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FOREWORD

About

The BLIS Law Review allows undergraduate students to develop their passion for legal scholarship at the University of California, Los Angeles. The objective of the BLIS Law Review is to foster critical thought about topics including, but not limited to, business law, public interest law, and capital markets. Our articles are published annually by undergraduate students who aspire to create meaningful change in the legal industry.

I am proud to share Volume IV of the Undergraduate Business Law Review at UCLA. Having been a writer for the past 2 Volumes, I know the amount of time, dedication, thought, and effort that goes into every piece. This year's staff has worked incredibly hard to provide a diverse and enriching review of relevant and pressing business law cases. It was an honor to serve as Editor-In-Chief and watch the pieces grow into their final products. I want to thank Katherine Greene and Darren Rosing for their support throughout the year. You are both so inspiring and I am grateful this review brought us together. And most importantly, thank you to all of the writers and editors for making this vision come to light. It is rewarding to see the final product come together and I look forward to seeing what the future of BLIS holds and am confident that the best is yet to come!

Vidya Patel
Editor-in-Chief

Serving as Assistant Editor-In-Chief this past year has given me the immeasurable opportunity to work hands-on with a talented group of peers, dedicated to creating the BLIS Law Review Journal. Each aspect of this review reflects the intelligence, prosody, and analysis of our writers and editors, reporting the nuanced aspects of the ever-changing realm of law. As I reflect on my journey from editor to a leadership position, I am filled with gratitude for the chance I have had to be apart of such a dynamic and dedicated community. I am particularly grateful to Vidya Patel, our exceptional and motivated Editor-In-Chief, who led us with a commitment to excellence, keen attention to detail, and genuine passion for the mission of the Journal. As a graduating senior, I am confident in the future of BLIS, knowing I am leaving it in the hands of high-caliber and capable legal scholars. Thank you!

Katherine Greene
Assistant Editor-in-Chief

Another year working for BLIS' undergraduate law review journal has effectively produced yet another amazing testament of our talented writers' and editors' hard work and dedication: Volume IV! I want to thank our diligent staff for their tireless effort, and I must express my most earnest appreciation for the labor of one superstar editor-in-chief, Vidya Patel. The review might never meet a more organized or competent leader again, but it sure will forever try to emulate her tact and commitment. It's been an honor working with this team!

Darren Rosing
Assistant Editor-in-Chief

ARTICLES

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The Rise of Legalized Sports Gambling

Written by Krithik Srinivasan
Edited by Vaishnavi Vasishta

ABSTRACT.

Since the 2018 Supreme Court case of Murphy v. NCAA, sports betting has become one of the fastest-growing industries across numerous states in the United States. With the regulation of these activities no longer determined at the federal level, many states face the conundrum of how to best deal with this trend. This article discusses the legality of gambling in the U.S., and how this new sector of sports gambling has made a financial impact that plays a significant role in our country's economy. It also delves into various legal cases throughout the history of the U.S. that have led to tension between the federal and state governments over the bounds of their regulatory capabilities. Lastly, this article will go into the economic implications of sports betting in states that have embraced favorable policies, citing how increases in tax revenues and job creation have led to further economic development and flexibility in these regions, as well as why all states should adopt policies that legalize sports gambling activities.

I. INTRODUCTION

In the United States, gambling laws have been alienated at the federal level, leaving gambling regulation in the hands of individual state governments. Despite its rampant popularity, only 48 U.S. states – based on the current regulation – have legislation set in place to allow engagement in legalized gambling. Certain types of recreational gambling, such as ones involving professional sports, are illegal in almost 40% of states.[1] This creates a system in which individuals have different levels of access to these activities based on the location in which they reside. Gambling, along with many other heavily debated issues in this country, falls into the category of controversial topics with legality in some geographic regions but not others.

Legally, gambling is defined as an activity where a person risks something of value upon the outcome of a game of chance or an understanding that they will receive something of value in the event of a specified outcome. Games of chance are a heavily debated topic in the U.S. legal system. While at first, it might seem unfair to dictate what citizens can and cannot do with their financial assets, complete deregulation in this area of the law may have social implications that are suboptimal for the country. Many argue that gambling, when left completely unregulated, may lead to a multitude of problems including increased violence, drug abuse, and bankruptcy. It is not always viewed as socially necessary, placing it in the same societal purview as other debated topics such as alcohol, marijuana, and prostitution. However, the desire for freedom to choose what one does with their personal expenditures has kept the push for legalized gambling alive, and many studies have shown that there is a tremendous economic benefit that can be achieved from loosening certain preexisting regulations. Questions about the morality of gambling have created a series of meticulous legal regulations at the state level designed to optimize economic benefits with social ramifications.

The newest emerging trend has now become sports betting, a subset of the betting market that requires individuals to make specific predictions about players or teams in professional sports leagues such as the NFL, NBA, and many more. Despite their financial success, this industry is one of the most heavily legally regulated industries in the U.S. economy at the state level. Sports betting, which is no longer regulated at the federal level, should be made legal across all 50 states in the United States due to the economic benefits provided by the recent creation of financial markets that facilitate the exchange of currency, growth and acquisitions of new companies, and increase in new jobs.

[1] Lieb, David A., and The Associated Press. "'It Just Seems Silly That Everyone Else Can Do It and We Can't,' Says Sports Gambler behind Social Media Campaign to Legalize It in Missouri." Fortune, December 27, 2023. https://fortune.com/2023/12/27/what-states-where-sports-gambling-legal-online-betting/.

II. THE SPORTS BETTING INDUSTRY

Sports betting is a subset of the gambling industry that focuses on predicting the performance of major sports athletes, organizations, and leagues. It has become a popular form of gambling due to the familiarity of its content. Its sudden rise into popularity has been aided by the fundamental groundwork that has been placed into the minds of American consumers for years by the popularity of sports like football, basketball, and baseball.

Since the 2018 Supreme Court Ruling in Murphy v. NCAA, there has been a rapid expansion in this industry. Companies dealing with sports betting markets have become one of the largest sectors of the economy, performing over $1.2 billion worth of mergers and acquisitions deals in the second quarter of 2023 alone.[2] Currently, more than 30 states have passed legislation to enable sports betting in the U.S., with the potential for more to join in the coming years, with further measures for legislative change being cited in upcoming state ballots. The current top 10 states by sports betting volume are as follows: New Jersey, Nevada, New York, Illinois, Pennsylvania, Colorado, Indiana, Michigan, Virginia, and Arizona.[3]

Economically, this has been one of the most notable burgeoning sub-industries in the 2020s. Sports betting is currently one of the fastest growing industries in the U.S. From the perspective of sportsbooks, revenue is expected to grow by 12.08% over the next four years, which would be a volume of $14.44 billion by the year 2027.[4] Based on valuation metrics, the global sports betting market is expected to grow at a compound annual growth rate of 10.3% from 2023 to 2030 to reach $182.12 billion by 2030.[5] Assuming state rules around this practice start to shift, the potential for growth in this sector will only increase as the market becomes more widely accessible to consumers.

This meteoric rise in valuation has been spearheaded by the development of notable corporations that have supplemented peer-to-peer open-market betting. These companies are known as sportsbooks, and operate as a market-maker in sports betting, similar to online brokerages for investing, such as Fidelity and ETrade. In essence, the sportsbooks are responsible for setting either the lines or odds for the list of bets they make available to the public. Lines represent the expected value for a player or team to record in a given statistic,

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[2] Staff, Verdict. “Q2 2023 Update: Sports Betting Related M&A Activity in the Technology Industry.” Verdict, September 13, 2023. https://www.verdict.co.uk/ma-activity-sports-betting-technology-industry/?cf-view.
[3] Staff, CBS Sports. “U.S. Sports Betting: Here Is Where All 50 States Currently Stand on Legalizing Online Sports Betting Sites.” CBSSports.com, November 17, 2023. https://www.cbssports.com/general/news/u-s-sports-betting-here-is-where-all-50-states-currently-stand-on-legalizing-online-sports-betting-sites/.
[4] “Online Sports Betting - US: Statista Market Forecast.” Statista, March 2024. https://www.statista.com/outlook/amo/online-gambling/online-sports-betting/united-states#revenue.
[5] “Sports Betting Market Size & Share Analysis Report, 2030.” Sports Betting Market Size & Share Analysis Report, 2030. Accessed April 21, 2024. https://www.grandviewresearch.com/industry-analysis/sports-betting-market-report.

while odds represent the expected payout to be given to the bettor if the selection they made is indeed correct.

According to a comparison of market capitalization – a sum of the value of outstanding shares of a company – the top five sportsbooks are Flutter, MGM Resorts, DraftKings, Caesars Entertainment, and Wynn Resorts, which make up a cumulative value of $81.5 billion.[6] This development has also made its way into the investment banking market, being the primary subject of many major M&A deals over the last few years. Two of the most notable transitions include Yahoo buying sports betting startup WAGR, as well as the company Endeavor purchasing Open Bet Inc. in a deal worth over $800 million.[7]

III. CASE ANALYSIS

A. Murphy v. NCAA

The surge in conversations surrounding this topic gained momentum after recent disputes that dealt with the regulation of compensation at the collegiate sports level. Although 48 of the 50 states have legalized some form of gambling, the legalization of sports gambling particular is a far newer trend that was not a major topic in political debates until recently. The major case that broke open the legalization of sports gambling was *Murphy v. NCAA* in 2018. In 2014, the state of New Jersey modified restrictions on the ability to gamble on sporting events. During this time, Phil Murphy was the governor of New Jersey, and was dealing with pushback from sports associations. The NCAA, along with other professional sports leagues, sued against these new regulations in federal court, claiming that the established change in restrictions violated the already existing Professional and Amateurs Sports Protection Act (PAPSA). The State of New Jersey argued that Congress had unconstitutionally pressured it into enforcing a federal program by requiring New Jersey to adhere to the gambling restrictions set by PAPSA. The major decision to be made in this case was whether or not PAPSA violated the anti-commandeering doctrine established in the U.S. Constitution, which essentially delegates to the states all of the rights not exclusively assigned to the federal government. In the end, The Supreme Court reversed the original decision, ruling that PASPA violated the anti-commandeering doctrine, which was in violation because it prohibited states from authorizing private sports gambling.[8]

The impact of this decision was that it provided further precedent in future situations in which state and federal governments disagreed on the legality of a certain political, social, or

[6] Caporal, Jack. "Biggest Sports Betting Companies." The Motley Fool, August 21, 2023. https://www.fool.com/research/biggest-sports-betting-companies/.
[7] Cavanagh, Cassidy. "Apollo-Backed Yahoo Buys Wagr." Mergers & Acquisitions, April 27, 2023. https://www.themiddlemarket.com/latest-news/apollo-backed-yahoo-buys-wagr.
[8] "Murphy v. NCAA." Ballotpedia. Accessed April 21, 2024. https://ballotpedia.org/Murphy_v._NCAA#:~:text=This%20is%20a%20case%20about,governments%20to%20enforce%20federal%20law.

economic issue. The case stands as a major shift in states' ideology toward gambling, as this opened the floodgates for many future legislative decisions across the country. The uptick in betting as a result of this decision has created new industries, corporations, and jobs that would not have previously existed without it. Furthermore, it played off of the principle of federalism that has been long-standing, keeping the power to regulate certain decisions to the purview of states rather than creating an overarching law that is determined by the federal government.

B. United States v. Lopez

Over the course of history, there have been certain cases that have played a role in reinforcing the doctrine of federalism that presides over the United States legal system. In many instances, these cases are brought up to dispute differences in legislative ideology between the federal government and individual state governments. The effects of these decisions have trickled down into our modern political system to maintain the powers granted to states, allowing them to make laws surrounding a highly controversial subject, such as gambling. One such case that played a role in the determination of this principle was *U.S. v. Lopez*.[9]

In 1992, a high school student in San Antonio, Alfonzo Lopez, was apprehended by authorities for bringing a concealed weapon onto his school grounds. In doing so, he had violated the firearm prohibition law established by the state of Texas. Eventually, his state charges were dropped and he was charged at the federal level, specifically for violating the Gun-Free School Zones Act of 1990. In 1995, Lopez appealed and took his case to the Supreme Court, arguing that schools should be regulated under state law and that the federal law he was charged with violated the doctrine of federalism established in the Constitution. The counterargument to this was that the federal government had the power to enforce such legislation through the commerce clause, which allows the federal government to regulate interstate commerce. Although Lopez never contended that he was innocent of bringing such a firearm to the school, the Supreme Court ultimately ruled in favor of his case 5-4, stating that the act established by the federal government had overstepped its bounds in regulating what should have been under the control of the states, ultimately abusing the powers granted under the commerce clause.[10]

In the end, this case further cemented the principle of federalism and stood as a massive win for state power. The decision made in this case gave greater ability to state governments to create their legislation, as it ultimately reduced the degree to which the federal government could intervene in state affairs. This decision shifted the balance of power between the federal government and states, providing a precedent for future decisions that have affected how sports gambling is regulated now. As the state governments are now deciding how to manage this emerging industry of gambling, the limited ability of the federal government to intervene is derived from the principles that were ultimately strengthened in the Lopez case.

[9] United States v. Lopez, 514 U.S. 549 (1995).
[10] "United States v. Lopez." Ballotpedia. Accessed April 21, 2024. https://ballotpedia.org/United_States_v._Lopez.

C. Gonzales v. Raich

The debate over sports betting is also similar to that of previously debated issues in the Supreme Court. The conflict between state regulation and federal law in this case is analogous to the dialogue surrounding the marijuana debate throughout the 1990s and 2000s. The case of Gonzales v. Raich played an instrumental role in setting the tone for other states to modify their regulations surrounding marijuana.[11] In 1996, California passed Proposition 215 which allowed for the legalized use of medical marijuana. After the destruction of their marijuana plants by the Drug Enforcement Administration, Raich sued, arguing that the DEA violated the Commerce Clause when they justified this destruction through the Federal Controlled Substances Act.

The case was concerned with the DEA's enforcement of the Controlled Substances Act, which contradicted two California state laws protecting the growth and consumption of medical marijuana. The main issue of the case was whether this act allowed the Drug Enforcement Administration to destroy marijuana, or if it violated the commerce clause established in the Constitution of the United States. The ruling in this case came down to an analysis of federal regulation versus state regulation. The Supreme Court decided to overturn the district court's judgment in a 6-3 opinion. It was determined that the Controlled Substances Act was indeed valid under the commerce clause and that this therefore gave the proper power to the DEA to conduct themselves as they had in this situation.[12]

In this case, the federal government was given more domain over actions supposedly determined at the state level, representing a reversal of the U.S. v. Lopez decision. The back-and-forth over marijuana legalization is still a tense point of discussion between state governments today. The trend in the societal view of marijuana regulation parallels that of the discussion around the legalization of sports betting across all states. In both cases, many of the states in the U.S. have adopted policies allowing both activities for recreational use, yet not all states have followed the emerging trend. Similarly, both activities have resulted in new industries and companies that have created unique and intriguing sectors of the economy, which have already started to be taken advantage of by savvy investors. As the regulation for both has been largely left to the discretion of the states, analysts are turning to quantitatively robust financial arguments that appeal to the economic benefit that both could allow if ultimately legalized across all 50 states.

IV. ECONOMIC IMPLICATIONS

The key cases above highlight the complicated nature of the regulatory relationship between state and federal governments. More importantly, they demonstrate the dominos that led to the federal government's course of action to relinquish its legal stronghold over this particular

[11] Gonzales v. Raich, 545 U.S. 1 (2005).
[12] "Gonzales v. Raich." Oyez. https://www.oyez.org/cases/2004/03-1454.

domain. Similar to the tenets of topics such as drug and firearm enforcement, gambling policy is following the footsteps of landmark cases that came before it. While the majority of states and territories in the U.S. have legalized sports gambling on their accord, many are yet to act on this premise. Even amongst those that have legalized it, not all have implemented a structure to monitor its effects and optimize its benefits over its costs.

States are at the center of this conundrum, and those that have not yet amended their gambling laws are missing out on potential financial benefits that could tremendously aid their economic health. A major opportunity that states are now taking advantage of is the increased tax revenue they are receiving due to the influx of sports gambling activity in recent years. Tax revenue is hypercritical to state governments. This is the capital that is ultimately used to provide a plethora of public resources that aid both financial and societal development in state economies across the country. On a local level, this can be useful for supporting education reform, healthcare coverage, community development, and public works projects, all of which have a massive impact on the wellbeing of citizens in the country. For instance, in the 3rd quarter of 2023, tax revenues generated reached a value of nearly $506 million, a 20% increase over the same period a year prior. Among this revenue, the highest contributor by far was the state of New York, followed by others, including Ohio, Indiana, and Illinois, respectively[13]. For New York, over a third of its total tax revenue came from sports betting sources, indicating that there exists a drastic improvement in funding that local governments can utilize to make decisions and execute policies that benefit the public welfare. With the activity on popular sportsbooks such as PrizePicks and DraftKings on the rise, it would be highly beneficial for states to capitalize on this trend and enact laws that allow them to increase their tax collection. Further increases in tax revenue can serve to resolve disputes of citizens on a wide variety of issues. Sports betting is the fastest growing industry that municipalities are able to take advantage of, resulting in an opportunity for tax-based economic development at a magnitude not common for the government.

Another benefit of sports betting is the ripple effect of a new burgeoning industry which ultimately results in far more opportunities for those not already devoted to any specific sector. As highlighted earlier, large sportsbooks are rivaling the economic power of many other large corporations in the country, which leads not only to more jobs for those with backgrounds in data analytics and computer science to keep up the infrastructure and business models that these companies operate on, but also helps those seeking careers in research, marketing, legal, accounting, and many others. According to a study by Oxford Economics, the legalization of sports betting could lead to an infrastructure that supports the development of up to 216,671 new

[13] Grundy, Adam. “Legal Sports Betting a Growing Source of Tax Revenue for Many States.” Census.gov, February 9, 2024. https://www.census.gov/library/stories/2024/02/legal-sports-betting.html#:~:text=In%20the%20third%20quarter%20of,the%20second%20quarter%20of%202023.

jobs across a variety of sectors, beyond simply sportsbooks and casinos.[14] There are expectations of job opportunity improvement in industries such as technology, food service, and tourism as well. The creation of new jobs on this scale serves as a spark plug for the economy and eventual growth in performance metrics, such as GDP. Legalization of sports betting for all states boosts this job growth and also allows investors to tap into financial markets to fund successful projects and add momentum to the growth rate factors helping the economy. The increased M&A activity in this sector shows the value that financial institutions such as investment banks, credit institutions, and private equity firms are placing on the growth and eventual output capacity of these companies.

A major concern among those who oppose this trend is the societal ramifications that could result from an encouragement of betting. While there is merit to this idea, the consequences can be easily mitigated with efforts from local governments to encourage responsible use of these platforms, similar to the restrictions already implemented in many traditional casinos. Governments who legalize this behavior should also subsequently promote marketing efforts that exclusively promote responsible behavior, as well as divert some of the excess funds created toward efforts that are aimed at battling addiction. Through this framework, states, acting as their entities apart from the federal government, can institute a safe framework that has tremendous economic benefits with very little risk of downside.

V. CONCLUSION

The battle between federal and state regulation is a major point of concern in the philosophical doctrine of the governance of the United States. The push and pull between the two sides has been the subject of many important Supreme Court cases, ultimately ending with states retaining the opportunity to tailor laws that best suit their circumstances. Among these heavily debated issues is that of the rapidly growing industry of sports betting, which is legal in some states, but not all states, across the United States. The capability of sports betting across many states is a result of the popular Murphy v. NCAA case that broke open this opportunity across the country. This case parallels many Supreme Court cases that came before it, including United States v. Lopez and Gonzales v. Raich, which dealt with firearm and marijuana enforcement respectively, playing a crucial role in advancing the debate between state and federal regulatory power. Based on the growing trend of sports betting activity amongst both tangible users and financial markets, all 50 states should legalize sports gambling, given that they can do so with a

[14] MediaWize. “Sports Betting and Economic Impact: Analyzing the Broader Economic Impact of Sports Betting on Job Creation, Tourism, and Local Economies in Regions Where It Is Legalized.” OCNJ Daily, October 18, 2023. https://ocnjdaily.com/sports-betting-economic-impact-analyzing-broader-economic-impact-sports-betting-job-creation-tourism-local-economies-regions-legalized/#:~:text=In%20addition%2C%20a%20study%20by,media%2C%20technology%2C%20and%20hospitality.

framework that allows for it to be participated in with the necessary precautions. The legalization of sports betting will create new financial pathways that serve to bolster economic prosperity in the regions in which they are used responsibly. Doing so would improve tax revenues and create new jobs in the economy, giving more opportunities to improve the well-being of citizens in the state.

Navigating the Ethical Frontier: Corporate Integrity in the Face of Deception, Lying, and Perjury

Written by Mandy Tang
Edited by Jacob Chau

ABSTRACT.

In a time when corporate transparency and accountability are under heightened scrutiny, this article presents three pivotal cases illuminating major violations of good faith in business ethics, focusing on deception, lying, and perjury. It explores the legal and ethical ramifications of business transactions, highlighting the responsibility of corporations as moral agents to ensure that disclosures or testimonies do not mislead rational decision-makers. It further argues that these agents must be acutely aware of their duties and mindful of the expectations of their audience—whether these are driven by respect for authority, the mutual pursuit of profits, or the context of the discourse. In adhering to good faith in business conduct and striving to maximize shareholder value, these individuals are encouraged to balance these often competing interests carefully. This balance involves a nuanced consideration of business practices that align with legal standards, while remaining robustly grounded in ethical principles, thus highlighting the complex interplay between ethical integrity and the pursuit of business objectives.

I. INTRODUCTION

The foundation of business practice is fundamentally rooted in transactions.[15] Trust is the foundation for all business transactions, established through explicit means such as written or verbal agreements or implicitly grounded in fundamental moral standards such as fairness and integrity. This initial establishment of trust facilitates the reciprocal exchange of rights, wherein each party agrees to provide something of value - be it goods, services, or financial remuneration - in return for a perceived equitable value. This exchange, dictated by the prior trust and expectation the involved parties share, naturally defines duties and liabilities for each party.

This paper asserts that the foundation of ethical standards in business practices are grounded in the responsibilities borne by individuals in business transactions - whether articulated verbally, implicitly understood in a given context, or formalized in written contracts - alongside the expectations that the stakeholders depend upon to make judgment and choices accordingly. It delves into the complexities of bankruptcy, fraudulent behaviors, and their consequential legal ramifications. It scrutinizes how deviations from good faith in verbal and practical business conduct - especially within testimonial contexts that necessitate authentic, sound, and faithful representation of one's mental contents - can lead to criminal and civil liabilities.[16]

The critical examination of this paper revolves around three landmark cases: *Bronston v. United States*, *Skilling v. United States*, and *U.S. v. Elizabeth Holmes, et al*. These cases illustrate scenarios where the involved parties—Bronston, Skilling, and Holmes—despite fully possessing the complete knowledge of facts, through misleading utterances or fraudulent business conducts, deceive their respective audiences: the jury, the shareholders, and the creditors. The examination aims to understand whether such conduct, irrespective of the intent to commit fraud or deception, constitutes a breach of good faith and fair dealing.

Furthermore, this paper discusses the pivotal role of individuals as moral agents within the corporate sphere, stressing the significance of unambiguous communication in business dealings and cautioning against the implications of partial truth disclosure or ambiguous representations that could impair the discernment of rational individuals. It argues for the necessity of vigilance regarding ethical responsibilities, considering stakeholder expectations influenced by authority, respect, profit pursuits, or communication context. As individuals endeavor to uphold good faith in their professional conduct while simultaneously seeking to enhance shareholder wealth, they shall navigate the delicate equilibrium between these potentially competing ends judiciously.

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[15] Jeffrey Moriarty, "Business Ethics," Stanford Encyclopedia of Philosophy, June 8, 2021, https://plato.stanford.edu/archives/fall2021/entries/ethics-business/.

[16] Shiffrin, Seana, "Normative Ethics: Truth-Telling and Promising" (Lecture Notes, University of California, Los Angeles, Los Angeles, CA, October 2, 2023).

II. CASE ANALYSIS - ON DUTIES AGAINST DECEPTION

A. Bronston v. United States (1973)

Samuel Bronston was convicted of perjury on February 2, 1971, for providing misleading testimony during a bankruptcy examination, despite his claim to have been truthful. Bronston was the president and sole owner of Samuel Bronston Production, Inc., a company that produced major films and managed numerous bank accounts worldwide. As president, Bronston personally managed virtually all of the transactions involved in these bank accounts. [17]

In 1964, after financial setbacks, his company sought bankruptcy protection. During a 1966 hearing, Bronston, as the witness, was questioned about Swiss bank accounts. He denied having personal accounts, while acknowledging his company had one in Zurich for six months.[18] This testimony led to perjury charges, as evidence showed Bronston had a personal account in Geneva, active from 1959 to 1964, involving transactions over $100,000. In the judicial proceedings, the judge instructed the jury that a conviction for Bronston could be warranted if his statement, despite being literally true, was misleading with its contextual presentation. Despite his defense claiming no secrecy, due to a waiver signed in 1965, the jury found him guilty based on the selective truthfulness of his statements.[19]

However, the charge of perjury was later withdrawn. It is considered that there should be no liability for perjury if a person presents truthful utterances in the testimonial context, though these utterances had the intention to mislead the questioner and the audience.[20]

The central issue here was how the legal interpretation of perjury applies in the case of Bronston, who, while being factually accurate about his company's Swiss bank account with his statement, was charged with perjury under 18 U.S.C. Section 1621 for potentially misleading statements implying he had no personal Swiss bank accounts. The dismissal hinged on two key points: 1. Bronston personally did not have a Swiss bank account at the time of the hearing & 2. Bronston Productions, Inc., did have the described Zurich account.

B. Duties Against Deception and How Partial Disclosure of Truths Misleads

In the courtroom setting, Bronston, as the witness, is expected to deliver testimonies that are not only factually verifiable, but also logically consistent, ensuring the judge and jurors can fully comprehend the presented information. This obligation extends to a rigorous avoidance of lying—which entails the speaker making statements within a testimonial context that he does not

[17] *Bronston v. United States*, 453 F.2d 555, 556 (2d Cir. 1971).
[18] Ibid.
[19] Ibid.
[20] US Supreme Court opinions and cases | findlaw, accessed March 31, 2024, https://caselaw.findlaw.com/court/us-supreme-court.

believe to be true, with the intention of convincing the recipient of the statement's truthfulness.[21] Furthermore, there is a critical duty to prevent deception, which involves not leading the audience to form potential, foreseeable, false inferences or erroneous judgments through words, actions, or omissions, whether done intentionally, negligently, or knowingly, and whether directly or indirectly or by omission.[22]

The case of Bronston exemplifies such deceptive practices, where his technically factual statements led to misunderstandings among the audience, a situation made worse by the legal representatives' failure to seek further clarification. Although Bronston's answers were factually accurate and not logically false, they obscured the full truth, demonstrating the nuanced distinction between not lying and not deceiving. Despite not lying, as his statements in court were factually true, Bronston's selective disclosure resulted in deception to the jury. This illustrates that in legal settings, the responsibility not to deceive is as critical as the obligation not to lie. The ethical mandate in such testimonial contexts demands that communicators provide factually accurate responses and complete and coherent information that precludes any potential for misunderstanding. While the lawyer bears some responsibility for failing to raise follow-up questions to clarify the matter, the greater duty falls on Bronston, who failed to provide full disclosure, thereby not fulfilling a duty against deception.

The Bronston case highlights the practical implications of deceptive practices in legal testimony, intentional or not, and exemplifies a broader conception of duties against deception and lying within the corporate and legal contexts. In this case, the eventual withdrawal of the perjury charge provides a crucial illustration of how the duty not to deceive functions as an imperfect duty.

Theoretically, as an imperfect duty, the duty to not deceive involves the agent adopting the value of non-deceiving as one of his ends, which influences the agent's decision-making when choosing between the many ends he might have. However, the agent adopting this certain value neither prescribes nor requires him to engage in any specific action.[23] Though it might not be prioritized in every case regarding the many ends the agent might have, the duty not to deceive remains morally salient because any rational agent has an agential interest in truth. False beliefs as one of the inferences of deception, restrict one's agency by narrowing the range of potential objectives and undermine effective self-guidance by impeding one's comprehension of the actions and their context. Thus, crucial for agent flourishing and valuing self-agency and others, the agential interest in truth highlights the necessity of aligning our ends with a pursuit of true beliefs and taking others' interests in truths in our own ends.[24] Therefore, valuing honesty

[21] Shiffrin, Seana, "Normative Ethics: Truth-Telling and Promising" (Lecture Notes, University of California, Los Angeles, Los Angeles, CA, October 2, 2023).
[22] Shiffrin, Seana, "Normative Ethics: Truth-Telling and Promising" (Lecture Notes, University of California, Los Angeles, Los Angeles, CA, October 18, 2023).
[23] Japa Pallikkathayil, "The Truth about Deception," *Philosophy and Phenomenological Research* 98, no. 1 (September 3, 2017): 147–66, https://doi.org/10.1111/phpr.12440, 2,3.
[24] Ibid., 6-7.

and considering others' interest in truth is essential for personal growth and respecting autonomy, emphasizing the need to align our objectives with the pursuit of genuine beliefs, and acknowledging the importance of truth in our interactions.

Thus, the Bronston case clarifies ethical imperatives within testimonial contexts, demonstrating how comprehensive disclosure is vital for upholding fair judicial outcomes.

III. CASE ANALYSIS - ON DUTIES AGAINST LYING

A. Skilling v. United States (2010)

Jeffrey Skilling, former Chief Executive Officer of Enron Corporation, was central to a seminal Supreme Court ruling that expressly limited the ambit of the "honest services" doctrine to fraudulent schemes involving the transmission of bribes or kickbacks via mail or wire. This legal contention emerged from Skilling's maneuvers to artificially bolster Enron's stock price through the dissemination of materially misleading financial statements, culminating in convictions on multiple counts, including securities fraud, wire fraud, insider trading, and falsification of financial information to auditors.[25]

A central point of Skilling's legal challenge was his conviction under the honest services fraud conspiracy charge. He contended that the statute underpinning this charge was unconstitutionally vague because it failed to delineate the nature of the actions it criminalized precisely. Specifically, Skilling argued that the statute's broad interpretation could unjustly encompass a wide array of corporate conduct, thereby infringing upon lawful business activities and decisions.[26]

The Supreme Court responded by strictly limiting the doctrine to fraud involving bribes or kickbacks transmitted via mail or wire, thereby excluding activities like undisclosed self-dealing by officials or employees. This ruling clarified the doctrine's application, setting a precedent for future cases and emphasizing the need for statutes to define criminal conduct to prevent arbitrary enforcement clearly.[27]

B. United States v. Holmes (2023)

Similarly, in the case of *United States v. Holmes*, the court faced the challenge of delineating between aggressive corporate strategies and overt fraudulent practices. This case, like that of Skilling, demonstrated the judicial system's pivotal role in defining the boundaries of lawful conduct amidst complex business operations and technological claims.

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[25] *Skilling v. U.S.*, 561 U.S. 358, 130 S. Ct. 2896, 177 L. Ed. 2d 619, 22 Fla. L. Weekly Supp. 550 (2010).
[26] Ibid.
[27] Ibid.

Elizabeth Holmes and Ramesh "Sunny" Balwani were indicted on June 14, 2018, facing charges related to their involvement in promoting Theranos, a healthcare company, through fraudulent schemes. The indictment, which was updated in July 2020, accused them of misleading doctors, patients, and investors about the capabilities of Theranos's blood testing technology. Despite knowing the technology could not consistently produce accurate and reliable results for certain blood tests, they advertised it as a revolutionary, fast, and cheap alternative to traditional lab tests and misrepresented its performance and financial prospects to investors.[28]

Holmes and Balwani were charged with two counts of conspiracy to commit wire fraud and nine counts of wire fraud. Balwani was sentenced to nearly 13 years in prison for his role in the scheme, which endangered patient health and defrauded investors. Holmes was tried separately and convicted on charges of conspiracy to commit fraud on investors and committing fraud on individual investors, involving wire transfers totaling more than $140 million. She was acquitted of fraud charges related to patients and sentenced to over 11 years in prison. Both were also sentenced to three years of supervision after their release, and hearings to determine restitution amounts were scheduled for the future.[29]

C. Discussion: Duties Against Lying and Unethical Business Practices

In the realm of corporate conduct, the legal system plays a crucial role in distinguishing between legitimate business strategies and fraudulent activities. The Supreme Court's decision in *Skilling v. United States* clarified this distinction by limiting the application of the "honest services" doctrine exclusively to cases involving clear-cut instances of bribery or kickbacks. This ruling was significant because it addressed concerns that the law was overly broad and might inadvertently criminalize normal, lawful business operations. Essentially, the court sought to ensure executives could pursue aggressive business strategies without fear of unjust legal repercussions, provided their actions did not involve direct forms of fraud such as bribes or kickbacks.

Conversely, the case against Elizabeth Holmes and Ramesh "Sunny" Balwani, related to their roles at Theranos, focused on straightforward allegations of deceit. The duo was accused of falsely purporting their company’s technology capabilities and financial health. These actions misled investors and endangered public health, highlighting the critical legal and ethical breaches involved. Such cases exemplify the importance of the duty against lying in business practices—this duty extends beyond merely rejecting false statements to prevent any misleading information that could deceive stakeholders. It entails the duty against lying, wherein the speaker makes statements within a testimonial context that they do not believe to be true, but to convince the recipient of the statement's truthfulness. This case reflects the judiciary's commitment to holding executives accountable when they cross the line from aggressive business practices,

[28] *United States v. Holmes*, 5:18-cr-00258-EJD-1 (N.D. Cal. Jan. 10, 2023).
[29] Ibid.

motivated out of a pursuit of profit maximization, to fraudulent behavior that can cause real harm to the trust of stakeholders and the general public, particularly regarding the market environment and the investment choices.

These two cases underscore a broader legal and ethical principle: while the law encourages innovation and competitive business strategies, it also demands a foundational level of honesty, ethics, and transparency. Executives are reminded that their duty to innovate and drive their companies forward must be balanced with a responsibility to stakeholders, including investors, customers, and the public, to engage in truthful and ethical conduct. This responsibility is not just a legal requirement, but a moral imperative, contributing to trust and integrity in business transactions within the marketplace.

The legal outcomes of these cases serve as a guiding light for corporate leaders, illustrating the importance of adhering to ethical standards and the serious consequences of failing to do so. In sum, while pushing the boundaries of business is often necessary for growth and success, crossing into deceitful practices undermines public trust and invites legal scrutiny and penalties.

IV. CASE COMPARISON

Reflecting on the *Bronston v. United States* case in the context of ethical and legal standards illuminates the profound importance of honesty and non-deception within legal testimonies. Bronston's case illustrates a pivotal distinction: while his responses were technically accurate, they were also misleading, leading to significant misunderstandings. This scenario accentuates the intricate relationship between legal duties and ethical responsibilities, showing that simple factual accuracy is insufficient to meet the higher standard of integrity expected in courtroom settings. The obligation extends beyond merely avoiding outright lies to prevent any potential misinterpretation through ambiguous statements or omissions, whether intentional or not. This ethical complexity is mirrored in the cases of *Skilling v. United States* and *United States v. Holmes*, which highlight the legal system's role in distinguishing between aggressive yet lawful business strategies and outright fraudulent behaviors that mislead stakeholders and harm the public interest.

In Skilling's situation, the Supreme Court's narrowing of the "honest services" doctrine to cases involving explicit bribes or kickbacks demonstrates a legal clarification intended to prevent the over-criminalization of corporate conduct. This decision underscores corporate executives' need to navigate their ambitious strategies within the confines of legal and ethical boundaries, emphasizing that innovation must not come at the cost of honesty and transparency. On the other hand, the case against Holmes and Balwani presents a more direct instance of deceit, where false claims about technological capabilities and financial prospects led to investor and public harm. This reinforces the judiciary's stance on the severe repercussions for executives who betray the trust placed in them by stakeholders and the broader community.

Together, these cases serve as critical benchmarks in the ongoing discourse on corporate integrity, highlighting the delicate balance between pursuing business objectives and maintaining ethical standards. They remind corporate leaders of the paramount importance of honesty in their operations and the legal and moral imperatives to avoid misleading conduct. As such, these landmark decisions contribute significantly to our understanding of the complex interplay between ethical integrity, legal accountability, and the pursuit of business success, advocating for a corporate culture that values truthfulness and transparency as foundational principles.

V. CONCLUSION

In conclusion, this paper explored the intersection of legal standards and ethical considerations in business practice through the lens of three significant cases: *Bronston v. United States, Skilling v. United States, and United States v. Holmes*. These cases illuminate the critical importance of adhering to principles of good faith, particularly in avoiding deception, lying, and perjury within the corporate realm. They underscore the responsibility of corporate agents to ensure that their communications do not mislead stakeholders, whether these communications occur in legal settings, financial disclosures, or public representations of a company's capabilities and prospects.

The analysis demonstrates that legal adjudications not only define the boundaries of lawful conduct but also offer guidance on the ethical imperatives for corporate behavior. The nuanced distinctions between misleading by omission, the strategic presentation of facts, and outright lying highlight the complex ethical landscape in which corporate agents operate. The paper argues that maintaining a balance between aggressive business strategies and ethical integrity is a legal and moral requirement. This balance is crucial for fostering trust, which is the foundation of all business transactions and relationships.

Furthermore, the discussion emphasizes that ethical conduct in business is not merely about avoiding legal penalties but about cultivating a culture of transparency, honesty, and respect for the stakeholder's right to truth. This culture is essential for sustainable business practices that contribute to the overall well-being of society and the economy.

By delving into the ethical and legal ramifications of business conduct, as illustrated by Bronston, Skilling, and Holmes, this paper contributes to a deeper understanding of the moral obligations of corporate agents. It highlights the importance of integrating ethical considerations into business decisions, advocating for a holistic approach to corporate governance that aligns legal compliance with ethical responsibility. In doing so, it calls for corporate leaders and legal practitioners to prioritize integrity in their professional conduct, thereby enhancing trust and fostering a more ethical business environment.

Working for Change: The UAW's 2023 Stand-Up Strike and Its Implications on U.S. Labor Law

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ABSTRACT.

During the fall of 2023, the United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW) held a massive strike against the Big Three automotive companies. Lasting for forty-six days, the UAW Stand-Up Strike was one of the biggest mass protests in the union's history and resulted in major economic impacts for these automotive companies. The success of this strike has renewed discussion of union and strike law in U.S. political discourse, especially in light of the recent *Glacier Northwest Inc. v. International Brotherhood of Teamsters Local Union* (2023) ruling that strengthened limitations on strike protections. Furthermore, the Big Three automotive companies have expressed concerns regarding the organization and location of future manufacturing sites. This sparked subsequent worry surrounding the possibility of increased labor outsourcing for these companies. The Big Three automotive companies employ thousands of American workers, so outsourcing would cause dramatic impacts on the manufacturing job market. Moving forward, U.S. unions may face further limitation and scrutiny in their employee mobilization, and American workers could face the consequences of an increasingly dwindling job market.

I. INTRODUCTION

Since the rise of labor unions during the nineteenth century, the intricacies of strike law and labor law have remained a complex and nuanced part of the U.S. legal landscape. Labor unions have long advocated for their working members, solidifying the recognition of employee rights and ensuring that workers are treated fairly by their employers. Acting as a liaison between employees and company leadership, unions negotiate on behalf of their members, deciding on issues such as retirement plans, salary changes, and organizational policies. If company leadership fails to cooperate with unions or ignores their demands, unions reserve the right to strike or organize a company-wide protest during which employees refuse to work. As an act of organized noncompliance, strikes have been a common tactic used by labor unions to pressure employers into recognizing the gravity of their negotiations.

One of the most influential unions in the United States is the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), whose member employees work in automotive manufacturing, agricultural technology, healthcare, and university education. Throughout its history, the UAW has been involved in the passage of progressive labor legislation, such as the Occupational Safety and Health Act (1970) and the Employee Retirement Act (1974). The UAW has also solidified its influence by locally advocating for its workers and engaging in large-scale strikes. Beginning in September 2023, the United Auto Workers union engaged in one of the biggest strikes in its history, amidst negotiations with the Big Three automotive companies. The "Big Three" automotive companies are General Motors, Ford, and Stellantis, which are the three largest automotive companies in the U.S. Not only did this strike impact the immediate negotiations between the UAW and the Big Three companies, but it also set an important precedent that now allows the union to strike over mass layoffs resulting from facility closures.

When considering the future implications of this strike, one must first understand the complexities relating to union law and strike limitations. Although the right to strike is protected by the National Labor Relations Board, there are limitations on the types of strikes that are considered protected. As decided in *San Diego Building Trades Council v. Garmon*, the legality of a strike is decided by the National Labor Relations Board. Therefore, any strike can be evaluated by this agency if its legality is questioned by the employing company. As stated by the National Labor Relations Board, one of the most fundamental criteria dictating the legality of a strike is whether or not the strike resulted in property damage for the employing company. As a result of the precedent created by *NLRB v. Fansteel Metallurgical Corp.*, unions are not legally allowed to organize "sit-down strikes," or strikes in which employees remain on company property and/or seize company property, but refuse to work. Furthermore, as a result of the precedent created by *Glacier Northwest Inc. v. International Brotherhood of Teamsters Local Union*, labor strikes are not protected by the National Labor Relations Act if they result in damage to company property.

With the success of the UAW's 2023 Stand-Up Strike, the precedent created by this strike will certainly remain influential in dictating labor negotiations moving forward. Given that the UAW can now strike over plant closures, this precedent may impact the locations of Big Three manufacturing plants moving forward, potentially leading to an increase in foreign outsourcing of industrial production. Amidst such labor changes paralleling economic recovery from the COVID-19 pandemic, the rights of unions and their working members must remain legally protected.

II. BACKGROUND

In July 2023, the United Auto Workers union began negotiations with the Big Three automotive companies regarding the new labor contract for employees at these companies. Under the leadership of newly elected UAW president Shawn Fain, the UAW argued for a four-day work week with improved overtime pay, union representation at new plants, a 46% wage increase to match national inflation, and the elimination of a tiered employment system.[30] These demands sought to strengthen employee benefits and remedy the major labor complaints of Big Three workers.

All three companies were unwilling to fulfill these demands, so the UAW began its Stand-Up Strike on September 15, 2023, after the expiration of the previous contract. This was the first trilateral strike against the Big Three automotive companies in the UAW's history. Given the economic influence of these manufacturing corporations, this strike proved to be a historic moment for not only the UAW but for the U.S. labor rights movement in general.

The strategy of this strike was unique for the UAW. Rather than having all Big Three employees at all facilities strike at once, the Stand Up Strike grew gradually over time. As negotiations continued and demands failed to be met, more and more employees joined the strike. The UAW adopted this strategy to gradually increase economic pressure on the Big Three companies and maximize the impact of each striking worker.[31]

As of November 2023, the UAW has reached agreements with all three companies. Negotiations were first finalized between the UAW and Ford, with Stellantis and General Motors later following suit. Some of the demands of the UAW were fulfilled as requested, while others involved compromise. Although the compromises were met with some reluctance from employees, the new contracts were largely supported.[32] Notably, the UAW won the right to strike over plant closures, which would give them an avenue to strike against mass layoffs.

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[30] Kenichi Serino, "3 experts on the UAW strike and why we're seeing an American labor 'upsurge.'" *PBS News*, September 27, 2023, https://www.pbs.org/newshour/politics/what-does-the-uaw-strike-have-in-common-with-this-years-wave-of-labor-action-3-experts-explain#.

[31] "Stand Up Strike Frequently Asked Questions." *UAW*, Accessed February 19, 2024, https://uaw.org/standup/.

[32] Khristopher J. Brooks, "UAW ends historical strike after reaching tentative deals with Big 3 automakers." *CBS News*, October 30, 2023, https://www.cbsnews.com/news/uaw-strike-update-gm-tentative-agreement/.

Amidst the successes of the UAW strike against the Big Three, Fain predicted a future organization of workers at Toyota, Tesla, and other non-unionized automotive companies.[33] He viewed the Stand Up Strike as a source of inspiration to other workers in the industry, proving what was possible with collective action and union involvement. If Fain's predictions are materialized, the U.S. labor movement may be reinvigorated. Workers across the nation may unionize and similarly demand better contracts and benefits from their employers, echoing the sentiments of the Stand-Up Strike. In this way, the effects of this strike will likely extend far beyond the Big Three and into the rest of the U.S. industry.

However, the impact of this strike on the Big Three companies specifically should not be understated. As of February 2024, workers at the Ford plant in Louisville, Kentucky are threatening to strike again if Ford does not make a conscious effort to improve worker safety and address health concerns.[34] Given that the Louisville plant is a major center of Ford truck and SUV production, such a strike could result in significant economic implications for the company.

More notably still, the success of the Stand Up Strike and the implications of its precedent will likely affect the locations of manufacturing labor for the Big Three companies moving forward. Since the 1980s and the 1990s, many automotive companies have increasingly outsourced manufacturing labor. The once undisputed influence of Detroit over the automotive industry has since dwindled, with more companies moving facilities to Japan, China, and Germany. The United States remains the second greatest producer of cars in the world, with Michigan as the home of the most automotive manufacturing employees.[35] However, many automotive companies rely on outsourced labor for the production of specific car parts, benefitting from the different standards and possible loopholes of foreign labor laws. Following the success of the Stand-Up Strike, the Big Three companies and other automotive manufacturers may increase foreign outsourcing of labor to retain labor contracts that are more economically beneficial for company profit. In the wake of the Stand-Up Strike, Ford's CEO Jim Farley asserted that the company would be more strategic with where they build future plants.[36] He cited the adverse economic impacts of the strike that resulted from concentrating truck production at Ford's Louisville plant. With consideration of the economic consequences of future strikes, the leadership of automotive manufacturing companies may decide to further decentralize the production of specific items. In other words, the production of specific cars or trucks will be further split between more facilities. This would lessen the economic impact of a strike at a

[33] Ken Coleman, "Here's where the UAW strike against Detroit Three Stands." *Michigan Advance*, November 4, 2023, https://michiganadvance.com/2023/11/04/heres-where-uaw-strike-against-detroit-three-stands/.
[34] "Autoworkers threaten to strike again at Ford's huge Kentucky truck plant." *NPR,* February 17, 2024, https://www.npr.org/2024/02/17/1232237049/autoworkers-threaten-strike-ford-kentucky-truck-plant.
[35] David Gorten, "6 Countries That Produce the Most Cars," *Investopedia*, December 8, 2021, https://www.investopedia.com/articles/markets-economy/090616/6-countries-produce-most-cars.asp.
[36] Tom Krisher, "Ford will rethink where it builds vehicles after UAW strikes, CEO says." *Associated Press*, February 15, 2024, https://apnews.com/article/ford-auto-workers-contract-ceo-rethink-factory-locations-ed580b465d99219eb02ffe24bee3d2f7#.

single plant, as Farley argues. Additionally, this production may be increasingly moved to overseas facilities, where labor costs can be cheaper and regulations can be less strict. In this way, the success of the Stand-Up Strike may motivate the further decentralization and outsourcing of automotive manufacturing labor. This could prove disastrous for the American economy and the availability of manufacturing jobs, especially in states where automotive production is a cornerstone of the economy.

III. KEY COURT CASES IN THE HISTORY OF U.S. STRIKE LAW

A. Who Decides the Legality of Strikes: *San Diego Building Trade Council v. Garmon*

One of the most influential court cases in strike law history is *San Diego Building Trade Council v. Garmon*, which defined the jurisdiction under which the legality of strikes is evaluated.[37] This case was decided by the United States Supreme Court on April 20, 1959. In March 1953, local unions pressured Valley Lumber Company to only retain employees who were members of the union or who would apply to then join. When Valley Lumber Company refused to comply, the unions picketed in front of company property, claiming that they were seeking to educate possible members. Valley Lumber Company filed a suit in the Superior Court for the County of San Diego, seeking injunction and damages. The National Labor Relations Board declined to get involved in the case, so the Supreme Court of California sought to decide the case.[38] However, the United States Supreme Court found that despite their initial reluctance, it was the legal responsibility of the NLRB to examine the case. Referencing *Guss v. Utah Labor Relations Board*, the court reasoned that in similar cases, the state courts still did not have the same authority that the National Labor Relations Board would have. State and local courts did not have the power to evaluate these issues; only the NLRB had such legal authority. Thus, even if they declined, the NLRB would still be designated as the primary deciding body for such cases that examine the legality of a strike.[39]

When discussing the legal basis of strikes, *San Diego Building Trade Council v. Garmon* is influential because it explicitly defines the jurisdiction under which strikes are legally assessed. For a strike to be legally protected, it must be considered protected by the National Labor Relations Act. Moving forward, this case sets the precedent that requires the NLRB to make this evaluation. In the context of the UAW's Stand-Up Strike, the legality of the strike

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[37] "San Diego Building Trades Council, Millmen's Union, Local 2020, Building Material and Dump Drivers, Local 36, Petitioners, v. J.S. Garmon, J.M Garmon, and W.A. Garmon." *Cornell Law School Legal Information Institute*, Accessed January 7, 2024, https://www.law.cornell.edu/supremecourt/text/359/236.
[38] "Garmon v. San Diego Bldg. Trades Council." *Stanford Law School: Robert Crown Law Library Supreme Court of California Resources*, Accessed January 7, 2024, https://scocal.stanford.edu/opinion/garmon-v-san-diego-bldg-trades-council-26604.
[39] "San Diego Unions v. Garmon, 359 U.S. 236 (1959). *Justia*, Accessed January 7, 2024, https://supreme.justia.com/cases/federal/us/359/236/.

would have been evaluated by the NLRB, had the UAW faced a lawsuit in response to the protest.

B. What Can Constitute an Unprotected Strike: *National Labor Relations Board v. Fansteel Metallurgical Corporation*

Another crucial case in the history of strike law is the *National Labor Relations Board v. Fansteel Metallurgical Corporation*, which was decided by the United States Supreme Court on February 27, 1939.[40] This case specifically contends with the question of what constitutes a legally protected strike. Fansteel Metallurgical Corporation is a company based in Chicago, Illinois that manufactures and sells products containing rare metals. In 1936, a group of Fansteel workers created a union committee and sought to create a new labor agreement with Fansteel. Fansteel declined to negotiate with the committee, as the company refused to conduct negotiations with an "outside," independent union. However, when enough employees joined this emerging union to officially designate the committee as their collective bargaining agent, Fansteel's superintendent agreed to meet with the committee leaders. The superintendent then refused to meet any of the union's demands, so the union decided to strike. In February 1937, participating employees engaged in a sit-down strike, during which they remained inside two key Fansteel buildings but refused to work. The strike lasted for several days, despite attempted police intervention. Fansteel filed for an injunction that would force the employees to surrender the buildings, but this injunction was ignored until a larger group of law enforcement officers forcibly arrested striking employees in the buildings. Following the conclusion of the strike, some participating employees were offered their jobs back, but without any union representation. However, most participating workers were fired.

Under the National Labor Relations Act, companies cannot fire or retaliate against any employees who participated in a protected strike.[41] However, as emphasized in *NLRB v. Fansteel Metallurgical Corp*, employers can dismiss employees who participate in strikes that are not protected by the National Labor Relations Board. This case specifically deals with "sit-down strikes," during which strikers seize company property but refuse to work. Sit-down strikes are not considered protected by the NLRB. Committing intentional acts of violence, property destruction, or otherwise unsolicited and explicitly illegal activity would not be considered protected behavior during a strike. The seizure of Fansteel company property in the sit-down strike was unlawful, therefore meaning that the employees were subject to judicial action and repercussions even though these actions were done as part of a strike. Additionally, the court found that Fansteel's labor practices indicated no real need for the seizure of company property.

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[40] "NLRB v. Fansteel Metallurgical Corp.,306 U.S. 240 (1939)." *Justia*, Accessed January 8, 2024, https://supreme.justia.com/cases/federal/us/306/240/.
[41] "The Right to Strike." *National Labor Relations Board*, Accessed February 19, 2024, https://www.nlrb.gov/strikes.

Therefore, Fansteel was allowed to make labor decisions that would ordinarily be allowed in a non-striking period. In other words, because there was no proven need for the employees to illegally take possession of company property, Fansteel could respond as they would if these actions had been taken during a non-striking period, and thus fire participating employees.

The court's decision in *NLRB v. Fansteel Metallurgical Corp*. helped define what was considered a legally protected strike. Specifically, this case defined the sit-down strike strategy as unlawful because it involves the unnecessary seizure and/or destruction of company property. Furthermore, *NLRB v. Fansteel Metallurgical Corp.* guaranteed employers the legal right to dismiss employees who engage in non-protected strikes. Although the National Labor Relations Act prohibits employers from firing striking employees, this only applies to legally protected strikes.

In relation to the UAW's 2023 Stand-Up Strike, this case would impact the striking strategies employed by the union. As its name implies, the tactics of the Stand-Up Strike vastly differ from those of the sit-down strikes. The name of the strike itself is a reference to the monumental 1937 UAW sit-down strikes, which catalyzed a wave of sit-down strikes across American industries. The "stand-up strike" strategy instead involves gradual involvement and growth over time.[42] Different production locations of the Big Three companies were ordered to join the strike at different times, depending on the progress of negotiations. When negotiations met opposition or became stagnant, more locations were ordered to participate. This gradual approach proved effective and also remained legally protected by the NLRA.

C. Recent Decisions in Strike Law: *Glacier Northwest Inc. v. International Brotherhood of Teamsters Local Union*

Notably, another major strike law case was decided by the U.S. Supreme Court on June 1, 2023. In a parallel to *Fansteel*, *Glacier Northwest Inc. v. International Brotherhood of Teamsters Local Union* sought to better define the concept of a legally protected strike.[43] Glacier Northwest Inc. is a construction materials company based in Washington, specializing in concrete. Glacier's truck drivers are represented by Teamsters Local Union 174, which is a branch of the International Brotherhood of Teamsters labor union. On July 22, 2017, the company's drivers agreed to strike to accelerate the negotiations between Glacier and Teamsters Local Union 174. On August 11, 2017, the truck drivers began their strike and stopped working. Many drivers returned their trucks to their assigned storage areas, leaving the concrete that the trucks were

[42] "Stand Up Strike Frequently Asked Questions." *UAW*, Accessed February 19, 2024, https://uaw.org/standup/.
[43] "No. 21-1449 In the Supreme Court of the United States. Glacier Northwest, Inc., D/B/A Calportland, Petitioner, v. International Brotherhood of Teamsters Local Union No. 174, Respondent. On Writ of Certiorari to the Supreme Court of Washington, Brief of *Amicus Curiae* Landmark Legal Foundation in support of Petitioner." *Supreme Court of the United States*, Accessed February 19, 2024, https://www.supremecourt.gov/DocketPDF/21/21-1449/246031/20221108131943953_42948%20Forys%20Main%20Document.pdf.

carrying inside. To be transported effectively, concrete must be kept in a container with a continuously rotating drum. As a result of the drivers returning their delivery trucks to Glacier full and refusing to complete ongoing deliveries, the concrete intended to be distributed that day was ruined. However, none of Glacier's trucks or equipment were damaged. Some of the participating truck drivers received disciplinary action from Glacier because they abandoned their trucks while leaving concrete inside. In response, Local Union 174 filed a ULP (unfair labor practice) charge against Glacier. Glacier then filed tort claims against Local Union 174 in the King County Superior Court, claiming that the timing of the strike had been strategically planned to damage Glacier property and that the participating workers had made no effort to minimize damages. These claims were dismissed under the precedent of *San Diego Building Trades Council v. Garmon*, but the Washington Court of Appeals later reversed the dismissal and argued that the actions of Local Union 174 were not protected by the National Labor Relations Act. The Washington Supreme Court then reversed the decision of the Court of Appeals.

The United States Supreme Court then reversed the decision of the Washington Supreme Court, asserting that the resulting damages of the Union's strike were not protected under *Garmon* and therefore not protected under the NLRA. The United States Supreme Court argued that the Union did not present sufficient evidence to prove that their actions were protected under the NLRA, meaning that Glacier's tort claims should not be dismissed under the precedent of *Garmon*. As clarified by Justice Amy Coney Barrett, the Union would have to prove that they had taken sufficient action to minimize the damage inflicted upon Glacier's property. Given that the Union did not provide sufficient evidence to this effect, Justice Samuel Alito reasoned that *Garmon* would not necessarily prevent the courts from holding employees responsible for destroying their employer's property.

Similarly to *NLRB v. Fansteel Metallurgical Corp,* this case would prove relatable to the UAW's Stand-Up Strike because it further narrows the definition of a legally protected strike. This decision weakens the precedents set by *Garmon* and restricts the delineation of legality in strikes. Any damage to company property or product perpetrated during a strike is automatically declared unprotected and is therefore subject to employer retaliation. The UAW's Stand-Up Strike did not involve the purposeful destruction of company property, ensuring its status as a legally protected strike. However, many, including UAW president Shaun Fain, have considered the decision in *Glacier* as an intentional restriction of union rights and strike legality.[44] This decision seems to give more retaliatory power to large companies in response to employee strikes. Moving forward, this decision restricts the ability of unions to organize strikes and may serve as a deterrent for employees to participate in such protests.

[44] Irina Ivanova, "Supreme Court ruling deals another blow to organized labor," *CBS News*, June 2, 2023. https://www.cbsnews.com/news/supreme-court-glacier-northwest-vs-teamsters-decision-ruling-labor-strike-limits/.

IV. CASE ANALYSIS AND IMPLICATIONS FOR THE UAW STRIKE

Union law and strike law remain very relevant topics to both workers and employers across the country. For workers, it directly affects their ability to advocate for their rights. For employers, these laws help define their responsibilities to their workers and dictate the limitations of their ability to respond to employee protests. Therefore, it is not surprising that the world of union and strike law has remained one fraught with controversy since the founding of the first unions in the late nineteenth century. *San Diego Building Trade Council v. Garmon*, *NLRB v. Fansteel Metallurgical Corp.,* and *Glacier Northwest Inc. v. The International Brotherhood of Teamsters Local Union* are some of the most important court cases that have directly addressed the complexities of union and strike law. Given the impact that these cases have had on the U.S. workers, their decisions involved intense deliberation and have been met with scrutiny and mixed public opinion.

As previously explained, *San Diego Building Trade Council v. Garmon* defined the National Labor Relations Board as the main judicial body to decide cases related to strikes, even if the NLRB was not willing to become involved. Defining legal jurisdiction in this way created a pivotal precedent in deciding how strike law cases are evaluated. In this way, *Garmon* sets a crucial precedent that affects unionized American workers moving forward. This decision seems to hold immense merit. By designating the NLRB as the primary deciding body in strike law cases, *Garmon* centralizes and streamlines the judicial process by which strike law cases are evaluated. In doing so, *Garmon* improves the efficiency with which these cases are addressed. Additionally, *Garmon* ensures that these cases are evaluated by a more impartial entity, helping to ensure that the decisions are fair.

NLRB v. Fansteel Metallurgical Corp. evaluated the legality of employer retaliation against striking employees. As decided in *Fansteel*, employers are allowed to terminate employment if the employee participates in a strike that is not protected under the National Labor Relations Act, such as a sit-down strike. In this decision, *Fansteel* would seem to be limiting the rights of striking workers, as it explicitly grants employers the right to legally retaliate. This would seem to be contradictory to the very fundamentals of strike law. Furthermore, *Fansteel* seems to be limiting the rights of unions to organize and execute a strike, as it deems some types of strikes unprotected. However, these clear definitions of protected and unprotected strikes could be seen as beneficial for strike organization. By explicitly defining what constitutes a protected strike, *Fansteel* allows unions to plan strikes accordingly and ensure that their mobilization will be protected by the NLRA. Even if an employer wishes to retaliate against striking workers, they would not be able to do so if the union organized the strike in a way that is protected. *Fansteel* provides a precedent with which a union could guarantee their strike's protection. For unionized American workers, *Fansteel* creates a reference with which striking workers could ensure their job safety if they partake in a strike. This would be incredibly beneficial in encouraging strike participation. Thus, by creating definitions of "protected" and

"unprotected" strikes, *Fansteel* could provide unions with more guidance and clarity in planning their strikes.

Glacier Northwest Inc. v. The International Brotherhood of Teamsters Local Union reversed some parts of the decision made in *Garmon* and evaluated the rights of an employer to retaliate against striking workers. Ruling in favor of Glacier Northwest Inc., the Supreme Court's decision allowed the company to dismiss some striking workers because their actions caused the company financial damages. Since its decision in 2023, this case has been criticized for its potential limitations on the rights of workers to strike. This decision narrows the definition of what is considered a "protected" strike under the NLRA, which therefore makes workers more vulnerable to dismissal from their employer following their participation in a strike. The fear of potential dismissal would understandably act as a major deterrent to workers who would otherwise want to participate in a strike. While striking workers have always faced this risk of potential dismissal, this ruling makes it even more probable. By expanding the rights of an employer to fire striking employees, *Glacier* may prove to be a barrier that discourages workers from participating in future strikes. In this way, this ruling is a major blow to a union's right to strike. Under *Glacier*, to what extent will employers be able to claim financial damages? Strikes always cause economic loss for the company, regardless of the type of strike that the workers are engaging in. So, could any resulting economic loss be construed as financial damages, and thus become grounds for employee termination? While this seems like an extreme point, one must wonder where the limitations of strike law will be drawn in the future, given the *Glacier* decision. *Glacier* may act as a catalyst to a continuing trend of strike law limitations for American workers. If parts of *Garmon* were overturned, what is to say that its entire precedent may soon be overturned as well? By discouraging workers from partaking in strikes, *Glacier* would subsequently limit the ability of workers to organize and advocate for better rights. Therefore, this case is extremely relevant for American workers across industries. Although *Glacier* was decided in an 8-1 majority, it could be argued that the Supreme Court should be working to find a compromise that would better protect the striking rights of the American working class, especially given the state of modern economic conditions. One may consider whether there should be stronger definitions of the type of evidence required to defend against tort claims filed by employers against striking unions. Furthermore, it may be beneficial to make exceptions to this ruling depending on the exact extent of financial damage and whether the financial damage was intentional.

V. CONCLUSION

The UAW Stand-Up Strike has sparked renewed discussion of strike law and union law in American political discourse. Due to its immense successes, the Stand-Up Strike has created an important precedent that allows the union to strike over mass layoffs resulting from plant closures. The vast number of participating workers made this strike incredibly impactful, both

socially and economically. As a result, Big Three automakers have expressed concern regarding the locations of manufacturing plants moving forward. For example, Ford has hinted at decentralizing their truck and car production to minimize the financial impact of any future strikes. This may encourage further foreign outsourcing of labor for manufacturing companies moving forward. Given the extent to which job outsourcing is already occurring across different sectors of the economy, this would be catastrophic to the American job market. For manufacturing workers struggling financially post-pandemic, a further decrease in job availability would prove especially devastating.

Given the success of the Stand-Up Strike, it is clear that strikes and large-scale union mobilization are still effective in creating productive change for workers. Especially in the wake of the recent decision in *Glacier*, U.S. governmental bodies must strengthen protections of strike rights and union rights. With the support of unions, U.S. workers must be able to assert their demands and advocate for themselves against any oppression or exploitation from their employers. To ensure that workers can effectively advocate for themselves, their right to strike must be adequately protected by law. By protecting the union's right to strike, we can amplify and empower the voices of the U.S. working class and provide for the individuals who form the backbone of the U.S. economy.

Changes to the Digital Economy and Reforms in Antitrust Law: A Contemporary Legal Analysis of Gatekeeping Power and Competition in the Tech Sector

Written by Anthony Yahya
Edited by Anahi Aguillon

ABSTRACT.

The rise of powerful technological corporations within the digital economy has raised concerns about their gatekeeping power and the overall impact on fair market competition within the industry. This article examines the evolving judicial perspectives on applying antitrust principles to digital markets, focusing on foundational cases against Microsoft, Intel, and Apple. While these cases demonstrate the applicability of antitrust laws to technological markets, they also highlight the limitations of current enforcement frameworks in effectively addressing the unique challenges posed by such digital gatekeepers. Thus, a multi-faceted approach to antitrust regulation is necessary, incorporating both rudimentary enforcement with swift regulation as a means of combating this ever-changing technological sector. The proposed reforms mirror the works of the *EU's Digital Markets Act* and urge the implementation of proactive discrepancy measures such as those seen in the U.K.'s App Store investigation. This intended influence is further indicative of the crucial role that data will serve in the reforms of antitrust law. It is greatly emphasized across this article that such a regulatory approach must be subsidized with a clear and collaborative approach by which these corporations work together in sharing applicable data– without overstepping and infringing upon their intellectual property rights. Subsequently, the clearest path for effective antitrust law reforms lie at the forefront of collaboration between regulators, industry stakeholders/leaders, and civil society groups to truly forge a greater technological sector for its constituents and the development of the tech industry as a whole.

I. INTRODUCTION

The rise of powerful technological companies such as Google, Amazon, Facebook, and Apple has transformed industry dynamics and concentrated immense influence over recent digital markets. As online platforms increasingly dominate economic activity and consumer choices, concerns emerge regarding potential abuses of entrenched market power to disadvantage rivals. Legal scholars and policymakers have called for modernizing antitrust rules, originally developed during the industrial era, to better address modern anti-competitive practices in the technology sector.

Antitrust laws in the United States, centered around the Sherman Antitrust Act of 1890[45] and the Clayton Antitrust Act of 1914[46] were designed to combat monopolistic business trusts like Standard Oil that eliminated marketplace competition through tactics such as predatory pricing (selling goods below cost to drive out competitors) and acquiring rivals. While promoting market competition to benefit consumers remains central in assessing modern technology cases, new analytical complexities arise. For example, digital practices like prioritizing a platform's own products in search algorithms (self-preferencing)[47] or restricting app store access can potentially undermine online competition by limiting rival visibility and market access. As antitrust litigation continues targeting Big Tech firms, evidentiary limitations rooted in precedent and enforcement gaps stemming from outdated paradigms inhibit meaningful scrutiny over the enduring market power of dominant platforms in the sector.

This article argues that existing antitrust frameworks are inadequate to effectively promote competition in digital markets, necessitating coordinated reforms beyond merely amplifying enforcement activity. The analysis examines the trajectory of recent technology antitrust cases, focusing on judicial reasoning, the resurgence of modern theories of competitive harm based on decades-old legal standards, and the remaining inadequacies in proving claims of illegally maintained dominance. Additionally, the commentary assesses the comparative strengths of proposed ex-post litigation remedies, such as breaking up dominant firms versus ex-ante conduct regulations, which proactively set rules for market behavior in rectifying distortions caused by entrenched platforms with durable market power. Ex-post regulation refers to such changes that are imposed retrospectively to address conduct concerns that arise in the market, which have already occurred. However, ex-ante regulation seeks to prevent such harmful conduct from occurring in the first place.

[45] Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1–7.
[46] Clayton Antitrust Act of 1914, 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53.
[47] Padilla, J., Perkins, J. and Piccolo, S. (2022), Self-Preferencing in Markets with Vertically Integrated Gatekeeper Platforms. J Ind Econ, 70: 371-395. https://doi.org/10.1111/joie.12287

II. SHIFTING LEGAL PERSPECTIVES ON TECH DOMINANCE AND FAIR COMPETITION

The Federal Trade Commission's (FTC) 2020 lawsuit against Facebook[48] marked the first major federal case directly targeting a technology platform's expansion through acquiring rivals. The FTC alleged that Facebook illegally maintained its market dominance[49] in personal social networking services by purchasing Instagram in 2012 and WhatsApp in 2014. Market dominance, also known as a monopoly, refers to having a large enough market share to influence prices or exclude competition. The FTC argued that these mergers were part of an anti-competitive strategy to protect Facebook's dominant position by eliminating potential future rivals, violating Section 2 of the Sherman Act[50] prohibiting monopolization and Section 5 of the FTC Act banning unfair competition methods.[51]

However, Judge James Boasberg of the U.S. District Court for the District of Columbia dealt a blow to the regulators by dismissing the complaint in 2021.[52] He ruled that the FTC failed to provide sufficient factual evidence supporting its monopoly claims against Facebook at the initial pleading stage, stating that more concrete proof was needed to link Facebook's acquisitions to clear harms in maintaining its alleged monopoly power through exclusionary actions.[53] Although the judge allowed the FTC to refile an amended complaint, he outright dismissed the states' parallel lawsuit.[54]

Despite this setback, the case is significant as a reference for evaluating judicial perspectives on applying antitrust scrutiny to technology platforms. The court's reasoning indicates evolving views tilting towards amplified suspicion of consolidation strategies among dominant tech giants to eliminate future competitive threats. Legal experts argue that the precedent set raises the bar for regulators to prove post-merger harms conclusively. However, economists caution that allowing digital incumbents to eliminate emerging innovators itself freely distorts competition over the long run. This underscores limitations around preemptively blocking such acquisitions compared to pursuing after-the-fact monopoly charges.

Going forward, agencies will likely continue targeting Facebook's strategic acquisitions. However, increased judicial scrutiny regarding marketplace effects may prompt tech companies to employ more subtle anti-competitive tactics that skirt allegations of overt monopoly maintenance violations. Even with stricter antitrust enforcement, gaps continue to prevent market

[48] FTC v. Facebook, Inc., No. 20-3590 (D.D.C. 2021).
[49] Ibid.
[50] Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2.
[51] Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.
[52] FTC v. Facebook, Inc., No. 20-3590 (D.D.C. 2021) - First Amended Complaint for Injunctive and Other Equitable Relief [Public Redacted Version]
[53] FTC v. Facebook, Inc., No. 20-3590 (D.D.C. 2021) - Plaintiff Federal Trade Commission's Memorandum of Law in Opposition to Defendant Facebook, Inc.'s Motion to Dismiss Amended Complaint
[54] Ibid.

power entrenchment through rival absorption. Unless legislative reforms are implemented that appropriately balance evidentiary standards around competition harms, this harsh circumstance of tech-monopoly-induced market share entrenchment will continue to be evident within the tech sector.

III. CASE ANALYSIS - PRIOR ANTITRUST FRAMEWORK

A. United States v. Microsoft (2001) - Abuse of Operating System Dominance through Browser Bundling

In the widely followed United States v. Microsoft case, the U.S. government, along with 20 states, charged software giant Microsoft with illegally maintaining its Windows operating system (OS) monopoly. They alleged that it did so by bundling its own Internet Explorer (IE) web browser to the exclusion of nascent competitor Netscape Navigator.[55] Much like today's technology titans, Microsoft held overwhelming dominance over the pivotal desktop OS access point to personal computing, enjoying a greater than 95% market share. However, the advent of internet browsing technology and Netscape's innovations in the space pried open possibilities of an alternate platform that could ultimately undermine Windows' position.[56]

Hence, when Netscape initially licensed its browser for distribution on Windows, Microsoft grew worried over the long-term threat and decided to "cut off the air supply" of this budding rival. It first attempted unsuccessfully to divide markets with Netscape. It then leveraged Windows licensing restrictions to compel computer manufacturers and customers to exclusively feature Internet Explorer, prohibiting the removal or alteration of IE in Windows to offer alternatives alongside. Regulators argued that this constituted illegal technological tying of Microsoft's OS monopoly power[57] to destroy competition in the browser market, violating Section 2 of the Sherman Act.[58]

Initially, in 2000, District Judge Thomas Penfield Jackson agreed, finding Microsoft liable for illegally maintaining its dominance through these exclusionary actions while ordering its breakup. However, the structural remedies were later overturned on appeal in 2001.[59] This occurred even after the D.C. Circuit court upheld the core liability ruling, deeming Microsoft a monopoly maintainer. The precedential findings established principles that remain highly relevant for current cases against modern tech titans - notably that technological attempts to

[55] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).
[56] Ibid.
[57] Ibid.
[58] Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2.
[59] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) - https://www.justice.gov/atr/us-v-microsoft-courts-findings-fact

extend platform power to adjacent markets can breach antitrust rules even with no apparent effects on direct prices.

This foundational case sent the message that competition laws could, in fact, apply checks against enduring software empire power. However, it also highlighted difficulties in crafting appropriate and tailored remedies even once liability is found regarding complex technology markets. Nonetheless, the rules against technological tying and principles developed provided a vital basis for comparable cases against today's dominant platforms such as Google.

B. Intel Corp v. Commission (2009) - Conditional Rebates as Anticompetitive in the European Union

Across the Atlantic, an equally foundational case unfolded when the European Commission leveled a record €1,060,000,000 fine against semiconductor titan Intel in 2009 for violating European Union (EU) competition laws.[60] Specifically, the Commission found Intel had abused its dominance in central processing units (CPUs) to exclude rival AMD through conditional rebates and payments, inducing exclusivity with key business partners.[61] Regulators also determined that Intel paid computer makers and retailers substantial rebates conditioned on purchasing more than 95% of their CPU needs from Intel. Furthermore, Intel made direct payments to dominant PC original equipment manufacturers (OEMs) like Dell, HP, and Lenovo to halt the adoption of any products containing AMD chips.[62]

The Commission held that these exclusionary rebates and payments essentially coerced crucial business partners to exclusively carry Intel's products over AMD's innovations regardless of competitive merits. This conduct was found illegal after regulators defined the relevant CPU market narrowly, establishing Intel's position as dominant with up to 70% market share in several EU member states. The conditional loyalty rebates made it harder for AMD to gain any foothold even when their products matched or exceeded Intel's chips in performance or pricing. Ultimately, the Commission and General Court both ruled that Intel's actions constituted monopolistic tactics to deliberately eliminate competition, stifling consumer choice and innovation in the CPU market.[63]

This ruling expanded scrutiny of coercive rebate programs beyond older theories, looking mainly for predatory pricing and instead focusing on the exclusionary effects on competition playing out over the long run. It also served as crucial groundwork that later informed several antitrust decisions against technology firms such as Google and Qualcomm. Furthermore, by establishing dominance in a narrowly defined relevant market, the case mirrors the contemporary

[60] European Commission v. Intel Corp., Case T-286/09, General Court of the European Union (June 12, 2014).
[61] Judgment of the General Court (Seventh Chamber, Extended Composition) (2014), (publication by extracts) Intel Corp. v European Commission, 1- 88. https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62009TJ0286
[62] Ibid.
[63] Ibid.

debate around properly framing platform power in digital contexts today. Ultimately, it reinforced the notion that exclusionary conduct can exist in diverse forms, even beyond outright acquisition that was prominent in cases such as United States v. Microsoft.[64]

C. Apple App Store Litigation - Examining Mobile Ecosystem Restrictions

More recently in 2021, there was a notable high-profile lawsuit brought by Fortnite developer, Epic Games, against Apple. This case highlighted contemporary claims regarding gatekeeping restrictions' influence in restricting competition within the critical mobile app ecosystem.[65] Central to the case was Apple's conduct in leveraging its monopoly over app distribution on iPhones through contractual policies mandating the use of its proprietary App Store and in-app payment systems, imposing 30% commissions.[66] Epic intentionally violated the App Store terms, offering direct Epic payment processing within Fortnite apps to bypass Apple's fees. In response, Apple removed Epic's flagship game from its App Store, leading to the lawsuit alleging antitrust violations maintaining iOS app market dominance.

U.S. District Judge Gonzalez Rogers ultimately ruled that Apple's complete control over iOS app distribution itself did not constitute an unlawful monopoly under the Sherman Act[67] infringement standards. On the definitional front, she held that the relevant market included other gaming platforms like consoles where Apple lacked dominance.[68] Furthermore, regarding overall conduct, the forced App Store and payment mechanisms did not meet the bar for illegal monopoly maintenance, and there was no more convincing proof that such policies excluded all competition rather than just disadvantageous rivals.

However, Rogers did find that the anti-steering contractual clauses prohibiting developers from directing users to alternative payment options within iOS apps violated California competition laws.[69] This ruling on Apple's restrictions curtailing consumer choice provides contemporaneous validation of themes similar to those in the earlier Microsoft case. It extends scrutiny over technological tying-like policies in a modern mobile ecosystem gatekeeping context, further bolstering notions that competition assessments should weigh impacts on innovation beyond narrow price effects.

Additionally, paralleling Intel, the case touches on properly defining platform power and associated policies reinforcing said influence within narrowly constructed relevant markets like iOS operating systems and app distribution channels. Ultimately, while Apple succeeded in

[64] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).
[65] Epic Games, Inc. v. Apple Inc., No. 4:20-cv-05640-YGR, 2021 U.S. Dist. LEXIS 185819 (N.D. Cal. Sept. 10, 2021).
[66] Ibid.
[67] Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1–7.
[68] Epic Games, Inc. v. Apple Inc., No. 4:20-cv-05640-YGR, 2021 U.S. Dist. LEXIS 185819 (N.D. Cal. Sept. 10, 2021).
[69] Ibid.

dismissing many of the federal monopoly claims, the partial loss does expose them to complimentary state or international jurisdiction challenges regarding similar restrictive practices. It also signals judicial receptiveness expanding to restrictive conduct within adjoining mobile technology markets centered around operating systems, app marketplaces, and payment infrastructures.

D. Implications for Gatekeeper Power in Digital Markets

Revisiting these foundational tech-competition cases collectively demonstrates evolving perspectives on applying antitrust laws to check enduring technological platforms' power across adjacent Web access points and software ecosystems. The findings cemented several notions that, beyond outright acquisitions, coercive technological and contractual arrangements could also illegally impact competition in digital markets. However, they also highlighted challenges in constructing precise legal remedies once violations were found regarding the intricacies of online platforms.

Fundamentally, these principles around condemning technological monopolies, restrictive consumer rebates, and prohibitions that restrict the choices of tech companies and their respective consumers underscore a movement towards assessing impacts on innovation beyond their market-share influence. However, enduring limitations rooted in existing statute language show the efforts that have been made to conclusively deter online monopolies from dominant platforms who primarily seek to enhance their own market-share at the cost of the overall market's volatility. This upholds arguments that enhanced regulation beyond merely pre imposed post-antitrust enforcement may be the necessary approach in order to promote fair competition in concentrated technology spheres.[70] These reforms may include breaking up dominant firms and providing a greater transparency in source and user data which limits the gatekeeper power of larger technology firms that currently have access to the majority of such user information. Although such ex-post antitrust reforms would seek to influence the currently unfair market, it must also be subsidized with preventative ex-ante regulations that seek to combat the inevitable intellectual property concerns of these larger corporations.

Critically, these cases also touch on properly defining competitive effects within adjacent internet access infrastructures such as operating systems, browsers, app stores, and advertising networks. These spaces perpetuate outsized power within the tech-market and can damage consumer welfare as well as market opportunities over a long-term period. This suggests that coherent competition policy for the digital age necessitates reforms which recognize the expansive gatekeeping influences of such dominant platforms. Understandably, these platforms exert such power across several online markets through their ownership of key access points, interactions, and data flows.

[70] Daniel F Spulber, Antitrust and Innovation Competition, Journal of Antitrust Enforcement, Volume 11, Issue 1, March 2023, Pages 5–50, https://doi.org/10.1093/jaenfo/jnac013

Overall, these foundational cases oppose dominating tech-industry giants and aim to yield a more controlled and competition-friendly environment. Thus, the process by which the legislature serves to aid in the reforms of these technological monopolies and improve the sphere of tech competition is a crucial process of competitive and social equality. Though the current reforms and efforts of the judicial process to reform antitrust laws is crucial, it is necessary to look ahead with caution when assessing contemporary litigation against massively successful tech companies such as Apple and Google. While these previous foundational cases do underscore antitrust laws' applicability in theory, they also showcase the failures of such legislature to actively promote fair competition in the tech industry. Such a construct is bound through the inadvertent understanding that a complicated legal sector is bound to face struggles in covering all bases by which tech monopolies are able to yield supreme market share without an abrasive legal consequence at all times. Thus, it is crucial to uphold the imperative for modernized reforms and enforcement approaches tailored to the unique competitive realities posed by today's enduring digital gatekeepers across concentrated Web infrastructure and software ecosystems.

E. Case Study of Gatekeeping Power - Apple and Google

As antitrust scrutiny intensifies on dominant technology platforms, regulatory authorities are increasingly prioritizing interventions to curtail the gatekeeping influence these firms exert over critical digital ecosystems. A prominent example is the United Kingdom's Competition and Markets Authority (CMA) investigation into Apple's and Google's app store policies,[71] which identified several restrictive practices deemed harmful to competition in the mobile application distribution market.

The CMA's interim report, released in December 2021, found that Apple and Google, through their control over the iOS and Android operating systems, hold an effective duopoly over the distribution of mobile apps.[72] This dominance enables them to impose rules and restrictions on app developers, such as mandating the use of their proprietary payment systems and charging commissions of up to 30% on in-app purchases. The CMA argued that these practices create barriers to entry, stifle innovation, and lead to higher prices for consumers.[73]

To address these concerns, the CMA proposed a series of remedies aimed at promoting competition and protecting users' interests. These included allowing users to download apps from alternative sources (sideloading), enabling developers to use their own payment systems, and prohibiting the pre-installation of certain apps on devices.[74] The CMA's recommendations

[71] Published by Competition and Markets Authority (CMA) (2021), "Mobile Ecosystems Market Study Interim Report" 5- 445.
https://assets.publishing.service.gov.uk/media/61e99b96d3bf7f0549bf7e11/MobileEcosystems_InterimReport.pdf
[72] Ibid.
[73] Ibid.
[74] Ibid.

signal a growing prioritization among policymakers to proactively regulate the gatekeeping power of dominant platforms in the digital economy. Its investigation highlights the emerging debate between the merits of ex-post competition enforcement and ex-ante conduct regulation in addressing the challenges posed by digital gatekeepers. Ex-post enforcement, as seen in the cases discussed earlier, relies on antitrust authorities taking action against anti-competitive practices after they have occurred. While ex-ante regulation involves establishing proactive rules and obligations for market participants to prevent anti-competitive practices from occurring in the first place.[75]

While this approach allows for targeted interventions based on specific market conditions, it often faces limitations in terms of the timeliness of remedies and the difficulty in proving long-term competitive harm. In contrast, ex-ante regulation involves establishing proactive rules and obligations for market participants to prevent anti-competitive practices from occurring in the first place. This approach, as exemplified by the CMA's proposed remedies, has the potential to create a more fair industry and foster innovation by reducing the ability of dominant platforms to leverage their market power. However, ex-ante regulation also raises concerns about potential overreach and the risk of stifling legitimate business practices.

As regulatory authorities grapple with these trade-offs, there is growing recognition that effectively governing digital gatekeepers will require a combination of both ex-post enforcement and ex-ante regulation. The European Union's recently adopted Digital Markets Act (DMA) represents a notable example of this hybrid approach.[76] The DMA establishes a set of ex-ante obligations for large online platforms designated as "gatekeepers" while also empowering the European Commission to enforce these rules through ex-post investigations and penalties. The DMA's provisions aim to promote fair competition and user choice by prohibiting certain practices, such as self-preferencing of a platform's own services and mandating interoperability between different platforms.[77] As the DMA comes into force, it will provide valuable insights into the effectiveness of this combined regulatory approach in addressing the challenges posed by digital gatekeepers.

IV. REGULATORY SOLUTIONS IN ANTITRUST REFORM

The case rulings and investigations discussed in the previous sections highlight the growing concern among regulators and policymakers about the gatekeeping power that dominant technology platforms wield over critical digital ecosystems. While these efforts represent important steps in addressing the anti-competitive practices of digital giants, they also reveal

[75] Ginsburg, Douglas H. and Wright, Joshua D., Introduction and Executive Summary (November 11, 2020). The Global Antitrust Institute Report on the Digital Economy 1, Available at SSRN: https://ssrn.com/abstract=3733650 or http://dx.doi.org/10.2139/ssrn.3733650
[76] European Union Digital Markets Act, (2021), "Regulation (EU) 2022/1925 of the European Parliament". https://eur-lex.europa.eu/eli/reg/2022/1925/oj
[77] Ibid.

significant gaps in the current antitrust framework that need to be addressed to effectively promote competition in the digital age.

One crucial aspect that the existing antitrust approach often overlooks is the unique nature of digital markets, characterized by strong network effects, high switching costs, and data-driven economies of scale. These factors enable dominant platforms to quickly establish and maintain their market power, even in the absence of traditional anti-competitive practices such as price gouging or exclusive contracts. The case rulings against Microsoft, Intel, and Apple demonstrate the difficulty in applying traditional antitrust principles to digital markets, where the harm to competition may manifest in more subtle ways, such as reduced innovation or limited consumer choice.

It is essential to address these issues because the unchecked dominance of digital gatekeepers can have far-reaching consequences for both businesses and consumers. Small businesses and startups may find it increasingly difficult to compete against the entrenched market power of dominant platforms, stifling innovation and entrepreneurship. Consumers, in turn, may face higher prices, reduced quality of services, and limited options as a result of the lack of competition in digital markets. To effectively tackle these challenges, a multi-faceted approach that combines ex-post enforcement with ex-ante regulation is necessary. While ex-post enforcement remains crucial in addressing specific instances of anti-competitive behavior, ex-ante regulation can help create a more level playing field by establishing clear rules and obligations for dominant platforms.

One potential solution is to adopt a regulatory framework similar to the European Union's Digital Markets Act (DMA), which sets out ex-ante obligations for large online platforms designated as "gatekeepers."[78] These obligations could include prohibiting self-preferencing practices, mandating data portability and interoperability between platforms, and ensuring fair access to app stores and other essential digital infrastructures. The advantages of such an approach are that it provides greater legal certainty for market participants, reduces the reliance on lengthy and complex antitrust investigations, and proactively addresses the structural issues that enable digital gatekeepers to maintain their dominance. However, the disadvantages include the risk of regulatory overreach, potential unintended consequences, and the challenge of keeping pace with the rapidly evolving nature of digital markets.

Another important aspect that the current antitrust framework often fails to consider is the role of data in digital markets. Dominant platforms' control over vast amounts of user data can create significant barriers to entry and reinforce their market power. Therefore, any effective regulatory solution must also address issues related to data access, portability, and interoperability. This could involve mandating data-sharing arrangements between dominant

[78] European Union Digital Markets Act, (2021), "Regulation (EU) 2022/1925 of the European Parliament". https://eur-lex.europa.eu/eli/reg/2022/1925/oj

platforms and competitors, subject to appropriate privacy and security safeguards.[79] Such measures would help level the playing field by enabling smaller players to benefit from the data-driven economies of scale that currently give dominant platforms an unfair advantage. However, the challenges in implementing such data-sharing arrangements include ensuring the protection of user privacy, maintaining data security, and defining fair and reasonable terms of access.

Thus, while recent antitrust efforts have made progress in addressing the anti-competitive practices of digital gatekeepers, more comprehensive and adaptive regulatory solutions are necessary to effectively promote competition in the digital age. By combining targeted ex-post enforcement with carefully crafted ex-ante rules, policymakers can work towards creating a more level playing field, fostering innovation, and protecting consumer welfare in digital markets. However, striking the right balance between effective regulation and avoiding overreach will require ongoing collaboration and dialogue between regulators, industry stakeholders, and civil society groups.

V. CONCLUSION

The rise of dominant technology platforms has led to growing concerns about their gatekeeping power over critical digital ecosystems. As antitrust scrutiny intensifies, regulators face the challenge of adapting existing legal frameworks to effectively promote competition in the digital age. The cases discussed in this article, spanning foundational lawsuits against Microsoft, Intel, and Apple, demonstrate the evolving judicial perspectives on applying antitrust principles to technological markets. However, the analysis also highlights the limitations of current antitrust enforcement, rooted in outdated precedents, high evidentiary barriers, and disagreements over optimal remedies. These gaps have allowed dominant platforms to entrench their market power, despite the anti-competitive effects of their practices.

To effectively govern Big Tech dominance, policymakers must pursue coordinated regulatory reforms tailored to the realities of digital competition. This requires a focused modernization of the economic and legal philosophies underpinning oversight approaches, moving beyond merely amplifying enforcement activity under current inadequate frameworks. The emergence of ex-ante regulation, as exemplified by the U.K.'s app store investigation[80] and the EU's Digital Markets Act,[81] represents a promising development in this direction. By establishing proactive rules and obligations for dominant platforms, these initiatives aim to create a more level playing field and foster innovation in the digital economy.

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[79] Cyphers, Bennett & Doctorow, Cory (2021), "Privacy Without Monopoly: Data Protection and Interoperability" Electronic Frontier Foundation 1- 42. https://www.eff.org/wp/interoperability-and-privacy

[80] Published by Competition and Markets Authority (CMA) (2021), "Investigation into Apple AppStore." https://assets.publishing.service.gov.uk/media/61e99b96d3bf7f0549bf7e11/MobileEcosystems_InterimReport.pdf

[81] European Union Digital Markets Act, (2021), "Regulation (EU) 2022/1925 of the European Parliament". https://eur-lex.europa.eu/eli/reg/2022/1925/oj

However, the optimal balance between ex-post enforcement and ex-ante regulation remains a subject of ongoing debate. As regulators navigate this complex landscape, it is crucial to strike a balance that effectively checks the gatekeeping power of dominant platforms while avoiding overreach that could stifle legitimate business practices. Thus, the antitrust challenges posed by digital gatekeepers require a comprehensive and adaptive regulatory approach. By combining targeted ex-post enforcement with carefully crafted ex-ante rules, policymakers can work towards promoting fair competition, protecting consumer welfare, and fostering innovation in the digital age. As the legal and regulatory landscape continues to evolve, ongoing collaboration between antitrust authorities, policymakers, and industry stakeholders will be essential in shaping a competitive and inclusive digital future for all.

Setting a Precedent: Legal Considerations in Microsoft's Activision Blizzard Acquisition

Written by Parham Assadi
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ABSTRACT.

After Microsoft announced its intent to acquire Activision Blizzard, the UK Competition and Markets Authority (CMA) and the US Federal Trade Commission (FTC) initiated a major regulatory investigation. The decision was made to mitigate antitrust concerns regarding the $68.7 billion acquisition. Aside from antitrust concerns, this publication also focuses discussion on complex legal concerns such as data privacy, security, and its impact on smaller developers. The objective of this publication is to evaluate components of the acquisition's regulatory framework by analyzing crucial legal rulings and case studies. This objective is followed by an analysis that emphasizes the necessity for a comprehensive regulatory approach that protects consumer rights, encourages innovation, and takes into account a variety of stakeholders. The insights in this publication are intended to educate policymakers and help develop regulatory frameworks for the growing tech industry since this deal sets a precedent for future tech mergers and acquisitions.

I. INTRODUCTION

Focusing within business strategy and government regulatory oversight, the Microsoft acquisition of Activision Blizzard plays a significant role regarding the realm of business law. The high-profile acquisition signifies a strategic alignment between two industry heads while also allowing for examination into the nuanced legal complications and potential ramifications that may impact the digital entertainment industry. Activision Blizzard is a leading entertainment corporation, and is renowned for its innovation and creativity in the gaming industry. It also boasts an extensive portfolio of iconic titles. These titles include Call of Duty, World of Warcraft, and Diablo, amongst others.[82] With these successful flagship titles, Activision Blizzard has solidified its position as a major player in the digital entertainment sector. The company's work in developing and publishing video games has created widespread recognition and consumer loyalty, which further presents its significance in the realm of interactive entertainment. Activision Blizzard's role as a major player in the entertainment sector allows it to specialize in developing and publishing video games. This, in turn, grants Microsoft the ability to boast a portfolio of globally recognized franchises, which emphasizes its role in shaping the industry.

II. BACKGROUND ON MICROSOFT ACQUISITIONS

This acquisition surpasses Microsoft's prior acquisitions, including LinkedIn and Bethesda, in monetary value. Microsoft seeks attraction in this acquisition as there is a large impact of the acquisition within the entire entertainment industry, making this acquisition a significant move in the entertainment sector for Microsoft. Microsoft has confirmed its commitment to initiate the acquisition of Activision Blizzard at $68.7 billion.[83] This is an all-cash deal, meaning Microsoft intends to purchase Activision Blizzard in only cash, rather than using stocks or other forms of payment. The company's purchase will be financed using its already existing cash reserves. When completed, it will place a 45% premium on Activision Blizzard's overall value, meaning the acquisition will result in Activision Blizzard being valued at 45% more than its current market value prior to the acquisition.[84] Microsoft's acquisition of Activision Blizzard marks new beginnings for Microsoft into the entertainment/gaming industry on a large scale due to Activision Blizzard's existing major position in the industry.

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[82] Warren, Tom. "Microsoft Completes Activision Blizzard Acquisition, Call of Duty Now Part of Xbox." *The Verge*, October 13, 2023. https://www.theverge.com/2023/10/13/23791235/microsoft-activision-blizzard-acquisition-complete-finalized.
[83] Movement, Q.Ai - Powering a Personal Wealth. "Microsoft's $69 Billion Activision Blizzard Acquisition Finally Approved." *Forbes*, October 17, 2023. https://www.forbes.com/sites/qai/2023/10/16/microsofts-69-billion-activision-blizzard-acquisition-finally-approved/
[84] Hu, Yuhao & Li, Fengxi & Mao, Linger. (2023). Microsoft's Acquisition of Activision Blizzard: SWOT and Prospect Analysis. Advances in Economics, Management and Political Sciences. 36. 85-92. 10.54254/2754-1169/36/20231789.

Microsoft's advancements in the entertainment/gaming industry through the acquisition of Activision Blizzard could easily be a strategic shift for the company. The company's move would allow it to jump into the evolving technology and entertainment sectors. By acquiring Activision Blizzard, Microsoft has positioned itself at the high end of a global and highly competitive market. This acquisition marks Microsoft as the third-largest gaming company by revenue globally.[85] This is due to gaining access to Activision Blizzard's robust revenue streams. The historical acquisition holds a future for Microsoft's role in shaping the gaming sector. Microsoft will set the stage for others to understand the motivations behind this progressive acquisition.

This law review is aimed to analyze the Microsoft Activision Blizzard acquisition and explore its implications from diverse perspectives. These include implications that are present in technology, business, law, and even international relations. This approach is crucial to untangling the complexity that surrounds this very significant deal. The law review seeks to provide an understanding of the acquisition's impact on the various industries involved. This will include understanding the competitive industry and delving into regulatory challenges that Microsoft has faced throughout this acquisition. This analysis focuses on contributing valuable insights to students, professors, and other professionals across the field.

III. CASE ANALYSIS

A. Microsoft v. UK Competition and Market Authority

The earlier decision by the British Competition and Markets Authority (CMA) to block Microsoft's attempted acquisition of Activision Blizzard sent concern throughout the tech industry. These concerns are related to antitrust issues and fear of monopoly in the industry. At its core, the ruling represented a moment in the regulatory oversight of large-scale mergers and acquisitions particularly when considering the realm of cloud gaming. The CMA's concerns, which they articulated in their early assessment, are centered around the potential anti-competitive implications that could come about from Microsoft's consolidation of power in the cloud gaming sector.[86] By considering this market segment, the CMA has demonstrated an interest and awareness of the transformative potential of cloud gaming, which leads into the need for preserving market competition in its formative stages. This decision also reflects broader

[85]Hu, Yuhao & Li, Fengxi & Mao, Linger. (2023). Microsoft's Acquisition of Activision Blizzard: SWOT and Prospect Analysis. Advances in Economics, Management and Political Sciences. 36. 85-92. 10.54254/2754-1169/36/20231789

[86] Authority, Competition and Markets. "Microsoft / Activision Deal Prevented to Protect Innovation and Choice in Cloud Gaming." *GOV.UK*, April 26, 2023. https://www.gov.uk/government/news/microsoft-activision-deal-prevented-to-protect-innovation-and-choice-in-cloud-gaming.

regulatory trends across jurisdictions. This is due to the fact that governments and regulatory bodies worldwide have to deal with the challenges posed by the rapid evolution of the tech industry. However, there has recently been a recognition for the need to scrutinize mergers and acquisitions more rigorously, particularly when it comes to large corporations like Microsoft. The rationale behind such scrutiny is fueled by the desire to prevent monopolistic practices from happening, protect consumer interests, and support an environment that allows innovation and competition. As such, the initial CMA's decision to block the Microsoft-Activision Blizzard deal serves as a signal that regulators have the power to intervene decisively in order to protect market integrity and prevent the emergence of dominant players who hold immense influence.

When analyzing the implications of the CMA's ruling, it becomes clear that the tech industry is entering an era in which there is major regulatory scrutiny. This is due to the heightened awareness and proactive intervention. Companies that seek to pursue growth strategies through mergers and acquisitions will now have to consider an increasingly complex regulatory landscape in which there are heightened antitrust considerations. The decision ultimately highlights the importance of competition and innovation in emerging markets, such as in this case with cloud gaming. Cloud gaming holds the potential to reshape the future of the industry. Regulators are now continuing to assert their authority and reshape the trajectory of technological development. Technology industry partners must adapt to a new idea where regulatory compliance and market competition require serious considerations in strategic decision-making.

B. Microsoft v. Federal Trade Commission

Microsoft's attempt to secure approval for its acquisition of Activision Blizzard encountered staunch opposition from the U.S. Federal Trade Commission (FTC) represented by Chair Lina Khan.[87] Despite Microsoft's continuous efforts to overcome regulatory concerns, the FTC remained aware and focused on its scrutiny of the deal. This reflects the trend of heightened antitrust enforcement which is aimed at weakening the power of large tech corporations. With Chair Khan's leadership approach to antitrust regulation, it signals an end from previous administrations' more lenient stances toward consolidation. Similar to the UK’s CMA, the FTC's challenge to the acquisition began with its commitment to the protection of competition and consumer interests in the now rapidly evolving technology industry.

In response to the FTC's legal challenge, Microsoft had no choice but to face the complex legal landscape in which they brought out a legal and lobbying network to defend the acquisition. The company's legal strategy focused on seeking private agreements with competitors. They made commitments to maintaining game accessibility across different platforms in order to counter regulatory objections. These efforts were strategic in order to demonstrate Microsoft's

[87] Financial Times. “Microsoft-Activision Ruling Represents Setback for FTC Chair Lina Khan,” n.d. https://www.ft.com/content/f89422da-a3b2-4534-9ce3-e90dd5648d27.

dedication to competition and innovation in the gaming industry while also addressing the many concerns about potential anticompetitive behavior. The FTC's resistance to Microsoft opened up the agency's determination to scrutinize tech mergers and uphold its obligation in protecting consumers from monopolistic practices of any corporation.

The resolution of the FTC's challenge to the acquisition was a significant moment in the regulatory process that surrounds tech corporations' mergers and acquisitions. Microsoft's legal team succeeded in beating the initial skepticism and legal challenges. They were successful in convincing a federal judge to rule in favor of the acquisition by citing how the company has commitments to maintain game access across platforms.[88] They use this as evidence of its commitment to promoting consumer welfare and market competition. This outcome was not only successful for Microsoft's legal team and strategy, but also highlighted the complexities involved in navigating antitrust regulations in today's world. This was due to the many challenges they faced by the FTC and CMA. The FTC's continued awareness creates the agency's role in addressing antitrust concerns in the tech sector. This sets a precedent for future regulatory concerns and actions in an era of heightened scrutiny over consolidation.

IV. ANALYSIS

A. Regulatory Issues

The Microsoft acquisition of Activision Blizzard has stirred up significant debate within the tech industry due to its successful convincing of the FTC and CMA. These debates are not only towards its financial and strategic implications but also ties into other issues it raises concerning competition, innovation, and consumer welfare in the tech industry. The regulatory authorities have focused mainly on the potential anti-competitive implications of the acquisition. This overlooks that there are several other important topics that the rulings and statutes, which require attention and discussion.

One significant topic that the regulatory authorities have failed to properly address is the potential impacts of the acquisition on data privacy and security. Both Microsoft and Activision Blizzard hold expansive amounts of user data.[89] Especially in regard to recent user data exploitation, it is essential for mergers and acquisitions to ensure that user data will not compromise individuals' privacy rights and expose them to potential risks. The consolidation of these data pools could raise serious concerns regarding data privacy, including security breaches and use of personal information. The failure, by the FTC and CMA, to address these issues of the

[88] Liu, Henry, Anisha S. Dasgupta, John Newman, Ariel Goetz, Shaul Sussman, Imad D. Abyad, Mark S. Hegedus, et al. "REPLY BRIEF OF THE FEDERAL TRADE COMMISSION." *IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*, n.d. https://www.ftc.gov/system/files/ftc_gov/pdf/microsoft_ftc_reply_brief_redacted_public_version.pdf.
[89] JD Supra. "Antitrust Scrutiny and Concessions: Unpacking Microsoft's $68.7 Billion Acquisition of Activision Blizzard," February 23, 2024. https://www.jdsupra.com/legalnews/antitrust-scrutiny-and-concessions-7990257/.

acquisition highlights the need for regulatory frameworks that considers the impact of data privacy and security alongside competition concerns.

Another topic that the regulatory authorities have looked past is the impact of the acquisition on smaller game developers and independent game studios. The merging of power and resources by large corporations, like Microsoft and Activision Blizzard, could create future barriers to entry for smaller competition, slowing down innovation as a result. It could also result in the limitation of consumer choice in the gaming industry. The lack of focus on these other issues in the regulatory rulings suggest a narrow minded perspective that puts priority on antitrust and market competition among the largest mergers and acquisitions. This results in neglecting the entire tech ecosystem and the negative consequences it may have for smaller stakeholders.

To add on, the regulatory authorities' emphasis on antitrust and competition when ruling on the acquisition does not take into account the societal implications and the role of corporate responsibility. As tech companies continue to gain wealth and influence, there is an increasing expectation for them to act responsibly. This includes positive contributions to society and addressing global challenges, such as climate change. The failure to incorporate these responsibilities into the regulatory framework creates a major disconnect between the current regulatory approach and the changing expectations and demands of society.

B. Solutions

To address the issues mentioned and ensure a more balanced regulatory approach to mergers and acquisitions in the tech industry, several solutions must be considered. Firstly, Regulatory authorities should adopt a different approach that considers competition, data privacy, consumer rights, innovation, and corporate responsibility when assessing the impact of a merger or acquisition. This would require collaboration across different regulatory bodies, interdisciplinary expertise, and comprehensive impact assessments that take into account the diverse stakeholders and the broader societal context. Secondly, to ensure data privacy and security, regulatory authorities should impose stricter conditions and safeguards on the storage and sharing of user data of merging corporations. This should include mandatory data protection, transparency requirements, user consent, and harsh penalties for non-compliance. This would be to ensure that data privacy rights are upheld and individuals are protected from potential risks. Third, to promote competition and innovation, regulatory authorities should consider exploring their own solutions, such as licensing requirements, rather than relying on the corporation to draft their own. This would properly address concerns related to market monopoly, difficulty of entry, and other anti-competitive practices. This would help create a more level playing field by creating competition and innovation and ensuring that consumers have access to different innovative products and services.

C. Advantages and Disadvantages

While these solutions offer advantages in addressing the issues mentioned and promoting a more balanced regulatory approach, they also come with their own set of challenges, and disadvantages. The different approaches could be very complicated to implement and will require significant resources and coordination among all the differing regulatory bodies. It may also lead to a longer review process as well as increased regulatory burdens. These disadvantages would all create delays in merger approvals which could push companies away from pursuing growth strategies and innovation. The stricter data privacy and security, while necessary to protect consumer privacy rights and lower risks, could also impose additional compliance costs as well as potential restrictions on solely data-driven innovation or collaborations. This would result in less technological advancement and innovation in the tech industry. The exploration of solutions would be useful in addressing competition concerns, however, could also be difficult to implement, monitor, or enforce. They could also result in other consequences such as decreasing companies' willingness and ability to create value through mergers and acquisitions.

V. CONCLUSION

To conclude, the Microsoft acquisition of Activision Blizzard has been a major point of regulatory debate in the tech industry. However, the current regulatory approach has neglected several important topics that are essential in ensuring a balanced and fair growth of the tech industry. Regulatory authorities can create a stronger regulatory framework that aligns with the demands of society by adopting a different approach that considers competition, data privacy, consumer rights, innovation, and corporate responsibility. This includes addressing the issues and promoting a more level playing field. The solutions proposed can be challenging to implement and enforce, but they can address the many issues raised by large mergers and acquisitions in the tech industry and for promoting a more competitive and innovative industry that benefits all. Regulatory bodies must implement these changes as the expectations are changing. This acquisition must set a precedent that influences future regulatory decision making to be more effective for future technology mergers and acquisitions.

AI and its Consequences: The Future of AI Accountability

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ABSTRACT.

The boundaries of Artificial Intelligence (AI) application seem endless, and it is a technology that is constantly expanding and developing. The current landscape of AI regulation within businesses is sparse and ill-defined, often leading to the unethical use of AI technology by AI-companies and other businesses alike. This paper will discuss the ways in which AI has been utilized in unethical manners by firms by analyzing the regulations that are currently in place regarding AI. These regulations will be examined through the dissection of both past and ongoing cases pertaining to alleged AI misuse, focusing on how courts are navigating this relatively novel area within the law. This paper recognizes the vital need for federal-level legislation that protects consumers and the general public from AI misuse and accidents since regional and state-level legislation have shown to not suffice. With federal legislation, the government can best assure the ethical and safe application of AI moving forward.

I. INTRODUCTION

Artificial Intelligence (AI) technology has revolutionized the technology sector due to its capability to analyze, adapt, and interpret data. Furthermore, its ability to draw from data patterns and continue to learn from new data inputs, also known as machine learning, has made it a convenient and incredibly useful tool. Naturally, businesses across all sectors and industries have implemented AI into their practices. Additionally, there are approximately 16,000 AI-based companies and startups in the United States alone. AI is being utilized within businesses for tasks as simple as improving the grocery shopping process to projects as significant as self-driving automobile systems.

Alongside AI's growing involvement in business administration and operation, there has been an increase in discourse regarding the ethics of AI implementation. One of the primary concerns pertains to data security. AI systems will inevitably gather and have access to sensitive data such as individuals' locations and habits; there is severe concern about data breaches with the risk of undesirable data diffusion and even identity theft. For instance, TaskRabbit, an online marketplace designed to connect freelance laborers with clients recently underwent a Distributed-Denial-of-Service (DDoS) attack on TaskRabbit servers utilizing AI technology in which user's bank details and Social Security digits remained unprotected. Essentially, DDoS attacks entail botnets, which is a network of computers that are infected with malware. The botnets are then used to send an overwhelming amount of traffic to target sites to distract IT personnel with restoring service to users. Meanwhile, attackers can take advantage of this vulnerability to steal data. AI has been used to strengthen DDoS attacks through AI-driven botnets that overall make the launching and operation of DDoS attacks more efficient. Ultimately, over 144 million users fell victim to this particular malicious use of AI against TaskRabbit. Given the gravity of consumer privacy violations, a series of lawsuits and complaints have been filed against major AI companies. Namely, the P.M. et al. v. OpenAI LP case prompted by OpenAI's alleged theft of personal and private information from publicly available sources to train its AI tools.[90]

Other concerns include bias within the data used to train AI models, which is especially detrimental given the increasing reliance on AI in the workplace such as the hiring process. A study conducted by JAMA Network found that out of 555 observed AI models, 83% indicated a high risk of bias and 99% failed to account for data complexity.[91] Overall, the general American public remains largely skeptical of AI and its implications on the future of society. 46% of

[90] Isaiah Poritz. "Openai Hit with Class Action over 'unprecedented' Web Scraping." Bloomberg Law, June 28, 2023. https://news.bloomberglaw.com/ip-law/openai-hit-with-class-action-over-unprecedented-web-scraping.
[91] Zhiyi Chen, Xuerong Liu, and Qingwu Yang. "Evaluation of Risk of Bias in Neuroimaging-Based AI Models for Psychiatric Diagnosis." JAMA Network Open, March 6, 2023. https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2801999.

surveyed Americans believe AI will generate equal harm and good while 41% of surveyed Americans believe it will bring more harm than good.[92]

As AI continues to be implemented by businesses and AI-based companies are rapidly expanding, the critical question arises: to what extent should businesses be held accountable for potential downfalls or misuses of AI technology that harm their consumers? Or should businesses be held accountable at all? Thus far, regulations and legislation pertaining to holding businesses accountable for their AI practices have been limited. Considering that AI is relatively novel, it is apparent that certain regulations on businesses should be discussed and the level of enforcement of already existing regulations should be evaluated for both the well-being of businesses and consumers who are affected by the decisions of businesses.

II. CASE ANALYSIS

A. *Lee v. Tesla* (2023)

As AI systems sometimes function erroneously, two pillars of AI ethics are accountability and reliability. However, recent cases have shown a diminished sense of accountability for AI companies. Specifically, in 2019, a 37-year old named Micah Lee was killed and other passengers severely injured after his Model 3 Tesla swerved off the highway and went aflame seconds after being set to the Autopilot feature. On the issue of accountability for AI mishaps in *Lee v. Tesla*, the primary dilemma is whether Tesla drivers or Tesla should be held responsible for the malfunctioning of the vehicle's Autopilot feature.

In cases such as this one, NYU Law Professor Mark Geistfeld considers the automation bias phenomenon[93], in which humans are more willingly trustful of automated services and decision systems. Although the explicit details of Lee's operation of his Model 3 Tesla during his last moments aren't fully disclosed, a prominent issue among autonomous vehicle drivers is thought to be the over-reliance on autonomous systems on the road. A statement from Tesla reads, "We're building Autopilot to give you more confidence behind the wheel, increase your safety on the road, and make highway driving more enjoyable…The driver is still responsible for, and ultimately in control of, the car."[94]

Lee's family then filed a lawsuit against Tesla, Inc. in a California state court, accusing the company of selling the vehicle despite knowledge of its defective Autopilot and safety

[92] Patrick Murray. "Artificial Intelligence Use Prompts Concerns." Monmouth University Polling Institute, October 2, 2023. https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_021523/.
[93] Emily Rosenthal. "When a Tesla on Autopilot Kills Someone, Who Is Responsible?" NYU, March 9, 2022. https://www.nyu.edu/about/news-publications/news/2022/march/when-a-tesla-on-autopilot-kills-someone--who-is-responsible--.html.
[94] Ibid.

systems.[95] Michael Carey, the defendant's lawyer, claimed that it is ultimately the driver's responsibility to maintain control of the vehicle even when Autopilot was activated. However, Tesla engineer Eloy Rubio Blanco admitted that vehicles sold in 2019 may have "latent defects" due to the complexity of its software and that Tesla's features have a "series of limitations" such as insufficient automatic braking that could lead to collisions.[96] Despite admittance of these limitations, a jury found Tesla not liable for the crash and the death of Lee in October 2023. Despite victory in this particular case, Tesla is facing at least a dozen other cases in which vehicle owners were either killed or crashed under Autopilot mode. If Tesla continues to win cases regarding the Autopilot feature, it could set a precedent for lackluster legal consequences and regulatory guidelines for ongoing and future lawsuits. In light of this outcome, greater attention has been turned towards the responsibility Tesla and other similar companies should bear in these incidents, especially when human life is at risk.

In September of 2023, California Governor Gavin Newsom vetoed Assembly Bill 316 which aimed to prevent autonomous trucks weighing over 10 tons from operating without a trained human driver present despite the bill passing with a great majority in both chambers of the California state legislature. He claimed that "existing law provides sufficient authority to create the appropriate regulatory framework."[97] He added that the Department of Motor Vehicles, California Highway Patrol, and other organizations adequately interpret necessary regulations with the safety of the public in mind. When analyzing the Lee v. Tesla case, however, Assembly Bill 316 highlights the overall lax attitude towards AI liability. Cases such as this one call for scrutiny on the level of guidelines placed on self-driving vehicles, as well as clarity on where the accountability falls in incidents of crashes, injuries, and deaths without explicit regulations. However, it is evident that further regulations must be implemented so that companies will be held to strict standards for their technology which will impact the well-being of their consumers.

The admittance of the limited capabilities of the Autopilot feature in 2019 vehicles by Eloy Rubio Blanco, a Tesla engineer, indicates that the company and other companies in the industry should be expected to be confident about their services before introducing them to the public. This would be achieved by increasing testing standards, perhaps requiring a certain threshold so that companies will ensure the reliability of their products. Even if there did not appear to be any defects with their technology at the time of release, it is natural that the company should be held accountable if their malfunctioning technology directly caused loss of life or harm to their consumers. Federal legislation that sets explicit guidelines on whether Tesla

[95] Andrew J Hawkins. "Tesla Wins Another Court Case by Arguing Fatal Autopilot Crash Was Caused by Human Error." The Verge, October 31, 2023. https://www.theverge.com/2023/10/31/23940693/tesla-jury-autopilot-win-liable-micah-lee.
[96] The Economic Times. "Tesla Engineer Defends 'full Self-Driving' Name at Crash Trial." October 6, 2023. https://economictimes.indiatimes.com/tech/technology/tesla-engineer-defends-full-self-driving-name-at-crash-trial/articleshow/104196112.cms?from=mdr.
[97] Gavin Newsom. AB-316-veto-message.PDF, September 22, 2023. https://www.gov.ca.gov/wp-content/uploads/2023/09/AB-316-Veto-Message.pdf.

and other similar companies should or should not be held accountable for instances where their AI-assisted products malfunction and create harm would undoubtedly eliminate unclarity in cases moving forward.

One of the primary reasons that AI-based companies, such as Tesla, have been able to avoid consequences for AI mishaps is that there is a lack of unanimous consensus as to what extent companies are accountable versus consumers are accountable. In some cases, the blame may fall on companies for any faults in their products. In others, the blame may fall on consumers for their user error. Although true accountability will differ case by case, creating legislation that holds companies to more rigorous testing standards would lower the cases of AI mishaps. This is especially important to implement when human life is at stake, for the sake of Tesla drivers as well as the driving public.

B. Andersen v. Stability AI (2023)

Another rising debate regarding AI is the true ownership of content generated by AI tools. For instance, if users of an AI image generator ask for an image of the Mona Lisa painting, does the output belong to the original creator, Leonardo Da Vinci, or does it belong to the AI image generator? Moreover, if a user asks for an image of Mona Lisa holding a bunny, it can even be argued that the generated image belongs to the user since it was his original idea. Ambiguity over ownership is the exact issue faced by the plaintiffs in the case of *Andersen v. Stability AI*. The plaintiffs include artists Sarah Anderson, Kelly McKernan, and Karla Ortiz, and the defendants are Stability AI, which is the creator of the image generator Stable Diffusion, along with several other similar platforms. This program utilized over a billion copyrighted images as data to train the generator and act as a software library without acquiring permission from the original owners. The plaintiffs claim that although the creations of Stable Diffusion are not identical to their creations, it is able to output images in their respective artistic style.

On this basis, they claim that Stable Diffusion is infringing on copyright laws and acting in violation of the Digital Millennium Copyright Act (DMCA), which outlaws the bypass of protective measures in order to access copyrighted content without authorization. Further, Andersen searched for her name on a site called “haveibeentrained.com” which shows whether users’ creations have been inserted into the training databases of AI generators. Upon investigation, the court acknowledged the plausibility of Andersen’s claims against Stability AI. However, there is uncertainty over whether artists are allowed to claim a specific style as their own, therefore weakening the plaintiffs’ main argument. So, the main violation appears to be the fact that training images were taken by StabilityAI without the permission of their respective owners.

Stable Diffusion has announced that in the next generation of the tool, artists will have the option to opt-out, meaning their artwork will not be included in the training database. However, artists and creatives criticize this decision because it requires artists to take action to

protect their property instead of their ownership being respected initially. Instead, it was argued that Stability AI should require artists to opt-in to their program. However, no final conclusion was reached on the way Stability AI should proceed.

Moving forward, AI organizations will need to boost the accountability they have, which can take the form of licensing and crediting the original owners of the property included in training bases. One form of crediting could be branding artists' names or some sort of representative icon on the tool's outputs. Compensation for these original owners could also potentially be a percentage of the generated revenue of the platform. However, there is still discourse as to whether any of these would be necessary given the ambiguity of AI output ownership. Because of the novelty of AI generated content, there is a great lack of regulation, or at least clear regulation, surrounding the circumstances of Andersen, McKernan, and Ortiz.

One precedent that can be cited to inspect the validity of the plaintiffs' argument in *Andersen v. Stability AI* is *Rogers v. Koons* of 1992. This suit pertained to Art Rogers' claim that Jeff Koons, another artist, had infringed on copyright claims after Rogers' original photograph was reproduced into a sculpture by Koons and then distributed on postcard. The court ultimately sided with Rogers, but a significant detail of this ruling is that the court debated on Koons' claim that this reproduction was a transformative work, making it distinctly different from the original. This case generated discussion on what degree an artwork piece must deviate from the original work to be considered fair use. *Rogers v. Koons* calls into question whether AI generated images that are inspired by original works due to the training process is considered fair use or copyright infringement.

Further, The *New York Times*' sued Microsoft and OpenAI for the use of their copyrighted material for Microsoft and OpenAI's large language models (LLMs) training. In OpenAI's defense, they cited the Library Copyright Alliance's (LCA) stance that "based on well-established precedent, the ingestion of copyrighted works to create large language models or other AI training databases generally is a fair use."[98] Given precedent and the LCA's statement, it can be said that in the case of *Andersen v. StabilityAI*, StabilityAI should not be held accountable for copyright infringement or be required to receive permission from artists for the use of their work. Further, StabilityAI should not be required to compensate artists through granting them a percentage of their revenue.

Moving forward, there will need to be legal clarifications that establish when use of copyrighted work is considered transformative. It can be argued that AI image generators add new meaning and alter the original material enough to be defined as transformative work. Legislation that protects AI developers and AI firms from copyright infringement accusations under the doctrine of fair use would be appropriate to prevent future suits from ensuing.

[98] Katherine Klosek, and Marjory S. Blumenthal. "Training Generative AI Models on Copyrighted Works Is Fair Use." Association of Research Libraries, January 23, 2024. https://www.arl.org/blog/training-generative-ai-models-on-copyrighted-works-is-fair-use/#:~:text=OpenAI%20has%20responded%20that%20%E2%80%9Ctraining,established%20precedent%2C%20the%20ingestion%20of.

C. U.S. Equal Employment Opportunity Commission v. iTutorGroup (2023)

While AI's primary application is boosting the convenience of certain processes, the shortcomings of AI have especially harmed certain individuals throughout the hiring process for job positions. One major shortcoming is that outputs of AI systems contain historical, social, and racial bias because the data used to train these systems often contain biased sampling, stereotyping, and a lack of diversity. Businesses and organizations using biased AI systems to automate parts of their hiring process creates discriminatory results that may contribute to more severe socioeconomic stratification in the long-term. These practices are also seemingly in violation of Title VII of the Civil Rights Act of 1964 and The Age Discrimination in Employment Act of 1967, which are laws enforced by the U.S. Equal Employment Opportunity Commission (EEOC).

In August 2023, the Supreme Court of California ruled that AI vendors providing companies and organizations with AI algorithms for their hiring processes can be held directly accountable for discrimination under California law. This ruling came after a lawsuit filed by Kristina Raines against the U.S. Healthworks Medical Group, which is a company partnered with multiple employers to carry out medical screenings of job applicants. After Raines refused to answer a series of questions regarding sexually transmitted diseases, mental illness, etc., she was released from her job at Front Porch Communities and Services, a partner of the U.S. Healthworks Medical Group. While many companies are incentivized to automate and expedite their employment process, they must be held accountable for the equity that current AI processes compromise.

Further, in 2022, the EEOC filed a lawsuit against iTutorGroup, an organization composed of iTutorGroup Inc., Shanghai Ping'An Intelligent Education Technology Co., and Tutor Group Limited. iTutorGroup aimed to connect tutors in the U.S. to Chinese students seeking English lessons. However, their automated recruitment software was found to automatically reject female applicants over 54 years old and male applicants over 60 years old regardless of their qualifications. This is in clear violation of the Age Discrimination in Employment Act (ADEA), stating that employers must not discriminate on the basis of age. In September of 2023, the suit was settled, requiring that iTutorGroup pay $365,000 to distribute among affected applicants. This lawsuit portrays the manners in which AI systems can be manipulated to promote social and economic inequity. There certainly could have already been biases in iTutorGroup's non-automated hiring process, but the issue lies in the fact that their automated hiring processes exacerbated it on a larger scale. While iTutorGroup was eventually penalized for their actions, there are innumerable other companies' automated hiring processes that contain bias on the basis of ethnicity, race, age, sex, etc.

In terms of AI bias, the only solution would be the continuation of improvements in AI development. To minimize AI bias, developers will need to take additional steps throughout the development process. Data curation should ensure that collected data accurately reflects the

real-world populations and do not disproportionately represent any specific demographic. In addition, less biased databases can be achieved by fostering diversity among AI development teams so that biases will go less unseen compared to homogenous development teams. Further, bias detection assessments along with consistent audits will promote equitable application of AI, especially in the workforce.

While Biden's Executive Order specifically highlights the significance of the responsible development of AI so that "all workers [have] a seat at the table," this will need to be solidified through federal-level legislation. On the state-level, California passed the California Consumer Privacy Act (CCPA) in 2018, which includes clauses that prohibits the discriminatory effects of automated processing. However, the overwhelming majority of other states merely have anti-discrimination laws in employment that *may* apply to the use of AI systems in recruiting considering their lack of explicit legislation in this matter. The most effective way to address the lack of equal employment opportunity laws across all states is through federal legislation that explicitly prohibits inequitable employment opportunities specifically pertaining to automated hiring processes.

V. CONCLUSION

Currently, there is no comprehensive legislation on AI on the federal level. Instead, local and state governments have been compromising for the lack of federal legislation, with a 440% increase in AI-related bills from state lawmakers in 2023 compared to 2022.[99] On the executive level, Biden and his administration issued the Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence in October of 2023. The lengthy order essentially sets an outline of regulations to be set on AI use, and promotes the equitable and responsible application of AI by firms and organizations. Despite these efforts, the lack of legislation from Congress creates a sense of uncertainty for industry entities as well as consumers due to the varying guidelines across regions and states. In order to most effectively address the issue of AI accountability there must be consistent legislation on the federal level. The issue with establishing federal legislation on AI, however, is an overall lack of consensus on AI regulation and the extent of impact it should hold in industries. Many developers argue that rigorous AI regulation could halt innovation and development, especially since the AI industry is constantly changing and progressing.

By examining the concerns regarding AI in *Lee v. Tesla* and *U.S. Equal Employment Opportunity Commission v. iTutorGroup,* it is apparent that corporations have an social obligation to apply AI in responsible and equitable ways. Therefore, legislation that leaves them legally obligated to do so, and promote ethical considerations within corporations and firms when utilizing AI processes. Due to the novel nature of AI and AI implementation on a grand

[99] Nicol Turner Lee, and Jack Malamud. "How Congress Can Secure Biden's AI Legacy." Brookings, January 25, 2024. https://www.brookings.edu/articles/how-congress-can-secure-bidens-ai-legacy/.

scale, it is natural that there is a wide lack of comprehensive legislation. However, since it's clear that AI will continue to shape our societies, it is critical that there is more rigorous and comprehensive legislation that lays down the limitations of AI companies. This is the only infallible method of ensuring a higher degree of accountability for AI-based companies as well as firms that utilize AI processes. Doing so will ensure that AI services are more reliable and trustworthy. A heightened sense of user confidence will allow the public to better experience the ways in which AI improves society, technology, and human life.

A Comparison of Free Trade Agreements: Which One Is Most Optimal For International Trade?

Written by Kayleen Chang
Edited by Pouria Sadeghishad

ABSTRACT.

The inequality of economic capability in developing and developed countries has been recognized, and the hunt to find a type of free trade agreement that would allow for this inequality to ameliorate is ongoing. The aim is to find one that increases the economic productivity of all countries, as well as be able to move forward with the times and continue to always have room to advance. The world does not stop for anyone and is constantly changing and improving. A similar concept should be found in the free trade agreement that is determined to be most viable in this context. This paper will analyze the advantages and disadvantages of the three major free trade agreements utilized in the world: unilateral, bilateral, and multilateral. This perspective will help clearly differentiate between flaws that can be overlooked and ones that overshadow its strengths. With respect to all agreements analyzed, an attempt to find a type of trade agreement that strives for global equality will result in a more stable and quick-thinking economy that is able to adapt to the times quickly and efficiently instead of continuously dividing the world's economy and prolonging strife between the developed and developing countries.

I. INTRODUCTION

Over the past generation, it has become increasingly clear that the more internationally connected countries' economies are, the more effective they are in strengthening and improving the world's overall economy and business. In fact, this process of interconnection has already produced many benefits including: reducing half of the global population from the depths of extreme poverty, as well as creating more jobs with higher wages, thus reducing the overall cost of living. However, the main concern of international trade to this day is the tensions it causes some countries due to its high-stakes nature. The stakes are high as the global economy is dependent on healthy trade flows, and as a result there is a "rising protectionism".[100] This is when government policies restrict international trade in order to aid domestic industries, especially in cases where it feels like its country's economy is in danger. This past era has paved the way for digital technology, which has created a different world of trade where "data flows are becoming more important than physical trade," and an impressive growth of the cross-border bandwidth has grown "90-fold between 2005 and 2016, and is expected to grow an additional 13-fold by 2023."[101] Previously, the "global trade of goods and services grew at more than twice the rate of the global economy" from 1968 to 2008.[102] However, now physical trade barely exceeds the global GDP growth. With the entrance of this new and largely uncharted digital era, we will be investigating the pros and cons of trade agreements in countries internationally, including unilateral, bilateral, and multilateral free agreements, to see how each respective country's economy and businesses are affected in response to each trade agreement. By investigating this matter, we will try to find the most feasible type of trade agreement to be used internationally in order to optimize the world's economy and business as a whole.

II. BACKGROUND ON FREE TRADE AGREEMENTS

In order to explain the pros and cons of trade agreements in different countries, it is important to first understand the differences between all trade agreements. Unilateral free trade agreements are one-sided and non-reciprocal granted by developed countries to developing ones. They are made with the purpose of attempting to help developing countries increase exports and allow for economic growth. It also encourages compliance with international standards in human rights, labor rights, and environmental protection. On the other hand, bilateral free trade agreements are agreements made between two countries where both agree to open its market to the other country's products. In this agreement, there are no tariffs or trade-related taxes, which gives companies within this agreement an advantage in price in the market. Labor standards and

[100]International Monetary Fund. "S&P/Lagarde: Creating a Better Global Trade System." IMF, May 14, 2018. https://www.imf.org/en/News/Articles/2018/05/14/sp-lagarde-creating-a-better-global-trade-system.
[101]Ibid.
[102]Ibid.

environment protection help maintain a level playing field that is fair, with countries honoring intellectual property and copyright laws to also prevent foul play such as stealing another country's innovative goods. Lastly, multilateral free trade agreements are normally made between three or more countries on equal grounds to create a free trade area. The purpose of this agreement is to attempt to break down trade barriers in order to make the process of importing and exporting an easier process.

III. PROS AND CONS OF UNILATERAL FREE TRADE AGREEMENTS

The advantage of unilateral free trade agreements is that they allow countries to reduce the amount of trade restrictions with another country, and because of said reduction, that country could go on to increase their exports and gain economic development. This type of trade agreement works really well for developing countries that are aiming to increase their economic productivity, as it allows them to interact and get economic help from already developed and well-off countries such as the United States. Originally, this free trade agreement was created because of the United Nations Conference on Trade and Development, where it was decided that "trade on a most-favored nation basis ignored unequal economic realities among trading nations, especially between developing and developed ones, in terms of stages of development, factor endowments, size of markets, efficiency, and diversification of production structures."[103] So this trade agreement was a global policy response to correct the imbalances, recognizing that developing countries require "special and differential treatment" to ultimately include an increase in their export earnings, "to promote their industrialization," and to "accelerate their rates of economic growth."[104] This launched the Generalized System of Preferences (GSP), which schemes are "determined unilaterally by the preference-giving countries, which also unilaterally modify the preferences, product coverage and beneficiary countries."[105] These countries include industrialized countries, some countries of Eastern Europe, and most developed countries.

Fortunately, these non-reciprocal preferential schemes have successfully operated for over two decades. They have created "more favorable market access conditions and progressively stimulated trade growth in some preference-receiving countries."[106] For example, developing countries such as "Fiji, Jamaica, Keya, Mauritius, and Zimbabwe have taken advantage of the preferences to diversify from traditional raw materials and their derivatives (coffee, cocoa, banana, sugar) into non-traditional exports like clothing, processed fish and

[103] Onguglo, Bonapas Francis. "Developing Countries and Unilateral Trade Preferences in the New International Trading System." (The Brookings Institution Press/Organization of American States, 1999).
[104] Ibid.
[105] Onguglo, Bonapas Francis. "Developing Countries and Unilateral Trade Preferences in the New International Trading System." (The Brookings Institution Press/Organization of American States, 1999).
[106] Ibid.

horticultural and floricultural products" under a GSP scheme called the Lome Convention.[107] Such trade under this convention helped to advance overall export revenue and created employment while reviving agriculturally based industrial pursuits. Thus, businesses in the economy have experienced an overall positive correlation from taking advantage of these non-reciprocal preferences.

The disadvantage of unilateral free trade agreements is that only the already-established major markets have been able to grow and diversify their exports instead of the developing markets in which these benefits were originally meant for. Thus, these beneficiaries have been using the agreements less and there has been a decline over the years. This situation is exemplified in the Lome Convention, where from 1976 to 1994 for about 18 years, the "share of non-oil imports from the ACP Group in the EU's total imports declined substantially from 6.7 to 2.8 percent. The root cause was due to a limited awareness in the countries that were receiving preference.

IV. RELEVANT CASES (I)

A. The Lome Convention

In 1975, The Lome Convention was signed by nine European Community (EC) member states, forty-six African, Caribbean and Pacific (ACP) forming a new type of relationship between the developing and developed countries. It aimed to establish a "basis of complete equality between partners… compatible with the aspirations of the international community towards a more just and balanced economic order."[108] Its most important creation was of Stabex, which attempted to curve the boom and bust cycle that developing countries ran into, where "increasing commodity prices result in high export earnings followed by an increase in public spending and household incomes only to be followed by a fall in prices and a contraction in expenditure with all the consequences that it entails."[109]

B. The Caribbean Basin Economic Recovery Act (CBERA)

This act was put into action from January 1, 1984, to provide duty-free entry of goods into the U.S. from "designated beneficiary countries."[110] This unilateral and non-reciprocal trade aims to promote the "economic development in the beneficiary countries by means of improved

[107] Onguglo, Bonapas Francis. "Developing Countries and Unilateral Trade Preferences in the New International Trading System." (The Brookings Institution Press/Organization of American States, 1999)
[108] Ibid.
[109] Ibid.
[110] U.S. Customs and Border Protection. "Caribbean Basin Economic Recovery Act (CBERA)." https://www.cbp.gov/trade/priority-issues/trade-agreements/special-trade-legislation/caribbean-basin-initiative/cbera

trade performance."[111] Currently, U.S. imports from CBERA beneficiaries have "increased steadily after a small dip in 2020," with imports claiming CBERA program preferences totaling "$2.2 billion in 2021 and $2.6 billion in 2022."[112]

V. PROS AND CONS OF BILATERAL FREE TRADE AGREEMENTS

An advantage of bilateral free trade agreements is that they help create a foundation "for strengthening the relationships between two countries and stabilizing a particular region" by giving each other "preferential trade treatment, such as reducing tariffs on goods or other entry barriers."[113] Many pro-trade policymakers use these trade agreements as a chance to help underdeveloped trade partners grow by providing them resources of the larger markets of established countries such as the U.S., which also could mean that international trade policies become more lenient as well. As a result, this leads to "higher per capita growth than trading with other countries that maintain international trade restrictions."[114] This agreement not only benefits the developing countries of the world, but also the developed, as it contributes "current rationale indicates that FTAs will enhance member countries' capacities to trade goods, thus increasing their national incomes."[115]

Nonetheless, bilateral free trade agreements may become a disadvantage when fair trade is not practiced. Trade agreements in some regions, usually in developed countries, establish bilateral free trade agreements to strengthen the political stability of an area instead of for trading purposes which defeats the purpose of the agreement in the first place. Vice versa, another disadvantage is when a trade partner participates in the agreement even though it is not in the right political or economic state to properly hold up their end of the agreement. For example, if the U.S. and Mexico had decided to form a bilateral free trade agreement in the mid-nineties while Mexico was suffering from a macro-financial crisis and competed with China for many years in producing consumer goods, it is likely this would lead to controversy. Especially if they were a part of the North American Free Trade Agreement (NAFTA), as it

[111]Onguglo, Bonapas Francis. "Developing Countries and Unilateral Trade Preferences in the New International Trading System." (The Brookings Institution Press/Organization of American States, 1999).
[112]Caribbean Basin Economic Recovery Act: Impact on U.S. Industries and Consumers and on Beneficiary Countries, 26th Report, September 2023, Publication Number 5446, Investigation Number 332-595, https://www.usitc.gov/publications/332/pub5446.pdf.
[113]Alghabbabsheh, Tareg Ghazi, Saleh Saud AlSaif, Md. Saiful Islam, Tareq Saeed AlShammari, and Ali M. A. Mahmoud. 2022. "Have Bilateral Free Trade Agreements (BFTAs) Been Beneficial? Lessons Learned from 11 U.S. BFTAs between 1992 and 2017." *PLoS ONE* 17 (4): 1–21. doi:10.1371/journal.pone.0264730.
[114] Ibid.
[115] Ibid.

represented "weak institutional capacity."[116] These situations show that both developed and developing countries can deceive each other for a hidden agenda.

VI. RELEVANT CASES (II)

A. Colombia - U.S. Bilateral Free Trade Agreement

This agreement was signed on February 27, 2006 between Colombia and the U.S. It benefited U.S. businesses that currently worked or plan to work with Latin America. However it is questionable what benefits Colombia gains. This type of bilateral agreement between only two countries can be preferred over multilateral agreements because of their "exceedingly slow process" such that of the World Trade Organization which "encourages developed countries such as the U.S. to meet its demand for better terms of trade through the use of smaller, less complicated bilateral and regional trade agreements. These agreements promise short-term gains in both trade access and political capital."[117]

VII. PROS AND CONS OF MULTILATERAL FREE TRADE AGREEMENTS

It is inevitable that digitalization will escalate global trade competition where companies will fight to develop the most advanced technology for a more efficient business process. A new IMF analysis shows that "greater competition accelerates the diffusion of technology across countries and even the rate of innovation itself."[118] Then, this would help decrease prices for both companies and their customers. However, a decrease in employment is the outcome as machines powered by technology would complete former human tasks more quickly and efficiently. Another advantage of a multilateral free trade agreement is that it can help re-boost a country's economy by increasing inclusivity by including more than two countries in one agreement. This helps to promote further economic competition and provides an inevitable wider range of benefits because of its larger scale of having more countries involved.

A disadvantage of multilateral free trade agreements is that they are much harder to negotiate than unilateral or bilateral free trade agreements. This is because an agreement involves a minimum of three countries, but normally they involve a much larger group of countries with all different goals and interests. Therefore, this prolongs the time it takes for a trade agreement to be confirmed. It normally takes several years for all of the countries involved to come to a

[116]Alghabbabsheh, Tareg Ghazi, Saleh Saud AlSaif, Md. Saiful Islam, Tareq Saeed AlShammari, and Ali M. A. Mahmoud. 2022. "Have Bilateral Free Trade Agreements (BFTAs) Been Beneficial? Lessons Learned from 11 U.S. BFTAs between 1992 and 2017." *PLoS ONE* 17 (4): 1–21. doi:10.1371/journal.pone.0264730.
[117]Fandl, Kevin J. 2014. "Bilateral Agreements and Fair Trade Practices: A Policy Analysis of the Colombia-U.S. Free Trade Agreement (2006)." *Revista Contexto*, no. 42 (July): 77–96. doi:10.18601/01236458.n42.07.
[118]International Monetary Fund. "S&P/Lagarde: Creating a Better Global Trade System." IMF, May 14, 2018. https://www.imf.org/en/News/Articles/2018/05/14/sp-lagarde-creating-a-better-global-trade-system.

consensus. There is also a risk of these multilateral agreements becoming too exclusive and costly to help developing countries that would benefit the most from this agreement.[119]

VIII. RELEVANT CASES

A. General Agreement on Tariffs and Trade (GATT)

This limited agreement was created in 1947 in response to a series of crises. This form of global trade governance contained 23 contracting parties designed to liberalize the trading of goods in industrialized countries and start deconstructing protectionism that had been built up by both world wars. Its design reflects the interests of its founders, the International Trade Organization (ITO). ITO's main purpose was to help the U.S. reach its full postwar economic gain potential and prevent a postwar recession. It opened up overseas markets for its "manufactured, semi-manufactured and capital goods as well as providing the financial wherewithal to enable its war-torn allies to buy US products," providing the means by which markets were to be opened.[120] In 1995, the GATT became known as the World Trade Organization (WTO), which it is still known as today.

B. World Trade Organization (WTO)

This agreement is the world's largest multilateral agreement, with 164 countries as members. WTO's negotiations had played an important role early on its development in gathering a large and diverse union of members. In early 2004, both the U.S. and the EU negotiated the "elimination of all forms of agricultural export subsidies (including credits and food aid as well as more traditional means of subsidizing exports)" and were able to make successful agricultural negotiations.[121]

C. International Monetary Fund (IMF)

The IMF helps to explain why international organizations favor some countries over others. Some creditor states appear to use favoritism to determine how good of a deal a borrowing country receives from the IMF, compromising its legitimacy. It's important to note that citizens of major IMF shareholders "generally oppose immigration inflows—especially

[119]Marcoux, C. (2008). Members Only? Explaining the Design of Membership Criteria in Multilateral Agreements. In *Conference Papers -- International Studies Association* (pp. 1–1).
[120]Wilkinson, Rorden. 2017. "Back to the Future: 'Retro' Trade Governance and the Future of the Multilateral Order." *International Affairs* 93 (5): 1131–47. doi:10.1093/ia/iix158.
[121] Ibid.

those from developing countries under financial distress."[122] In fact, policymakers of the IMF's major shareholders are likely to exert their influence to alleviate migration pressure.

D. The Uruguay Agreement

The institutional components of this agreement caused more industrialized countries to pressure their developing country counterparts to sign up for the Uruguay agreement, which lasted from 1986 to 1994. The proposal to create a new organization to contain and administer the Uruguay Round agreements changed the game. The GATT and WTO announced that when a new organization was founded to contain the Uruguay agreement, they would withdraw from the GATT. In this case, any country that decided not to join this organization would have been ostracized from the rest of the world. This resulted in the adoption of "agreements on services (the General Agreement on Trade in Services, GATS), intellectual property (the Agreement on Trade Related Intellectual Property Rights, TRIPs) and investment measures (the Agreement on Trade Related Investment Measures, TRIMs)."[123] Developing states could finally take advantage from the liberalization of agricultural and textiles or clothing markets. Additionally, developed countries could become the main beneficiaries of market opportunities from the liberalization.

E. Doha Declaration

This declaration's objective was to lower global trade barriers, ultimately increasing global trade. For developing countries, this declaration was based on their dissatisfaction with the Uruguay agreement. The agricultural negotiations within it were "designed to pursue substantial improvements in market access and to reduce (and eventually eliminate) export subsidies and trade-distorting domestic support systems."[124] General promises were made to "explore the relationships between trade, debt and finance, the plight of small economies, the transfer of technology, technical cooperation and capacity-building, as well as to review and strengthen special and differential provisions for least developed countries."[125] However, the balance of potential gains remained strongly in favor of the industrialized states.

F. Nairobi Decision

This decision marks a "critical juncture in the evolution of the multilateral trading system, enabling the leading industrialized members to move away from the pursuit of universal

[122] Ibid.
[123] Ibid.
[124] J. Michael Finger and Julio J. Nogués, 'The unbalanced Uruguay round outcome: the new areas in future WTO negotiations', World Economy 25: 3, 2002, p. 334.
[125] Ibid.

agreements wherein a balance of concessions is required that are acceptable to all members, back to a situation in which they are better able to focus on narrow piecemeal deals that exclude troublesome states."[126] This decision re-normalized small group agreements, resulting in a reduced "capacity of developing countries to secure trade-offs from developed countries in return for concessions in new areas."[127]

IX. ANALYSIS

In order to determine the most effective global trade agreement that would benefit both developing and developed countries as equally as possible, all three types of free trade agreements that had been used internationally will be analyzed. Specifically, the weaknesses and strengths will be studied in order to determine whether one's strengths overpower its weaknesses. It will not be denied that none of the three free trade agreements mentioned work perfectly, they are all flawed in some way. The goal is not to emphasize a completely smoothly working agreement, but one that has the potential to be refined and improved fluidly with the times. It is important to find a trade agreement that in its essence is flexible enough to withstand conflict within countries and also unexpected ones out of humans' control such as natural economic dips or stagnations.

Starting with unilateral free trade agreements: its biggest strength is its great success for developing countries. When considering the future of the global world instead of looking just marginally at one country's needs like unilateral agreements tend to do, one can come to the conclusion that eventually the best-case scenario is to even out the playing field of all countries. This way there is not such a harsh split between developed and developing countries. Instead, the lines become blurred which creates a more even playing ground for everyone. For international purposes, the world is in need of a trade agreement that allows for continued economic productivity after demand for developing countries to become developed is complete. A unilateral trade agreement's largest risk is that after developing countries have reached the status of being developed, the economy is bound to stagnate and economic productivity will most likely plummet. As this weakness has the potential to lead to a complete breakdown of any economic progress made, possibly leaving conditions worse than when the developed countries started out, it seems too big of a risk to recommend a unilateral free trade agreement to use globally.

Next, examining the bilateral free trade agreement structure, it seems to have an advantage over unilateral free trade agreements because it allows for two countries to interact with each other and promote free trade within both countries to help quickly boost economic productivity. However, there are so many loopholes that developed and developing countries can

[126]Wilkinson, Rorden. 2017. "Back to the Future: 'Retro' Trade Governance and the Future of the Multilateral Order." *International Affairs* 93 (5): 1131–47. doi:10.1093/ia/iix158.
[127]Ibid.

take advantage of through this agreement. Both countries in the agreement can deceive each other and use it to settle any political feuds or maintain relationships. This is a misuse of the agreement's original purpose which was to promote trade in order to improve economic productivity. In this case both countries have no intention to do such a thing. When more than one country becomes involved, conflict is inevitable and a natural process, and with good communication skills it can be easily resolved. However, disadvantages of this nature become too risky and are highly combustible when there are only two parties involved. This is because with both sides using the power of deception, they are bound to find out that they betrayed each other since there aren't multiple countries to suspect from. It would not make sense to make this type of trade agreement the universal international trade agreement when it has the potential to completely break the world's trust in each other. Eventually every country is bound to walk away from every other country with bad relations, and we will have an even more broken up world by the end of it.

Lastly, we have the multilateral free trade agreement which is very similar to the bilateral free trade agreement, except for the fact that it involves multiple countries instead of only two. Yet, it does have an advantage to bilateral free trade agreements, which is being most caught up with the modern times— the digital age. Realistically, incorporating the digital age into our lives is something that can neither be avoided or denied. The world only ever moves forward, so the smartest move would be to not fight the natural flow, and instead be proactive about it. For example, the "reduction and progressive elimination of tariffs on ICT (Information and Communications Technology) goods has a key role in promoting innovation in the digital age. It not only enables and promotes the international flow of ICT goods, thus stimulating innovation, but also has a multiplier effect on the international trade of goods and services that use ICT-based components, infrastructure and hardware."[128] The immense amount of benefits can not be overlooked. As the type of agreement with the widest range of benefits, it overlooks its time disadvantage of agreements taking too long to be solidified. This is due to the fact that several countries are involved, which is something that mirrors what it would look like once all countries are interconnected eventually. Again, this type of situation is eventually going to be dealt with in order to reach the ultimate goal of a connected international economy. As United States Trade Representative Michael Froman said, "If global trade is to drive development and prosperity as strongly this century as it did in the previous, we need to write a new chapter for the World Trade Organization that reflects today's economic realities. It is time for the world to free itself of the structures of Doha.[129] He really brings home the point that the developed countries should awaken and stop adhering to being stunted economically. With a new chapter, we can move past

[128]World Trade Organization, *World Trade Report 2020: Government Policies to Promote Innovation in the Digital Age* (Geneva: World Trade Organization, 2020), https://www.wto.org/english/res_e/booksp_e/wtr20_e/wtr20-4_e.pdf.
[129]Wilkinson, Rorden. 2017. "Back to the Future: 'Retro' Trade Governance and the Future of the Multilateral Order." *International Affairs* 93 (5): 1131–47. doi:10.1093/ia/iix158.

this inequality between countries in the past and continue to work on a more equal economic relationship between all countries of the world.

X. CONCLUSION

The most practicable outcome of trade negotiations is a multilateral free trade agreement that includes all countries. In this way, "free trade can be widened to allow many participants to achieve the greatest possible gains from trade."[130] The potential of economic productivity within all countries should be recognized and given the opportunity to contribute internationally. The General Agreement on Tariffs and Trade (GATT) has already "substantially reduced the tariff barriers on manufactured goods in the industrial countries."[131] This is just the beginning and there is hope for so much more economic growth. It is primitive that we adopt ideas from this multilateral agreement to form a more advanced type of international trade agreement which allows for an open form of trade without tariff barriers on exported goods that help developing countries, but continues to uplift the countries that have already succeeded economically.

The most potential was seen in multilateral free trade agreements because of how it is adaptable to the times, which in our current case is the digital age. The digital age is such a foreign concept to how trade has been handled previously. Its technology is unmatched compared to the speed and efficiency of the human brain and body. Therefore, despite its flaws, it can be believed that if there were to be more advancements since the digital age and the world enters an even more advanced era, it would be able to keep up with the times and adapt. This is a crucial characteristic to look at when looking at an agreement's long-term viability, especially something as up-scale as an international setting.

The goal of this publication was to determine the most feasible type of trade agreement to be used internationally in order to optimize the world's economy and business as a whole. By analyzing unilateral, bilateral, and multilateral free trade agreements, an educated resolution can be made that multilateral free trade agreements have the most potential to one day completely optimize the world's economy and business to be the most efficient it ever has been. All of the free trade agreements exist because at one point in time they were effective, but we were determined to find which one would last. After careful examination and analysis of all agreements, the multilateral free trade agreement is the only agreement that has enough structure yet flexibility to withstand the challenge of a world of constantly changing times.

[130]Irwin, A. Douglas. Library of Economics and Liberty. "International Trade Agreements." https://www.econlib.org/library/Enc/InternationalTradeAgreements.html.
[131] Ibid.

At Legal Crossroads: NFIB v. OSHA and its Implications for Workplace Safety

Written by Caroline Hsu
Edited by Rafay Siddiqui

ABSTRACT.

In the wake of the COVID-19 pandemic, this article argues that the Supreme Court's ruling in *NFIB v. OSHA*, which invalidated Occupational Safety and Health Administration's vaccine-or-test mandate for large employers, was a legal misstep that compromised public health and safety measures. It explores the legal and constitutional underpinnings that should have supported the mandate, highlighting the historical precedent for federal intervention in public health emergencies. The article further contends that the decision has led to a fragmented regulatory landscape, increased compliance costs for businesses, and fostered operational uncertainty. In striking down the mandate, the Court prioritized individual liberties over collective safety, failing to strike a proper balance between these competing interests and undermining effective governance during a national crisis. The article calls for Congress to clarify the scope of agency authority and provide a more stable framework for regulatory action in times of crisis, ensuring that federal agencies have the necessary flexibility to protect public health and safety while being subject to appropriate checks and balances, thus underscoring the importance of a nuanced legal approach that balances individual rights with the collective good.

I. INTRODUCTION

In 2020, the onset of COVID-19 led to significant global disruptions, as governments implemented various lockdown measures to curb the spread of the virus. As society adapted to these changes, a significant shift occurred in professional environments. In the workplace, remote work became a widely adopted practice wherever feasible.[132] This transformation reshaped how businesses operated, promoting a digital-first approach to daily tasks and collaboration.

In due time, however, leaders faced the daunting task of managing the virus, maintaining public order, and rejuvenating society after a long standstill. To usher in a seamless transition to normalcy, measures needed to be taken to provide safer working conditions to ensure the safety of vulnerable demographics. In September 2021, U.S. President Joe Biden announced his administration would mandate weekly vaccinations and COVID-19 tests for all private companies with over 100 employees, a directive to be implemented by the Occupational Safety and Health Administration (OSHA). This announcement was met with resistance from several business interests and political organizations, including the Washington Legal Foundation and We the Patriots USA Inc., who contended that a federal agency lacked the authority to enforce such an expansive and sweeping mandate that infringes upon individual liberty.[133]

The Supreme Court ultimately struck down the mandates in *National Federation of Independent Businesses* (NFIB) *v. The Department of Occupational Safety and Health Administration* (OSHA) via a 6-3 decision, articulating that the enforcement exceeded OSHA's statutory authority, highlighting a significant examination of regulatory reach and its limits.[134] The majority opinion highlighted concerns that OSHA, by mandating vaccines or weekly testing for large employers, extended its regulatory reach into areas of health policy and personal medical decisions traditionally reserved for states or individual choice.[135] This perspective was rooted in the argument that OSHA's mandate exceeded its congressionally granted powers, which are primarily focused on occupational hazards that are directly related to the workplace environment and practices, rather than broad public health measures.[136] The decision has since significantly undermined public health and business stability, by escalating health risks in workplaces, fueling operational uncertainties, and establishing a precedent for future regulatory

[132] Clara De Vincenzi et al., "Consequences of Covid-19 on Employees in Remote Working: Challenges, Risks and Opportunities an Evidence-Based Literature Review," *International Journal of Environmental Research and Public Health* 19, no. 18 (September 16, 2022): 11672, https://doi.org/10.3390/ijerph191811672, 2.
[133] Vkimber, "National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration," Cornell Law School Legal Information Institute, July 1, 2022, https://www.law.cornell.edu/supct/cert/no._21a244.
[134] National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration, 595 U.S. pg 1 (2022).
[135] Ibid.
[136] National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration, 595 U.S. pg 1 (2022).

ambiguities in business law. This ruling not only challenged the authority of federal agencies in public health matters, but also had far-reaching implications that affected how businesses would navigate future public health crises and compliance with federal mandates.

In this article, I will argue the Supreme Court ruling in *NFIB v. OSHA* was a legal misstep that compromised public health and safety measures amidst a national public health response to the COVID-19 pandemic and set a concerning criterion for addressing future occupational health hazards. I will delve into the legal framework surrounding OSHA's authority, the historical precedent for federal intervention in public health emergencies, and the constitutional underpinnings that should have supported the mandate. Through a detailed examination of the court's decision against the backdrop of these elements, I will illustrate how the ruling not only contravened established legal principles, but also set a concerning precedent for future government-led health initiatives. By analyzing the law, the court's decision, and constitutional doctrines, this article will underscore the importance of a nuanced legal approach to public health that balances individual liberties with collective safety.

II. LEGAL BACKGROUND

The *NFIB v. OSHA* case represents a significant legal dispute over the extent of regulatory authority granted to federal agencies. The Department of Occupational Safety and Health Administration, tasked with ensuring workplace safety and health, frequently enacts regulations impacting a broad range of industries. In this case, the National Federation of Independent Businesses, an advocate for small and independent businesses, challenged OSHA's regulations on the grounds of overreach or exceeding statutory authority.[137] This dispute underscores a critical tension in administrative law: balancing the need for effective and comprehensive safety regulations against the operational autonomy and economic interests of businesses. The key legal question revolves around whether OSHA's actions are within the powers delegated by Congress, probing the scope and limits of federal agency power.

Delving into the nondelegation doctrine reveals its constitutional underpinnings and relevance in this case. Rooted in the separation of powers principle, the doctrine asserts that Congress cannot delegate its legislative authority wholesale to another branch of government.[138] In the context of *NFIB* v. OSHA, the doctrine's application would involve a thorough examination of the legislative authority under which OSHA operates.[139] The court would assess whether Congress provided sufficiently clear guidelines for OSHA's regulatory activities. A lack of such "intelligible principles" could render OSHA's actions unconstitutional, viewed as an

[137] National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration, 5.
[138] Ibid.
[139] National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration, 6.

impermissible delegation of legislative power. The scrutiny here extends beyond mere procedural legality to the very essence of legislative responsibility and accountability in a democratic system.

Complementing this, the major questions doctrine represents a crucial judicial tool in cases involving significant policy decisions by federal agencies. This doctrine posits that agency decisions with wide-reaching economic, political, or social implications require clear congressional authorization.[140] The rationale is that significant policy decisions should not be based on vague or ambiguous legislative directives. In *NFIB v. OSHA*, if the challenged regulation carries substantial economic impact or societal importance, the court would closely examine the legislative mandate empowering OSHA. The doctrine implies a higher standard of clarity and specificity from Congress when empowering an agency to make decisions with far-reaching implications.[141] The absence of such explicit authorization could lead to a ruling that OSHA exceeded its authority, reaffirming the principle that major policy shifts warrant direct congressional sanction.

The N*FIB v. OSHA* case is also deeply rooted in the complex interplay of administrative law, statutory interpretation, federalism, and state authority. OSHA often enacts regulations that have widespread impact across various industries. NFIB challenges these regulations, arguing they extend beyond OSHA's authority as granted by Congress or infringe upon states' rights. This legal battleground highlights the tension between the need for national safety standards and the preservation of business autonomy and state sovereignty.

In examining this case, statutory interpretation plays a critical role. This legal process involves courts interpreting the language of statutes to determine the scope and intent of Congress when it delegates authority to federal agencies like OSHA.[142] Statutory interpretation becomes particularly crucial when the statutory language is ambiguous or broad, requiring the court to infer Congressional intent and ensure that agency actions align with it.

In *NFIB v. OSHA*, the court grappled with the issue of federalism, the constitutional distribution of power between federal and state governments. The case challenged the extent of OSHA's authority as a federal agency to mandate vaccination or testing requirements, raising questions about the proper balance of power between the federal government and the states in regulating public health matters. In cases like this, the court must consider the balance between federal regulatory power and states' rights. The Tenth Amendment to the U.S. Constitution reserves to the states or the people those powers not delegated to the federal government.[143]

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[140] Ibid.
[141] Ibid.
[142] Blake Emerson, "Administrative Answers to 'Major Questions': On the Democratic Authority of Agency Statutory Interpretation," *Minnesota Law Review*, 2018, https://doi.org/10.2139/ssrn.2818786, 2053.
[143] "Constitutional Amendments – Amendment 10 – 'Rights to the States or to the People,'" Ronald Reagan Presidential Library & Museum, accessed April 2, 2024, https://www.reaganlibrary.gov/constitutional-amendments-amendment-10-rights-states-or-people#:~:text=%E2%80%9CThe%20powers%20not%20delegated%20to,%2C%20or%20to%20the%20people.%E2%80%9D.

Therefore, if OSHA's regulations are perceived to encroach upon areas traditionally under state jurisdiction, or if they override state laws without clear constitutional or statutory authority, they could be challenged on the grounds of federal overreach.

III. IMPLICATIONS FOR BUSINESS OPERATIONS

The Supreme Court's decision in *NFIB v. OSHA* has led to a reevaluation and fresh interpretations of the separation of powers and agency authority. This decision has highlighted a more coherent and revitalized approach to the separation of powers doctrine, particularly concerning the nondelegation doctrine and the role of the judiciary in reviewing agency interpretations of statutory authority. In his concurrence to *NFIB v. OSHA*, Justice Neil Gorsuch presents a new approach to the separation of powers doctrine, focusing on the nondelegation doctrine and the judicial branch's role in reviewing agency interpretations of statutory authority. Gorsuch argues that the nondelegation doctrine and the major questions doctrine work together to maintain the proper balance of power between Congress and the executive branch.[144] Gorsuch's approach illustrates the importance of ensuring that the power to make laws remains with the people's elected representatives and that executive agencies do not exceed their authority by adopting statutory interpretations that go beyond the clear text of the law.[145]

The Supreme Court's ruling in *NFIB v. OSHA* has pushed businesses into unfamiliar territory by pausing the Biden administration's COVID-19 vaccine mandate. This mandate would have required employees to either receive the vaccine or adhere to masking and weekly testing protocols, with employers responsible for enforcing these measures. In the absence of a clear federal mandate, businesses now face uncertainty regarding their role in implementing and enforcing COVID-19 safety measures in the workplace. The Court's invocation of the major questions doctrine in *NFIB v. OSHA* is deeply problematic, as it effectively hampers federal efforts to swiftly address national crises without explicit congressional authorization. By failing to provide a clear standard for determining what constitutes a matter of vast economic and political significance, the Court has created a vague and arbitrary barrier to agency action – leading to inconsistent interpretations, confusion, and hesitation among agencies tasked with protecting public health and safety. As a result, the Court's decision sets a dangerous precedent that could slow down or even paralyze national responses to large-scale crises, as agencies become increasingly wary of exercising their statutory authority in the face of potential legal challenges. The major questions doctrine, as applied in *NFIB v. OSHA*, prioritizes abstract notions of congressional authority over the practical realities of governance, ultimately

[144] Randolph J. May and Andrew Magloughlin, "NFIB v. Osha: A Unified Separation of Powers Doctrine and Chevron's No Show," *South Carolina Law Review* 74, no. 2 (2023), https://doi.org/10.2139/ssrn.4067799, 290.
[145] Ibid., 293.

undermining the ability of expert agencies to act decisively in times of crisis.[146]

This situation is particularly challenging for businesses with a multi-state presence, as they must tailor their operational and compliance strategies to meet diverse regulatory requirements across jurisdictions. The challenge is not just about adapting to different rules; it is about the increased administrative burden on businesses to ensure compliance everywhere they operate, which can be both costly and time-consuming.[147]

The operational challenges businesses face in this fragmented regulatory landscape are significant. They include increased legal and financial risks due to potential non-compliance with varied local regulations, which could result in hefty fines and damage to the company's reputation. Additionally, the uncertainty surrounding the regulatory environment can stymie business planning and investment, as companies may be wary of investing in areas with unclear or fluctuating regulatory requirements. This can have a stifling effect on innovation and growth, as businesses might prioritize regulatory compliance over expansion and innovation efforts.[148] As companies navigate this complex regulatory environment, the ruling serves as a crucial reminder of the need for clear legislative guidance and judicial interpretation in matters of significant economic and political importance. The decision not only raises significant legal questions about the scope of federal agencies' authority but also underscores the operational challenges businesses face in a landscape devoid of a clear federal mandate.

In previous public health emergencies, such as the H1N1 influenza pandemic of 2009-2010 and the Ebola outbreak of 2014-2016, federal agencies like the CDC and OSHA worked closely with state and local health departments to develop and implement coordinated guidance for workplace safety.[149] This cooperative approach allowed for swift and unified responses to rapidly evolving public health threats while respecting state and local authority. Similarly, in the early stages of the COVID-19 pandemic, federal agencies collaborated with state and local governments to establish recommendations for workplace safety measures, which many states and localities adopted and incorporated into their public health orders. However, the Supreme Court's decision in *NFIB v. OSHA* disrupted this cooperative approach by limiting the federal government's ability to establish uniform workplace safety standards during a public health emergency. As a result, the burden of developing and enforcing COVID-19 workplace safety measures shifted to individual states, leading to a patchwork of regulations that varied widely across the country.

This ruling also highlights the tension between legal interpretations of agency authority

[146] Thomas A Birkland et al., "Governing in a Polarized Era: Federalism and the Response of U.S. State and Federal Governments to the COVID-19 Pandemic," *Publius: The Journal of Federalism* 51, no. 4 (August 14, 2021): 650–72, https://doi.org/10.1093/publius/pjab024, 13-14.
[147] May and Magloughlin, "NFIB v. Osha," 2-3.
[148] Ibid., 15.
[149] Ana Santos Rutschman and Ruqaiijah Yearby, "Public Health Law and Policy in the Wake of NFIB v. Osha: Probing Emerging Divides in the Supreme Court's View of Public Health," *New York University Journal of Legislation & Public Policy*, March 24, 2022, https://doi.org/10.2139/ssrn.4066050.

and the practical necessities of public health governance, particularly in crises. It questions the extent to which federal agencies can enact broad measures in the face of emergent health threats, a concern that is magnified when considering the variable adoption of public health practices across states, often influenced by partisanship. This variability underscores the need for a cohesive national strategy, something that becomes challenging when federal agencies' powers are curtailed.

IV. LONG-TERM IMPACT ON BUSINESS LAW

By invoking the major questions doctrine to invalidate OSHA's "vaccine-or-test" mandate, the Court has established a higher level of scrutiny for agency actions that have substantial economic and political consequences.[150] This ruling not only compromises the immediate response to the COVID-19 pandemic but also sets a concerning standard for addressing future health and safety challenges. The Court's decision effectively limits the power of federal agencies to enact broad, comprehensive regulations, even when such measures are deemed necessary to address urgent national issues, contravening established legal principles and historical precedent for federal intervention in public health emergencies.

The Supreme Court's decision in *NFIB v. OSHA* has significant implications for business law, as it directly impacts the regulatory environment in which businesses operate. The ruling's effect on agency authority and the application of the major questions doctrine will shape the legal landscape for businesses across various industries.[151] From a business law perspective, the decision creates a more challenging regulatory framework for agencies tasked with overseeing workplace safety, environmental protection, and consumer welfare. By setting a higher bar for agencies to justify broad regulations, the Court has effectively given businesses a stronger legal basis to challenge agency actions that they believe are overly burdensome or exceed statutory authority, prioritizing individual liberties over collective safety.

Furthermore, the increased likelihood of legal challenges to agency actions may create a more uncertain and unpredictable regulatory environment for businesses. Companies may face greater difficulty in planning for and adapting to new regulations, as they may be subject to prolonged legal disputes and potential invalidation. This uncertainty can impact business decisions related to investments, hiring, and compliance strategies.[152] The Court's ruling also has implications for businesses seeking to influence the regulatory process. Companies and industry groups may feel emboldened to lobby against proposed agency rules, arguing that they exceed the scope of agency authority or violate the major questions doctrine. This could lead to a more contentious and politicized rulemaking process, with businesses and other stakeholders more

[150] Walter G. Johnson and Lucille Tournas, "The Major Questions Doctrine and the Threat to Regulating Emerging Technologies," *SSRN Electronic Journal*, February 1, 2023, https://doi.org/10.2139/ssrn.4187381 25.
[151] Ilya Somin, "A Major Question of Power: The Vaccinate Mandate Cases and the Limits of Executive Authority," *SSRN Electronic Journal*, 2022, https://doi.org/10.2139/ssrn.4186139, 91.
[152] Johnson and Tournas, "The Major Questions Doctrine and the Threat to Regulating Emerging Technologies," 28.

actively challenging agency actions in court and the court of public opinion.[153]

In addition to the direct impact on businesses, the *NFIB v. OSHA* decision may also have unintended consequences for the broader regulatory landscape. With federal agencies' ability to issue broad, nationwide regulations limited, states and local governments may step in to fill the void, leading to a mismatch of varying rules and requirements across different jurisdictions and industries. For example, in the absence of a federal vaccine-or-test mandate, some states may choose to implement their mandates, while others may prohibit such measures altogether. This mix of regulations can make compliance more complex and costly for businesses, particularly those operating across multiple states or industries, as they must devote more resources to understanding and adhering to the different requirements. Moreover, the *NFIB v. OSHA* decision may deter agencies from proposing innovative or far-reaching solutions to emerging problems, fearing that such proposals will be challenged and struck down by the courts under the major questions doctrine. Even when agencies do propose solutions, the prospect of lengthy and costly legal battles may delay or deter their implementation, leading to further uncertainty and instability in the regulatory environment.

The Supreme Court's ruling in *NFIB v. OSHA* has far-reaching effects on future legal interpretations and cases involving agency authority and the major questions doctrine. By establishing a high bar for agencies to clear when issuing significant regulations, the Court has created a dangerous precedent that undermines the government's ability to respond effectively to public health crises and protect workers from occupational hazards.[154] The Court's ruling may embolden challenges to agency-made rules, with claims that these rules exceed statutory authority or violate the major questions doctrine. Consequently, businesses may face an increasingly complex and uncertain regulatory landscape, deterring agencies from pursuing bold or transformative regulations necessary to protect public health, safety, or welfare. As these legal theories evolve and interact, it is crucial to adopt a nuanced legal approach to public health that balances individual liberties with collective safety. The *NFIB v. OSHA* decision serves as a stark reminder of the need for a carefully calibrated interplay between agency authority, congressional intent, and judicial review in shaping the regulatory environment to protect the health and well-being of workers and the public at large.

V. CONCLUSION

The Supreme Court's decision in *NFIB v. OSHA* represents a significant shift in the balance of power between federal agencies and the courts, with far-reaching implications for workplace safety and public health. By invoking the major questions to strike down OSHA's vaccine-or-test mandate, the Court has effectively constrained the ability of federal agencies to respond swiftly and comprehensively to national crises without explicit congressional

[153] Ibid.
[154] Johnson and Tournas, "The Major Questions Doctrine and the Threat to Regulating Emerging Technologies," 28..

authorization. This article argues that the Court's ruling in *NFIB v. OSHA* was a legal misstep that has created more problems than it has solved. The decision has led to a fragmented regulatory landscape, leaving businesses to navigate a patchwork of state and local regulations, increasing compliance costs, and fostering operational uncertainty.

While the Court's decision purports to protect individual liberties and maintain the separation of powers, it has done so at the expense of collective safety and effective governance. The ruling fails to strike the proper balance between these competing interests, prioritizing an abstract notion of congressional authority over the practical realities of responding to a rapidly evolving public health crisis. To address the challenges created by the *NFIB v. OSHA* decision, Congress must act swiftly to clarify the scope of agency authority and provide a more stable framework for regulatory action in times of crisis. By establishing clear statutory guidelines and oversight mechanisms, Congress can ensure that federal agencies have the necessary flexibility to protect public health and safety while still being subject to appropriate checks and balances. The *NFIB v. OSHA* case demonstrates a cautionary tale about the unintended consequences of overly restrictive judicial intervention in agency decision-making. As we confront the ongoing challenges posed by the COVID-19 pandemic and future public health crises, our legal system must adapt to strike a better balance between individual rights, collective safety, and effective governance. Only by learning from the shortcomings of the *NFIB v. OSHA* decision can we hope to build a more resilient and responsive framework for protecting workers and the public at large.

"A Digital World: How Will International Businesses Work With Countries to Address AI and Technology Concerns?"

Written by Abigail Pastel
Edited by Elizabeth Shay

ABSTRACT.

This article focuses on the international response to AI in two global areas: North America (US) and Europe (the European Union member states). Specifically, this paper analyzes how efficiently these countries' AI and technology policies will address concerns such as data security, privacy, identity theft, and illegal data acquisition by exploring specific cases. Furthermore, I present a hypothesis for how businesses that use advanced technology may adapt their operational processes to continue working with the aforementioned countries to avoid being continually sued for AI and technology misuse in domestic and international jurisdictions such as conflict of laws. To do so, I predict the outcomes of ongoing AI lawsuits by comparing them with past cases.

I. INTRODUCTION

The legal principle of "conflict of laws" refers to "a difference between the laws of two or more jurisdictions with some connection to a case, such that the outcome depends on which jurisdiction's law will be used to resolve each issue in dispute," as defined by Cornell's Legal Information Institute.[155] This means that, when certain cases are assessed, it may be necessary to evaluate the laws of multiple jurisdictions to see which ones apply to the immediate case. This principle can be applied on an international scale. For instance, when multiple countries have a shared case (or many individual cases) against the same international business or organization, who is to tell what the outcomes are supposed to be? A notable example is that, due to a globalized economy, Google has received antitrust lawsuits from the US, Australia, Spain, and Brazil.[156] This is a particularly difficult situation, as all of those sovereign states have different laws that should be considered when assessing the legitimacy of a case as well as its final ruling. Such is the dilemma posed by the modern issue of artificial intelligence ("AI") and advanced technology.[157] Financial and technological powerhouses are increasingly turning to AI in order to streamline tasks and facilitate "informed decision-making" by using it to process much larger chunks of data in smaller amounts of time than humanly possible.[158] This ultimately boosts productivity. Not to mention, AI's data processing facilitates a personally-tailored approach to individual customers' needs, as explained by Founder and CEO of Financial Finesse's Liz Davidson on the *Bloomberg Technology* podcast.[159] One may argue that this is a "win-win" for businesses around the globe: increased productivity and skyrocketing customer satisfaction ratings. However, these benefits far from outweigh the risks of AI, such as data security and privacy, legal and regulation-related challenges, and misinformation.[160] Before delving into this topic, it is integral to this case study to differentiate traditional AI from generative AI. According

[155] "Conflict of Laws," LII / Legal Information Institute, accessed February 5, 2024, https://www.law.cornell.edu/wex/conflict_of_laws.
[156] "Google Antitrust Lawsuits Continue throughout Multiple Countries," February 25, 2021, https://globaledge.msu.edu/blog/post/56976/google-antitrust-lawsuits-continue-throu.
[157] *For the purposes of this case study, AI will follow IBM's definition:* "What Is Artificial Intelligence (AI) ? | IBM," accessed February 5, 2024, https://www.ibm.com/topics/artificial-intelligence; *For the purposes of this case study, advanced technology will follow the European Union's and the Cornell Legal Information Institute's overlapping definitions*: "Definition: Advanced-Technology from 42 USC § 1862i(j)(1) | LII / Legal Information Institute," accessed April 5, 2024, https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=42-USC-895123351-233005741&term_occur=999&term_src=. ; "Advanced Technologies - European Commission," accessed April 5, 2024, https://single-market-economy.ec.europa.eu/industry/strategy/advanced-technologies_en.
[158] "The Top Five Ways AI Is Transforming Business," accessed February 5, 2024, https://www.forbes.com/sites/forbesbusinesscouncil/2022/11/21/the-top-five-ways-ai-is-transforming-business/?sh=24add59a8e7f.
[159] "Bloomberg Technology: AI and Hiring, Huawei Laptop Teardown - Bloomberg," accessed February 5, 2024, https://www.bloomberg.com/news/audio/2024-01-05/bloomberg-technology-ai-s-impact-on-hiring-podcast.
[160] "The 15 Biggest Risks Of Artificial Intelligence," accessed February 5, 2024, https://www.forbes.com/sites/bernardmarr/2023/06/02/the-15-biggest-risks-of-artificial-intelligence/?sh=75c3f1ee2706.

to the U.S. Chamber of Commerce, traditional AI systems are trained on large datasets and use subsequent predetermined algorithms to predict or optimally complete restricted sets of tasks (i.e., playing board games, translating a language). Generative AI, in addition to doing everything that traditional AI can, is also able to create something *new*,also known as machine learning. It refers to when AI uses data to understand, predict, and create content when given a specific prompt.[161] For the purposes of this case article, the topic refers to generative AI rather than traditional AI. Generative AI systems' ability to "machine learn" has increasingly concerned citizens and governments around the world.[162] This challenge is particularly difficult to navigate as we lack established legal processes to address AI infringements. Furthermore, many countries are still in the process of finalizing laws that will differentiate between legal and illegal uses of AI and other advanced technology. In this article, I strive to analyze and understand two main points. The first point is how countries are currently drafting laws in response to AI. The second point is how international businesses will likely adjust their use of AI while abiding by multiple countries' new AI laws in order to prevent lawsuits, which deals with *conflict of laws*. To do so, this article will focus on two global areas: North America ("US") and Europe (the European Union member states). I will then analyze how efficiently these countries' laws and draft policies will address concerns such as data security, privacy, identity theft, and illegal data acquisition by exploring specific cases. Subsequently, I will hypothesize how businesses may adapt their operational processes to continue working with the aforementioned global areas.

II. WHAT SPECIFIC ISSUES DOES AI RAISE ON THE DOMESTIC AND INTERNATIONAL SCALES

Contemporarily, artificial intelligence and advanced technology are being used in the following fields: medicine, transportation, robotics, science, education, the military, surveillance, finance and its regulation, agriculture, entertainment, retail, customer service, and manufacturing.[163] International concerns that AI raises include international trade and development (on global chains and digital platforms), intellectual property, "transparency, explainability, responsibility, and accountability," as well as governance frameworks (how it will be regulated).[164]

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[161] "Traditional AI vs. Generative AI: A Breakdown | CO- by US Chamber of Commerce," accessed February 5, 2024, https://www.uschamber.com/co/run/technology/traditional-ai-vs-generative-ai.
[162] IMPORTANT: *When 'AI' is mentioned throughout the article, it refers to generative (machine-learning) artificial intelligence, specifically.*
[163]"How AI Will Be Used - Caltech Science Exchange," accessed February 5, 2024, https://scienceexchange.caltech.edu/topics/artificial-intelligence-research/artificial-intelligence-everyday-life-uses.
[164]"The Impact of Artificial Intelligence on International Trade | Brookings," accessed February 5, 2024, https://www.brookings.edu/articles/the-impact-of-artificial-intelligence-on-international-trade/; "Artificial Intelligence in International Development: Avoiding Ethical Pitfalls," Journal of Public and International Affairs, accessed February 5, 2024,

Domestic concerns of AI in the US are: how exactly AI is built (which brings up the subsequent issues of intellectual property, IP, biometrics, and personal data), malicious use of AI, AI "bias and inaccuracies," and limited access to human beings after experiencing bad AI customer service, according to the Federal Trade Commission.[165] The Morgan & Morgan v. Microsoft lawsuit is a fitting example, as its main issues are intellectual property and questionable data acquisition. Domestic concerns of AI in the European Union are: price discrimination, targeted advertising/nudging, as well as keeping or "turn[ing] off" personalized online experiences.[166] The Meta v. EU (Spain) lawsuit is a fitting example, as its issues include disabling personalized online experiences.

III. HOW WILL COUNTRIES REFORM THEIR CURRENT LAWS TO ADAPT INTERNATIONAL BUSINESS' USE OF AI

A. United States of America (North America)

AI regulation legislative efforts in the US have fallen under six specific categories: "(1) promoting AI R[epublican] & D[emocrat] leadership; (2) protecting national security; (3) disclosure; (4) protecting election integrity; (5) workforce training; and (6) coordinating and facilitating federal agency AI use."[167] President Biden's *Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence* released in October 2023 (aka the AI *Bill of Rights*) establishes these following standards: ***Security and Safety*** by creating and implementing cybersecurity programs and standards to ensure safety (standards will be developed by the National Institute of Standards and Technology and carried out by the Department of Homeland Security); ***Protect Americans' Privacy*** by accelerating the production, development, and strengthening of "privacy-preserving" techniques in addition to establishing guidelines for federal agencies to collect data; ***Advancing Equity and Civil Rights*** by targeting algorithmic discrimination, "ensuring fairness in the criminal system," and "provid[ing] clear guidance to landlords, federal benefits programs, and federal contractors"; ***Standing Up for Consumers, Patients, and Students*** by having the The Department of Health and Human Service establish a program to ensure responsible use of AI in healthcare and creating educational

https://jpia.princeton.edu/news/artificial-intelligence-international-development-avoiding-ethical-pitfalls.; "The AI Governance Challenge," accessed February 5, 2024, https://www.spglobal.com/en/research-insights/featured/special-editorial/the-ai-governance-challenge.

[165]"Consumers Are Voicing Concerns About AI," Federal Trade Commission, September 30, 2023, https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/10/consumers-are-voicing-concerns-about-ai.

[166]"Artificial Intelligence: Challenges for EU Citizens and Consumers," The European Parliament, January 2019, https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/631043/IPOL_BRI(2019)631043_EN.pdf

[167]"U.S. Artificial Intelligence Policy: Legislative and Regulatory Developments," accessed February 24, 2024, https://www.cov.com/en/news-and-insights/insights/2023/10/us-artificial-intelligence-policy-legislative-and-regulatory-developments.

resources; ***Supporting Workers*** by producing reports on AI's potential labor-market impacts and analyzing their results to optimize federal support for job-displaced workers and to minimize "the harms and maximize the benefits of AI for workers"; ***Promoting Innovation and Competition*** by continuing research whilst "encouraging the Federal Trade Commission to exercise its authorities"; ***Advancing American Leadership Abroad; Ensuring Responsible and Effective Government Use of AI*** by hiring AI experts and helping "agencies acquire specified AI products and services."[168]

B. The European Union (Europe)

The European Union was able to establish a revolutionary *EU AI Act* in early December 2023. Its final draft was released on January 21, 2024. It entails the following: unacceptable risk, high risk, and limited risk. ***Unacceptable Risk*** use of AI (under Title II, Articles IV/V) includes cognitive behavioral manipulation of people or specific vulnerable groups, social scoring (i.e. classifying people based on behavior, socio-economic status, and/or personal characteristics), biometric identification and categorization of people, and real-time and remote biometric identification systems (i.e.facial recognition). ***High risk*** use of AI (under Title III) includes individual profiling (i.e., automated processing of personal data to assess various aspects of a person's life, such as work performance, economic situation, health, preferences, interests, reliability, behavior, location or movement), and an AI model that is used as a safety component or covered by EU laws in Annex II of the EU AI Act AND required to undergo a third-party conformity assessment under those Annex II laws; OR those under Annex III use cases (although, there are exceptions). ***Limited Risk*** use of AI includes any General Purpose AI Model (GPAI model). At this level, developers, owners, and deployers must ensure that users are aware that they are interacting with AI.The AI Act also establishes "guardrails" and bans of certain AI and advanced technology software and products.[169] Please refer to the European Union or European Parliament Websites for more detailed information on the European Union AI Act.[170]

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[168] The White House, "Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence," The White House, October 30, 2023, https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/.; The White House, "FACT SHEET: President Biden Issues Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence," The White House, October 30, 2023, https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/30/fact-sheet-president-biden-issues-executive-order-on-safe-secure-and-trustworthy-artificial-intelligence/.

[169]"Artificial Intelligence Act: Deal on Comprehensive Rules for Trustworthy AI | News | European Parliament," December 9, 2023, https://www.europarl.europa.eu/news/en/press-room/20231206IPR15699/artificial-intelligence-act-deal-on-comprehensive-rules-for-trustworthy-ai.

[170] "EU AI Act: First Regulation on Artificial Intelligence," Topics | European Parliament, June 8, 2023, https://www.europarl.europa.eu/topics/en/article/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intellige

IV. HOW WILL INTERNATIONAL BUSINESS CONTINUE USING AI WITHOUT BREAKING MULTIPLE COUNTRIES; LAWS AND GETTING USED?

One way that I believe international businesses may respond to the new AI laws and regulations in the aforementioned countries may be through data privacy enforcement. This prediction is supported by Stanford's Human-Centered Artificial Intelligence department, which recommends "narrow[ing] the scope of automated decision making" to only include information relevant to the specific task at hand. It also recommends "respect[ing] the right to delete [private information from] machine-learning models."[171] Another potential solution may be a specific license acquisition. As algorithm verification and pre-approval have been required in the US through the Executive Order and the EU through the AI Act, businesses will need to get their AI models and algorithms pre-approved and verified by governments. To prevent miscommunication and avoid accidentally breaking any laws, businesses may also benefit from licensing specific AI models in "high-risk areas." Additionally, it was suggested by the Center for Strategic and International Studies that governments should create government agencies that will implement and regulate new AI laws and policies. These agencies may also monitor corporations' and organizations' use of AI and modify algorithms so that AI use may be more transparent, fair, and secure (which will make it easier to hold groups or people accountable for AI infringements and risks).[172] While it is not yet fully clear what the advantages and disadvantages of these prospective solutions are (not to mention how these solutions will affect business-government relations), many believe it is a step in the right direction to protect global citizens and maintain control of a "beast" we do not completely understand. To impose more detailed and efficacious regulations on AI, it is recommended to "run experiments to understand AI," including its limitations and its full capacities.[173] In the famous words of the "Godfather of AI," Geoffrey Hinton, "we're entering a period of great uncertainty where we're dealing with things we've never dealt with before… and normally, the first time [we] deal with something totally novel, [we] get it wrong. We can't afford to get it wrong with these things."[174]

V. HOW WILL LAWSUITS IN THE US AND EU BE RESOLVED?

It is clear that because the *Morgan & Morgan v. Microsoft* (US) and *Meta v. Spain* (EU) lawsuit cases were all filed within the past year (and include powerful corporations), no verdict

nce.;"High-Level Summary of the AI Act | EU Artificial Intelligence Act," accessed April 5, 2024, https://artificialintelligenceact.eu/high-level-summary/.

[171]"Regulating AI Through Data Privacy," accessed February 24, 2024, https://hai.stanford.edu/news/regulating-ai-through-data-privacy.

[172]"AI Regulation Is Coming- What Is the Likely Outcome?," accessed February 24, 2024, https://www.csis.org/blogs/strategic-technologies-blog/ai-regulation-coming-what-likely-outcome.

[173]"'Godfather of AI' Geoffrey Hinton: The 60 Minutes Interview - YouTube," accessed February 24, 2024, https://www.youtube.com/watch?v=qrvK_KuIeJk.

[174]Ibid.

has been reached in any of these cases. However, in order to predict the possible outcomes, one could analyze a past legal case with similar issues. Then, the new AI regulation standards could be factored in to forge a complete hypothesis regarding these two cases' rulings.

A. Morgan & Morgan v. Microsoft (The "US")

In the *Morgan & Morgan v. Microsoft* case, the plaintiff accuses OpenAI of misusing personal data from social media platforms and other sites to "train ChatGPT and other systems." Two main issues in this case are questionable means of data acquisition and intellectual property.[175] The *Buchwald vs. Paramount Studios* (1990) case, in which writer and comedian Art Buchwald sued Paramount for stealing and reusing his past ideas from a past project on a new screenplay, also includes concerns such as intellectual property and unethical (or illegal) information/data acquisition. In this specific case, the court ruled in favor of Buchwald, as it found Paramount contractually liable to Buchwald for basing their screenplay on Buchwald's ideas. As this case involves an American company and an American plaintiff, this case falls under American legal jurisdiction. The *Morgan & Morgan v. Microsoft* case ruling may be similar to that of *Buchwald vs. Paramount Studios'*, in which the court will rule in favor of the plaintiff on grounds of illegal data acquisition (as the company did not formally ask the plaintiff to use their personal data to train AI models). However, the court may potentially rule in favor of Microsoft on intellectual property grounds instead, as the creator may not have formally registered their data with the copyright office. Thus, the use of their publicized personal data would not be a technical copyright infringement.[176] Furthermore, even if the plaintiff's social media data was copyrighted, the court may conclude that Microsoft did not infringe on any intellectual property rights as it simply applied the US Fair Use doctrine, which permits the unlicensed use of "copyright-protected works in certain circumstances," such as "commentary, criticism, news reporting, and scholarly reports."[177] In addition to the ruling, the course may mandate Microsoft to hire AI consulting experts in order to prevent questionable data acquisition, as stated in Biden's AI executive order under the "Protect Americans' Privacy" and "Protect Americans' Safety" sections.

B. Meta v. EU (Spain)

In the *Meta v. EU (Spain)* case, a coalition of Spanish media outlets sued Meta for $600 million USD in December 2023, alleging that Meta repeatedly violated EU General Data Protection Regulation (GDPR) rules in order to control the local ad market. Two main issues in

[175]"What Is Intellectual Property (IP)?," accessed April 15, 2024, https://www.wipo.int/about-ip/en/index.html.
[176]"How to Prevent Copyright Infringement on Social Media," Business News Daily, accessed April 15, 2024, https://www.businessnewsdaily.com/4693-legal-image-usage.html.
[177]"U.S. Copyright Office Fair Use Index," accessed February 24, 2024, https://www.copyright.gov/fair-use/.

this case involves personalized online experiences and questionable data acquisition. [178] The *Meta v. EU* case (May 2023), in which the EU fined Meta a $1.3 billion privacy fine for transferring users' personal information from the EU to the US, also included online experience and unethical (or illegal) information/data acquisition concerns.[179] In this specific case, the EU got its way and ordered the company to stop transferring data across the Atlantic by October 2023. The *Meta v. Spain* case ruling may be similar to that of *Meta v. EU (May 2023),* in which the court will rule in favor of the plaintiff on grounds of illegal data acquisition (as Meta did not formally ask the original sources to use their data to inspire their ads).

Furthermore, the new EU AI Act may play a role in the outcome of this case, as Meta uses an AI program (called Meta Advantage) to personalize ad recommendations.[180] However, the court's ruling on the grounds of personalized online experiences may depend on how Meta personalizes ads. The court may side with the plaintiffs if Meta uses "personal data" to customize ads without getting clear permission from the data subject. Personal data includes "any information relating to an identified or identifiable natural person," such as genetic, biometric, or health information on a person, as well as data that shows their race, ethnicity, political or ideological beliefs, religious beliefs, or membership in a trade union.[181] However, if Meta solely uses personal data in the form of an individual's watch history and most frequently consumed online materials, it may not be a breach of the GDPR. Thus, in this situation, the court may rule in favor of Meta on the grounds of personalized online experience. The court could also ban Meta Advantage AI if it fits the definition in Title II, Article 5 of illegal biometric data collection and categorization. If, on the other hand, Meta's AI uses biometric and personal data collection methods that are not against the law (see Title III, Article 6, Annex III of the EU AI Act), the court may rule in Meta's favor.

VI. CONCLUSION

In this article, I argue how I believe international businesses will have to adapt their use of AI to abide by new legal guidelines. Furthermore, I use existing laws and past cases to predict how current lawsuits in the US and EU that involve AI may be resolved. While I believe that my

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[178]"Meta Faces Lawsuit From Spanish Media Over Advertising Practices - WSJ," accessed February 24, 2024,https://www.wsj.com/business/media/meta-faces-lawsuit-from-spanish-media-over-advertising-practices-c2b8e753.

[179] "European Union Hits Facebook Parent Meta with Record $1.3 Billion Privacy Fine," PBS NewsHour, May 22, 2023,https://www.pbs.org/newshour/politics/european-union-hits-facebook-parent-meta-with-record-1-3-billion-privacy-fine.

[180]"Introducing the AI Sandbox for Advertisers and Expanding Our Meta Advantage Suite," Meta for Business, accessed April 12, 2024, https://www.facebook.com/business/news/introducing-ai-sandbox-and-expanding-meta-advantage-suite.

[181]"Art. 9 GDPR – Processing of Special Categories of Personal Data," *General Data Protection Regulation (GDPR)* (blog), accessed February 24, 2024, https://gdpr-info.eu/art-9-gdpr/.; "Personal Data," *General Data Protection Regulation (GDPR)* (blog), accessed February 24, 2024, https://gdpr-info.eu/issues/personal-data/.

case analyses and court ruling hypotheses are legally logically sound, it is important to note that legal experts have yet to determine how these new AI and technology laws will apply in business and international law. Thus, these cases' rulings may apply new AI laws differently than how I described them in this article. Furthermore, as the aforementioned cases are in two different global regions with different national laws, I strongly believe that some courts may choose to rule on these cases by mostly relying on pre-existing regional laws rather than on novel AI laws.