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Challenging Minority Rule: Developing AI Standards that Serve the Majority World

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ABSTRACT

This essay considers the emerging transnational governance frameworks for AI that are being developed under the auspices of a handful of powerful regulatory blocs, namely the United States, the European Union, and China, which are best positioned to influence emerging global standards. It argues that these represent a relatively homogenous set of global interests, and that while attempts to develop binding rules of the road are laudable, the world would be better served if the standard-setting processes represented a more diverse set of stakeholders, and that perspectives from the people of the Global South, otherwise known as the Majority World, should be an essential component to developing new standards to govern the development and deployment of A.I. technologies.

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INTRODUCTION

In 2017, a Nigerian Facebook employee named Chukweuemeka Afigbo shared a video of his struggles getting an automated soap dispenser to work, presumably because the machine's optic sensor was not calibrated to recognize his darker skin tone.¹ Ultimately, Mr. Afigbo had to cover his hand with a white paper towel to get the machine to function. The post was captioned with a statement on the importance of diversity in the technology industry and the pitfalls of having a racially homogenous team working on products, especially where the team's makeup does not reflect the realities of the product's usage in the real world.

The lack of representation can have serious repercussions. Over the past decade, there have been countless stories of products developed in Silicon Valley causing harm when introduced to diverse cultural, socioeconomic, or geographic contexts.² With the emergence of artificial intelligence (AI) as a major transformational technology, regulators around the world are determined to get ahead of the potential social harms by developing guardrails that are gradually coalescing into a new set of global standards for AI.³

There is no question that order and appropriately regulated AI growth is preferable to the chaos that dominated the previous era of disruption.⁴ But just as

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1. Sidney Fussell, *Why Can't This Soap Dispenser Identify Dark Skin?*, GIZMODO (Aug. 17, 2017), <https://gizmodo.com/why-cant-this-soap-dispenser-identify-dark-skin-1797931773> [<https://perma.cc/B9DA-NFQK>].
 2. See, e.g., Paul Mozur, *A Genocide Incited on Facebook, With Posts From Myanmar's Military*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html> [<https://perma.cc/U4U5-3XZ6>] (describing the role of Facebook's services in driving a genocide against the Rohingya people in Myanmar); Kate O'Flaherty, *YouTube Keeps Deleting Evidence of Syrian Chemical Weapon Attacks*, WIRED (Jun. 26, 2018, 7:00 AM), <https://www.wired.co.uk/article/chemical-weapons-in-syria-youtube-algorithm-delete-video> [<https://perma.cc/BJ94-N74A>] (chronicling the struggle human rights activists have in attempting to use social media to document evidence of war crimes); Daniel Avery, *Gay Dating App Grindr Still Leaking Users' Location Data, Report Indicates*, NEWSWEEK (Aug. 12, 2019, 8:00 AM), <https://www.newsweek.com/grindr-location-leak-1453697> [<https://perma.cc/U89L-8MEY>] (listing poor privacy practices that endanger LGBTQ users in parts of the world where they face persecution).
 3. Daniel Schiff, Justin Biddle, Jason Borenstein & Kelly Laas, *What's Next for AI Ethics, Policy, and Governance? A Global Overview*, in AIES '20: PROCEEDINGS OF THE AAAI/ACM CONFERENCE ON AI, ETHICS, AND SOCIETY 153 (2020).
 4. U.S.-based social media companies face a number of challenges resulting from entry into markets and cultural contexts which are dramatically different from the U.S., and where there was little evidence of any attempt to understand these differences prior to entering those markets. See, e.g., Mozur, *supra* note 2 (driving genocide in Myanmar); O'Flaherty, *supra* note 2 (affecting activists in Syria); Avery, *supra* note 2 (endangering LGBTQ users).

context is important to the development of new technologies, regulatory standards which fail to reflect the localized impacts of a new technology can be ineffective and even dangerous. A legal principle may have a certain meaning in, for example, a society where the rule of law and checks against administrative abuse are strong, and a completely different meaning in the context of a weak democracy or authoritarian government.⁵ In crafting standards which are meant to guide the global development and deployment of AI, who gets a seat at the table will shape the values and priorities that underlie whatever framework emerges.

This Essay considers the emerging transnational governance framework for AI that is being developed under the auspices of a handful of powerful regulatory blocs, which represent a relatively homogenous set of global interests. I argue (1) that while attempts to develop binding rules of the road are laudable, the world would be better served if the standard-setting processes represented a more diverse set of stakeholders, and (2) that perspectives from the people of the Global South, otherwise known as the majority world, should be an essential component to developing new standards to govern the development and deployment of AI technologies.⁶

The Essay proceeds in Part I by introducing AI and emerging conceptions of bias and other harms. Part II discusses the models of AI governance emerging globally, particularly from the United States, the European Union (EU), and

5. JACOB MCHANGAMA & NATALIE ALKIVIADOU, THE DIGITAL BERLIN WALL: HOW GERMANY (ACCIDENTALLY) CREATED A PROTOTYPE FOR GLOBAL ONLINE CENSORSHIP - ACT TWO (2020), https://justitia-int.org/wp-content/uploads/2020/09/Analyse_Cross-fertilizing-Online-Censorship-The-Global-Impact-of-Germans-Network-Enforcement-Act-Part-two_Final-1.pdf [<https://perma.cc/2K94-WBXB>].

6. Terminology for how to distinguish between the world's high-income and lower-income economies is a fraught exercise, which is difficult to disentangle from the traditional colonial structure which undergirds terms like "the third world" or "the developing world." "Developing world" is particularly problematic, insofar as it paints a false picture of a narrowing gap between haves and have-nots, despite the fact that global inequities, and the exploitative relationships that reinforce these inequities, have proven extremely resilient. While "Global South" is a popular alternative term, it belies a perspective that is centered on the United States, Europe, and Canada. Australia and New Zealand, for example, are both paradoxically understood to be included within the Global North, while Mongolia and North Korea are Global South. All such binary distinctions are problematic insofar as they fail to grapple with the varying levels of development, income, and power around the world, as well as within countries at every development and income level. This Essay will proceed to use the terms "majority world" and "minority world." Although this distinction inevitably glosses over important context, it is a useful reminder that the traditional geopolitical paradigm concentrates power and wealth in a minority of people at the expense of the majority. See generally Shahidul Alam, *Majority World: Challenging the West's Rhetoric of Democracy*, 34 AMERASIA J. 88 (2008).

China, which are best positioned to influence emerging global standards. Parts III and IV discuss the concept of regulatory diffusion and challenges to this model of international standard setting. Part V offers recommendations for a more inclusive model of development which take into account the needs of diverse global stakeholders who are impacted by the transition to an AI society.

I. UNDERSTANDING AI

AI refers to several technical concepts which can generally be understood under the umbrella of machine learning, meaning that a system learns from data as opposed to following hard-coded rules. In essence, machine learning systems operate as statistical inference engines with the capacity to generate outputs from the analysis of large inputs of data.⁷ The data-dependent nature of machine learning technology, however, means that biases and errors can constantly leak into these processes, with the potential to automate and further entrench inequalities and inequities inherent in the social order from which the underlying data or development processes originate.⁸ There can be a number of subtle avenues for these biases to take root, including as a result of the structure of the data fed into the system and the architecture of the algorithm.⁹

There is voluminous literature on how problems, including biases, manifest, and on the potential responses aimed at countering these problems from a technical, social, and legal perspective.¹⁰ Likewise, early scholarship has emphasized risks stemming from data sets that are either explicitly biased, or which are otherwise reflective of pervasive structural social problems.¹¹ Human biases can be introduced at every stage of the development and deployment process, even in unsupervised machine learning, based on how data is organized

7. Harry Surden, *Machine Learning and Law*, 89 WASH. L. REV. 87, 87–90 (2014).

8. Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671, 674 (2016).

9. *Id.* at 716–22.

10. See, e.g., Ruha Benjamin, *Assessing Risk, Automating Racism: A Health Care Algorithm Reflects Underlying Racial Bias in Society*, 366 SCI. 421 (2019); Anupam Chander, *The Racist Algorithm?*, 115 MICH. L. REV. 1023 (2017); Sonia K. Katyal, *Private Accountability in the Age of Artificial Intelligence*, 66 UCLA L. REV. 54 (2019); Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218 (2019); Ifeoma Ajunwa, *The Paradox of Automation as Anti-Bias Intervention*, 41 CARDOZO L. REV. 1671 (2020); SAFIYA UMOJA NOBLE, *ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM* (2018); Barocas & Selbst, *supra* note 8; Vidushi Marda & Shivangi Narayan, *Data in New Delhi's Predictive Policing System*, in FAT '20: PROCEEDINGS OF THE 2020 CONFERENCE ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY 317 (2020).

11. See Kate Crawford & Ryan Calo, *There Is a Blind Spot in AI Research*, 538 NATURE 311 (2016).

or success is defined.¹² All of these challenges are particularly severe in cases where there are significant geographic or cultural gaps between where models are built or where data is sourced and where the systems themselves operate.¹³

In addition to concerns about bias, accuracy, and efficacy, some leading scholars have asked more fundamental questions about AI's purported benefits and appropriateness. In *Automating Inequality*, technology and social justice scholar Virginia Eubanks poses two questions related to the basic ethics of AI deployment: (1) Does the tool increase the self-determination and agency of the poor? (2) Would the tool be tolerated if it was targeted at nonpoor people?¹⁴

Across advanced democracies, however, the bulk of scholarship on this issue has focused on bias and discrimination, and problematic impacts of these technologies on traditionally marginalized communities in the domestic context of the authors who are examining the issue.¹⁵ As the next Part demonstrates, this focus has colored regulatory priorities in the AI governance space.

II. REGULATING AI

Around the world, the growing interest in AI has led to the emergence of a number of different sets of principles, guidelines, or ethical codes that have been proposed or adopted.¹⁶ Relatively few governments, however, have actually passed comprehensive legislation to govern this space.¹⁷ Some of the most

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12. See James Zou & Londa Schiebinger, *Design AI so That It's Fair*, 559 NATURE 324 (2018).
 13. Shreya Shankar, Yoni Halpern, Eric Breck, James Atwood, Jimbo Wilson & D. Sculley, *No Classification Without Representation: Assessing Geodiversity Issues in Open Data Sets for the Developing World*, in NIPS 2017 WORKSHOP ON MACHINE LEARNING FOR THE DEVELOPING WORLD 1 (2017).
 14. VIRGINIA EUBANKS, *AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR* (2018).
 15. This is not intended to overlook contributions from majority world scholars to the current discourse, such as, for example, Abeba Birhane, Note, *Algorithmic Colonization of Africa*, 17 SCRIPTED 389 (2020); Marda & Narayan, *supra* note 10; RESPONSIBLE AI IN AFRICA (Damian Okaibedi Eke, Kutoma Wakunuma & Simisola Akintoye eds., 2023); Arthur Gwagwa, Erika Kraemer-Mbula, Nagla Rizk, Isaac Rutenberg & Jeremy de Beer, *Artificial Intelligence (AI) Deployments in Africa: Benefits, Challenges and Policy Dimensions*, 26 AFR. J. INFO. & COMMUN 1 (2020).
 16. See, e.g., AFR. UNION, *THE DIGITAL TRANSFORMATION STRATEGY FOR AFRICA (2020–2030)* (2020), <https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf> [<https://perma.cc/MDS2-PN8J>]; UNESCO, *RECOMMENDATION ON THE ETHICS OF ARTIFICIAL INTELLIGENCE* (2022), <https://unesdoc.unesco.org/ark:/48223/pf0000381137> [<https://perma.cc/8RSR-L9QC>].
 17. Blair Levin & Larry Downes, *Who Is Going to Regulate AI?*, HARV. BUS. REV. (May 19, 2023), <https://hbr.org/2023/05/who-is-going-to-regulate-ai> [<https://perma.cc/4V5X-D6LJ>].

ambitious efforts aimed at developing a new regulatory structure for AI have emerged from the EU, particularly the proposed Artificial Intelligence Act (AI Act) which focuses on potential risks of AI in terms of its security or potential to infringe on fundamental rights.¹⁸ The AI Act imposes a sliding set of requirements based on the purported risk of the application, such as obligations related to transparency, auditing, oversight, and more.¹⁹ Although the AI Act is the core of this new regulatory framework, other aspects of EU regulation, such as the General Data Protection Regulation and the Digital Services Act, are also relevant in setting standards for how AI systems must be developed and rolled out in certain contexts.²⁰

In the United States, the most high-profile attempt to impose uniform standards has been the Biden administration's *Blueprint for an AI Bill of Rights*.²¹ This framework shares the general thematic focus of the proposed AI Act, insofar as both are targeted at mitigating performance challenges, particularly decisionmaking which is biased, unfair, or otherwise erroneous. There are also significant structural differences, however, particularly as the *Blueprint for an AI Bill of Rights* is a nonbinding set of guidelines. In January 2023, the National Institute of Standards and Technology released its own *AI Risk Management Framework*, a set of voluntary guidelines for organizations and individuals to support the trustworthiness of AI systems that they may be developing or deploying.²² In addition, there have been a range of other executive orders aimed at tackling this challenge, along with legislation in several states, particularly California, Texas, Connecticut, and Illinois.²³

18. *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) [hereinafter *EU AI Act*].

19. *Id.* at 5.2.2.

20. *Id.* Council Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and Amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277), <http://data.europa.eu/eli/reg/2022/2065/oj/eng> [hereinafter *DSA*]; Regulation 2016/679 of the European Parliament and of the Council of Apr. 27, 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 (General Data Protection Regulation), 2016 O.J. (L 119) ch. I, III.

21. WHITE HOUSE OFF. OF SCI. & TECH. POL'Y, BLUEPRINT FOR AN AI BILL OF RIGHTS (2022), <https://www.whitehouse.gov/ostp/ai-bill-of-rights> [https://perma.cc/T75M-TECZ].

22. NAT'L INST. OF STANDARDS AND TECH., ARTIFICIAL INTELLIGENCE RISK MANAGEMENT FRAMEWORK (AI RMF 1.0) (2023), <https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf> [https://perma.cc/QU3J-655W].

23. *See, e.g.*, Exec. Order No. 13,859, 84 Fed. Reg. 3967 (Feb. 11, 2019); Exec. Order No. 13,960, 85 Fed. Reg. 78939 (Dec. 3, 2020); A.B. 331, 2023–2024 Reg. Sess. (Cal. 2023); S.B. 1103, Jan. Gen.

The Organization for Economic Co-operation and Development (OECD), an intergovernmental organization comprised mainly of high-income economies, has also been a significant driver of international standards in this space, beginning with their *Artificial Intelligence Principles*, which were adopted in 2019.²⁴ The Global Partnership for Artificial Intelligence (GPAI), which was launched in 2020, further built on these principles, including through a set of “[p]rinciples for responsible stewardship of trustworthy AI” and “[n]ational policies and international cooperation for trustworthy AI”.²⁵ The GPAI bills itself as a multistakeholder initiative, with avenues for participation by industry, civil society and independent experts. In practice, however, governments dominate the GPAI’s structure and decisionmaking.²⁶ The GPAI Secretariat is hosted at the OECD, though it is open to non-OECD members, and at least four majority world countries have joined, namely Brazil, India, Senegal and Argentina.²⁷

In recent years, China has been increasingly proactive in its attempts to establish itself as a hub for regulatory leadership and standard setting in AI. This includes efforts to empower national champions, especially Baidu, Alibaba, Tencent, Xiaomi (BATX), as well as concomitant efforts to drive standards through investment, particularly through the Digital Silk Road under the Belt and Road Initiative, which is framed as a South-South development alternative.²⁸ China, however, has also rolled out a number of groundbreaking policy initiatives, particularly through the powerful Cyberspace Administration of China, which recently imposed broad new rules to govern recommendation algorithms.²⁹ In contrast to rights-based or risk-based approaches to AI, China’s regulatory

Assemb., Reg. Sess. (Conn. 2023); H.B. 3385, 103rd Gen. Assemb., Reg. Sess. (Ill. 2023); H.B. 2060, 88th Leg., Reg. Sess. (Tex. 2023).

24. *OECD AI Principles Overview*, OECD POL’Y OBSERVATORY, <https://oecd.ai/en/ai-principles> [<https://perma.cc/7ZX2-WXQC>].

25. *About GPAI*, GLOB. P’SHP ON GLOB. INTEL., <https://gpai.ai/about> [<https://perma.cc/24XL-AQSV>].

26. *Id.*

27. *Community*, GLOB. P’SHP ON GLOB. INTEL., <https://gpai.ai/community> [<https://perma.cc/4DEZ-UBFA>].

28. Matthew S. Erie & Thomas Streinz, *The Beijing Effect: China’s Digital Silk Road as Transnational Data Governance*, 54 N.Y.U. J. INT’L L. & POL’Y 1 (2021); Marie-Therese Png, *At the Tensions of South and North: Critical Roles of Global South Stakeholders in AI Governance*, in ACM CONFERENCE ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY 1434 (2022).

29. Micah Musser, *Don’t Assume China’s AI Regulations Are Just a Power Play*, LAWFARE (Oct. 3, 2022, 8:16 AM), <https://www.lawfareblog.com/dont-assume-chinas-ai-regulations-are-just-power-play> [<https://perma.cc/2U9T-GDQW>].

landscape draws heavily from cybersecurity structures, which amalgamate conceptions of data security with a broader focus on national security.³⁰

Thematically, although questions like enforceability vary across jurisdictions, governance efforts in the United States, the EU, and the OECD tend to revolve around solutions aimed at combatting the perceived harms of AI applications, including product liability rules, data privacy rules, safety standards, requirements related to explainability and fairness, and, in some instances, outright prohibitions on the uses of AI systems for particularly problematic purposes.³¹ China's rules, while somewhat more focused on security and order, also cover many of these same areas, notably related to explainability, trustworthiness, oversight, and broader ethical norms for developing and using AI.³²

The examples mentioned above are not the only AI regulatory efforts. Other noteworthy examples include Canada's *Directive on Automated Decision-Making*, which governs the development and deployment of AI systems across that country's federal agencies.³³ Singapore has also been an early mover in this space through the launch of its own *Model AI Governance Framework* and, more recently, the development of A.I. Verify, a testing framework toolkit designed to support independent self-assessment by private sector actors developing or employing AI technologies.³⁴ These initiatives, however, are clustered in the minority world.³⁵ Moreover, while frameworks such as Canada's and Singapore's represent important contributions to the global discourse on regulating AI, they lack the institutional support to drive broader standard setting in the way initiatives based in the United States, the EU, and China are able to. The next Part discusses standard setting as a general phenomenon and introduces the drivers and origins for how a framework gains international legitimacy.

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30. ARTICLE 19, EMOTIONAL ENTANGLEMENT: CHINA'S EMOTION RECOGNITION MARKET AND ITS IMPLICATIONS FOR HUMAN RIGHTS 46–48 (2021).
 31. Emma Carmel & Regine Paul, *Peace and Prosperity for the Digital Age? The Colonial Political Economy of European AI Governance*, 41 IEEE TECH. & SOC'Y MAG. 94, 96 (2022).
 32. Matt Sheehan, *China's New AI Governance Initiatives Shouldn't Be Ignored*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Jan. 4, 2022), <https://carnegieendowment.org/2022/01/04/china-s-new-ai-governance-initiatives-shouldn-t-be-ignored-pub-86127> [<https://perma.cc/Q7UR-4523>].
 33. GOV'T OF CAN., DIRECTIVE ON AUTOMATED DECISION-MAKING (2019), <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32592§ion=html> [<https://perma.cc/LD9C-KB7K>].
 34. *Singapore's Approach to AI Governance*, PERS. DATA PROT. COMM'N (May 2022), <https://www.pdpc.gov.sg/Help-and-Resources/2020/01/Model-AI-Governance-Framework> [<https://perma.cc/G45K-BAAL>].
 35. See, e.g., Chukwubikem I. Obianyo & Solomon Vendaga Ater, *A Critical Appraisal of the Legal Framework of Artificial Intelligence Governance in Nigeria*, 4 CHUKWUEMEKA ODUMEGWU OJUKWU U. J. PRIV. & PUB. L. 48 (2023) (discussing the regulatory gap in Nigeria).

III. REGULATORY DIFFUSION

While there are substantial differences between the governance standards being advanced across the advanced economies mentioned in the previous section, there is also significant overlap, representing a consolidation around particular understandings of the challenges inherent in AI and the appropriate scope of regulatory responses. Collectively, this emerging consensus, which has been driven largely by frameworks developed among wealthy and powerful countries, leads to external pressure on other countries to either adopt a similar regulatory framework, or to cede their regulatory position on these issues altogether. While the “Brussels Effect” is probably the best-known framing for how local standards become globally influential, these impacts are not limited to EU processes.³⁶

There can be a number of drivers which inspire countries to copy or adopt laws or legal principles from elsewhere, including the efficiency of harmonized regulations, or even simply to save the resources required to develop their own approach.³⁷ This trend can be particularly powerful in the context of emerging democracies, which often turn to more established democracies to build legitimacy behind a particular course of action.³⁸ Similar tendencies, however, can play out across more authoritarian models of governance, as evidenced by the rash of new criminal misinformation laws and misinformation prosecutions of journalists and opposition figures that accompanied the COVID-19 pandemic.³⁹

Regulatory diffusion can be a positive phenomenon, such as the rapid global proliferation of freedom of information (or right to information) legislation which has taken place since the 1990s.⁴⁰ Although there were certainly coercive elements at play in this process, such as the use of foreign aid or multilateral institutions to pressure countries into adopting these laws as a mechanism for democratic

36. See Annegret Bendiek & Isabella Stuerzer, *The Brussels Effect, European Regulatory Power and Political Capital: Evidence for Mutually Reinforcing Internal and External Dimensions of the Brussels Effect From the European Digital Policy Debate*, 2 DIGIT. SOC'Y 5 (2023) (noting how this term describes the broader impact of E.U. legislation in the tech space, particularly through its export of standards and regulatory models across both developed and developing markets).

37. Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 846 (2003).

38. *Id.*

39. Michael Karanicolos, *Even in a Pandemic, Sunlight Is the Best Disinfectant: COVID-19 and Global Freedom of Expression*, 22 OR. REV. INT'L L. 101 (2021).

40. Margaret Kwoka & Michael Karanicolos, *Overseeing Oversight*, 54 CONN. L. REV. 655, 663 (2022) (illustrating how trends in the passage of transparency legislation can be tracked around the world, through commonalities in right to information or freedom of information laws).

accountability and as a check against corruption, the end result has been broadly beneficial from the perspective of human rights and democracy.⁴¹ Similar diffusion pressures have been observed related to a number of other constitutional rights.⁴²

But regulatory diffusion is not a universally positive phenomenon. Political scientists have noted that, while adoption based on learning about effective policies elsewhere can provide for good outcomes, diffusion can also occur based on competition.⁴³ This can occur where a government faces economic pressure to ensure that their regulatory framework is as attractive to prospective investors as their peers, or even through direct coercion by more powerful governments.⁴⁴ Both of these mechanisms are likely to produce regulatory postures which fail to optimally serve the needs of locals.⁴⁵ For example, concerns over such pressures among the states was a factor underlying the adoption of the commerce clause in the U.S. Constitution.⁴⁶

IV. AI GOVERNANCE AS A STANDARD SETTING EXERCISE

In its 2022 *AU Data Policy Framework*, the African Union urged its member states to adopt a coordinated, comprehensive and harmonized regional approach to global digital governance challenges, including with regards to technical standards, ethics, governance, and best practices related to AI.⁴⁷ Governments in the majority world, however, face significant obstacles to developing independent AI governance frameworks which suit the needs of their constituents. First is the simple challenge of compelling compliance. Companies that are on the leading edge of AI development tend to be headquartered in high income countries, leaving poor countries with far less leverage in influencing the companies'

41. See, e.g., U.N. HUMAN RIGHTS COMM'N, *General Comment No. 34 on Article 19: Freedoms of Opinion and Expression*, U.N. Doc. CCPR/C/GC/34 (July 29, 2011); *Claude-Reyes et al. v. Chile, Merits, Repatriations, and Costs, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 151 (Sept. 19, 2006).

42. Benedikt Goderis & Mila Versteeg, *The Diffusion of Constitutional Rights*, 39 INT'L REV. L. ECON. 1 (2014).

43. Charles R. Shipan & Craig Volden, *The Mechanisms of Policy Diffusion*, 52 AM. J. POL. SCI. 840, 841–48 (2008).

44. *Id.*

45. *Id.*

46. *Id.* at 843.

47. AFR. UNION, *AU DATA POLICY FRAMEWORK* (2022), <https://au.int/sites/default/files/documents/42078-doc-AU-DATA-POLICY-FRAMEWORK-ENG1.pdf> [<https://perma.cc/Q2WJ-XKUS>].

decisionmaking.⁴⁸ Outside of a handful of particularly large markets, such as Brazil or India, majority world countries face a binary choice between accepting the inherent problems or biases in these technologies or foregoing their associated economic benefits entirely and risk being left behind.

Relatedly, and as noted in the previous Part, significant intergovernmental momentum has already built behind the frameworks that have been developed by advanced economies. This leads to direct pressure on majority-world governments to join existing initiatives, such as the one being pushed by the OECD. For example, the *Egyptian Charter on Responsible AI*, which was published in 2021, draws heavily from the OECD principles.⁴⁹ Countries must accept the framing and perspective that underlies these projects in order to have a seat at the table going forward.

In this context, it should not be surprising that the major global governance frameworks which have emerged are generally focused on impacts across a set of prioritized stakeholders. For example, where the EU's proposed AI Act contemplates which uses of AI should be fully prohibited, the focus is on subliminal manipulation, exploitation of vulnerable people, general purpose "social credit scoring", and real-time biometric identification.⁵⁰ The latter prohibition, however, is subject to limited exceptions based on public safety threats. This carveout may be suitable in the context of a country like France or Germany, which is relatively stable and has robust protections for democracy and the rule of law.⁵¹ But in the context of a country like Uganda or Nigeria, such a loophole is likely to be abused, due to the authoritarian tendencies of their leadership, the lack of strong protections for broader democratic rights, and a more precarious security situation across the country.⁵² Underlying ethnic or political tensions, and the likelihood of mass violence, should also impact the

48. Birhane, *supra* note 15, at 392–93.

49. NAT'L. COUNCIL FOR A.I., EGYPTIAN CHARTER FOR RESPONSIBLE AI (2023), <https://aicm.ai.gov.eg/en/Resources/EgyptianCharterForResponsibleAIEnglish-v1.0.pdf> [<https://perma.cc/8U8E-NY8S>].

50. *EU AI Act*, *supra* note 18, tit. II, art. 5.

51. See, e.g., *Countries and Territories: Global Freedom Scores*, FREEDOM HOUSE, <https://freedomhouse.org/countries/freedom-world/scores?sort=desc&order=Total%20Score%20and%20Status> [<https://perma.cc/5JR3-WHGC>] (listing Freedom House's annual index of democratic health, which rank nearly all EU countries at or near the top of the list).

52. See *Uganda: Events of 2021*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2022/country-chapters/uganda> [<https://perma.cc/ZHU8-HYRB>] *Nigeria: Events of 2021*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2022/country-chapters/nigeria> [<https://perma.cc/SG82-B64B>].

calculus for whether an AI-driven tracking or surveillance program may be acceptable if subjected to careful safeguards, or whether it should be prohibited entirely.

Frameworks which originate in wealthier states typically ignore concerns that global AI supply chains will throttle the potential for homegrown technological development in poor regions, presenting an obstacle to equitable development as increasing shares of the economy are transformed by AI.⁵³ The exploitative labor relationships which underlie the development and improvement of AI systems, or the toxic and harmful impacts of extractive industries which are designed to provide energy or raw materials for their production, are also typically not areas of priority.⁵⁴ AI research and development is enormously energy-intensive, compounding and accelerating climate change threats which will be disproportionately borne by residents of the majority world.⁵⁵ AI development is also undergirded by extractive supply chains whose environmental impacts are likewise centered in poor countries.⁵⁶ The development of AI also requires enormous amounts of labor to label datasets, curate and moderate harmful content, and train and input data, which is likewise typically drawn from the global poor.⁵⁷

While it may seem intuitive to many public policy professionals in the minority world to separate discussions about AI fairness and privacy from environmental or labor concerns related to the development of these sectors, it is likely not coincidental that this division lines up with a geographic delineation in how the harms from AI manifest. It is also worth noting that the piloting of AI technologies across the EU and North America often targets disempowered populations, including data subjects from the majority world, such as through the prevalence of AI technologies in the EU's migration system.⁵⁸

53. Gwagwa et al., *supra* note 15, at 4; Birhane, *supra* note 15, at 396.

54. Carmel & Paul, *supra* note 31.

55. See Mark Coeckelbergh, *AI for Climate: Freedom, Justice, and Other Ethical and Political Challenges*, 1 AI & ETHICS 67 (2021); Payal Dhar, *The Carbon Impact of Artificial Intelligence*, 2 NATURE MACH. INTEL. 423 (2020).

56. Danae Tapia & Paz Peña, *White Gold, Digital Destruction: Research and Awareness on the Human Rights Implications of the Extraction of Lithium Perpetrated by the Tech Industry in Latin American Ecosystems*, GLOB. INFO. SOC'Y WATCH (2020), <https://giswatch.org/node/6247> [<https://perma.cc/B3GB-78G5>].

57. KATE CRAWFORD, ATLAS OF AI: POWER, POLITICS, AND THE PLANETARY COSTS OF ARTIFICIAL INTELLIGENCE 53–89 (2021).

58. Julien Jeandesboz, *Technology, Knowledge and the Governing of Migration*, in HANDBOOK ON THE GOVERNANCE AND POLITICS OF MIGRATION 337 (Emma Carmel, Katharina Lenner & Regine Paul, eds., 2021).

V. GOVERNING FOR THE MAJORITY

There are various existing avenues for governance conversations which allow for representatives from the majority world to address these issues on a more equal footing with their more economically advanced counterparts. The International Telecommunications Union (ITU), for example, provides a platform for discussions related to inclusive development of AI technologies and equitable access to their benefits.⁵⁹

As a United Nations specialized agency with 193 member states, the ITU's structure is naturally more inclusive than the OECD or purely domestically driven frameworks that do not account for the majority world at all.⁶⁰ Nevertheless, it still fails to address challenges of inclusion and opacity, since this dynamic may not capture the nuances of the relationship between governors and governed, and exploiters and exploited. As Chinmayi Arun points out in her chapter for the *Oxford Handbook of Ethics of AI*, titled *AI and the Global South: Designing for Other Worlds*, a temptation to view these challenges as part of a binary relationship between the developed and developing world is problematically reductionist.⁶¹ While traditional colonial extractive and exploitative relationships certainly exist, the story of AI's diffusion across the majority world also includes cases such as India's Aadhar biometric database, which was driven by a political and industrial elite within that country to force the marginalized into a pervasive system of surveillance, as well as to systematically deny them other rights.⁶² The emergence of China as a hub for the sale of abusive surveillance technologies to countries like Ethiopia, Brazil, Ecuador, and Kenya further complicates the narrative.⁶³ This is not to gloss over the traditional and ongoing role of European and U.S. based companies in the global spyware trade.⁶⁴ But, as Arun notes, "institutional frameworks of Southern countries must be taken into account as we consider what impact AI might have on the South. . . . The rights of Southern populations can be

59. *Artificial Intelligence*, INT'L TELECOMM. UNION, <https://www.itu.int/en/action/ai/Pages/default.aspx> [https://perma.cc/3RN9-N4FJ].

60. *See Membership*, INT'L TELECOM. UNION, <https://www.itu.int/hub/membership/how-we-are-governed> [https://perma.cc/TNF7-H3ED].

61. Chinmayi Arun, *AI and the Global South: Designing for Other Worlds*, in *THE OXFORD HANDBOOK OF ETHICS OF AI* 588 (Markus D. Dubber, Frank Pasquale & Sunit Das, eds. 2019).

62. *Id.* at 598–99.

63. *Id.* at 603.

64. PRIV. INT'L, *THE GLOBAL SURVEILLANCE INDUSTRY* 18 (2016), https://privacyinternational.org/sites/default/files/2017-12/global_surveillance_0.pdf [https://perma.cc/ZFX8YQSM].

realized through efforts made by states, but can also be eroded by the governing elite of states.”⁶⁵

It is certainly true for a broad cohort of countries that their relationship with AI is dominated by their role in the supply chain: providing raw materials for export, as well as data for companies based in wealthier parts of the world to extract in order to improve their products.⁶⁶ This dynamic, however, typically takes place with the acquiescence of local governments who may contract with the companies to provide public services, or otherwise demand access to the data collected as part of the cost of carriage.⁶⁷

From a governance perspective, challenges in ensuring robust representation through governments necessitates that emerging AI standards be considered along a multidimensional axis. Beyond a myopic focus on risks to data subjects, or even a geopolitical context of rich countries and poor countries, the development and deployment of these technologies must be subject to a holistic assessment of impacts across a range of different stakeholder groups. As problematic as it is for a small cadre of decisionmakers in Washington, D.C., San Francisco, or Brussels to develop standard setting processes that will guide global AI development, extending these processes to include small numbers of elite representatives from industry or governments in the majority world is only a marginal improvement.

Instead, the development of standards that reflect the needs of these diverse stakeholders requires an approach which goes beyond traditional governmental policymaking. Recent years have seen a number of experiments in new forms of governance, particularly clustered in the tech space. These have included the Global Internet Forum to Counter Terrorism (GIFCT), an industry-led self-regulatory initiative which works to set content standards for participating social media platforms, including through the development of machine-learning algorithms to catch extremist content and a shared hash database.⁶⁸ GIFCT was designed to foster collaboration between governments, the private sector, and civil society, though the latter has complained of a lack of transparency.⁶⁹ Facebook’s

65. Arun, *supra* note 61, at 602.

66. Paola Ricarte, *Data Epistemologies, Coloniality of Power, and Resistance*, 20 TELEVISION & NEW MEDIA 350, 358 (2019).

67. *Id.*

68. *Joint Tech Innovation*, GLOB. INTERNET F. TO COUNTER TERRORISM, <https://web.archive.org/web/20210609160608/https://gifct.org/joint-tech-innovation/> [<https://perma.cc/A3NE-3XBV>].

69. Emma Llansó, *Platforms Want Centralized Censorship. That Should Scare You*, WIRED (Apr. 18, 2019, 9:00 AM), <https://www.wired.com/story/platforms-centralized-censorship> [<https://perma.cc/T6P3-U3JM>].

moves to empower an Oversight Board to review content decisions is also worth noting, insofar as it represents a (limited) derogation of power from the corporation to an arm's length entity.⁷⁰ Though the Oversight Board is not technically a multistakeholder body, it has included significant engagement with civil society.⁷¹

Probably the most well-established example of multistakeholder governance is the Internet Corporation for Assigned Names and Numbers (ICANN), a nonprofit corporation that oversees a number of critical technical functions underlying the global internet, including managing the generic top-level domain name system (gTLD) and the country code top-level domain name system (ccTLD).⁷² ICANN's decisionmaking takes place across multiple layers, led by a president and a board of directors, along with a number of other diffuse decisionmaking bodies which focus on particular areas or subthemes.⁷³ ICANN's multistakeholder model includes spaces for engagement by governments through the Governmental Advisory Committee,⁷⁴ engagement by civil society through the Non-Commercial Stakeholder Group,⁷⁵ engagement by internet end users through the At-Large Advisory Committee,⁷⁶ and engagement by business interests through the Commercial Stakeholders Group.⁷⁷ There is also a heavy emphasis on engagement and representation across regions.

Structurally, an independent multistakeholder AI governance body could act as a central hub for convening and policymaking by expert thematic subgroups, supported by robust public consultation and engagement processes. It could also

70. *Oversight Board Bylaws*, FACEBOOK (Jan. 2020), <https://about.fb.com/wp-content/uploads/2020/01/830amBylawsTranscript-1.pdf> [<https://perma.cc/4PF8-SGU6>].

71. Brent Harris, *Preparing the Way Forward for Facebook's Oversight Board*, META (Jan. 28, 2020), <https://about.fb.com/news/2020/01/facebooks-oversight-board> [<https://perma.cc/7DNR-32N7>].

72. *Welcome to ICANN!*, INTERNET CORP. FOR ASSIGNED NAMES & NOS., <https://www.icann.org/resources/pages/welcome-2012-02-25-en> [<https://perma.cc/C3V6-QVEK>].

73. *See Insperity OrgPlus 2012*, INTERNET CORP. FOR ASSIGNED NAMES & NOS. (May 1, 2018), <https://www.icann.org/en/system/files/management-org-01may18-en.pdf> [<https://perma.cc/4TRW-Z83N>].

74. *See Governmental Advisory Committee*, INTERNET CORP. FOR ASSIGNED NAMES & NOS. GOVERNMENTAL ADVISORY COMM., <https://gac.icann.org> [<https://perma.cc/QGX7-YME7>].

75. *See Noncommercial Stakeholder Group*, INTERNET CORP. FOR ASSIGNED NAMES & NOS.: | GENERIC NAME SUPPORTING ORG. (Jan. 24, 2022), <https://gnso.icann.org/en/about/stakeholders-constituencies/ncsg> [<https://perma.cc/JM5C-8TEF>].

76. *See About Us*, INTERNET CORP. FOR ASSIGNED NAMES & NOS. AT-LARGE, <https://atlarge.icann.org/about/index> [<https://perma.cc/7P33-KXFQ>].

77. *See Commercial Stakeholder Group*, INTERNET CORP. FOR ASSIGNED NAMES & NOS. | GNSO (NOV. 3, 2022), <https://gnso.icann.org/en/about/stakeholders-constituencies/csg> [<https://perma.cc/SZ9M-P775>].

support research, particularly by allowing secure sharing of information across companies and between companies and accredited researchers. It is worth noting that such a framework for information sharing is currently contemplated by the EU's Digital Services Act, although the ambition of this plan is limited by its thematic and geographic focus.

While ICANN's ability to retain its legitimacy as a hub for policy development in the domain name space shows that multistakeholder collaboration is possible in a manner which is not unduly dominated by nation-states, the organization has faced its share of criticisms and challenges. In addition to broader concerns about accessibility, there have been criticisms that the structure is not as egalitarianism as it claims, with particular risks of capture by commercial players, whose resources allow them to find ways to tilt the playing field in their favor even in the context of a consensus-driven and multistakeholder process.⁷⁸ It is also worth noting that ICANN's legitimacy emerged from a relatively unique set of circumstances, for which there is no parallel in the AI governance space.⁷⁹ ICANN's remit is also narrow and relatively technocratic, compared to the thematically sprawling and politically controversial world of AI governance.

There is also a more fundamental tension between any drive towards harmonized standards and the "hyper-local" way in which algorithmic harms manifest.⁸⁰ Any set of global, or even regional, standards, is bound to gloss over important contextual cues related to the specific cultural, linguistic, political, or social nature of AI's impact in a given place or time.⁸¹ A natural objection to calls for new multistakeholder body to develop AI governance standards is to query whether a centralized approach is desirable at all, or whether the inefficiencies of a patchwork of local rules are a worthwhile price to pay if it ensures that the rules appropriately reflect each unique local context.

Either way, the world faces a pressing need to ensure that the interests of stakeholders who are on the frontlines of AI's global impact are reflected in how

78. See generally Michael Karanicolas, *The New Cybersquatters: The Evolution of Trademark Enforcement in the Domain Name Space*, 30 *FORDHAM INTELL. PROP., MEDIA & ENT. L.J.* 399 (2020) (discussing how IP interests have had an outsized impact on the development of trademark policy in the domain name space).

79. See Milton Mueller, *Detaching Internet Governance From the State: Globalizing the IANA*, 4 *GEO. J. INT'L AFFS.* 35 (2014).

80. Chinmayi Arun, *Rebalancing Regulation of Speech: Hyper-Local Content on Global Web-Based Platforms*, *MEDIUM* (Mar. 28, 2018), <https://medium.com/berkman-klein-center/rebalancing-regulation-of-speech-hyper-local-content-on-global-web-based-platforms-1-386d65d86e32> [<https://perma.cc/V9CD-ANT6>].

81. Gwagwa et al., *supra* note 15, at 8–10.

these technologies are governed. Standard setting and clear, binding policy are desirable outcomes. The concern that AI is replicating traditional biases, inequities and discrimination within the societies where it has been developed, is well-grounded. It is critical, however, that new governance structures aiming to mitigate these challenges do not themselves reflect traditional colonial contexts that have been the source of so much of the world's poverty, oppression and inequity.⁸²

CONCLUSION

For seventy years, researchers studying automobile safety primarily based their work on the use of crash test dummies that were designed around what the industry considered to be the default dimensions of European and American men.⁸³ Because this research drove the development of vehicles' safety features, it led to design choices which supported favorable crash survival outcomes among this demographic, at the cost of worse survival rates among those with different body types.⁸⁴ Context matters, and a lack of appropriate context can have dire—even fatal—consequences for those excluded from consideration.

It is a good thing that the world's most influential policymakers appear to be taking a proactive approach towards AI regulation, and there is no question that harmonization has its advantages, particularly in a globalized world. Governance standards which seek to bolster the rights of those who are adversely impacted by AI in the context of advanced economies are laudable. But as these frameworks begin to coalesce into transnational standards, it is important to query whether they actually represent the needs and concerns of those on the sharpest edge of technological disruption, or whether such global standards are seeking to address traditional domestic inequities by further entrenching inequities on a global scale.

82. Birhane, *supra* note 15, at 391–93.

83. See Tao Xu, Xiaoming Sheng, Tianyi Zhang, Huan Liu, Xiao Liang & Ao Ding, *Development and Validation of Dummies and Human Models Used in Crash Test*, 2018 APPLIED BIONICS & BIOMECHANICS 1 (2018).

84. C. J. Kahane, *Injury Vulnerability and Effectiveness of Occupant Protection Technologies for Older Occupants and Women*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. (2013), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/811766> [<https://perma.cc/PCM4-77T2>].