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The AI Preemption Debate in America: The Legal Frame and its Policy Implications

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KEY TAKEAWAY

The determination of which level of government—national or subnational—should be responsible for artificial intelligence ("AI") regulation turns on both legal and pragmatic, consequentialist considerations. Both as a matter of law and for policy purposes, two dynamics merit careful attention: First, is the policy-making entity at the relevant (national or subnational) level a legislative or an executive body? And second, how does the political logic of AI regulation intersect with the legal architecture of a nation's federal structure? While the American experience illuminates the importance of both these questions, the way in which they will be worked out in other jurisdictions will vary as a consequence of different legal architectures and political economies.

> ***"American federalism's most important lesson for other nations may be the risk that institutional design will inadvertently make policy less, rather than more, effective."***

THE ISSUES

Situating the AI Preemption Debate

Recent debates in the United States concerning the regulation how or even if AI is deployed have centered on the question whether federal (i.e, national) law should oust state-level regulation. This focus on federal preemption has sharpened because the national Congress is disabled from enacting affirmative regulation by intense partisan polarization and intense lobbying from tech firms. At the same time, many states have enacted many narrowly targeted measures. Further, Utah, Colorado, Texas, Illinois, and California have passed general measures addressing in one way or another how AI is deployed addressing in some way a broad slice of the AI field. In response to these state-level measures, the Trump White House promulgated an executive order ("EO") in December 2025 purporting to bar—or preempt, in the technical jargon of American law—state-level AI regulation. The Justice Department has also joined private lawsuits challenging state AI laws.

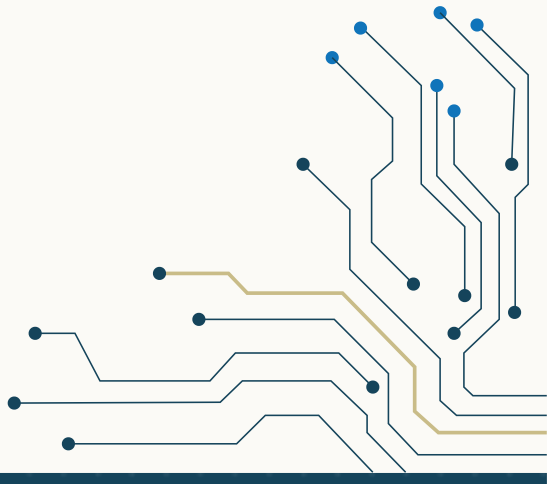
This EO and the underlying AI preemption debate offers an opportunity to grapple with two general questions. To begin with, how does the legal architecture of federalism influence or limit the kind of structural regulatory solutions that can be achieved in relation to AI use? This question is importantly narrow along two dimensions:

AI Regulation in the US Federal System
Two Key Dimensions

1. The regulation of AI's use-cases is just one of several legal-design questions raised by recent advances in AI. The latter also raises issues of international trade law (e.g., export controls); the regulation of energy, and in particular a legal framework for electricity-grid growth; immigration (especially of high-skill migrants); workplace health and safety regulation; and environmental law (e.g., about water usage).

2. Each jurisdiction has its own legal framework for the vertical division of regulatory authority between a national government and its subnational analogs.

This policy brief considers the case of the United States, with the aim of bringing general lessons to light just on one piece of the regulatory puzzle (of the harms from AI use). Hence, the specific question considered here is whether the American regulatory AI preemption debate illuminates the choice between national and subnational regulators for a new technology such as AI.



THE ISSUES

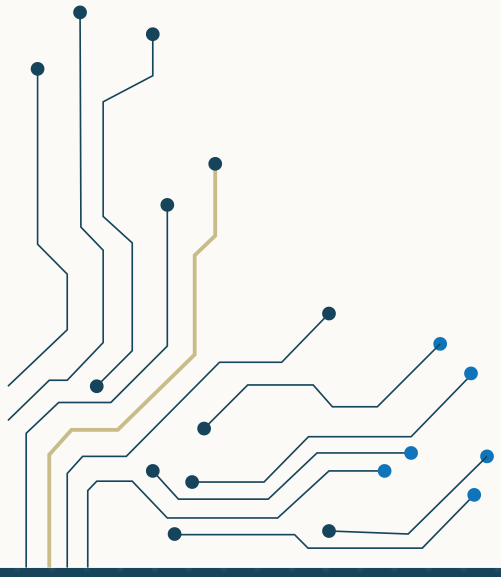
The State Regulation Explosion and Move Toward AI Preemption

These issues are brought into focus by considering the legal and factual background of the AI preemption debate in the United States. The latter is proximately motivated by a wave of state-level AI regulations enacted between 2023 and 2026. In the American federal states, states have standing authority to exercise a "police power" to advance the health, safety, and welfare of their residents. State legislatures and courts, therefore, promulgate and enforce general tort, contract, and property laws. By default, these cover new technologies such as AI. But common-law doctrines use conceptual tools inherited from decades or centuries ago, and so are not necessarily well-adapted to specific ways in which AI is deployed, or the distinctive harms it might inflict. Hence the allure of AI-specific regulation.

The 2023 legislative sessions in the states saw an initial "surge in state AI laws proposed," with measures being enacted or coming into force in some ten states. To be sure, these measures were not entirely without precedent. Some states, for example, were following New York City's influential 2021 measure on employers' use of AI in hiring. In 2024 legislative sessions, 45 states, Puerto Rico, the Virgin Islands and Washington, D.C., introduced AI bills; some 31 state legislatures, along with Puerto Rico's and the Virgin Islands', adopted resolutions or enacted law. Among them were the Utah and the Colorada measures discussed below.

By 2025, legislatures in all fifty states, Puerto Rico, the Virgin Islands, and the District of Columbia had introduced legislation related to AI, while thirty-eight had enacted some new law touching on AI as of July 2025. Most of these measures targeted specific policy questions (e.g., privacy, sexually explicit deep fakes, ownership rights in the context of employment law) rather than offering general regulatory prescriptions for AI.

In contrast, across-the-board regulatory schemes enacted by Utah, Colorado, California, and Texas had more ambitious goals. For instance, Colorado's act initially required that firms using a "high-risk artificial intelligence systems" for "consequential decision[s]"—i.e., those affecting the provision or denial of employment, education, housing, and health care—implement risk-management programs, conduct annual impact assessments, and give notice to consumers. (It has since been abrogated and replaced by a far narrower disclosure-focused regime). The aim of such systemic state-specific regulatory measures is plainly to change overall patterns of AI usage across the economy.



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National Responses

In contrast to this state-level activity, national legislators have struggled to formulate a general regulatory policy on AI beyond subsidies for chip manufacturers in the CHIPS Act and export controls. Where efforts to formulate a coherent national regulatory policy on AI use flounders, however, tech firms have stepped in. One estimate is that some $100 million has been spent in lobbying on AI preemption in the 2026 election cycle by firms such as Google, OpenAI, and Andreessen Horowitz. The result of lobbying has already been a turn away from regulation to what one scholar has called "null preemption": a national measure ousting all state regulation on a topic, and leaving nothing in its place. Null preemption was not an option on the legislative agenda prior to 2025. But, likely as a consequence of accelerated lobbying by tech firms, in 2025, Congress made two attempts to enact a general AI law styled as a decade-long "pause" of state-level regulation. In both instances, the null-preemption measure was presented not as a stand-alone measure, but instead as a rider upon a must-pass appropriation bill—an implicit concession by supporters that they lacked the votes to enact the measure on its merits. In each case, the effort foundered in the face of bipartisan opposition.

Only after congressional efforts to preempt failed did the White House step in with its AI preemption EO. This included two measures aimed at ousting state law. First, the Attorney General was ordered to create an "AI Litigation Task Force," to "challenge State AI laws inconsistent" with the White House's policy. A state law can be "preempted by existing Federal regulations, or are otherwise unlawful in the Attorney General's judgment." Second, the order directed the Secretary of Commerce to withhold broadband-related funding from "States with onerous AI laws … to the maximum extent allowed by Federal law." The aim of both measures is candidly said to be "global AI dominance."

The policy case for null preemption usually advanced on the theory that "without strong federal preemption, [state AI] laws could significantly disrupt the development and deployment of AI technologies." To make this case more substantial, consider the possibility that two different states enact rules barring "discriminatory" outputs by generative AIs, but then define "discrimination" in distinct, incompatible ways. Co-existence of those rules, it is supposed, generates a friction that hinders adoption because it is difficult to conform to both regulatory commands.

The strength of this argument, however, is far from certain. Not least, it depends on the factual premises that (1) AI companies cannot tailor their tools to distinctive geographic markets at a relevantly low marginal cost, and (2) the expected social welfare costs of allowing the unregulated adoption of AI tools is small. It is very far from clear that either of these empirical premises holds true, although this policy brief does not address the comparative statics at issue.

THE FINDINGS

Two sorts of findings can be extrapolated from the American AI preemption debate:

- The first concerns **how the legal architecture of federalism shapes the expected contours of AI regulation**.
- The second concerns **the effect of specific legal rules on the regulatory opportunities of national and subnational actors**.

How American Federalism Shapes AI Regulation Debates

Consider first some implications of the recent history described here. To begin with, the American case showcases the differential sensitivity of national and subnational actors to demands for new AI-specific laws. It has been subnational regulators—i.e., the ones who are closer to constituents and who have immediate regulatory responsibility for the activities where AI is being integrated—who moved acted first to address the spillover harms of new AI use cases in both a targeted and a general way. Interestingly, fierce local opposition to data centers suggests that as one moves down the level of vertical complexity, the bipartisan intensity of AI-related concerns grows; the success of anti-data center initiatives in the November 2026 elections only underscores this point. By contrast, the national government has been more sensitive to macroeconomic and geopolitical concerns, e.g., through subsidies for new semiconductor fabs and for export controls on high-end chips—but relatively indifferent to the immediate economic, psychological, and environmental spillovers of the tech. This pattern reflects the tradition division of responsibilities between the two levels of government in the United States.

Another reason for the divergent choices of national and subnational regulators is the pattern of lobbying by AI firms. It seems that Congress is a more attractive target for corporate actors without to maximize their freedom from regulation (including their freedom to impose spillover harms on others) because federal legislators can, at one stroke, install a level playing field via null preemption. It seems likely, however, that this political economy of interest-group behavior will be inflected in different directions in other national jurisdictions. Not least this is because the United States is characterized by a very high concentration of AI-oriented capital; indeed, it captured three-quarters of all venture capital investments on AI globally in 2025. Where there is not an indigenous AI industry, and where the channels of legislative and regulatory action are better insulated from lobbying than in the United States, the political environment for AI regulation will correspondingly be quite different.

Finally, the political logic of federalism intersects with the political logic of separated powers in notable ways. At the national level, the executive proved more open to the "null preemption" project advanced by tech firms than Congress. At the state level, the same pattern seems to hold. For example, in both California and Colorado, a Democratic governor has been manifestly more reluctant to advance AI regulation than the Democratic-controlled legislature. This suggests that **an understanding of how federalism shapes the political terrain for AI regulation efforts needs**

THE FINDINGS

to account also for the ways in which political authority is distributed horizontally between different branches of government at all levels of goverment. For example, in a polity where subnational executives are, all things considered, weaker than their national counterparts, it will be more likely for effectual regulation to emerge at the subnational level than at the national level.

The Uncertain Legal Basis for AI Preemption

The second significant finding to underscore here is the legal scope for null preemption under U.S. law. Of course, the legal architecture of federalism varies widely between jurisdictions —and so there is no reason to think that the following can be generalized. Nevertheless, the key point here is that there is a sharp tension between the political logic of null preemption and the legal framework for such action. This tension that, depending on the normative lens applied to AI regulation, might be desirable or harmful.

Under the Supremacy Clause of Article VI of the U.S. Constitution, only "laws" and "treaties" can oust state rules. It follows from this text that preemption is a matter for Congress, and not the executive alone. Consistent with this understanding, the U.S. Supreme Court has long asked whether a regulation issued by an administration agency is backed by the force of statutory law before allowing it to oust state laws. As telling, the Court since the 1940s has applied an interpretive presumption against preemption when reading federal statutes. It has never, however, squarely held that Congress wipe the slate clean of state laws, and not replace them with a national law. At the same time, Congresshas two different tools to oust state law. On the one hand, it can simply pass a preemptive provision, as legislators twice tried and failed to do in 2025. On the other, it can leverage its fiscal supremacy by conditioning grants of federal funds upon a state's willingness to stay its hand when it comes to AI regulation. Where Congress opts for the funding-contingent mechanism, the Supreme Court has ruled that any conditions must be stated with unequivocal clarity in the text of the law. They cannot be imputed or inferred after its enactment.

This framework has implications both for the 2025 AI preemption EO and for the shape of future regulatory policy. Immediately, these constitutional rules undermine any strong claim of an executive or presidential power to preempt in the absence of a clearly stated statute. None of the statutes cited in the 2025 AI preemption EO plainly state that they apply to state AI laws, and so none of them license preemption. This is not surprising since Congress enacted these laws long before AI became a pressing public concern.

> ***"There is a sharp tension between the political logic of null preemption and the legal framework for such action. Politics and ex ante legal frameworks, in other words, are in some tension with each other."***

THE FINDINGS

For the future, the scope of permissible preemption will depend on what Congress does, and which instrument it employs whenever it chooses to act. Of note here, this legal architecture tilts authority toward Congress as opposed to the executive, even as the political logic of AI regulation lists toward the executive as a first mover when it comes to the project of "null preemption." **The most politically likely kind of regulation**—i.e., a field-clearing federal action that bars states from acting—**is therefore the exact sort of legal change that is most difficult to achieve given the legal constraints created by American federalism's structural architecture.**

The normative implications of this state of affairs depends on an evaluation of the desirability of AI regulation. It is also worth noting that if the contrary political and legal logics of AI regulations press toward a stalemate at the national level—as seems likely—then this places greater pressure on the scope of state tort law, which operates as a general default regulation. Recent law-suits against social media firms illustrate how this default might be leveraged even in the absence of AI-specific rules. The broad and bipartisan antagonism to data centers suggests that national inertia on the issue is also at odds with popular sentiment—a potential hint of a failure of national democratic processes.

Regulatory Proposals from the White House

	Status Quo Ante	Congressional Proposals	Executive Action
Kind of National Regulation	No general, national AI law	"Pause" or moratorium of most state and local regulation	Preemption by Justice Department taskforce; Preemption as a condition of broadband funding for states

POLICY LESSONS

The implications of this analysis beyond the United States must be drawn with care: Both the legal architecture and the political economy of AI regulator choice will vary dramatically from one nation to another. Nevertheless, three general lessons can be drawn:

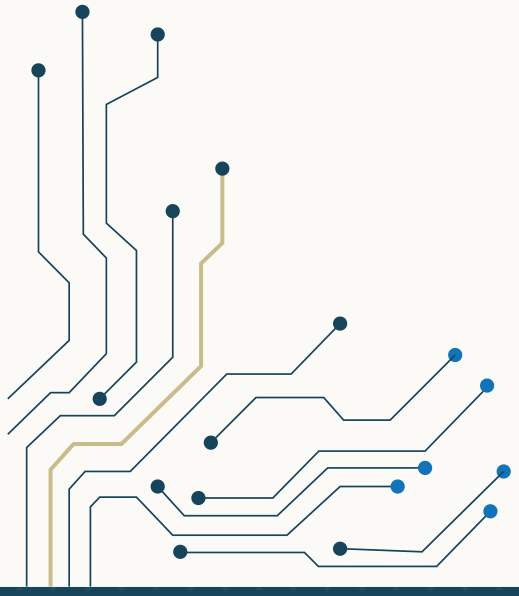
- First, **the ex-ante legal structure** dividing authority between a national and several subnational entities **is a central determinant of how technology policy will develop.**

- Second, in evaluating this question of how authority is divided 'vertically,' **it is important to account for the 'horizontal' division of powers between branches of a government at a given horizontal level**. In the U.S. context, this has played out in terms of greater executive-branch willingness to deregulate.

- Finally, **the political demand and the legal logic of AI regulation are separate and distinct**. In the United States, they are in tension to each other. In other jurisdictions, it will be important to evaluate each separately so as to determine how they net out against each other.

There is little doubt that the United States would benefit from a coherent regulatory framework for AI, particular in respect to frontier models that present cyber security and national security concerns, as well as to address the labor market difficulties that may arise. Yet the manner in which power is divided in the American system may well mean that these regulatory goals are different to achieve: The political logic of regulation may cut athwart the legal institutional processes by which new laws come to pass. As a result, American federalism's most important lesson for other nations may be the risk that institutional design will inadvertently make policy less, rather than more, effective.

> ***"There is little doubt that the United States would benefit from a coherent regulatory framework for AI. Yet the manner in which power is divided in the American system may well mean that these regulatory goals are difficult to achieve."***



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