14, 2016, 10:53 AM), https://www.computerworld.com/article/3043490/security/what-can-your-isp-really-see-and-know-about-you.html.

[256] *Id*.

[257] Rani Molla, *ISPs Could Lose a Data Gold Mine*, BLOOMBERG: GLADFLY, (April 7, 2016, 8:00 AM), https://www.bloomberg.com/gadfly/articles/2016-04-07/fcc-rules-could-hurt-isp-data-mining.

[258] *See* Nathaniel Gleicher, *Neither A Customer Nor A Subscriber Be: Regulating the Release of User Information on the World Wide Web*, 118 YALE L.J. 1945, 1948–49 (2009); Jay P. Kesan, Carol M. Hayes and Masooda N. Bashir, *Information Privacy and Data Control in Cloud Computing: Consumers, Privacy Preferences, and Market Efficiency*, 70 WASH & LEE L. REV. 341, 346 (2013).

users,[259] since consumers are more likely to buy products that are targeted at them.[260] Tailored or customized advertising depends on collecting and storing information[261] about users' habits or characteristics and presenting advertisements in a way that fits their interests.[262] Data brokers buy customer information from ISPs, and then aggregate it to create collections of detailed profiles of people.[263] Then they may sell the profiles to anyone including the government or law enforcement.[264]

There are significant privacy concerns in ISP data collection and storage because ISPs are exempt from major parts of privacy laws. Much of the basis of online privacy policy for ISPs involves the Electronic Communications Privacy Act of 1986 (ECPA).[265] The ECPA includes protection for stored and transmitted communications as well as guidelines for disclosure of the content of the communications.[266] Storage is specifically covered under The Stored Communication Act (SCA), which "punishes the intentional unauthorized … access to a wire or electronic communication while it is in electronic storage…."[267] The SCA, however, excludes actions by ISPs regarding stored communications as conduct authorized "by the person or entity providing a wire or electronic

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[259] Kesan et al., *supra* note 11.
[260] *See* Jacob B. Hirsh, *Marketing Is More Effective When Targeted to Personality Profiles*, ASSOCIATION FOR PSYCHOL. SCI. (May 21, 2012), https://www.psychologicalscience.org/news/releases/marketing-is-more-effective-when-targeted-to-personality-profiles.html.
[261] Gleicher, *supra* note 11.
[262] *See*, Rebecca Walker Reczek, Christopher Summers, Robert Smith, *Targeted Ads Don't Just Make You More Likely to Buy — They Can Change How You Think About Yourself*, HARV. BUS. REV. (Apr. 04, 2016), https://hbr.org/2016/04/targeted-ads-dont-just-make-you-more-likely-to-buy-they-can-change-how-you-think-about-yourself.
[263] *Cf.*, *Data Brokers And "People Search" Sites*, PRIVACY RIGHTS CLEARINGHOUSE (Oct 17, 2017), https://www.privacyrights.org/consumer-guides/data-brokers-and-people-search-sites.
[264] *Id.*
[265] 18 U.S.C. §§ 2510-2522, 2701–2712 (2012).
[266] *Id.*
[267] 18 U.S.C. § 2701 (2012); *see* §§ 2701–2712 (2012).

communications service."[268] The SCA allows voluntary disclosure of any and all non-content user information by an ISP, "to any person other than a governmental entity."[269]

Courts have interpreted the SCA and ECPA to give the most protection to email content and less protection to consumer account information like web browser records. Courts hold "content" to mean "the substance, purport, or meaning of [the] communication"[270] including the written portions of emails,[271] texts,[272] and email subject lines.[273] Non-content includes information such as customer account information and metadata including user location,[274] IP address,[275] web address,[276] email recipient,[277] and possibly even search terms.[278]

Consumers cannot avoid collection and sale of their data even if they switch to a smaller ISP or attempt to sacrifice speed for privacy by using an ISP that provides slower internet speeds. Even if switching to a different ISP was a solution, internet users do not have many choices of ISP providers. In 2015, the FCC reported that eighty percent of US Census blocks[279] had access to one or fewer internet providers.[280] In 2017, around 100 million Americans had no choice but to get

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[268] *Id.* § 2701.
[269] 18 U.S.C. § 2702(c)(6) (2012).
[270] 18 U.S.C. §2510(8) (2012).
[271] Quon v. Arch Wireless Operating Co., Inc., 445 F. Supp. 2d 1116, 1135 (C.D. Cal. 2006).
[272] *E.g.*, Quon v. Arch Wireless Operating Co., Inc., 529 F.3d 892, 910 (9th Cir. 2008).
[273] Graf v. Zynga Game Network, Inc. (In re Zynga Privacy Litig.), 750 F.3d 1098, 1106 (9th Cir. 2014).
[274] *See*, Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to Gov't, 620 F.3d 304, 305-06 (3d Cir. 2010) (considering cell phone location data to be non-content).
[275] *Graf,* 750 F.3d at 1104.
[276] *Cf.*, *In re* Google Inc. Cookie Placement Consumer Privacy Litig., 806 F.3d 125, 139 (3d Cir. 2015) (arguing that in a special case some URLs might qualify as content. This implicitly acknowledges that generally URLs are not content.).
[277] *Graf*, 750 F.3d at 1107.
[278] *In re Google*, 806 F.3d at 137.
[279] *Geographic Terms and Concepts – Block,* UNITED STATES CENSUS BUREAU https://www.census.gov/geo/reference/gtc/gtc_block.html (defining Block as small geographic areas divided by the number of people present; used to uniformly group people for the census) (last visited Jan. 18, 2018).
[280] Jon Brodkin, *US Broadband: Still No ISP Choice For Many, Especially At Higher Speeds*, ARS TECHNICA (Aug. 10, 2016, 10:43 AM),

broadband from an ISP that violated Net Neutrality.[281] Thus, many Americans have no choice but to sacrifice their privacy for use of the Internet.

The FCC is the administrative agency responsible for regulation of ISPs. The FCC's authority over ISPs was legislated by the Telecommunications Act of 1996 which modified the existing the Communications Act of 1934.[282] This authority[283] includes the ability to regulate according to ISP designation as a common carrier under Title II, or under § 706 to encourage growth, competition, remove barriers to infrastructure development and overall broadband access to consumers.[284]

Historically, the FCC has done little to regulate ISPs' use of customer information.[285] But in 2016, the FCC ordered privacy protections for customers that would have required ISPs to get customer consent before selling or distributing their customers' information.[286] Then in March 2017, before it could take effect, Congress voted to undo the order.[287] That law further prevents the FCC from

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https://arstechnica.com/information-technology/2016/08/us-broadband-still-no-isp-choice-for-many-especially-at-higher-speeds/.

[281] Kaleigh Rogers, *More than 100 Million Americans Can Only Get Internet Service from Companies That Have Violated Net Neutrality*, VICE: MOTHERBOARD (Dec. 11, 2017, 1:30 PM), https://motherboard.vice.com/en_us/article/bjdjd4/100-million-americans-only-have-one-isp-option-internet-broadband-net-neutrality (using a liberally broad definition of 'net neutrality violation' to mean behaviors that are opposed to it, including politically opposing net neutrality, all the way to actually throttling back on internet speeds).

[282] Haran Craig Rashes, *The Impact of Telecommunication Competition and the Telecommunications Act of 1996 on Internet Service Providers*, 16 TEMP. ENVTL. L. & TECH. J. 49, 60 (1997); *see also,* 47 U.S.C. §§ 153, 522 (2012).

[283] 47 U.S.C. § 154 (2012) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter[5], as may be necessary in the execution of its functions"); *see,* Jim Chen, *The Authority to Regulate Broadband Internet Access Over Cable*, 16 BERKELEY TECH. L.J. 677, 723 (2001).

[284] Verizon v. F.C.C., 740 F.3d 623, 635 (D.C. Cir. 2014), *see also*, 47 U.S.C. §§ 1302(a)–(b) and 706(b).

[285] *Cable Television Privacy Requirements Enter the World of Internet Service Providers,* MEDIA L. & POL'Y, SPG 1997, at 1, 5–6

[286] FCC, NO. 16-106, REPORT AND ORDER: PROTECTING THE PRIVACY OF CUSTOMERS OF BROADBAND AND OTHER TELECOMMUNICATIONS SERVICES (2016); *see also* 47 C.F.R. § 64.

[287] Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, Pub. L. 115-22, April 3, 2017, 131 Stat 88.

attempting to promulgate similar consumer privacy protections against ISP's in the future.[288] On January 4, 2018, the FCC issued an order, *In the Matter of Restoring Internet Freedom,* to declassify ISPs as common carriers, undoing "Net Neutrality"[289] in order to "exercise [the FCC's] forbearance authority to establish a 'light-touch' regulatory regime"[290] and "return jurisdiction to regulate broadband privacy and data security to the Federal Trade Commission."[291]

Handing authority back to the FTC, as the FCC does in the order, *In the Matter of Restoring Internet Freedom*, is insufficient to protect users' privacy from the brazen and open selling of data. The Federal Trade Commission (FTC) plays a role in enforcing privacy policies by prosecuting companies' use of "unfair or deceptive trade practices" under § 5 of the Federal Trade Commission Act,[292] which includes companies' privacy policies.[293] A privacy policy, even if just a general statement or a non-binding "promise that is offered freely and equally to all people,"[294] can be regulated by the FTC as a false or misleading business practice

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[288] Richard S. Beth, *Disproval of Regulations by Congress: Procedure Under the Congressional Review Act*, CONGRESSIONAL RESEARCH SERVICE (Oct. 10, 2001), at Summary ¶ 2, https://www.senate.gov/CRSpubs/316e2dc1-fc69-43cc-979a-dfc24d784c08.pdf.

[289] *What is Net Neutrality?*, ACLU (Dec. 2017), https://www.aclu.org/issues/free-speech/internet-speech/what-net-neutrality (Net Neutrality is basically a policy to prevent ISPs from controlling or limiting speed or access to websites, or discriminating by selling faster internet traffic to sites willing to pay more) (Net Neutrality is not central to the issue of privacy, but the results of Net Neutrality litigation and challenges to FCC preemption may set precedents for other areas, including whether the FCC can preempt state laws regulating ISP privacy policy.).

[290] FCC, *In the Matter of Restoring Internet Freedom,* DECLARATORY RULING, REPORT AND ORDER, AND ORDER, (Adopted: Dec. 14, 2017) (released: Jan. 4, 2018), ¶ 274.

[291] *Id.* ¶181.

[292] Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055, 2114 (2004) (internal footnotes and citations omitted).

[293] FEDERAL TRADE COMM'N, *Enforcing Privacy Promises*, https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy/enforcing-privacy-promises. (last visited Jan. 17, 2018).

[294] Austin-Spearman v. AARP & AARP Servs. Inc., 119 F. Supp. 3d 1, 11–12 (D.D.C. 2015).

that induced the user to accept and use the service.[295] This means that the FTC enforces a company's own privacy policies against it, ensuring the company does what it says it will do. The company still decides what, if any, privacy policy to have.[296] This means the FTC is unable to proactively change an ISP's ability to share information so long as the ISP's privacy policy says that it can do so.

The FCC's order, *In the Matter of Restoring Internet Freedom,* produces a gap between the protection users may expect and what the FTC can provide. The FCC implicitly acknowledges this gap when it suggests users must rely on self-help measures[297] to protect their privacy from intrusion by their ISPs,[298] while reserving the ability to review the reasonableness of ISP practices on a case-by-case basis.[299]

III. ANALYSIS

The FCC's order *In the Matter of Restoring Internet Freedom,* has not given any meaningful privacy authority to the FTC. The reservation[300] of authority combined with the preemption of state regulation means that any change to ISP practices or protection of ISP user privacy will have to come from Congress, unless the courts disagree with the FCC about preemption.

The FCC order explicitly preempts state legislation that might impair or inhibit ISPs from the view and mission of the FCC.[301] Two states previously passed laws that regulate ISPs' ability to share information without customer consent,[302] while a number of states have internet privacy legislation pending.[303] Twenty-one

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[295] FTC, *Enforcing Privacy Promises*, *supra*.; *See generally*, Federal Trade Commission Act, 15 U.S.C. §§ 41 et seq. (2012).
[296] Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055, 2114 (2004) (internal footnotes and citations omitted).
[297] *I.e.*: using a VPN, HTTPS, and TOR.
[298] FCC, *In the Matter of Restoring Internet Freedom,* DECLARATORY RULING, REPORT AND ORDER, AND ORDER, (Adopted: Dec. 14, 2017) (released: Jan. 4, 2018) at ¶ 305.
[299] *Id*.
[300] *See id*. at fn. 52.
[301] *Id*. ¶ 194-195. ("[W]e thereby preempt any so-called "economic" or "public utility-type" regulations[.]")
[302] Minn. Stat. §§ 325M.01 to .09; Nevada Revised Stat. § 205.498.
[303] NCSL, *Privacy Legislation Related to Internet Service Providers-2018*, Jan. 29, 2018, http://www.ncsl.org/research/telecommunications-and-information-technology/privacy-legislation-related-to-internet-service-providers.aspx.

states including Illinois have filed lawsuits challenging the grounds for preemption.[304] These suits primarily contest the FCC repeal of Net Neutrality,[305] and do not specifically address privacy. Their complaints are grounded either on problems with the Net Neutrality comment process,[306] or they challenge the FCC's ability to preempt states that wish to introduce Net Neutrality regulation on the state level.[307] The resulting precedent of this litigation will likely affect states' laws regulating ISPs, including internet privacy protection.

The existing case law gives an indication of how this litigation might be decided. In 2004, the Supreme Court held in *Nixon v. Missouri Municipal League*, that the FCC did not have the ability to preempt state regulations that specifically and only targeted the ability of municipal authority to participate the telecommunications market.[308] The case involved a Missouri municipality providing telecommunications services prohibited by Missouri statutes.[309] The FCC did not claim preemptive authority, and according to the *Gregory* rule,[310] such

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[304] Jon Brodkin, *21 States Sue FCC To Restore Net Neutrality Rules,* ARS TECHNICA (Jan. 16, 2018, 3:17 PM), https://arstechnica.com/tech-policy/2018/01/21-states-sue-fcc-to-restore-net-neutrality-rules/.

[305] *What is Net Neutrality?*, ACLU, https://www.aclu.org/issues/free-speech/internet-speech/what-net-neutrality (last visited Feb. 2, 2018) (Net Neutrality is basically a policy to prevent ISPs from controlling or limiting speed or access to websites, or discriminating by selling faster internet traffic to sites willing to pay more).

[306] *A.G. Schneiderman: I Will Sue to Stop Illegal Rollback of Net Neutrality*, N.Y. State Office of the Attorney General, press release (Dec. 14, 2017), https://ag.ny.gov/press-release/ag-schneiderman-i-will-sue-stop-illegal-rollback-net-neutrality; *Madigan Will Appeal FCC Vote to Eliminate Net Neutrality Rules*, Illinois State Office of the Attorney General, press release (Dec. 14, 2017), http://www.illinoisattorneygeneral.gov/pressroom/2017_12/20171214.html.

[307] *Attorney General Becerra Sues FCC Over Repeal of Net Neutrality Rules,* California State Office of the Attorney General, press release (Jan. 16, 2018), https://oag.ca.gov/news/press-releases/attorney-general-becerra-sues-fcc-over-repeal-net-neutrality-rules; *see also*, Ben Heuso, Mike Morrell, *Re: Federal Communications Commission's December 14, 2017 decision to end oversight over Internet Service Provider industry and its impact on privacy and network neutrality*, ELECTRONIC FRONTIER FOUNDATION (Jan. 11, 2018).

[308] Nixon v. Missouri Mun. League, 541 U.S. 125, 140–41 (2004).

[309] *Id.* at 128–132.

[310] Gregory v. Ashcroft, 501 U.S. 452, 464 (1991) ("[W]e must be absolutely certain that Congress intended such an exercise. '[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very

preemptions should be clearly intended by congress. The case interpreted § 253 of the Telecommunications Act, which prevents "any entity" from prohibiting telecommunications service.[311] The Supreme Court held that § 253 did not indicate that "any entity"[312] was intended to apply to matters between a state and its local government,[313] indicating that the FCC's ability to preempt state privacy laws depends on whether the state is regulating public entity and whether the scope is local or interstate.

Ten years later in 2014, the D.C. Circuit Court held in *Verizon v. F.C.C.*, that § 706 was a congressional grant of authority to adopt regulations or take "immediate action" . . . "by removing barriers to infrastructure investment and by promoting competition[.]"[314] Section 706(a)-(b) of the Telecommunications Act indicates, the FCC and states will encourage deployment on a "reasonable and timely basis" of telecommunications with measures that promote development or remove barriers, and further allow that if deployment does not occur in a "reasonable and timely fashion" that the FCC take immediate action to accelerate deployment by removing barriers and promoting competition.[315] Verizon disputed

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procedure for lawmaking on which *Garcia* relied to protect states' interests.'" (citation omitted)).

[311] 47 U.S.C. § 253 (2012) ("No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.").

[312] *Nixon,* 541 U.S. at 129.

[313] *Id*. at 140.

[314] Verizon v. F.C.C., 740 F.3d 623, 635, 641 (D.C. Cir. 2014) ("[W]e believe the Commission has reasonably interpreted section 706(b) to empower it to take steps to accelerate broadband deployment if and when it determines that such deployment is not "reasonable and timely.").

[315] *Id.* at 635. (quoting § 706(a) "The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." Quoting § 706(b): "[if] the Commission find that "advanced telecommunications capability is [not] being deployed to all Americans in a reasonable and timely fashion," it "shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.")

an FCC order to ISPs on transparency practices, prohibiting blocking and "throttling" of internet speed.[316] The court applied the *Chevron* rule[317] and determined that the FCC's order was a reasonable resolution of the ambiguity[318] given the FCC's findings that broadband deployment was not reasonable and timely.[319] This shows that courts are willing to adopt FCC interpretations, at least as they relate to private entities, if the FCC provides a reasonable interpretation of the Telecommunications Act in the scope of an interstate context.

In 2016 the Sixth Circuit Court held in *Tennessee v. Federal Communications Commission*, that under § 706, the FCC did not have power to preempt state regulations prohibiting the expansion of telecommunications operated by municipalities.[320] The court used the *Gregory* rule, but based the reasoning that § 706 shared power between the FCC and state government, specifying that state authority could not trump a municipality's discretion without a clear statement from congress in the statute.[321] The court also limited the scope of its holding to FCC attempts to preempt state regulation over municipalities; it declined, however, to say § 706 had no preemptive power.[322]

These decisions can be unified if courts are acknowledging FCC primacy under a *Chevron* standard in well-reasoned FCC orders over private telecommunications entities operating in an interstate context, and a *Gregory* standard towards state authority over state local government in an intrastate context. The current litigation between the states and the FCC is a fight over who has authority over private entities (ISPs) engaged in interstate Telecommunications. When the regulatory action contemplated by states may have effects to telecommunications that extend interstate, courts will likely interpret Federal

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[316] *Id*. at 33–34.
[317] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
[318] *Verizon,* 740 F.3d at 641.
[319] *Id*. at 635 ("[I]f we determine that the Commission's interpretation of section 706 represents a reasonable resolution of a statutory ambiguity, we must defer to that interpretation."); *See also*, *Chevron,* 467 U.S. at 843.
[320] Tennessee v. Fed. Commc'ns Comm'n, 832 F.3d 597, 613 (6th Cir. 2016).
[321] *Id*.
[322] *Id.* at 613–14.

regulations to the contrary as having preemptive force.[323] Given the possible negative effects of inconsistent application of Net Neutrality across states, courts would very likely find that the FCC has preemptive authority over states' legislation regarding interstate ISPs.

States that have passed privacy laws affecting ISPs would be open to preemption under this precedent.[324] As more states implement their own privacy laws restricting ISP sale of consumer information on the citizens of that state, it will quickly become difficult for ISPs to comply as internet traffic is being routed through various states as well as make up revenue lost from restrictions on selling data. Future litigation may duplicate *Verizon*, and ISPs will petition the FCC to declare states' privacy requirements on ISPs to be barriers interfering with the interstate goals of § 706, and therefore within the power of the FCC to preempt states' privacy laws as barriers to the growth of broadband. ISP's claims will become stronger as more states implement privacy laws, and if the laws are not uniform between the states.

Ultimately, the current states' cases against the FCC and any state laws that ISPs may litigate as violations of the FCC order, will likely be found in favor of the FCC. The congressional authority placed in the FCC given its granted power to regulate ISPs in the interstate transmission of data over the Internet is clearly under the authority of the FCC. The only way therefore to change the FCC, is through congressional legislation that will update the aged ECPA of 1986.

IV. RECOMMENDATION

The best solution would be legislation updating the ECPA to modern internet-age conceptions of privacy and apply it to all internet entities. Legislation solely targeting ISPs would not balance user privacy interests uniformly beyond ISPs to

[323] *Gregory*, 501 U.S. at 463–64.
[324] Jon Brodkin, *Pressure Grows On FCC To Kill State Consumer Protection Laws,* ARS TECHNICA (Nov. 15, 2017, 12:10 PM), https://arstechnica.com/tech-policy/2017/11/broadband-lobby-steps-up-attack-on-state-privacy-and-net-neutrality-laws/.

other internet companies as well. Care must be taken to also account for the importance of advertising and data collection to the revenue of internet services. The difficulty of balancing financial and privacy concerns is one reason why privacy legislation has likely not yet occurred. It is not desirable or financially viable to restrict all data collection, prohibit data sales, or advertising. Doing so may chill or restrict the growth of internet infrastructure as the FCC claims, or stop internet company startups or the dissemination of free applications and programs.

Drawing a line might be palatable if the line were "customizable" by individual users on a continuum and configured to favor business interests with a "low privacy" default setting. But like the "Do Not Call" list,[325] individuals must opt-in to get the benefit of additional privacy. The privacy settings would have to be protected, meaning that companies could not discriminate against users (slowing connections, denying service) because one opted into more privacy. Companies would be prohibited from attempting to require that users "waive" their privacy settings in order to nullify the user's privacy on their service.

Psychological studies have shown the effect of default settings in employee 401k contributions,[326] and therefore one could assume that most internet users would not change their settings. Users that don't care about their privacy won't touch their default settings, while those that do care would opt for the highest settings. This would preserve the revenue generating potential of internet data collection while allowing improvements in privacy to those that care enough to opt into higher settings on an internet privacy continuum.

Such legislation would put meaningful privacy control in the users' hands and allow them to control what information is collected and sold, while balancing the financial concerns of companies such as ISPs and internet companies.

V. CONCLUSION

[325] *See* Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(c) (2012).
[326] James J. Choi, David Laibson, Brigitte Madrian, Andrew Metrick, *For Better or For Worse: Default Effects and 401(k) Savings Behavior, in* PERSPECTIVES ON THE ECONOMICS OF AGING, David Wise (Ed.). University of Chicago Press, Chicago, IL, 81 (2004).

In conclusion, the current privacy laws are insufficient for regulating ISPs data sharing. The current FCC and FTC agencies are equally unable to require ISPs to engage in or guarantee data sharing practices that allow the user control of their information, or prevent its sale. Based on recent regulatory actions and court history, state legislation may be preempted by the FCC. The only way the situation can be improved is with broad federal privacy legislation effectively updating the ECPA of 1986 to the technological advances and internet landscape of 2018.

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MONSANTO: THE DEATH OF AMERICAN FARMING

❖ NOTE ❖

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I. INTRODUCTION

In 1901, Monsanto's inception began to change the United States' farming industry forever.[327] As of 2018, Monsanto's patents control the growth of 93% of U.S. soybean seeds and 80% of U.S. corn seeds.[328] Additionally, 40% of all U.S. crops use Monsanto's products.[329] As Monsanto's control over the U.S. farming industry has grown, American farmers have begun to see this impact their own farming practices. As a result, many farmers are left with difficult decisions to make. This Note will explore Monsanto's control over the farming industry through

[327] *How Monsanto took control of our food*, TOP MASTERS IN HEALTHCARE ADMIN., https://www.topmastersinhealthcare.com/monsanto-food/ (last visited Feb. 7, 2018).
[328] *Id.*
[329] *Id.*

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its seeds in Section II, an analysis of Monsanto's impact on U.S. farmers in Section III, a recommendation for altering Monsanto's control of the farming seed market in Section IV, and will conclude in Section V. As Monsanto continues to monopolize the farming seed industry, American farming slowly loses its inherent independence.

II. BACKGROUND

With Monsanto controlling 93% of U.S soybean seeds and 80% of U.S. corn seeds, U.S. farmers are faced with few options when purchasing genetically modified (GM) seeds, especially with Monsanto monopolizing an industry that was once a product of competition cultivated by family farmers.[330] As a result, most farmers purchase their seeds from Monsanto. These seeds come with a hefty licensing agreement, which forces farmers to agree to follow Monsanto's farming procedures.[331] In addition, farmers must grant Monsanto access to their fields and records, all of which can be investigated at any time Monsanto chooses.[332] The 2011 Monsanto Technology/Stewardship Agreement stated the following:

> Grower Agrees: . . . To acquire Seed from authorized seed companies (or their authorized dealers) with the applicable licensees). To use Seed containing Monsanto Technologies solely for planting a single commercial crop. Not to save or clean any crop produced from Seed for planting, not to supply Seed produced from Seed to anyone for planting, not to plant seed for production other than for Monsanto or a Monsanto licensed seed company under a seed production contract. Not to transfer any Seed containing patented Monsanto Technologies to any other person or entity for planting. To plant and/or clean Seed for Seed production, if and only if, Grower has entered into a valid, written Seed production agreement with a Seed company that is licensed by Monsanto to produce Seed. Grower must either physically deliver to that licensed Seed Company or must sell for non-seed purposes
> or use for non-seed purposes all of the Seed produced pursuant to a Seed production agreement. Grower may not plant and may not transfer to others for planting any Seed that the Grower has produced containing patented Monsanto Technologies for crop breeding, research, or generation of herbicide registration data. Grower may

[330] *Id.*
[331] *Id.*
[332] *Id.*

> not conduct research on Grower's crop produced from Seed other than to make agronomic comparisons and conduct yield testing for Grower's own use.[333]

Monsanto also encourages neighbors and community members to report farmers who use Monsanto's seeds without a license by providing them with a toll-free hotline.[334] The licensing agreement forces farmers to buy new seeds each year that they plan on harvesting.[335] As a result, farmers cannot "save seeds" and reuse them the following year. Often times, crops naturally regrow the following year without farmers replanting seeds. This causes problems, as farmers are faced with patent-infringement lawsuits if they choose not to purchase additional seeds, yet patented Monsanto crops grow.[336]

Each year, Monsanto spends $10 million on investigating roughly 500 farmers who are suspected of patent infringement.[337] This has led to numerous court cases in which family farmers are forced to go up against a multi-billion-dollar company. In fact, as of November 2012, Monsanto had taken 410 farmers and 56 small businesses dealing with farming to court, leading to a collective total $24 million payout.[338] Additionally, many cases don't even reach court, as they are settled in pretrial. The total estimated payout that Monsanto has received from pretrial settlements and court cases is somewhere between $85 million and $160 million.[339]

In 2001, Monsanto sued Homan McFarling, a Mississippi farmer whose net worth was estimated around $75,000.[340] Monsanto alleged "breach of contract and infringement of patents claiming herbicide-resistant plants, seeds, genes, and

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[333] *Monsanto Technology/Stewardship Agreement*, FARMER'S LIFE BLOG (2011), https://thefarmerslife.files.wordpress.com/2012/02/scan_doc0004.pdf.
[334] *Id.*
[335] Elizabeth Kucinich, *Monsanto: The enemy of family farmers*, HUFFPOST (Apr. 2, 2014, 12:00 AM), https://www.huffingtonpost.com/elizabeth-kucinich/the-enemy-of-family-farmers_b_4064134.html.
[336] *Id.*
[337] *Id.*
[338] *Id.*
[339] *Id.*
[340] Monsanto Co. v. McFarling, 302 F.3d 1291, 1300 (Fed. Cir. 2002).

method of producing the genetically modified plants."[341] McFarling bought Roundup Ready® soybean seed in 1997, paid Monsanto their required licensing fee, and signed the licensing agreement in which he agreed to plant the seeds only in the 1997 planting season and to not save any seeds and replant them in any future planting season.[342] McFarling saved 1,500 bushels of soybeans and planted them in the 1998 planting season and the 1999 planting season.[343] As a result, Monsanto brought McFarling to court. The court ruled in favor of Monsanto and granted an injunction against McFarling, however, when McFarling appealed in 2002, he argued that Monsanto had violated antitrust laws.[344] The court, again, ruled in favor of Monsanto and found that Monsanto had not made any antitrust violations.[345] Monsanto brought another case against McFarling in 2004 to determine damages, which resulted in the court setting the damages amount at $375,000 in 2007.[346]

When Monsanto sued Scruggs Family Farm in 2001 for infringement, Scruggs argued "that the plaintiff's decision to obtain utility patents in lieu of certificates under the Plant Variety Protection Act is an impermissible attempt to cut off farmers' practice of saving seed for future planting, a practice long rooted in history and tradition."[347] The court also ruled in favor of Monsanto in this case, granting injunction against Scruggs.[348]

In another case, Monsanto sued William Strickland, a South Carolina farmer, in 2009 for patent infringement.[349] Monsanto accused Strickland of saving seeds and planting them in a later planting season than the planting season they were initially bought for.[350] The court, again, ruled in favor of Monsanto and

[341] *Id.* at 1291.
[342] *Id.* at 1293.
[343] *Id.*
[344] *Id.* at 1294.
[345] *Id.* at 1299.
[346] Monsanto Co. v. McFarling, 488 F.3d 973, 974 (Fed. Cir. 2007).
[347] Monsanto Co. v. Scruggs, 249 F. Supp. 2d 746, 748 (N.D. Miss. 2001).
[348] *Id.*
[349] Monsanto Co. v. Strickland, 604 F. Supp. 2d 805, 805 (D.S.C. 2009).
[350] *Id.* at 809.

ordered Strickland to pay Monsanto $44,200 for royalty fees and attorney fees in addition to $19,55.18 for infringement.[351]

These are only three of a long list of cases in which Monsanto sued U.S. farmers for infringement. As a result of these cases, many farmers are faced with financial detriment due to the multi-billion-dollar company. The importance on whether farmers have a choice of which seeds to purchase and whether this choice affects the U.S. economy has started to become recognized, and these issues will be main topics of discussion in this note.

III. ANALYSIS

In 2015, Monsanto's patent for Roundup Ready® soybean seed expired after twenty years.[352] A second version was already patented, giving Monsanto more time to enforce its strict licensing standards as it stopped selling its first version of the seeds and began to only sell the second version.[353] Even with the first patent having expired, regulatory files will be kept up to date through 2021.[354] This has allowed Monsanto to continuously enforce its licensing agreement of its first version of Roundup Ready® soybean seed even though the patent has expired. Even with a second patent in place, Monsanto is already in the process of gaining approval of a third version of Roundup Ready® soybean seed that it can patent.[355]

Farmers are left with few choices when it comes to purchasing Monsanto's seeds and agreeing to their licensing agreement, especially because GM seeds are becoming increasingly crucial to the farming industry. Additionally, farmers are at a disadvantage when it comes to bargaining power in order to negotiate favorable licensing terms against corporate giant Monsanto. As of 2017, 96% of cotton in the U.S., 94% of soybeans in the U.S., and 92% of corn in the U.S. is produced through

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[351] *Id.* at 805.
[352] Antonio Regalado, *As patents expire, farmers plant generic GMOs,* MIT TECH. REV. (July 30, 2015), https://www.technologyreview.com/s/539746/as-patents-expire-farmers-plant-generic-gmos/.
[353] *Id.*
[354] *Id.*
[355] *Id.*

some sort of genetic engineering.[356] Because Monsanto has such a strong hold on the market of these seed varieties, most farmers choose to buy Monsanto. Monsanto's technology is difficult to beat, especially because their GM seeds are purposefully engineered to survive glyphosate, something other seeds on the market can't do.[357] This component attracts many farmers, as glyphosate is the main herbicide U.S. farmers use.[358] If farmers can produce a crop that is resistant to the main herbicide they use, then they can produce a higher yield. This ultimately increases probable profits and minimizes loss. However, this comes at the price of agreeing to Monsanto's licensing agreement, which has bankrupted many farmers as a result of not adhering to Monsanto's strict guidelines. With Monsanto's dead hand control over seed practices, many farmers are left helpless when confronted with doing what is reasonable and commonly accepted and doing what will help make a profit for Monsanto.

Additionally, farmers are currently facing a difficult farming economy, as crop prices have decreased and seed prices have increased drastically over the last few years.[359] Between 1995 and 2011, the average per-acre cost of GM corn seed and GM soybean seed has increased 325% and 259% in acreage, respectively.[360] One of the results of this has been a decrease in the number of farms and acreage of farming in the U.S. Between 2008 and 2015, U.S. farmland decreased by about 6.6 million acres.[361] Within those eight years, it is estimated that the U.S. farming

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[356] *Adoption of genetically engineered crops in the U.S.*, USDA (July 12, 2017), https://www.ers.usda.gov/data-products/adoption-of-genetically-engineered-crops-in-the-us.aspx#.U-oxb4BdWN7.
[357] Regalado, *supra* note 26.
[358] Charles M. Benbrook, *Trends in glyphosate herbicide use in the United States and globally*, Envtl. Sci. Eur. (Feb. 2, 2016), https://enveurope.springeropen.com/articles/10.1186/s12302-016-0070-0.
[359] Jacob Bunge, *As crop prices fall, farmers focus on seeds,* WALL ST. J. (Oct. 16, 2016, 10:05 PM), https://www.wsj.com/articles/as-crop-prices-fall-farmers-focus-on-seeds-1476669901.
[360] Ken Roseboro, *The GMO seed cartel*, ORGANIC & NON-GMO REP. (Feb. 1, 2013), http://www.non-gmoreport.com/articles/february2013/the-gmo-seed-cartel.php.
[361] Doug Mayo, *Population growing but US farm acreage declining*, UNIV. FLA. (Mar. 4, 2016), http://nwdistrict.ifas.ufl.edu/phag/2016/03/04/population-growing-but-us-farm-acreage-declining/.

base has shrunk by 7%.[362] While the amount of farms has decreased, the size of farms has increased as large companies are able to gain more acreage and farming share as private farmers are forced out of the industry; regardless, U.S. farming has still decreased.[363]

In 2016, the U.S. population grew by 0.7%.[364] With the U.S. population growing year by year and U.S. farming decreasing year by year, the U.S. is forced to import its food from other countries. While this can create an exchange of goods that helps relations between the U.S. and other countries, it also takes business away from the U.S. economy. Additionally, it places a strong dependency on countries that may not be able to produce the amount the U.S. needs in different times of growth and expansion. This dependency can be dangerous, especially in politically uncertain times, as relations with foreign countries can turn volatile or unproductive to the needs of both parties. Food security and food access becomes an issue that can impact the country as a whole. However, U.S. citizens are left to trust the farming of other countries in order to meet their own food needs.

In discussing the U.S. economy in relation to farming, Farm Aid published the following:

> A frequently overlooked source of economic development and job creation, [farmers] are standing on the cutting edge of flourishing local and regional food systems that are sustaining economies, nourishing communities and creating a strong foundation for a stable and prosperous future. In a time when we risk losing tens of thousands of family farmers and ranchers from our land, protecting and fostering their potential and properly investing in local and regional food system development offers our nation a sound path forward.[365]

Farming creates jobs as it centers most of its activity in the country in which it produces. Most farm workers affected by the farming decrease come from low-

[362] *Id.*
[363] *Id.*
[364] *Population growth,* WORLD BANK (2017), https://data.worldbank.org/indicator/SP.POP.GROW.
[365] *Rebuilding America's economy with family-farm centered food systems*, FARM AID (June, 2010), https://www.farmaid.org/our-work/family-farmers/rebuilding-americas-economy-with-family-farm-centered-food-systems/.

income households.[366] As these jobs are forced to be vacated, workers are at a loss when looking for comparable work, especially in rural areas. This increases the unemployment rate while diminishing the quality of life in the U.S. Additionally, in losing these farms, America is losing a vast amount of small businesses that cultivate and positively influence the economy by creating jobs and providing one of the necessary resources all U.S. citizens need.

IV. RECOMMENDATION

With farming declining and seeds being a major factor in the decline, Monsanto holds the reigns in that regard. To remedy their contribution to the decline in farming, it might be advantageous for Monsanto to change its licensing agreement to something more sustainable for farmers, particularly their seed saving provision. Most of the cases brought to court by Monsanto against farmers feature seed saving. Although Monsanto requires all purchasers not to plant saved seeds in following planting seasons, perhaps allowing a two-year window to be able to plant these seeds will help alleviate some of the problems farmers have been facing as a result of Monsanto's practices. Although Monsanto may face a small decrease in profits by changing its licensing agreements in such a way, it can determine if this change directly impacts the U.S. farming practice on by implementing such a change on a trial basis.

Additionally, Monsanto's patents revolving around their glyphosate engineering do not allow for much variation and competition. Because of this, many farmers looking to plant the more sustainable and affordable GM seeds are left with few options. Perhaps if the U.S. court system were able to open channels to allow more competition in engineering seeds that are able to tolerate popular chemicals used in herbicides, such as glyphosate, more competition would be created. The amount of variation of such engineering is so minimal, that Monsanto's patents knock out a majority of comparable seeds.

[366] *The national agricultural workers survey*, U.S. Dep't Labor (Mar. 24, 2004), https://www.doleta.gov/agworker/report/ch3.cfm.

V. CONCLUSION

Although Monsanto is not the main reason for the decline in farming, the company is likely a contributing factor. Monsanto's practices and licensing agreements have placed farmers in a subordinate position that can close their farms if they do not comply with Monsanto's demands. While the U.S. government can enforce competition by minimizing the amount seed engineering of chemicals used in herbicides within patents, it's more likely that Monsanto will change their licensing agreement to be more operable for farmers. Only time will tell whether the government will step in or Monsanto will change their practices as the U.S. economic climate becomes increasingly impacted by the decline in U.S. farming.