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Introduction: Generating Governance - An Essay Series on Strategies and Challenges in AI Regulation

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For several years now, lawmakers around the world have been confronted with the dangers presented by artificial intelligence (AI). Lawmakers are concerned about health, safety, misinformation, economic risks, discrimination, privacy, and due process, in a variety of contexts, such as employment, housing, credit, social media, medicine, robotics, and the provision of governmental services.¹ With recent developments in generative AI in, there are more fears than ever that AI will transform society in ways that we cannot even predict.²

Regulators are realizing that it is time to regulate. But AI is a tricky problem. As the term is used today, AI is not a single technology, but rather a loosely defined set of technologies that aim to automate tasks or make predictions based on patterns in large quantities of data.³ All the different technologies, potential harms, and different contexts mean that universal solutions are unlikely and different choices must be made about how to

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1. See, e.g., *Blueprint for an AI Bill of Rights*, THE WHITE HOUSE OFF. OF SCI. & TECH. POL'Y, <https://www.whitehouse.gov/ostp/ai-bill-of-rights> [https://perma.cc/87RR-9V6W] (concerning data safety, privacy, discrimination, and government benefits in the United States); U.S. FOOD & DRUG ADMIN., ARTIFICIAL INTELLIGENCE & MEDICAL PRODUCTS (2023), <https://www.fda.gov/media/177030/download?attachment> [https://perma.cc/4W5J-TX78] (concerning health in the United States); Sam Jungyun Choi, Anna Oberschelp de Meneses, Jayne Ponder & Trevor Bernardo, *Robotics Spotlight: Global Regulatory Trends Affecting Robotics*, COVINGTON: INSIDE GLOB. TECH. (May 24, 2022), <https://www.insidetechnia.com/2022/05/24/robotics-spotlight-global-regulatory-trends-affecting-robotics> [https://perma.cc/G7WA-CGRU] (discussing AI's impact on robotics in the United States); *Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts*, COM (2021) 206 final (Apr. 21, 2021) (embodying legislative efforts to ensure safety, misinformation, and fundamental rights in the European Union (EU)); The Artificial Intelligence and Data Act (AIDA), *part of Digital Charter Implementation Act of 2022*, H.B. C-27, 44th Parl., 1st sess. (2021) (Can.) (bringing health, safety, discrimination, and transparency in Canada); Anna Oberschelp de Meneses, Nicholas Shepherd & Kristof Van Quathem, *Brazil's Senate Committee Publishes AI Report and Draft AI Law*, COVINGTON: INSIDE PRIV. (Jan. 27, 2023), <https://www.insideprivacy.com/emerging-technologies/brazils-senate-committee-publishes-ai-report-and-draft-ai-law> [https://perma.cc/W75N-UYCQ] (discussing privacy, discrimination, due process, in Brazil).
 2. Lucy Papachristou & Jillian Deutsch, *ChatGPT Advances Are Moving So Fast Regulators Can't Keep Up*, BLOOMBERG (Mar. 17, 2023, 1:00 AM), <https://www.bloomberg.com/news/articles/2023-03-17/chatgpt-leaves-governments-scrambling-for-ai-regulations?embedded-checkout=true> (last visited Mar. 17, 2024).
 3. See, e.g., CHRISTOPHER MANNING, STAN. UNIV. HUM. -CENTERED A.I., ARTIFICIAL INTELLIGENCE DEFINITIONS (2020), <https://hai.stanford.edu/sites/default/files/2020-09/AI-Definitions-HAI.pdf> [https://perma.cc/82UM-BY2Y] (offering numerous related definitions).

approach such regulation. Thus, it should be no surprise that many different approaches to AI governance have been proposed around the world.

In this essay series, the authors explore different aspects of emerging AI governance regimes.⁴ Though about quite different topics, the essays have many common threads. Several of the essays demonstrate that many of the difficulties with AI governance are less challenges of AI than challenges of governance generally—navigating power struggles and competing interests, getting buy-in, and avoiding capture. A second theme is the importance of regulatory diffusion and how governance regimes implicitly rely on it. Several of the authors see a vision of diffusion as central to the form of regulation chosen by each government—particularly in the EU’s case, where the government relies on the so-called “Brussels Effect” to assert greater control over global technology and market regulation. Finally, several of the authors examine the EU’s draft AI Act, probably the most globally important pending AI regulation. Specifically, they discuss the impacts of its core focus on risk, an approach that relies heavily on precaution, internal assessments, and enterprise risk management and mitigation, rather than accountability and liability from an oversight body. The choice to use risk management—a choice that the EU is certainly not alone in—has specific consequences that are worth teasing out, and several of the essays here do just that.

The series starts with Professor Teresa Scassa’s essay, *Sovereignty and the Governance of Artificial Intelligence*,⁵ a meditation on the increasing importance of sovereignty as a concept in the technology law arena. Scassa examines “digital sovereignty”⁶ at three levels: international, subnational, and individual. At the international level, Scassa notes that sovereignty claims are claims for power and control that play out in the digital sphere just as you would expect for traditional sovereignty claims—each nation or supranational bloc wants to expand its control over technology norms and standards to assert greater degrees of technological and economic dominance.⁷ But she argues subnational claims to sovereignty are having a

4. This collection of Discourse essays were drafted for a 2022-2023 symposium issue focused on emerging AI governance regimes. Accordingly, these essays predate the passage of the EU AI Act and other nascent initiatives, but nonetheless offer critical insights into the salient space of generative AI regulation.

5. Teresa Scassa, *Sovereignty and the Governance of Artificial Intelligence*, 71 UCLA L. REV. DISC. 214 (2024).

6. See Anupam Chander & Haochen Sun, *Sovereignty 2.0*, 55 VAND. J. TRANSNAT’L L. 283 (2022).

7. Scassa, *supra* note 5, at 217.

large effect as well.⁸ Indigenous people around the world use sovereignty claims to push decolonization and bolster their rights to self-government, and so we see the rise of Indigenous digital or data sovereignty movements. Where co-sovereignty is established in a federalist system, Scassa argues that legislation moves slower and may practically be more a product of compromise than in non-federalist systems, as subnational sovereigns get to have their say.⁹ Within the data protection realm, notions of individual sovereignty sounding in control and ownership over data are constant. Thus, we see that increasingly, people are using a concept that is centrally about power struggles to negotiate in the digital regulatory arena.¹⁰

Professor Alicia Solow-Niederman's essay, *Can AI Standards Have Politics?*,¹¹ examines the role of supposedly neutral standards bodies in AI regulation. Noting that neutrality is the central allure of this approach, Solow-Niederman immediately shatters that illusion. Standards cannot be neutral, she argues, as they are constructed by people with biases and agendas, and the neutrality framing is incomplete, or even naïve.¹² She points out that reliance on standards bodies looks very different in different places. In the EU, the law defers to private standards-setting organizations that democratic processes may not be able to check.¹³ A different model in China relies on standards dictated by state fiat.¹⁴ In the United States, proposals focused more on codes of conduct than rules of law, ultimately opening pathways for private sector actors to establish their own ethical codes—and then embed them within the state by securing government contracts to build AI systems.¹⁵ Each of these standards development approaches depend on and are affected by the institutional arrangements and political commitments of their respective governments and societies—how much they trust the private sector and how they expect the standards to proliferate, for example. They are anything but neutral. Solow-Niederman concludes by calling into question the entire project: If standards-based regulation is built on a myth of neutrality, can it still have value when the myth is dispelled?¹⁶

8. *Id.* at 221.

9. *Id.* at 222.

10. *Id.* at 228.

11. Alicia Solow-Niederman, *Can AI Standards Have Politics?*, 71 UCLA L. REV. DISC. 230 (2024).

12. *Id.* at 232.

13. *Id.* at 236.

14. *Id.* at 238.

15. *Id.* at 241.

16. *Id.* at 244.

These essays each suggest different ways that the visibility of power dynamics manifests in AI regulation. The neutrality positioning that entities developing standards rely on is almost an inversion of the rhetoric of sovereignty. Where sovereignty claims are used by the subjugated to demand power,¹⁷ neutrality claims are used by those already empowered in order to deny their own power.¹⁸ Each also has different connections to regulatory diffusion. As Scassa points out, the EU's market and political dominance allows it to make big claims to extraterritoriality of its laws,¹⁹ while Solow-Niederman points out that the EU relies on its existing dominance to ensure that companies will have to abide by the standards that the standards body sets.²⁰ The goal in both cases is diffusion of its laws; but the rhetorical positioning around the move is inverted.

In our third essay, *Voices in, Voices out: Impacted Stakeholders and the Governance of AI*,²¹ Professor Margot Kaminski argues for the central importance of including voices of those affected by AI in creating regulations, while noting that figuring out how to do so effectively is not a simple task. Kaminski offers five reasons that impacted stakeholders must be included in lawmaking here, including due process, democratic legitimacy, ensuring the regulation works as intended, avoiding regulatory capture, and procedural justice.²² Each of these reasons is significant and important, but one point is especially worth highlighting, and that is the connection between a regulation focused on enterprise risk management and outside voices. Kaminski points to two emerging trends in the orientation of AI governance in the US and EU: (1) risk regulation—a focus on precaution and risk management, rather than harm and liability; and (2) collaborative governance—an approach to regulation that enlists private sector expertise to give regulation flexible and adaptive.²³ Both these modes of regulation are known to delegate a good amount of power to the private sector entities who are often the ones being regulated, presenting a significant risk of capture as the private sector and government get too intertwined.²⁴ Among the many reasons to involve

17. Scassa, *supra* note 5, at 227.

18. Solow-Niederman, *supra* note 11, at 239.

19. Scassa, *supra* note 5, at 218.

20. Solow-Niederman, *supra* note 11, at 237.

21. Margot Kaminski, *Voices in, Voices out: Impacted Stakeholders and the Governance of AI*, 71 UCLA L. REV. DISC. 176 (2024).

22. *Id.* at 183.

23. *Id.* at 186.

24. *Id.* at 183.

affected stakeholders that Kaminski offers is the idea that the presence of an outside third party can mitigate such a risk.²⁵

Next is Eike Graef, Policy Officer in the Digital Services Unit of the Directorate-General for Communications Networks, Content and Technology of the European Commission, offering some insight into the motivations behind the EU's draft AI Act. In his essay, *Addressing The Challenge Of Protecting Fundamental Rights Through Ai Regulation In The European Union*,²⁶ he discusses how the AI Act fits in the broader landscape of European technology regulation. Graef argues that the AI Act should be understood through the problems it is meant to solve: the threats to safety and fundamental rights that are particular to AI.²⁷ He explains that the drafters of the AI Act relied on the backdrop of other laws such as the EU Charter of Fundamental Rights²⁸ and the General Data Protection Regulation (GDPR)²⁹ that protect fundamental rights at a basic level.³⁰ The AI Act did not need to replicate those efforts and could instead focus on the new challenges, with bans on the most dangerous AI uses and requirements for documentation, testing, and transparency for high-risk systems that will enable affected people to vindicate their existing rights.³¹ In the context of this essay series, Graef's observation that the AI Act could not possibly address all behaviors related to automation³² rings out as a strong defense of the AI Act; it can only do what it is meant to do, and it will do that.

Michael Karanicolas, Executive Director at the UCLA Institute for Technology, Law & Policy, provides our fifth entry with his essay, *Challenging Minority Rule - Developing AI Standards that Serve the Majority World*.³³ This essay takes on the conflict between emerging sources of international standards in AI governance and the diffusion or transplanting of these rules into contexts where local values or interests are significantly different.

25. *Id.* at 189.

26. Eike Graef & Paul Nemitz, *Addressing the Challenge of Protecting Fundamental Rights Through AI Regulation in the European Union*, 71 UCLA L. REV. DISC. 144 (2024).

27. *Id.* at 149.

28. Charter of Fundamental Rights of the European Union, art. 51–52, Dec. 7, 2000, O.J. (C 326) 406–07.

29. Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC, 2016 O.J. (L 119) 1.

30. Graef & Nemitz, *supra* note 26 at 151.

31. *Id.*

32. *Id.* at 152–153.

33. Michael Karanicolas, *Challenging Minority Rule: Developing AI Standards That Serve the Majority World*, 71 UCLA L. REV. DISC. 196 (2024).

Karanicolas stresses that legislation in each country should be designed around the social and political contexts of that region, creating a tension with the efficiencies of harmonized rules, particularly for less powerful regulatory actors. These ideas reflect a theme present in several of the earlier essays as well. From there, Karanicolas considers the populations most likely to be harmed by these technologies' development and adoption, but who are generally not given as say in how these laws are drafted.³⁴ What pressures do governments in the Majority World face from regulatory diffusion?³⁵ What are the effects on people whose governance values are left out of global AI governance? And what should the international community do about it?³⁶ These are all important and natural questions to ask in light of dynamics discussed in earlier essays in the series, and he provides some important answers.

Finally are Fanny Hidvegi and Daniel Leufer, Europe Policy and Advocacy Director and Senior Policy Analyst respectively, at AccessNow, with their critical assessment of the draft AI Act, titled *The Pitfalls of the European Union's Risk-based Approach to Digital Rulemaking*.³⁷ They begin by noting that much of civil society objected to the risk-based framing of the AI Act because it is inadequately protective of fundamental rights, but due to limited resources, those complaints gave way to pragmatism once it was clear that the AI Act was proceeding on that basis.³⁸ From there, the essay offers proposed amendments to the AI Act to make it as protective of rights as it can be given that framing.³⁹ The fundamental problem with the Act, according to Hidvegi and Leufer, is that instead of empowering rights holders, it treats the proliferation of AI systems as something that must be encouraged and the dangers as merely a product safety issue to be negotiated between companies and market regulators.⁴⁰ Connecting back to regulatory diffusion once again, they argue that the weaknesses of this Act are particularly bad because the Brussels effect can carry it around the world, and in particular to regions lacking rights-based regulation like the GDPR.⁴¹

34. *Id.* at 209.

35. *Id.* at 207.

36. *Id.*

37. Fanny Hidvegi & Daniel Leufer, *The Pitfalls of the European Union's Risk-Based Approach to Digital Rulemaking*, 71 UCLA L. REV. DISC. 156 (2024).

38. *Id.* at 162.

39. *Id.* at 161.

40. *Id.* at 165.

41. *Id.* at 165-168.

The essays in this series make clear that we must understand power dynamics and the incentives of various institutions, the challenges of regulatory diffusion, and both the reasons for and limitations of risk-based approaches to regulation. We must pay attention to whom we delegate regulatory power, and who is empowered to contribute to regulations. Most importantly, we must balance a focus on regulating AI as a particular set of technologies with a broader understanding of regulation within the international context generally. The global conversation about AI regulation is still in its early stages, and we hope that these essays will contribute to our understanding as it matures.