AFTERWORD

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This year, Emory University School of Law celebrates its Centennial Year. As Emory Law celebrates a century of advancing the rule of law it also celebrates one hundred years of advancing society. Indeed, the two primary engines of societal progress are the laws that protect humanity and the innovations that enhance it as a whole. Yet, innovation and law are often at odds due to the nature of these concepts. Innovations create changes and the law must react to those changes. If technology is truly advancing it often pushes boundaries and quickly outpaces the legislative process. Even when current laws are stretched by liberal interpretation, technology can still escape their scope. For the past century, the answer to this problem has been to empower agencies to regulate industries in the hopes that the agencies may move faster than a legislative body. However, as the speed with which the digital age blesses society with new innovations increases at an ever faster rate, agencies have reacted with power grabs for jurisdiction and a flurry of redundant regulatory schemes. Thus, as technology continues to advance, the United States’ regulatory administrative state has become an increasingly restrictive bottleneck for innovation. In recognition of the constrain regulations place on innovation, the Emory Corporate Governance & Accountability Review decided to publish this “Law & Innovation” themed issue.

To examine the growing tension between the United States’ large administrative state and innovators’ desires for progress, ECGAR asked whether the administrative state could itself innovate to promote innovation. Four experts were chosen to answer this question. Three responded by investigating regulatory schemes attended to the fuel of modern innovation—the internet. To provide a more tangible view of the interplay of law and innovation, one expert used a worker’s compensation law to demonstrate the often imperfect result of what happens when law attempts to catch technology.

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George F. Akers discusses the benefits innovation has to society as well as its legal cost in a manner that legal professionals can appreciate. Using online software as a service ("SaaS") as his canvas, Akers painted a picture of the risk and reward inherent in digital technologies. Although equity management platforms ("EPMs") and other electronic document management programs have been crucial advancements in the legal profession, they have created new risks. As Akers noted, the data lawyers and clients input into these programs is vulnerable in the event the host goes out of business, the servers fail, or a breach occurs. Alice T. Kane and Philip A. Goldstein discuss the responsibility a company bears in the event of the latter of the three occurrences—a cybersecurity breach. By focusing on the financial services industry in New York, Kane and Goldstein walked readers through an example of the kind of responsibility placed upon boards by webs of regulators and regulations. These regulations serve as an example of regulatory schemes that go beyond created commonsense liability for companies by creating liability for the directors themselves. When liability goes beyond ensuring remedies for those who may be affected by a company, it serves to discourage start-up companies and other would-be entrants from bringing their innovations to market. Rarely are new market entrances able to afford the army of legally-trained eyes required to ensure compliance with this maze of concurrent regulation. Regulations of this nature are thus at odds with innovation because they restrict markets to entrenched players.

Craig Nazzaro, Eric Setterlund and Matt White examine the evolution of cybersecurity regulation. In doing so, the authors further demonstrated the cost of innovation in the financial services industry. As more information and processes rely on the internet and cloud services, more information becomes vulnerable to cybersecurity breaches. Nazzaro, et al., noted that, in addition to various state agencies, seven federal agencies have jurisdiction over the measures by which a company protects its customer’s information. While such sensitive information should be examined, the existence of seven federal agencies with concurrent jurisdiction over a company’s cybersecurity measures serves only to create redundancies and drive up the cost of innovation. Fortunately, the authors provided practical examination tips as well as the best practices to follow in the event of a cybersecurity breach.

Turning from the legal cost of digital innovation to the legal cost of industrial revolution, Morgan M. Cressman discussed an unfortunate example of a law that attempted to keep pace with economic innovation. With the industrial revolution came increased mobility in the form of motorized vehicles.
as well as increased access to technology in the form of production lines. In an attempt to meet the demands of a rapidly advancing society, a state legislature passed a law that limited the rights of both employers and employees. The state thus exchanged legal recourse for speed.

Stefanie Kavanagh speaks directly to how tax laws can affect innovation. Kavanagh focuses on how many countries aim to encourage expenditure on research and development (“R&D”), but often end up stifling innovation. This unintended result is due to the fact that the tax incentives inadvertently and disproportionately benefits large multinational enterprises (“MNEs”) over startups and small businesses. Because startups and small businesses struggle to compete on such an unlevel playing field, some of the most cutting-edge businesses are stifled by the tax provisions that are intended to encourage and bolster their innovative pursuits. Kavanagh concludes that the U.S. Government must continue to take steps to level the playing field. Specifically, Kavanagh advocates for the implementation of a thorough tax regime that would provide a reduced rate of tax on income arising from the license or use of intellectual property. Such a regime could significantly improve the ability of startups and small businesses to compete with MNEs.

Law and innovation topics aim to educate the public on how the administrative arm of government can not only constrain or encourage innovation, but also control access to the American Dream. In all the professional pieces, we saw that innovations come at cost. But we also saw much of that cost is the result of governmental inefficiency. In Cressman’s piece, the cost was a legislative knee-jerk that resulted in a haphazard law which restricted the freedom of individuals and companies alike. In Kane and Goldstein work, we saw how regulators discouraged market entry and thus restricted access to the American Dream. On the other hand, Akers’ work showed that innovation can come at the cost of increased risk. Although innovation and risk go hand in hand, an administrative state that cannot realize a quilt of regulators strangles the fire of innovation is not the answer. Setterlund and Nazzaro demonstrated that in the face of such fragmented regulation, the best practices often involve at least some costly measures. Finally, Kavanagh demonstrated that even when regulatory powers seek to encourage innovation, they can have the opposite effect. This issue of ECGAR provided specific examples of how regulations stifle innovation. Although finding the perfect balance between the blistering speed of innovation and the slow advance of law may be difficult, an administrative state that answers innovation with only more regulation can provide no answer at all.