

The SAVe Act: A Roadblock To Automated Vehicle Innovation

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The automobile is poised at an historic inflection point that rivals the introduction of the internal combustion engine over a hundred years ago.

Autonomous vehicle technology — currently being developed and tested under real-world conditions by numerous companies both outside and inside the traditional auto manufacturing sector — promises to bring important advances in safety and transportation quality and convenience to U.S. roadways.

Open, robust competition among all innovators is essential to realizing self-driving technologies' transformative potential. The Safe Automated Vehicle (SAVe) Act — state model legislation introduced in several states purportedly to regulate safe autonomous vehicle deployments — actually would erect hurdles to autonomous vehicle competition and innovation.

Autonomous vehicle tests, and ultimately deployments, naturally must operate within the rigorous safety standards that apply to vehicles on American roadways. But the legislation — reportedly promoted by General Motors[1] — is unnecessary and is written to protect traditional auto manufacturers and dealers from competition in this new technology space.

The SAVe Act not only fails to promote safety (its ostensible purpose), but will impair the development and deployment of autonomous vehicle technology and its benefits.

Although this analysis focuses on the SAVe Act as introduced in several states, the basic principle has broader application. Any anticompetitive, protectionist legislation that seeks to limit autonomous vehicle market participation based on unwarranted barriers or to impose technologically prescriptive requirements will, like the SAVe Act, delay rather than advance the arrival of the significant safety benefits autonomous vehicles can offer.

The Promise and Diversity of Self-Driving Technology

Autonomous vehicle technology has the potential to “catalyze an unprecedented advance in safety on U.S. roads and highways.”[2] It also promises advances in mobility, productivity and driver convenience.

The autonomous vehicle technology space is highly dynamic with development occurring at a broad range of companies in sectors such as software, hardware, computing and transportation, as well as the traditional automotive sector.[3] This



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intense interest from a diverse set of credible innovators suggests there will be many different deployment models contending in the market for autonomous vehicle technology.

The competition will be fierce. It will be pro-consumer, and it will bring greater safety to America's roadways — if it is allowed to develop and be deployed.

Disruptive New Technologies are Vulnerable to Government-Imposed Barriers

Open competition is the foundation of America's economic system. It fosters innovation in new products, promotes greater quality in existing products and lowers prices making products more accessible to consumers and businesses.[4] Government action can foster competition by prohibiting anticompetitive conduct and by tailoring necessary regulation narrowly to achieve its purposes.[5]

But government action can also destroy competition by raising costs, imposing barriers to entry and picking winners and losers based not on market performance, efficiency or technological innovation, but lobbying muscle and legislative creativity.[6]

Industries in which new technologies promise to disrupt old ones are particularly vulnerable to such regulatory capture because entrenched players' economic interests are threatened by new entrants.[7] The disrupters may bring promising technology and new ideas that bring competition to the market, but lack the connections to be competitive at the state house.

The Antitrust Division of the U.S. Department of Justice and the U.S. Federal Trade Commission — the enforcers of U.S. antitrust law that promote free U.S. markets — in both Republican and Democratic administrations have repeatedly warned against state government regulations that impose barriers to new market entry, often in the guise of safety or “protecting” consumers, because they limit consumer choice and stifle innovation.[8]

“SAVe Acts” Erect Protectionist Barriers to Self-Driving Technologies

The SAvE Act is model legislation that purports to provide a regulatory framework for safe autonomous vehicle deployment. So far, only one state, Michigan, has enacted a version of the SAvE Act.[9] But similar legislation has been introduced in at least six other states — Georgia, Illinois, Maryland, Massachusetts, Oregon and Tennessee.[10]

The SAvE Act has at least two hallmarks of anticompetitive, protectionist legislation: (i) it contains provisions that protect established industry participants from new competition — here, traditional auto manufacturers over high-technology and other companies; and (ii) those provisions are justified by pretextual reasons — here, ostensibly “providing” states with the authority to regulate safe autonomous vehicle deployment, powers which states and the federal government already have.

Protectionist Provisions

As introduced in its various forms, the SAVe Act allows only “motor vehicle manufacturers” to test and operate autonomous motor vehicles in the state.[11] Only companies that have manufactured motor vehicles — to the exclusion of all the other kinds of diverse and credible innovators in the autonomous technology space that do not manufacture automobiles — meet this definition.[12]

Non-automobile manufacturers — including companies with existing autonomous vehicle programs such as Nvidia, Bosch, Microsoft and Uber — could be barred from competing with their technology (at least on their own) in SAVe Act states that adopt this narrow definition.[13]

In addition, in some states the SAVe Act goes even further in protecting traditional automobile manufacturers by including the requirement that only vehicle manufacturers that have “distributed” motor vehicles are eligible to operate autonomous vehicles.[14]

If this language were construed to refer to distribution through auto dealers, this requirement would effectively limit participation in the autonomous vehicle market to only established automobile manufacturers, such as General Motors, since they are the only entities that distribute vehicles through dealers. In fact, even experienced manufacturers could be excluded by this language if they do not distribute vehicles through dealers.

Numerous firms beyond traditional automobile manufacturers/distributors are poised to develop and deploy groundbreaking innovations that could shape the future of autonomous vehicles.[15] These developments are backed by billions of dollars of capital invested and person-hours worked.

Yet with the stroke of a pen, any company that is not a traditional automobile manufacturer will be at a significant disadvantage in entering the autonomous vehicle market. Moreover, having experience manufacturing traditional vehicles is not a reliable indicator that these companies have the ability to safely develop autonomous technology.

Given available information, the level of on-road experience with self-driving cars varies significantly from automaker to automaker. While some automakers have recently begun autonomous vehicle development, others have not indicated any on-road testing of autonomous vehicle technology at all.

Conversely, available data indicate that some technology companies have safely amassed significantly more miles of AV testing than traditional automakers have accumulated in combined mileage. For instance, the California DMV published the disengagement reports for eleven companies testing autonomous vehicle technology in the state in 2016.[16]

The data show that not only did technology companies amass hundreds of thousands more autonomous miles than traditional automakers, but also that their drivers needed to take manual control over the vehicle while in autonomous mode at a significantly lower frequency than traditional automakers.

Nor do all automakers have experience with the cutting-edge software and hardware technology at the core of autonomous vehicle systems. In fact, several automakers have sought to obtain that expertise by acquiring or investing in non-traditional autonomous vehicle companies, the very companies these bills would exclude had they remained independent.[17]

Safety-driven organizations with backgrounds outside vehicle manufacturing should not be denied the ability to contribute their expertise and work to improve road safety.

The SAVe Act imposes other protectionist and unnecessary barriers to development and deployment of these technologies. These include provisions requiring autonomous vehicles to contain automatic crash notification technology with specific parameters that seem tailored to proprietary technology, like GM's Onstar, owned by certain traditional auto manufacturers.[18]

And various iterations of the SAVe Act include provisions protecting auto manufacturers, but not other competitors, from tort liability if the vehicle was modified or converted from its original design without the auto manufacturer's consent[19] Without similar immunity for non-manufacturers, this could lead to efforts to shift liability (and therefore costs) onto developers of the software and hardware elements of self-driving technology itself, putting them at a competitive disadvantage relative to auto manufacturers.

Pretextual Justifications

The SAVe Act is billed as providing states with the regulatory framework and authority necessary to ensure safe autonomous vehicle deployments.[20] But states and the federal government already possess enforcement authority capable of protecting the public from the unsafe deployment of automated vehicle systems.

For example, states have already applied their existing authority over the licensing and registration of motor vehicles to automated systems. In December 2016, the California DMV revoked the registration of autonomous vehicles that it determined to be operating improperly within the state.[21]

The power to revoke vehicle licensing and registration can be found in statutes in many states, including California, Michigan, Illinois and Georgia.[22] In many instances, state-level regulations expressly prohibit the operation of "unsafe" vehicles.[23] States can rely on this existing authority to protect public roadways.

Moreover, the National Traffic and Motor Vehicle Safety Act grants broad authority to the National Highway Traffic Safety Administration (NHTSA) over motor vehicle safety, including the enforcement power to regulate and, if necessary, recall defective or dangerous vehicles.[24]

NHTSA has pointed to this authority as providing the federal agency the flexibility to respond to safety concerns related to forward collision warning systems and other recent innovative automation technologies.[25] According to regulatory guidance released in September 2016, this authority allows NHTSA to reach vehicles “that pose an unreasonable risk to safety even when there is no applicable Federal Motor Vehicle Safety Standard,” including autonomous vehicle systems.[26]

This is not the first time that the introduction of new technologies has provoked backward-looking regulatory responses. Indeed, when automobiles drove alongside horse-drawn carriages, Detroit initially mandated a 5-mile-per-hour speed limit — the same as the speed limit for horse-drawn carriages — a speed too low for the new internal combustion engine technology to operate without stalling.[27]

Likewise, protectionist and unnecessary barriers to enter the autonomous vehicle market threatens to stall progress in autonomous vehicle deployments, and delay the many benefits those innovations offer.

Taken as a whole, legislation based on the SAVE Act principles creates these types of barriers. While the language of future bills may not carry the SAVE brand, state legislators should be wary of inadvertently favoring incumbent automobile industry participants over new players and creating an unfair playing field that will be felt for decades to come.

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[1] Joan Lowy, Influence Game: GM bill is self-driving and self-interested, Associated Press (Feb. 23, 2017), <https://apnews.com/fb906060c89442a3b17cf800f00b3455>; Letter from Jeffrey Boyer, Vice President Global Vehicle Safety General Motors, to Mark Rosekind, Administrator, National Highway Traffic Safety Administration (Nov. 21, 2016), <https://www.regulations.gov/document?D=NHTSA-2016-0090-1005>.

[2] See U.S. Department of Transportation, National Highway Traffic Safety Administration, Federal Automated Vehicles Policy at 5, (Sept. 2016), <https://www.transportation.gov/sites/dot.gov/files/docs/AV%20policy%20guidance%20PDF.pdf>.

[3] Examples of companies developing autonomous vehicle technology include Apple, Tesla, Nvidia, Waymo (the former Google self-driving car project), Uber, Hyundai, BMW, Bosch, Delphi, Microsoft, Volvo, Volkswagen, Honda, Baidu, Toyota, Ford, General Motors, QNX and Intel. See Sam Shead, 30 companies are now making self-driving cars, Business Insider (Apr. 22, 2016), <http://www.businessinsider.com/30-companies-are-now-making-self-driving-cars-2016-4>; see also

John R. Quain, *Self-Driving Cars Might Need Standards, but Whose?*, *The New York Times* (Feb. 23, 2017), https://www.nytimes.com/2017/02/23/automobiles/wheels/self-driving-cars-standards.html?emc=eta1&_r=1.

[4] See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978).

[5] E.g., *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986).

[6] See Mark Green & Ralph Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, 82 *Yale L.J.* 871, 879–881 (1973) (noting the power of government regulators to restrict entry, diminishing competition).

[7] Joshua Wright, *Fed. Trade Comm'n, Remarks at the Clemson University Big Ideas about Information Lecture, Regulation in High-Tech Markets: Public Choice, Regulatory Capture, and the FTC* (April 2, 2015) (“To the extent disruptive competition is supplied by new entrants, regulation that favors incumbents over new entrants will make it more difficult for firms to bring to market the disruptive business models that revolutionize industries and provide enormous benefits to consumers.”); Ernesto Dal Bo, *Regulatory Capture: A Review*, *Oxford Rev. of Econ. Pol'y* 203 (2006).

[8] See, e.g., *Joint Statement of the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice to the Virginia Certificate of Public Need Work Group* (Oct. 26, 2015), https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-federal-trade-commission-antitrust-division-u.s.department-justice-virginia-certificate-public-need-work-group/151026ftc-dojstmtva_copn-1.pdf; *supra* note 6; *Fed. Trade Comm'n, Staff Comment to The Honorable Paula Dockery Concerning Florida Senate Bill 282, A Bill To Allow Direct Shipment of Wine to Florida Consumers From Manufacturers Inside or Outside Florida* (Apr. 10, 2006), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-honorable-paula-dockery-concerning-florida-senate-bill-282-bill-allow-direct/v060013ftcstaffcommentfloridasenatebill282.pdf; *Fed. Trade Comm'n Staff Report, Possible Anticompetitive Barriers to E-Commerce: Contact Lenses* (March 2004), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/possible-anticompetitive-barriers-e-commerce-contact-lenses-report-staff-ftc/040329clreportfinal.pdf.

[9] S.B. 995, 98th Leg., Act No. 332, (Mich. 2016), <http://www.legislature.mi.gov/documents/2015-2016/publicact/pdf/2016-PA-0332.pdf>; S.B. 996, 98th Leg., Act No. 333 (Mich. 2016), <http://www.legislature.mi.gov/documents/2015-2016/publicact/pdf/2016-PA-0333.pdf>.

[10] See H.B. 248 (Ga. 2016), <http://legislativenavigator.myajc.com/#bills/HB/248>; S.D. 1470, 190th Sess. (Mass. 2017), <https://malegislature.gov/Bills/190/SD1470>; S.B. 902 (Md. 2017), <http://mgaleg.maryland.gov/2017RS/bills/sb/sb0902f.pdf>; H.B. 2747 (Ill. 2017), <http://www.ilga.gov/legislation/BillStatus.asp?DocTypeID=HB&DocNum=2747&GAID=14&SessionID=91&LegID=104062>; H.B. 0381 (Tenn. 2017), <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0381&GA=110>; H.B. 31191, 79th Leg. (Or. 2017), <https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/HB3119/Introduced>.

[11] See *id.* The definition of “manufacturer” in the Oregon bill is broader but still limits deployment to certain types of manufacturers. H.B. 31191, 79th Leg. (Or. 2017), <https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/HB3119/Introduced>.

[12] S.B. 995, 98th Leg., Act No. 332, § 2(b)(7) (Mich. 2016), <http://www.legislature.mi.gov/documents/2015-2016/publicact/pdf/2016-PA-0332.pdf>.

[13] As enacted, Michigan’s SAVE Act contains a limited exception to expand the definition of a motor vehicle manufacturer, but even that definition imposes arbitrary and burdensome hurdles on many developers of autonomous vehicle technology. Michigan’s definition of “motor vehicle manufacturer” allows for the participation of non-OEM companies who have (a) manufactured automated motor vehicles in the U.S. that are certified to comply with all applicable federal safety standards, (b) operated automated motor vehicles using a test driver and with an automated driving system engaged on public roads in the U.S. for at least 1 million miles, and (c) obtained an insurance instrument of at least \$10 million. S.B. 995, 98th Leg., Act No. 332, § 2(b)(7) (Mich. 2016), <http://www.legislature.mi.gov/documents/2015-2016/publicact/pdf/2016-PA-0332.pdf>.

[14] See S.D. 1470, 190th Sess. (Mass. 2017); H.B. 0381, § 19(5)(A) (Tenn. 2017).

[15] These firms do not just include technology companies such as Uber, Apple, Nvidia, Intel, and Waymo (the former Google self-driving car project) but also include traditional Tier 1 automotive parts suppliers such as Bosch and Delphi. See Shead, *supra* note 4; see also Quain, *supra* note 4.

[16] State of California, Department of Motor Vehicles, Autonomous Vehicle Disengagement Reports 2016, https://www.dmv.ca.gov/portal/dmv/detail/vr/autonomous/disengagement_report_2016.

[17] See Press Release, Ford Invests in Argo AI, A New Artificial Intelligence Company, in Drive for Autonomous Vehicle Leadership (Feb. 10, 2017), <https://media.ford.com/content/fordmedia/fna/us/en/news/2017/02/10/ford-invests-in-argo-ai-new-artificial-intelligence-company.html>; Press Release, GM to Acquire Cruise Automation to Accelerate Autonomous Vehicle Development (Mar. 11, 2016), <http://media.gm.com/media/us/en/gm/news.detail.html/content/Pages/news/us/en/2016/mar/0311-cruise.html>.

[18] S.B. 995, 98th Leg., Act No. 332, § 665(2)(b)(4) (Mich. 2016), <http://www.legislature.mi.gov/documents/2015-2016/publicact/pdf/2016-PA-0332.pdf>.

[19] See, e.g., S.B. 995, 98th Leg., Act No. 332, § 665a (Mich. 2016); S.D. 1470, 190th Sess. (MA 2017), <https://malegislature.gov/Bills/190/SD1470>; see also Nev. Rev. Stat. § 482A.090.

[20] See Preamble, S.B. 995, 98th Leg., Act No. 332 (Mich. 2016).

[21] Eric Newcomer, Uber Stops Self-Driving Car Program in California, Bloomberg (Dec. 21, 2016), <https://www.bloomberg.com/news/articles/2016-12-22/uber-autonomous-cars-stop-after-california-cancels-registrations>.

[22] See, e.g., Cali. Veh. Code § 8800(a)(2) (revocation where “registered vehicle is mechanically unfit or unsafe to be operated”); Mich. Veh. Code § 257.258(1)(g); Ill. Comp. Stat. Ann. 5/3-704(a); Georgia Motor Veh. & Traffic Code §§ 40-2-135(a), 40-5-50.

[23] See, e.g., Cali. Veh. Code § 24002(a) (prohibiting operation of “any vehicle or combination of vehicles which is in an unsafe condition”); Mich. Veh. Code § 257.683(1) (prohibiting driving or moving of vehicle “in such an unsafe condition as to endanger a person”).

[24] 49 U.S.C. §§ 30102(a)(8), 30118(b), 30120.

[25] Final Notice, NHTSA Enforcement Guidance Bulletin 2016-02: Safety-Related Defects and Emerging Automotive Technologies, 81 Fed. Reg. 65705, 65707-65708 (Sept. 20, 2016).

[26] NHTSA, Federal Automated Vehicles Policy, *supra* note 3, at 7.

[27] Bill Loomis, 1900 – 1930: The years of Driving Dangerously, The Detroit News (Apr. 26, 2016), <http://www.detroitnews.com/story/news/local/michigan-history/2015/04/26/auto-traffic-history-detroit/26312107/>.