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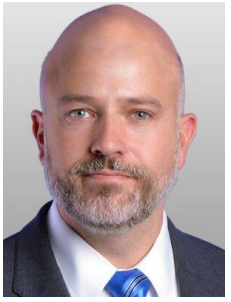
The Risk And Reward Of Federal Approach To AI Regulation

By **Arlo Devlin-Brown, Vanessa Lauber and Javier Andujar** (February 5, 2025, 3:21 PM EST)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Artificial intelligence technologies are developing at a rapid pace, one that is likely to hasten as the Trump administration seeks to promote an industry in which the U.S., for now, maintains the upper hand.

The leading developers of large language models have released new and more capable models, with some industry leaders predicting that we are not far from the point of creating AI that matches or surpasses human cognitive abilities across a broad range of tasks.

With this progress, though, comes well-known risks. Current LLMs can be susceptible to hallucinations, in which inaccurate or unsubstantiated information is proffered as fact to the peril of those who might rely on it. But the much scarier scenarios involve powerful AI tools doing exactly what they are supposed to do should they fall into the hands of terrorist organizations or foreign adversaries.

Even existing AI models can assist bad actors in exploring new biological or chemical weapons, and these capabilities will almost certainly grow.

The government has struggled to keep up with AI's furious pace. Congress has enacted no new laws addressing AI regulation, and the existing federal legal regime does not address many of the unique issues AI poses. State governments are wading into the void, with attorneys general seeking to enforce state consumer protection laws with no clear application to AI and legislatures proposing new and often ill-considered rules to police a technology many do not understand.

While an overbroad or ham-handed federal attempt to adopt a more unified approach obviously poses its own risks, so does the current environment of regulatory uncertainty.

The Early Federal Approach to AI: Less Than Meets the Eye

The American public might be forgiven for thinking that the federal government is already on top of the challenges AI poses. And that is because a number of U.S. regulators have done what they often do when a new technology captures the public's imagination: pretend to do far more to modernize their approach than they actually are.

For example, in January 2024, the Federal Trade Commission announced that it would leverage "the full panoply of [its] statutory tools" to provide AI safeguards.[1] But its statutory tools give it very little to go on as the agency's ambit is limited mostly to consumer fraud. Unsurprisingly, the FTC has played little role beyond targeting companies that take advantage of consumer hype around AI to sell products and services that just don't work as advertised.[2]

The U.S. Securities and Exchange Commission has likewise issued numerous pronouncements about the dangers of AI[3] but, limited to its investor-protection mandate, has focused almost exclusively on companies seeking to raise money for AI products that aren't really there.[4] As the SEC itself put it in one press release, these cases are really about "old school fraud using new school buzzwords like 'artificial intelligence' and 'automation.'"[5]

The U.S. Department of Justice's efforts to police AI have been much the same. Prosecutors have been directed to "seek stiffer sentences for offenses made significantly more dangerous by the misuse of AI"[6] and to consider how a company "assess[es] the potential impact of new technologies, such as artificial intelligence [ ] on its ability to comply with criminal laws."[7] But the DOJ is powerless to promulgate, much less enforce, rules that govern the development, use or abuse of AI models.

There are exceptions. AI techniques have been used in the medical field well before the most recent generative AI boom, and the U.S. Food and Drug Administration continues to police these technologies in its regulation of medical devices.

The most notable area where the federal government has taken action is around national security, where the U.S. Department of Commerce has issued restrictions on the export of chips that can be used to develop LLMs under existing and sweeping export control restrictions.[8]

The Biden administration likewise issued a pair of executive orders relating to AI model development,[9] but the Trump administration abrogated one on the first day of the administration and is likely to rewrite the other.[10]

Since the White House has broad authority to control AI in the name of national security, the lack of any cohesive legislative or regulatory framework around how that power should be exercised, and uncertainty in the courts as to how far that authority goes, leave much to the whim of the executive branch.

Danger in the Regulatory Vacuum

While the lack of a cohesive federal approach to addressing AI risks might at first blush seem a boon for the AI industry, the lessons of history suggest it is anything but. The lack of updated regulations doesn't prevent enforcement authorities from policing new technologies — it just makes it a mess when they try to make new technology comport to old ill-fitting rules.

Just ask the cryptocurrency industry. With the federal government failing to introduce meaningful crypto regulation, federal agencies have sought to police this burgeoning new economy with regulations designed for other asset classes. The SEC has thus claimed that most cryptocurrencies are close enough to "securities" like stocks and bonds that they fell under SEC control.[11]

Not to be outdone, the U.S. Commodities Futures Trade Commission argues that trading in crypto options is like trading in pork belly futures and falls under its jurisdiction.[12]

The DOJ too has jumped into the fray, applying anti-money laundering laws developed around fiat currency to financial platforms in this very different space.[13] The results speak for themselves: The industry has been hampered, not helped, by the absence of new crypto regulation.

Still more worrisome, the federal legislative vacuum gives states an opportunity to jump into the fray, leaving companies building and using AI subject to different regimes in each part of the country.

Last year, California passed a number of laws targeting AI technologies, although Gov. Gavin Newsom **vetoed a controversial** bill, S.B. 1047, that would have broadly regulated the developers of large language models in that state.[14]

And other states are not standing quietly by. In 2024, lawmakers across the U.S. introduced more than 700 AI-related bills,[15]and in the first weeks of 2025, more than 50 new AI-related proposals have been introduced.[16]

In fact, state attorneys general are likely to act against companies building on AI with or without new legislative authority. There are few laws — state or federal — that have been enacted to regulate the social media industry.

But that has not stopped 42 state attorneys general from across the country from **filing cases against social media platforms**,[17] each alleging violations of sundry, often ill-fitting state laws having nothing to do with social media. Social media platforms have been forced to guess at what might or might not limit their exposure to unwritten and untested rules that many state governments seem intent on enforcing.

Enforcement without new regulation specific to AI will be a mess given the unique characteristics of the technology. There will be substantial questions as to who bears responsibility for a model's bad behavior — its developers, deployers or platforms that adopt the model for specific applications. And when the government demands that companies using AI explain exactly why models performed as they did, the industry will face not only trade secret concerns but also the wild fact that no one knows exactly why generative AI systems produce the results they produce.

Risks and Rewards of a Federal Approach

There is of course a danger in passing new federal legislation now to cover a rapidly evolving technology when even top AI researchers do not entirely agree on the direction it is likely to take.

The European Union has arguably made that mistake already with the EU AI Act.[18] The act leaves open many questions about which AI companies are covered by the act's most stringent restrictions on AI technology and whether it is even possible for AI companies to comply with these mandates. Overbroad regulation risks pushing AI development out of the U.S. while doing little to address the actual trouble spots with the technology.

But the risk of an imperfect federal approach must be measured against the risk of a vacuum in its absence. In the current environment, 50 state attorneys general may take 50 different positions as to how existing and ill-fitting statutes and regulations targeted at consumer protection and other areas apply to emerging AI technology. Plaintiff lawyers too are likely to jump into the fray with lawsuits against AI companies employing all manner of novel theories.

Without federal standards tied specifically to AI, there is nothing to preempt this patchwork approach and the risk the ensuing uncertainty poses to progress.

It is worth remembering there are examples of federal legislative approaches that have created the opportunity for new technologies to advance. In the earliest days of the consumer internet, Congress enacted the Communications Decency Act, which gave platforms broad protection against claims against them for content posted by their users.[19] It was these protections that allowed user-generated content that makes up the modern internet to flourish.

A cohesive federal approach in the AI space would also reduce the likelihood that the industry's development will be hampered by federal regulatory agencies seeking to enforce ill-fitting regulations drafted long before the days of generative AI to address risks the new technology may pose.

What a good federal approach to AI development risks might look like is of course a deeply complicated question. A balance must be struck between stimulating a new technology that can provide the world with tremendous value and guarding against its inherent challenges. But it is time for that discussion to be had.

In the murky waters of the moment, the promise of the technology will remain clouded by uncertainty while the risks it poses are poorly addressed.

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