

CHAPTER 25

AI REGULATION IN THE BIDEN AND TRUMP ERAS: THE CONSEQUENCES OF A (SUBSTANTIAL?) PARADIGM SHIFT

*Livia Baldinelli**

Abstract

This chapter examines the evolving trajectory of artificial intelligence regulation in the United States by contrasting the approaches adopted under the Biden and Trump administrations. While the Biden presidency marked a significant shift toward a rights-driven and accountability-oriented model – emphasising transparency, human oversight, and safeguards against algorithmic bias – Trump’s return to office reintroduced a deregulation-focused paradigm centred on innovation, global competitiveness, and market primacy. The chapter analyses how this shift has weakened procedural guarantees associated with due process, particularly in relation to notice, the right to be heard, and impartial human review. It further explores the growing tensions between federal deregulation and increasingly active state-level AI legislation, highlighting the renewed relevance of pre-emption doctrines. Finally, it assesses the emerging role of private actors – whose interests now converge with federal priorities – as both drivers of innovation and de facto regulators.

TABLE OF CONTENTS

1. Introduction: The United States’ wavering approach to artificial intelligence regulation.....	446
2. Procedural safeguards in times of deregulation: tensions with the principle of due process.....	449
3. Growing frictions between the federal and state levels.....	454
4. A new role for private actors.....	457
5. Concluding remarks.....	459

* Research fellow in Administrative Law, Tor Vergata University of Rome.

1. Introduction: the United States' wavering approach to regulating artificial intelligence

Together with China and the European Union, the United States is undoubtedly a protagonist in what has been described as the 'race to the top' for leadership in the field of artificial intelligence¹, which is now considered an essential requirement for ensuring the full control of global politics and economics².

Although the centrality of this technology has long been widely recognised, the regulatory approach taken by the United States has changed considerably over the years, starting with the first attempts at regulation during the second Obama administration. In particular, the 2016 report *Preparing for the Future of Artificial Intelligence*³ laid the foundations for the development of AI in the United States and highlighted the two aspects whose complex balance is the main source of challenges in regulating this technology: economic potential on the one hand, and ethical considerations on the other. Faced with such a dilemma, the report – while acknowledging the complex implications of AI use – opted for a fundamentally non-interventionist approach, characterised by a strong reliance on the functioning of the free market and the private sector, the latter considered capable of driving innovation and therefore free to operate within a regulatory framework set by the State in fairly broad terms⁴. In other words, from the very first attempts to define the regulation of AI, the United States appears to have adopted the market-based regulatory model, which – according to the

¹ N. Savage discusses the 'race to the top' in *The race to the top among the world's leaders in artificial intelligence*, in 588 *Nature* 102 (2020).

² This is highlighted, for example, by the US think tank Brookings in *Whoever leads in artificial intelligence in 2030 will rule the world until 2100, 2020* (<https://www.brookings.edu/articles/whoever-leads-in-artificial-intelligence-in-2030-will-rule-the-world-until-2100/>).

³ National Science and Technology Council, *Preparing for the Future of Artificial Intelligence*, 2016, accompanied by two similar documents with a more practical approach. The references are National Science and Technology Council, *The National Artificial Intelligence Research and Development Strategic Plan* (R&D Plan), 2016, and Executive Office of the President, *Artificial Intelligence, Automation and the Economy*, 2016.

⁴ In fact, as remarked by C. Cath, S. Wachter, B. Mittelstadt, M. Taddeo, L. Floridi, *Artificial Intelligence and the 'Good Society': the US, EU, and UK approach*, 24 *Science and Engineering Ethics* 505 (2017), 510: "The general vision is one in which the government manages the tasks of defining the outer parameters of what AI should be used for, and of collecting data to further inform policy making. The private sector developing AI should continue to innovate within a broad risk management regulatory framework set by the government. This approach suggests that the US government's implicit understanding of AI is one that relies heavily on the liberal notion of the free market".

well-known classification by Anu Bradford⁵ – still allows us to draw a fairly clear line between US, Chinese, and European policies, the latter characterised by a State-driven and rights-driven approach respectively.

Despite the failure to implement related policies – due to its adoption when the Obama presidency was coming to an end –, the 2016 report nevertheless influenced the direction taken by the first Trump administration. After a period of stalemate, in which any attempt at public regulation was shelved as it was considered to be mere interference in an area of competence reserved to private actors⁶, the Trump administration launched the so-called American AI Initiative⁷, characterised by an approach oriented towards deregulation, a focus on the need to safeguard the power of the United States in the AI sector, and a tendency to downplay issues such as privacy protection and the risk of algorithmic bias⁸.

The continuity between the Obama and Trump administrations – an only partial one, as references to ethical considerations in the documents adopted by the former are totally absent in those adopted by the latter⁹ – might make it difficult to understand the use of the adjective ‘wavering’ in the title of this section.

It appears then worth clarifying that his adjective has been used essentially to describe the paradigm shift that followed the advent of the Biden administration, which, for the first time, brought to the forefront the need to actively regulate the market and to consider broader issues than the mere need to safeguard and consolidate the power of the United States in developing new technologies. Central to Executive Order 14110, adopted in 2023 and entitled *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, were indeed some aspects that had been

⁵ A. Bradford, *Digital Empires: The Global Battle to Regulate Technology* (2023).

⁶ As noted by W. Knight, *Here's how the US needs to prepare for the age of artificial intelligence*, in *MIT Technology Review* (2018), who points out that initially, from the Trump administration's perspective, there was no need for an ‘AI moonshot’, as minimal public intervention was considered the best way to allow the AI industry to flourish. However, this approach was not without its critics, even within the government itself: see, for example, the call made to President Trump by then-Defence Secretary Mattis to adopt a national AI strategy, considered essential to keep pace with China and other world powers (on this point, see C. Metz, *Artificial Intelligence is now a Pentagon priority. Will Silicon Valley help?*, in *The New York Times*, 26 August 2018).

⁷ Executive Order 13859, *Maintaining American Leadership in Artificial Intelligence*, 2019.

⁸ D. J. Mallinson, L. Azevedo, E. Best, P. Robles, *Artificial intelligence policy, the Trump Administration, and federalism*, in 47 *Administrative Theory & Praxis* 202 (2025), 203.

⁹ As noted by E. Hine, L. Floridi, *Artificial intelligence with American values and Chinese characteristics: a comparative analysis of American and Chinese governmental AI policies*, in 39 *AI & Society* 257 (2024), 262.

secondary until then, such as the need to ensure the accountability of AI systems, as well as their transparency and control, also with a view to preventing (or at least curbing) the biases and the discrimination often linked to the use of such technologies. In other words, the attempt – through the aforementioned Executive Order but also through other documents such as the report adopted in 2021 by the National Security Commission on Artificial Intelligence (NSCAI) – was to make the US model – to use Anu Bradford’s classification – more rights-driven. In particular, this seems to emerge not only from the definition of ‘trustworthy development of AI’, directly linked to the protection of human rights¹⁰, but also from the international cooperation promoted by the Biden administration in the field of AI, with the ultimate aim of promoting shared values¹¹ and containing the possible risks arising from the use of new technologies by sharing best practices¹² between countries that until then had been considered only as adversaries in the race to the top referred to earlier.

With the advent of the second Trump administration and, more specifically, through Executive Order 14179 of 2025, Executive Order 14110 was withdrawn, and the focus returned to the need to promote innovation and consolidate US leadership in the sector through extensive deregulation, an approach also confirmed by *the AI Action Plan* of July 2025. In fact, the three pillars of the latter appear to be accelerating innovation in AI, reducing both regulations and control; the construction

¹⁰ See in this regard the definition (no longer available) on the AI.gov portal which, in reporting the definition of ‘trustworthy development’, one of the pillars of the United States’ AI strategy, stated that: “The United States has long been a champion and defender of the core values of freedom; guarantees of human rights; the rule of law; stability in our institutions; rights to privacy, civil rights, and civil liberties; respect for intellectual property; and opportunities for all to pursue their dreams. The AI technologies the Nation develops and uses must respect human rights and fundamental freedoms, reflect these core values, and be devoted to helping people”.

¹¹ The presence of shared values emerges, for example, from the 2021 joint statement by *the EU-US Trade and Technology Council*, which reads: “The European Union and the United States affirm their willingness and intention to develop and implement trustworthy AI and their commitment to a human-centred approach that reinforces shared democratic values and respects universal human rights, which they have already demonstrated by endorsing the OECD Recommendation on AI. Moreover, the European Union and the United States are founding members of the Global Partnership on Artificial Intelligence, which brings together a coalition of like-minded partners seeking to support and guide the responsible development of AI that is grounded in human rights, inclusion, diversity, innovation, economic growth, and societal benefit”.

¹² See in particular section 11 of Executive Order 14110. As noted by E. Hine, L. Floridi, cit. at 9, the promotion of international cooperation does not, however, detract from the intention to consolidate the United States’ global leadership.

of infrastructure, also through the simplification of authorisations for semiconductors and data centres; international supremacy, to be achieved through US participation both in diplomatic forums and in the definition of security standards, with the ultimate goal of promoting AI governance models fostering innovation and safeguarding US interests.

This paradigm change – which is nevertheless largely consistent with the strategy developed during Trump’s first presidency – has led to a series of significant consequences that indirectly emerge from the questionnaire on the US available in Part II of this volume and which can be summarised as repercussions in terms of weaker procedural guarantees, renewed frictions between the federal and state levels, and a new role for private actors, and, more specifically, for tech companies.

The following paragraphs will attempt to account for these aspects, the analysis of which appears to be of fundamental importance for framing the deregulation strategy put in place by the Trump presidency within administrative practice, but also within the distribution of powers between the federation and the states. However, the analysis will not be limited to these main areas of investigation: the discussion will also attempt to provide a more general overview, in an attempt to understand whether a change of pace such as that proposed by Executive Order 14179 could actually lead to a radical change in the US strategy for regulating AI, assuming, as will be seen below, that we can still speak of a single strategy and not of multiple conflicting regulatory approaches.

2. Procedural safeguards in times of deregulation: tensions with the principle of due process

As shown by recent studies, the use of AI – and, more specifically, of algorithmic tools – by the federal government and by the state and local authorities¹³ has become so widespread that these new technologies can be regarded as entities with the same powers that Congress delegates upstream to administrative agencies¹⁴.

¹³ For an overview of the uses of AI systems, see, for example, at the federal level, Office of the Federal Chief Information Officer, *Federal AI Use Case Inventory*, D. Freeman *et al.*, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies* (2020). At the state and local levels, see National Conference of State Legislatures, *Artificial Intelligence in Government. The Federal and State Legislative Landscape* (2024), *ICMA, Artificial Intelligence in Local Government* (2024).

¹⁴ In this sense, see, R. Calo, D. K. Citron, *The Automated Administrative State: A Crisis of Legitimacy*, 70 *Emory Law Journal* 797 (2021), 816.

This makes it increasingly urgent to reflect on the compatibility of new automated procedures with the principle of due process referred to in the Fifth and Fourteenth Amendments to the US Constitution¹⁵, the latter principle being a precondition for the legitimate exercise of power, leading the interpreter to reconceptualise traditional procedural guarantees in an attempt to construct what has been defined as ‘Technological due process’¹⁶.

Indeed, in addition to the well-known critical issues related to algorithmic opacity and to the so-called black boxes, which inevitably affect the ability to follow the logical process which led to a particular decision¹⁷, the use of AI within the administrative procedure appears to be potentially in contrast with the three procedural guarantees that constitute the due process, namely the right to be informed, the right to be heard, and the right to be subject to the decision of an impartial person¹⁸, and this contrast appears to have become more acute with the advent of the Trump administration as a logical consequence of its deregulation-oriented approach.

With regard to the right to be informed – preparatory to the right to be heard – the Supreme Court has generally emphasised the centrality of an ‘understandable notice’, communicated within a reasonable time and intended to inform the parties concerned of the pending action and allow them to submit their comments¹⁹. In the specific context of automated proceedings, the right to be informed assumes an additional function, as it also aims to inform the recipient of the possible use of algorithmic tools. However, doubts may arise in practice as to the scope

¹⁵ Which affirm, respectively: “No person shall be [...] deprived of life, liberty, or property, without due process of law [...]”; “[...] No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”.

¹⁶ D. K. Citron, *Technological due process*, in 85 Washington University Law Review 1249 (2008).

¹⁷ On the repercussions of algorithmic administration in terms of transparency, see, among others, C. Coglianese, D. Lehr, *Transparency and algorithmic governance*, in 71 Administrative Law Review 1 (2019). The authors also emphasise that the obligation to adequately justify a decision – on which the automation of the procedure has a significant impact – is grounded in the principle of due process.

¹⁸ On this point, see, among others, E. J. Rubin, *Due Process and the Administrative State*, in 72 California Law Review 1044 (1984), J.L. Mashaw, *Due Process in the Administrative State* (1985).

¹⁹ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

of the obligation to provide information imposed on the administration²⁰, without even touching on the limited usefulness of communication in cases involving the algorithmic black box mentioned above²¹.

It is precisely when examining the right to be informed as a tool for communicating the possible use of algorithmic tools that a significant difference emerges between the approach taken by the Biden administration and that adopted by the Trump administration. More specifically, if – as noted in the questionnaire on the US²² – *the OMB Memorandum 'Advancing Governance Innovation'*²³ issued during the Biden presidency not only required each agency to communicate information on the use of AI tools to the public as a whole, but also included a similar communication requirement in individual proceedings²⁴ – within which the use of AI had to be preceded, where possible, by an *ad hoc*

²⁰ For example, C. Chambers Goodman, *AI, Can You Hear Me? Promoting Procedural Due Process in Government Use of Artificial Intelligence Technologies*, in 28 *Richmond Journal of Law & Technology* 700 (2022), 719, questions the advisability of requiring disclosure of the algorithm used. More specifically, commenting on the *Estate of Jacobs v. Gillespie* case, examined by an Arkansas court and concerning the automated procedure by which the administration had reduced the benefits granted to a citizen, the author states: “The court held that due process requires notice which is ‘as specific as reasonably practicable’ when providing a rationale for a benefit reduction, ‘with specific references (as applicable) to the beneficiary’s [algorithmic] assessment, the beneficiary’s [programme], and the [automated system], including the algorithm’. But would providing the algorithm be of any assistance to the average welfare recipient? Likely not, given the complexities involved. Even though the beneficiaries’ assessment may include a numeric score, without knowledge of the range, mean, and distribution of scores within the beneficiary population, the reasons for the score may remain opaque”.

²¹ See on this point B. L. Garrett, *Artificial Intelligence and Procedural Due Process*, in 7 *Journal of Constitutional Law* 933 (2025), 941.

²² See the Chapter on the United States in Part II, in particular the response to question no. 4.

²³ Office of Management and Budget, *Memorandum 'Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence'* (2024).

²⁴ “Agencies must ensure, to the extent consistent with applicable law and governmentwide guidance, including concerning protection of privacy and of sensitive law enforcement, national security, and other protected information, that the AI’s entry in the use case inventory provides accessible documentation in plain language of the system’s functionality to serve as public notice of the AI to its users and the general public. Where people interact with a service relying on the AI and are likely to be impacted by the AI, agencies must also provide reasonable and timely notice about the use of the AI and a means to directly access any public documentation about it in the use case inventory. Where agencies’ use cases are not included in their public inventories, they may still be required to report relevant information to OMB and must ensure adequate transparency in their use of AI, as appropriate and consistent with applicable law.”

communication to the recipient of the measure²⁵ –, the OMB Memorandum ‘Accelerating Use of AI’²⁶ does not seem to envisage anything similar. In particular, the new Memorandum merely requires agencies to inventory and report to the Office of Management and Budget cases of AI systems’ use²⁷, with no specific communication to the citizen to whom the automatically issued measure is addressed.

Moving to the right to be heard – to which, as mentioned above, the right to be informed is functional²⁸ – the latter must also be framed within the specificities of automated procedures. In particular, if this right appears to be, in general terms, a fundamental tool for ensuring procedural fairness, allowing the recipients of the measure to present their arguments, in the specific context of procedures in which AI technologies are used, the right to be heard also acts as a tool enabling citizens to contribute to the design and development of AI. However, in the aforementioned Memorandum ‘Accelerating Use of AI’, this possibility is only acknowledged for high-risk AI²⁹, thus underestimating the key role played – regardless of risk classification – by the design stage in ensuring the compatibility of AI tools with the principles of due process, in an attempt to prevent the creation of algorithmic black boxes that would otherwise deprive procedural safeguards of any practical

²⁵ More specifically, wherever feasible, agencies should provide notice to a user before the AI takes an action that significantly impacts them.

²⁶ Office of Management and Budget, *Memorandum ‘Accelerating Federal Use of AI through Innovation, Governance, and Public Trust’* (2025).

²⁷ *Ibid.*, 12: “Each agency (except for the Department of Defence and the Intelligence Community) must inventory its AI use cases at least annually, submit the inventory to OMB, and post a public version on the agency’s website. Agencies are encouraged to update the public versions of their inventories on an ongoing basis to reflect their current use of AI. OMB will issue detailed instructions to agencies regarding the inventory and its scope”.

²⁸ Furthermore, as stated in *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970), both the right to be informed and the right to be heard must be guaranteed ‘at a meaningful time’ and ‘in a meaningful manner’.

²⁹ Office of Management and Budget, *Memorandum ‘Accelerating Federal Use of AI through Innovation, Governance, and Public Trust’*, 17, which includes the possibility of sending *feedback* and comments among the practices aimed at minimising the risk of AI systems classified as high risk, such as those intended to have a significant impact on human health, strategic resources, privacy or access to social services. More specifically, the Memorandum states that: ‘Agencies must provide an option for end users and the public to submit feedback on the use case, where appropriate, in the design, development, and use of the AI and use such feedback to inform agency decision-making regarding the AI’.

usefulness³⁰. This is yet another significant change of pace from the provisions of the *'Advancing Government Innovation'* Memorandum, which, instead, provided in more pervasive terms for the duty of agencies to involve citizens – and more specifically the social groups most affected by new technologies – in the design and development of AI tools, as well as in the discussion of their use, and then to integrate the comments received into their AI strategy³¹.

Lastly, concluding with the right to be the recipient of a decision adopted by an impartial actor, the third pillar of the due process principle clashes – despite the widespread tendency to present AI tools as capable of leading to objective and neutral decisions – with the long-standing problem of so-called algorithmic bias, which is known to lead to significant distortions and consequent discrimination against certain social groups³².

References to this issue, which can be resolved or at least mitigated by taking specific precautions when training algorithmic systems, were present in several passages of Executive Order 14110³³. To date, they are

³⁰ As stated by B. L. Garrett, cit. at 21, 940: "Violating due process is a design choice, and a poor one at that, where AI can be designed to be interpretable and compatible with due process. Existing due process safeguards can protect us, but only if judges or lawmakers rigorously insist on validated, reliable, and interpretable AI to protect due process".

³¹ Office of Management and Budget, *Memorandum 'Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence'*, 22: "Consistent with applicable law and governmentwide guidance, agencies must consult affected communities, including underserved communities, and they must solicit public feedback, where appropriate, in the design, development, and use of the AI and use such feedback to inform agency decision-making regarding the AI. [...] Agencies are strongly encouraged to solicit feedback on an ongoing basis from affected communities in particular as well as from the public broadly, especially after significant modifications to the AI or the conditions or context in which it is used. In assessing this feedback, if an agency determines that the use of AI in a given context would cause more harm than good, the agency should not use the AI".

³² For a useful overview to understand the extent of the problem in areas such as predictive policing, see, for example, European Union Agency for Fundamental Rights, *Bias in algorithms – Artificial Intelligence and discrimination* (2022).

³³ The issue of algorithmic bias emerged in the very first section of this document, which, after highlighting the great potential of AI, emphasised that its irresponsible use 'could exacerbate societal harms such as fraud, discrimination, bias, and disinformation'. Consequently, mechanisms for monitoring AI systems in particularly sensitive sectors such as healthcare were introduced (see section 8, letter b, which, with the aim of ensuring safe and responsible use in healthcare, highlighted the need for 'incorporation of equity principles in AI-enabled technologies used in the health and human services sector, using disaggregated data on affected populations and representative population data sets when developing new models, monitoring

completely absent from Executive Order 14179, an element that, among other things, appears to align with the decision to eliminate any reference to the so-called DEI ideology (acronym for ‘Diversity, Equity and Inclusion’) within the AI regulation³⁴. Lacking any reference to the issue of bias – as also pointed out in the questionnaire on the US, which then links this issue to that of the so-called human in the loop³⁵ – the ‘Accelerating Federal Use of AI’ memorandum merely provides that, if possible, recipients of automated administrative decisions should have access to timely human review as well as to the possibility of appealing against decisions detrimental to them. This provision – as noted³⁶ – appears to follow a more flexible conception of due process than the *Advancing Government Innovation* memorandum adopted under the Biden presidency; the latter – in order to compensate for the lack of private enforcement mechanisms of the memoranda – placed a duty on agencies to concretely offer a procedure allowing individuals to appeal against unfavourable decisions made by AI and to submit them to a human review process.

3. Growing frictions between the federal and state levels

As anticipated at the outset and confirmed by the growing tensions with the principle of due process, the approach taken by the Trump administration to regulating AI appears to be based on substantial deregulation, thus placing it in open contrast with the policies adopted during the Biden administration. At the same time, however, the objective pursued by Executive Order 14179 to eliminate all forms of restrictive regulation of AI – given the willingness to consolidate US leadership in the sector by removing all potential obstacles to its full development – does not appear to have been fully achieved.

Indeed, following the adoption at the federal level – between 2021 and 2024 – of the more restrictive policies mentioned in the introductory section, there has been a significant increase in AI policies adopted at state level³⁷, and these now conflict with the diametrically opposed

algorithmic performance against discrimination and bias in existing models, and helping to identify and mitigate discrimination and bias in current systems’.

³⁴ Executive Order 14319, *Preventing Woke AI in the Federal Government*, 2025.

³⁵ See, once again, the Chapter on the United States in Part II, and in particular the response to question no. 4.

³⁶ *Ibid.*

³⁷ D. J. Mallinson, L. Azevedo, E. Best, P. Robles, cit. at 8, and in particular the graph on p. 104, which highlights how an initial interventionist approach by states in the field of

regulatory model followed by the Trump administration, thus impeding the latter's deregulation efforts. More specifically, while the provisions of Executive Order 14110 were revoked by Executive Order 14179, the same cannot be said of the numerous state laws on the subject adopted in recent years³⁸, with which Executive Order 14179 is forced to coexist in the absence of federal legislation that could trigger so-called pre-emption, discussed in more detail below³⁹.

To resolve this conflict between the federal and state levels – or rather, remove its root causes – the recent *American Artificial Intelligence Leadership and Uniformity Act* bill has suggested including a review of state laws conflicting with the federal policy in the so-called *National Artificial Intelligence Action Plan*, with the stated intention of identifying those that appear to be at odds with the prescribed deregulation⁴⁰. Even more significantly, the same bill includes a five-year moratorium on new state and local AI regulations, which echoes the ten-year moratorium proposed – and subsequently rejected by the Senate – in the *One Big Beautiful Bill Act*, passed in July 2025, confirming mistrust for regulations adopted at state level.

Given these frictions – which can also occur in other federal systems such as those in Germany, where State AI regulation is also considerable⁴¹ – there are essentially two paths facing the US government. On the one hand, it can tolerate fragmented regulation that conflicts with the federal-level strategy, perhaps indirectly pushing states to comply through measures such as funding cuts⁴². On the other hand, it can exercise so-called pre-emption and thus acquire dominance

AI had already taken place in 2020 – and therefore at the turn of Trump's first presidency – with the first laws on transparency and algorithmic discrimination.

³⁸ See the Chapter on the United States, and in particular the response to question no. 1. It is noteworthy that in 2024 alone, almost 700 laws were adopted to regulate issues such as algorithmic bias and the lack of transparency in automated processes (<https://www.dataguidance.com/opinion/usa-common-themes-2024-state-ai-legislation-and>).

³⁹ In fact, the obligation to suspend, review, or revoke actions taken in accordance with Executive Order 14110 applies only to federal agencies, not to states, which therefore retain a significant degree of autonomy.

⁴⁰ Section 5(a)

⁴¹ L. Liebig, L. Güttel, A. Jobin, C. Katzenbach, *Subnational AI policy: Shaping AI in a multi-level governance system*, in 39 *AI & Society* 1477 (2024).

⁴² For example, in a draft executive order made available in November 2025 by the Consumer News and Business Channel (CNBC), <https://fn.cnb.com/applications/cnbc.com/resources/editorialfiles/2025/11/20/EO.pdf>, reference is made to the impossibility for states that have adopted restrictive AI laws to access funds from the *Broadband Equity Access and Deployment* (BEAD) programme.

in the regulation of AI⁴³, adopting federal legislation that takes precedence over state laws, thus limiting or completely removing the power of the states to regulate matters already regulated at federal level⁴⁴.

At the time of writing, the Trump administration appears to be more willing to choose the second path, which, however, poses two sets of problems. Firstly, this solution could prove ineffective in practice, given the tendency of US courts, in accordance with the principle of dual federal and state sovereignty, to presume the absence of pre-emption⁴⁵, especially in areas traditionally within the states' competence and where AI is used transversally⁴⁶.

Furthermore, to effectively limit states' ability to regulate AI, comprehensive federal legislation would be required to justify the federal legislature's dominance in the sector and prevent regulatory gaps⁴⁷. In other words, an administration that bases its AI strategy on deregulation would then have to develop regulations for the sector⁴⁸, in

⁴³ In this regard, see C. Novelli, A. Gaur, L. Floridi, *Two Futures of AI Regulation under the Trump Administration*, available on SSRN. The issue of pre-emption was also extensively examined in the hearing referred to in the above-mentioned questionnaire on the US in Part II – more in particular in the answer to question no. 1 – which was held in September 2025 by the House Subcommittee on Courts, Intellectual Property, Artificial Intelligence and the Internet, entitled 'AI at a crossroads: a nationwide strategy or californication?'. During this hearing, pre-emption was repeatedly referred to as the only tool capable of ensuring clarity and predictability in public action, as well as preventing the fragmentation of US AI regulation, which could hinder innovation and impose significant costs on the sector.

⁴⁴ In fact, the mechanism of pre-emption, based on the so-called *Supremacy Clause* in Article 6, paragraph 2, of the US Constitution, ensures that in the event of a conflict between federal law and state law, the former replaces or prevails over the latter.

⁴⁵ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

⁴⁶ Consider, for example, education, security or health, where pre-emption will be more difficult to prove. On health, see, for example, E. McCuskey, *Body of Preemption: Health Law Traditions and the Presumption against Preemption*, in *Temple Law Review*, 2016, vol. 89, 96 ff. In more general terms, on the tendency not to consider pre-emption to exist, and on the rather stringent requirements imposed by US courts, see J. W. Rogers, *Federal Pre-Emption of State Railroad Tort Law: The Misuse of the Federal Railroad Safety Act to Insulate Railroads from Liability*, in *Missouri Law Review*, 1993, vol. 58, no. 2, 359 ff.

⁴⁷ In fact, as noted by C. Novelli, A. Gaur, L. Floridi, cit. at 43.: "Mere negation in the absence of any coherent federal policy may lead to a vacuum regarding who can assess the suitability of the models and may not pass judicial review. This will also lead to uncertainties for businesses".

⁴⁸ However, as also pointed out by C. Novelli, A. Gaur, L. Floridi, cit. at 43, the federal government could always decide to draw up – with the necessary precautions – a minimum set of rules, which could then be interpreted by the courts as exhaustive and therefore capable of replacing conflicting legislation drawn up at state level.

order to counteract – through pre-emption (which, at the time of writing, appears to be the path chosen by the Trump presidency)⁴⁹ – state regulations that oppose the *laissez-faire* policy promoted at the federal level.

At the same time, to overcome this paradox, the Trump administration could decide to act through what is known as negative pre-emption, which occurs when Congress's inaction is interpreted as a specific choice not to regulate a particular matter, leading the courts to consider pre-emption to exist even in the absence of federal legislation⁵⁰. However, this solution does not appear to be entirely feasible at present, given the extreme caution shown by US judges in identifying pre-emption cases, consistent with the principle of dual sovereignty mentioned above. Indeed, in the light of this underlying mistrust, in the absence of federal legislation it becomes even more difficult to demonstrate Congress's intention to limit the power of the states to regulate a particular matter, especially where, as noted above, the issues at stake traditionally fall within state competence, in which such an intention must be 'clear and manifest'⁵¹.

4. A new role for private actors

The need for a comprehensive federal legislation such that a measure to activate the pre-emption mechanism can pass judicial scrutiny, also allows us to better understand why (at first glance counterintuitively) the tech giants themselves, subject to the most restrictive state regulations⁵², are calling for federal regulatory intervention in the sector in which they operate. In fact, far from wishing for a stricter regulatory framework, these entities consider federal regulation a strategic tool for neutralising state regulatory expansion, thereby creating a more uniform and, given the orientation of the current presidency, potentially more advantageous environment.

⁴⁹ Pre-emption is also central to the draft executive order referred to above. More specifically, this draft refers to the commerce clause – referred to in Article 1, paragraph 8, of the US Constitution – which is often used to justify pre-emption in cases where state laws hinder free trade between federal states.

⁵⁰ *Norfolk & Western Ry. v. PUC of Ohio*, 727 F. Supp. 367 (S.D. Ohio 1990), *Missouri Pacific Railroad Company, et al., Plaintiffs-appellees, v. Railroad Commission of Texas, et al., Defendants-appellants*, 833 F.2d 570 (5th Cir. 1987).

⁵¹ *English v. General Elec. Co.*, 496 U.S. 72 (1990).

⁵² Consider the example of California, one of the states most active in establishing rules to regulate AI and, at the same time, home to most of the big tech companies.

The role of tech companies within the broader context has also changed to some extent between the Biden and Trump administrations. In fact, while the former attempted to include private actors in the regulation of the sector⁵³ – in view of the importance of co-regulation processes in areas such as AI⁵⁴, while also establishing pervasive forms of public control⁵⁵, the second unsurprisingly seems to consider the same actors as mere instruments for consolidating US leadership in the sector. As a result, they receive substantial funding and are exempt from overly restrictive regulations, the latter becoming more flexible.

This is how we should understand, for example, the Trump administration's support for the creation of Stargate, a joint venture between OpenAI, Oracle, and SoftBank, which is set to invest up to \$500 billion in AI infrastructure in the United States over the coming years, thereby reinforcing its global position. Beyond the considerable concerns this project may raise regarding compliance with antitrust regulations⁵⁶, it is noteworthy that public and private interests are increasingly converging – the same convergence previously drove deregulation in the

⁵³ As mentioned in the questionnaire on the US in Part II, and more specifically in the answer to question n. 5, the Biden administration had in fact involved more than 200 private companies – including Open AI, Meta, Apple, and Microsoft – in the *AI Safety Institute Consortium* so that they could collaborate with the *National Institute of Standards and Technology* (NIST), as well as state and local governments, to develop AI safety standards. As evidence of the radical change in perspective that came with the advent of the Trump presidency, it is interesting to note that the *AI Safety Institute Consortium* changed its name in 2025 to become the *Centre for AI Standards and Innovation*.

⁵⁴ More specifically, co-regulation allows, for example, a faster response to technological developments and the modelling of regulations on the actual possibilities of the regulated entities, although this may also give rise to significant risks of regulator capture and critical issues in terms of the democratic legitimacy of the entity that draws up the regulations. On this point, see, for example, R. W. De Bruin, *Co-regulation and AI-innovation: Principles for a Sustainable Framework Fostering Innovation and Acceptance of AI*, in M.I. Alinhas Ferreira (ed.), *Producing Artificial Intelligence Systems*, Berlin, Springer, 2024, M. Cantero Gamito, C. T. Marsden, *Artificial intelligence co-regulation? The role of standards in the EU AI Act*, 32 *International Journal of Law and Information Technology* (2024).

⁵⁵ Suffice it to consider, for example, the obligation imposed by Executive Order 14110 on developers of the most powerful AI systems to share the results of security tests carried out, as well as other relevant information, with the government before placing such systems on the market.

⁵⁶ On this point, see M. Singh, *Stargate or StarGatekeepers? Why this Joint Venture Deserves Scrutiny*, 41 *Berkeley Technology Law Journal* (2025), forthcoming, available on SSRN.

sector⁵⁷ – with the consequent likelihood that the US AI strategy will be progressively shaped by private actors⁵⁸.

5. Concluding remarks

The change in perspective on AI regulation promoted by the Trump presidency thus appears to have considerable repercussions not only for global geopolitical balances, but also for due process guarantees and relations between the federal government and the states. More specifically, in the latter field, the deregulation policy adopted at the federal level – together with the willingness to impose the same model at the state level – may lead to a new way of using instruments such as pre-emption: in fact, while in the past pre-emption was frequently used to establish a general framework, leaving it to the states to provide for stricter forms of regulation⁵⁹, the same mechanism is now being used to eliminate precisely those more robust safeguards put in place at the state level in the field of AI.

In any event, irrespective of the approach adopted to address the tensions between the federal government and the states, it seems clear from these frictions that there is no single US AI strategy. Rather, there exists a patchwork of heterogeneous regulatory regimes, which impedes full implementation of the deregulation that underpins the model proposed by the Trump administration.

⁵⁷ On the growing convergence of public and private interests, see R. Radu, *Steering the governance of artificial intelligence: national strategies in perspective*, 40 *Policy and Society* 178 (2021), 193. The author also points out that this convergence is not unique to the United States, but appears to be a trend common to many countries.

⁵⁸ In I. Wilkinson, *Trump, Stargate, Deepseek: A new, more unpredictable era for AI?* (2025), published on the website of the British think tank Chatham House, it is also observed that the US strategy appears to be significantly influenced by the Economic Blueprint developed by OpenAI. For an examination of the risks arising from the influence of tech companies on US AI policy, see also K. Wei *et al.*, *How Do AI Companies 'Fine-Tune' Policy? Examining Regulatory Capture in AI Governance*, in S. Das *et al.*, *Proceedings of the Seventh AAAI/ACM Conference on AI, Ethics, and Society* (2024).

⁵⁹ See, in this regard, what happened in environmental policy with the Clean Air Act, which allowed California to set a lower emissions limit than that set at the federal level. In this regard, see Environmental Protection Agency, *California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles*, Federal Register, 2009, vol. 74.

It is precisely these state laws, together with the multitude of soft law instruments adopted over the years⁶⁰ – many of which were largely revoked by Executive Order 14179 – that are currently curbing total deregulation of the sector. At the very least, they seem to indicate that an AI culture in which ethical considerations – largely absent from the Trump administration’s perspective⁶¹ – is beginning to take root in the United States. At this point, given the growing and widespread awareness of both the potential and, above all the critical risks posed by new technologies, it may be reasonable to question the effectiveness of a ‘clean slate’ such as that provided primarily by the aforementioned Executive Order⁶², whose regulatory impact – aside from the resistance posed by state regulations – will be tested in the coming months.

⁶⁰ See, for example, Department of Homeland Security, *Roles and Responsibility Framework for Artificial Intelligence in Critical Infrastructure* (2024), U.S. Department of Labour, *Artificial Intelligence and Worker Well-being: Principles And Best Practices for Developers and Employers* (2024).

⁶¹ It should be noted, however, that ethical considerations – especially in cases of self-regulation by companies that have been present in the US for years – have also been used as a tool for legitimisation through so-called ethics washing. See in this regard E. Bietti, *From ethics washing to ethics bashing: a view on tech ethics from within moral philosophy*, in M. Hildebrandt et al. (eds.), *FAT* '20: Proceedings of the 2020 Conference on Fairness, Accountability, and Transparency*, New York, Association for Computing Machinery, 2020, 210 ff.

⁶² This perspective is also shared by V. Lubello, *From Biden to Trump: Divergent and Convergent Policies in The Artificial Intelligence (AI) Summer*, in 69 DPCE Online 49 (2025).