Fighting Risk with Risk: Anti-Precaution in Law and Policy

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Abstract

A growing scholarly and policy debate pits advocates of the precautionary principle, who prioritize risk minimization, against proponents of the innovation principle, who argue that regulation suppresses technological progress. Despite their differences, both camps share a common assumption: that contemporary regulatory law is shaped by a risk-averse orientation fundamentally at odds with the risk-seeking ethos of technological entrepreneurship in fields such as AI, climate-tech, and fintech. What this debate overlooks is an alternative regulatory logic—one that deliberately embraces risk.

This article introduces and theorizes this missing logic, which we term anti-precaution because, unlike a precautionary approach that fights risk by banning or controlling it, the government sometimes combats risk by embracing risk. This Article brings anti-precaution to the fore, offering the first systematic account of its place in law and policy. Anti-precautionary measures deliberately authorize or deploy risky activity to mitigate greater harms. Examples include ethical hacking to expose cybersecurity vulnerabilities, prescribed burns to prevent catastrophic wildfires, and geoengineering to combat climate change. Contrasted with precautionary approaches, which seek to minimize risk, or innovation-based approaches, which favor permissionless experimentation, anti-precaution affirmatively and self-consciously deploys risk as a tool of risk governance. It thus embodies a hybrid logic that blends precautionary and innovation-oriented impulses and cannot be captured by either paradigm alone.

We offer a framework for deciding when anti-precaution is justified and when it should be revised or discontinued. This inquiry implicates both first-order questions—the welfare implications of risk–risk tradeoffs and the distributive consequences of shifting exposures to risks—and second-order questions concerning the epistemic challenges in deploying anti-precaution. Building on case studies across environmental, health, and digital domains, we also bring anti-precautionary policies into the light, situating them in contemporary debates over risk regulation and identifying core challenges of risk-embracing governance.

Anti-precaution's challenges include decision-making under uncertainty across the policy life cycle, mitigating institutional and behavioral biases, structuring liability and compensation regimes for the risks that law deliberately embraces, and building reflexivity in an often fragmented institutional environment. To address these challenges, we advance a "meta-regulatory" architecture rooted in reflexivity—the capacity of legal institutions to adapt and update policies as evidence, risks, and priorities evolve. This architecture rests on four interlocking elements, each of which corresponds with each of anti-precaution's main challenges: dynamic updating; structures to counteract cognitive biases; targeted liability and compensation; and collaborative mechanisms that enable coordinated revision. Without such governance mechanisms, regulatory authorities that embrace risk may inadvertently entrench policies whose harms outweigh their benefits and whose inequitable effects deepen existing vulnerabilities in society.

By introducing anti-precaution into the precaution–innovation debate, we seek to bring a fresh perspective to the way that law can confront the harms facing society today. We show how the debate between precaution and innovation is incomplete, if not also overly simplistic.

Regulating in a highly dynamic world necessitates an equally dynamic posture toward risk. In a fast-paced era defined by climate change and new technologies, society surely requires some precautionary forms of risk governance that minimize risk, as well as some government policies that promote innovation. But it will also at times require strategies that deliberately deploy risk to avert greater harms. The meta-regulatory framework we propose offers a blueprint for embracing risk by integrating economic efficiency with a commitment to distributive fairness. That framework also points to how regulators should act more generally in the face of the risks of new technologies and a changing world.