

SYMPOSIUM CONTRIBUTION

Implementing Horizontal Regulation of Artificial Intelligence Through an Independent Federal Agency

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Abstract

*Artificial intelligence is developing faster than the federal government's ability to regulate it. The United States currently relies on existing federal agencies to address AI within their jurisdiction while encouraging private industry self-regulation. Although this approach allows agencies to use existing expertise and promotes innovation, it leaves important gaps when AI creates risks that cross industries or fall outside an agency's authority. This article argues that the United States should create an independent federal agency to provide horizontal regulation of AI while preserving the authority of existing agencies. The proposed agency would serve as a regulatory backstop, helping agencies that lack the resources or technical expertise to address AI and filling gaps where no agency has clear authority. Drawing from the European Union's Artificial Intelligence Act, this article proposes a flexible framework that includes risk-based oversight and disclosure requirements. The Article also considers the constitutional challenges facing independent agencies after *Trump v. Slaughter* and proposes bipartisan structural requirements that preserve political diversity without limiting presidential removal authority. A hybrid model would allow the United States to protect consumers and address emerging AI risks without abandoning innovation or existing regulatory structures.*

Keywords: Artificial intelligence; AI regulation; administrative law; federal agencies; independent agencies.

A Introduction

I The AI Problem

The legal field is conservative, as practitioners constantly look back to precedent to ensure stability and tradition; by contrast, the technology of our present-day world is fast moving, and it is not stopping for anyone, including the legal profession.¹

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1 Chang and Bondy, 'A Lawyer's Guide to Artificial Intelligence and Its Use in the Practice of Law', 37 *Utah B.J.* (2024) 16.

Artificial intelligence ('AI'), according to the National AI Advisory Committee, 'is one of the most powerful and transformative technologies of our time' and has the potential to 'address society's most pressing challenges'.² The legal community faces an unprecedented challenge in developing legal frameworks capable of addressing the societal risks posed by rapidly evolving AI technologies.³ At the same time, these frameworks must avoid unnecessary constraints on innovation in one of the most transformative technological developments in modern history.⁴

AI systems are designed to retain knowledge, interpret new information, and autonomously generate responses or plans through inference and learning processes.⁵ Collectively, these practices allow AI systems to meet, and in some cases surpass, human cognitive functions.⁶ As a result, the technology distinguishes itself from traditional software because it can process data, adapt based on that processing, and perform new tasks without additional programming.⁷

II *The Rise of Generative Artificial Intelligence*

The decisive technical step came in 2018, when OpenAI released the first Generative Pre-trained Transformer (GPT-1).⁸ GPT-1 was a research model rather than a consumer product, but it established the architecture on which later systems were built. It was the release of ChatGPT in November 2022 that first allowed the public to hold text-based conversations with such a system and to assign it tasks.⁹ This process is referred to as generative AI, which is designed to support human work by autonomously producing new content in response to user input.¹⁰ The generative process uses transformers, which process large amounts of data at once and then produces statistically probable outputs from the data provided.¹¹

Fast forward to 2025, OpenAI has released GPT-5, which represents a landmark advancement in AI capability compared to earlier iterations of the system.¹² The new model provides significant improvements in problem-solving with incredible accuracy that can exceed the capabilities of human experts in a given field.¹³ According to OpenAI testing, GPT-5 passed expert-level exams across several fields, including mathematics, software development, visual reasoning, and

2 Cicconi & Herring, 'Exploring Government Action on AI: State Attorneys General Define Priorities', Reuters Legal News (Nov. 9, 2023).

3 Zaidan and Ibrahim, 'AI Governance in a Complex and Rapidly Changing Regulatory Landscape: A Global Perspective', 11 *Humanities and Social Sciences Communications* (2024) 1121, available at <https://doi.org/10.1057/s41599-024-03560-x>.

4 Ibid.

5 Chang and Bondy, *supra* note 1.

6 Pearl, 'Governance in the Absence of Government', 130 *Dick. L. Rev.* (2025) 157, at 164.

7 Ibid.

8 Chang and Bondy, *supra* note 1, at 17.

9 Ibid.

10 Pearl, *supra* note 6, at 165.

11 Ibid.

12 Choi and Chang, 'ChatGPT-5 in Education: New Capabilities and Opportunities for Teaching and Learning' (Preprints.org, 2025), available at <https://doi.org/10.20944/preprints202508.0684.v1>.

13 Ibid.

healthcare-related tasks.¹⁴ This high level of performance reflects a breadth of knowledge that will have a major impact across virtually all industries and reshape many aspects of everyday life.

III Emerging Risks and Societal Impacts of AI

With this expanding use of AI in mind, regulation will be increasingly complex, as the technology presents several risks associated with this level of power and its variety of uses across sectors.¹⁵ AI provides an enormous amount of productivity benefits across nearly all fields, but the inherent risks accompanying these advancements are particularly important to keep in mind. These risks include algorithmic bias and discrimination, deepfakes, job displacement, privacy violations, and fraud.

AI systems are being integrated into critical decision-making processes, using trained data and predictions to help industries make decisions.¹⁶ The issue is that the algorithms behind the decision making have a history of exhibiting bias, which can result in discriminatory effects against specific races, genders, or other classes that have a history of discrimination.¹⁷ The unfortunate reality is that these systems are embedded with this data that will lead to unintended discrimination in its use for society that could potentially go unnoticed and intensify over time.¹⁸

Deepfakes are AI-generated images and videos uniquely designed to look real in order to manipulate the internet, pose a threat to elections, or exploit vulnerable populations.¹⁹ Historically, regulation and investigations regarding misinformation have required a significant amount of resources and specialized expertise to be effective.²⁰ In 2023 alone, NewsGuard reported identifying 1,271 AI-generated news websites that produced unreliable content in the absence of meaningful human oversight.²¹ With this potential threat, regulation is critical to ensure there is integrity and transparency in the information available to consumers.²²

As AI has advanced and achieved this expert-level of competency in numerous human tasks, there is serious potential for human labor to become redundant or obsolete in the future.²³ The reason for this concern is that sufficiently capable AI systems will replace human employees without creating new jobs for human workers.²⁴ As a result, unemployment could rise dramatically, necessitating

14 Ibid.

15 Frazier, 'Administrative X-Risk: Pinpointing the Flaws of an AI Regulatory Scheme Reliant on Administrative Action', 63 *Washburn L.J.* (2024) 181, at 182.

16 Arbel et al., 'Systemic Regulation of Artificial Intelligence', 56 *Ariz. St. L.J.* (2024) 545, at 557.

17 Ibid.

18 Ibid.

19 Lowe, 'The Deeply Complicated Issues Surrounding Deepfakes', 97 *N.Y. St. B.J.* (2025) 21, at 22.

20 Pearl, *supra* note 6, at 171.

21 Ibid., at 172.

22 Lowe, *supra* note 19, at 22.

23 Pearl, *supra* note 6, at 173.

24 Arbel et al., *supra* note 16, at 563.

extensive resources and federal oversight to ensure that affected individuals can have access to meaningful income and social benefits.²⁵

AI systems require vast amounts of data to be trained and make decisions.²⁶ There is currently little oversight on this data collection, and, as a result, the data being used often contains sensitive personal information from consumers.²⁷ This information is collected through various channels including smart phones, social media platforms, smart-home devices, and internet-based services.²⁸ Regulation is likely necessary to protect consumers' sensitive information from being collected and used without their consent.

Today, across nearly all industries, individuals are educated on the various types of fraudulent activities used to take advantage of consumers. The main issue is that as AI technology continues to improve, these fraudulent practices become increasingly harder for the average individual to detect.²⁹ Additionally, AI fraud has the potential to undermine the trust in non-physical interactions, leading to a significant decline in trust across social interactions. Accordingly, regulation will require substantially more resources in order to combat AI-enabled fraud than have historically been necessary for addressing traditional fraud.

While most of these dangers are not yet experienced to a significant extent, they will likely become more prevalent in the coming years. The speed at which AI technology is advancing is so rapid that it makes effective regulation particularly challenging.³⁰ By 2025, AI is now at the stage where it is no longer a passive tool but instead operates as autonomous agents completing tasks and assessing present conditions or limitations to make independent decisions, signaling deeper integration into society.³¹

IV Initial Response and Current U.S. Regulatory Scheme

In October 2022 the White House Office of Science and Technology Policy published the Blueprint for an AI Bill of Rights, a non-binding statement of principles directed at 'civil rights and democratic values' in the design and use of automated systems.³² Additionally, President Biden issued an executive order directing federal agencies like the Securities and Exchange Commission ("SEC") and the Consumer Financial Protection Bureau ("CFPB") to develop their own forms of AI regulation and plans of responsibility.³³ In 2024 the European Union adopted the EU Artificial Intelligence Act, the most comprehensive AI legislation enacted to date.³⁴ The Act

25 Ibid., at 565-566.

26 McGill, 'AI and the Rule of Law', 104 *Mich. B.J.* (2025) 12, at 13.

27 Ibid.

28 Arbel et al., *supra* note 16, at 561.

29 Ibid., at 560.

30 Connell and Hamlin-Black, 'Artificial Intelligence and Legal Education', 67 *R.I. B.J.* (2019) 5.

31 Kolpakov, 'Agents of Disruption: Legal Dilemmas and the Future of AI', 97 *N.Y. St. B.J.* (2025) 8, at 9.

32 Robinson and Rodenberger, 'From Robots to Rules: An Overview of AI and Its Current Legal and Regulatory Landscape', 85 *Ala. Law.* (2024) 172, at 175.

33 Ibid., at 175-176.

34 Novak, 'The Evolving Landscape of AI Regulation', 82 *Bench & B. Minn.* (2025) 18, at 20.

focuses on promoting trustworthy AI systems for consumers through a risk classification system that assigns compliance obligations for each class of AI systems.³⁵

The initiatives introduced by President Biden were rescinded following the election of President Donald Trump at the end of 2024.³⁶ Executive order 14179, titled “Removing Barriers to American Leadership in Artificial Intelligence,” emphasized federal deregulation as a means to promote innovation and make the U.S. one of the leading countries in AI development.³⁷ This marked a major shift for the scope of U.S. regulation, prioritizing market competitiveness over the protection of consumer rights and information transparency.³⁸ Accordingly, the U.S. approach now differs significantly from the European Union, which may create challenges for regulatory compliance in the global market moving forward.

V *Thesis and Roadmap*

As AI transforms markets, privacy, and public safety, the United States must decide whether to regulate AI through existing agencies and industry self-regulation or to establish a new independent body dedicated to AI governance. While both approaches have institutional and policy merits, this paper argues that only an independent AI agency can provide the centralized expertise, flexibility, and accountability necessary to manage the complex, cross-sector risks posed by emerging AI technologies. Through a comparative analysis of both models, this paper demonstrates that institutional design, particularly independence and specialization, is better equipped to handle the growing dangers of AI while maintaining effective domestic and international regulatory coordination.

First, this article will introduce readers to what independent federal agencies are and explain how their characteristics could be beneficial for AI regulation. Next, this article will examine the current U.S. regulatory scheme by analyzing existing agencies and industry self-regulation. Finally, the article will review several AI regulatory efforts undertaken by existing agencies and analyze how a federal independent agency could address regulatory gaps by drawing on the structural framework of the EU AI Act.

B Independent Federal Agencies

I *The History of Independent Federal Agencies*

Independent federal agencies are well established throughout United States history. Congress creates them to perform federal regulatory functions without the interference of partisan political control.³⁹ This separation is primarily maintained

35 Ibid.

36 Davtyan, 'The U.S. Approach to AI Regulation: Federal Laws, Policies, and Strategies Explained', 16 *Case W. Reserve J.L. Tech. & Internet* (2025) 223, at 257.

37 Ibid.

38 Ibid., at 258.

39 Gillette, 'Form over Function: How Collins v. Yellen Signals a Threat to the Independence of Multimember Financial Regulatory Agencies', 26 *N.C. Banking Inst.* (2022) 109.

through the rule that the Executive Branch may appoint the principal officers who lead the agency but may remove these appointed officers only for good cause.⁴⁰

As Osuch describes them, independent federal agencies generally possess four characteristics. First, they are designed to be independent, with few or no bureaucratic organizations above them, thereby insulating the agency from the pressures and broader policy goals of executive departments. Second, they are typically organized as boards or commissions, which further insulates the agency from presidential control by increasing the number of actors who must be influenced to change the agency's direction. Third, administrators generally serve fixed terms, limiting presidential control because they cannot be removed without cause. Finally, independent agencies may impose specific qualifications for administrators based on political party, occupation, or experience, which further constrains the President's ability to select appointees.⁴¹ These independent federal agencies are seen by some as a form of governance that promotes political neutrality while regulating highly technical and complex fields.⁴²

By separating these agencies from politics, the regulatory decisions are designed to be free of political influence.⁴³ However, over time U.S. presidents have tried to limit this independence by invoking the unitary executive theory under Article II of the Constitution.⁴⁴ In 1981, EO 12291 expanded the authority of the Office of Information and Regulatory Affairs ("OIRA"), a component of the Executive Office of the President, by requiring agencies to submit draft regulations for review before implementation.⁴⁵ Since then, each new president to enter office has either reduced or expanded OIRA oversight of independent federal agencies.⁴⁶

The landmark case advancing this unitary executive theory occurred in 2020 in *Seila Law v. Consumer Financial Protection Bureau*. The decision reversed longstanding judicial precedent and marked a significant step back for independent federal agencies.⁴⁷ The case examined the constitutionality of tenure protection for the Director of the Consumer Financial Protection Bureau ("CFPB").⁴⁸ The U.S. Supreme Court held the protection was unconstitutional, thereby increasing executive influence over independent agencies by eliminating protections for agency heads.⁴⁹

40 Ibid., at 110.

41 Osuch, 'Presidential Oversight of Independent Agency Rulemaking: A Literature Review', 100 *Notre Dame L. Rev. Reflection* (2025) 111, at 112-113.

42 Ibid., at 113.

43 Gillette, *supra* note 39, at 110.

44 Osuch, *supra* note 41, at 117.

45 Ibid., at 115.

46 Ibid., at 115-117.

47 Dvorak, 'The Unitary Executive on the Rise: Seila Law and the Future of Agency Independence', 78 *N.Y.U. Ann. Surv. Am. L.* (2023) 263, at 264.

48 Ibid.

49 Freeman, 'Removal for Cause: Seila Law and the Future of the CFPB and FHFA', 25 *N.C. Banking Inst.* (2021) 367, at 367-368.

The Court in *Seila Law* held that Congress may not confer for-cause removal protection on a single agency head who exercises substantial executive authority.⁵⁰

The rule from *Seila Law* was extended in 2021 in *Collins v. Yellen*, where the Court held that the narrower authority of the Federal Housing Finance Agency did not save its director's removal protection.⁵¹ These efforts to undermine independent federal agencies will likely continue following the election of Donald Trump at the end of 2024. President Trump has a record, dating back to his first term, of seeking to narrow agency independence and to gain greater control over federal rulemaking.⁵² While this could prove challenging for an independent agency dedicated to AI, the unitary executive theory currently dominates reform efforts, and the direction of travel is now considerably clearer than it was.

29 June 2026 marks a significant victory for President Trump's advancement of the unitary executive theory. In *Trump v. Slaughter*, the Supreme Court held that the President may remove without cause the head of an agency who exercises executive power.⁵³ Rebecca Slaughter was removed by President Trump after disagreements over the Federal Trade Commission ("FTC") administrative priorities and immediately challenged her removal under the framework established in *Humphreys Ex'r v. United States*.⁵⁴ *Humphreys* had recognized a limitation on presidential removal authority for members of multimember agencies, such as the FTC, that exercised "quasi-legislative" and "quasi-judicial" functions.⁵⁵

The Court's decision rests on the premise that the President alone holds the executive power of the United States and that permitting any other individual to exercise that power would violate the separation of powers.⁵⁶ In the Court's view, Congress's ability to insulate decision-making from presidential control through the creation of independent agencies cannot supersede the unitary executive theory.⁵⁷ Ultimately, the Court concluded that Congress may continue to delegate authority to administrative agencies, but individuals exercising executive power must remain accountable to the President and, ultimately, to the "American people."⁵⁸

With the Court's rejection of *Humphreys'* removal protections, the future of independent agencies will increasingly depend not on the tenure protections afforded to agency heads, but on the institutional design of those agencies. Moving forward, Congress should consider statutory safeguards that promote bipartisanship not only in agency leadership but also in the agencies' substantive decision-making processes. For example, Congress could require bipartisan participation in the adoption of major regulations or other significant agency

50 *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 US 197 (2020), at 238.

51 Dvorak, *supra* note 47, at 264.

52 Sartoretti, 'The Trump Administration and Its Strategy to Seize Control over Independent Agencies', 46 *DPCE Online* (2021), available at <https://doi.org/10.57660/dpceonline.2021.1291>.

53 146 S. Ct. 2283 (2026), 2310.

54 *Ibid.*, at 2292.

55 *Ibid.*

56 *Ibid.*, at 2310.

57 *Ibid.*, at 2316.

58 *Ibid.*, at 2316-2317.

actions. Such structural safeguards could preserve meaningful minority-party participation without restricting the unitary executive theory. As a result, Congress could continue to promote deliberative and bipartisan agency decision-making while remaining consistent with the constitutional principles articulated in *Slaughter*.

Lastly, in a companion case to *Slaughter*, the Supreme Court recognized an exception to removal without cause for Federal Reserve governors, requiring that governors receive notice of the grounds for removal and an opportunity to respond.⁵⁹ The Court emphasized the Federal Reserve's "long tradition" of independence from executive influence as a basis for providing procedural protections to its governors facing removal.⁶⁰ Moving forward, the scope of this historical-independence exception will likely be tested as the President continues to exercise the removal authority recognized in *Slaughter* against other agency heads. Future challenges may require the Court to determine whether other independent agencies possess sufficiently longstanding traditions of independence to warrant similar protections, potentially defining the boundaries of *Slaughter*'s broader rule.

II Advantages of Independent Agency Regulation

Independent agencies, despite historical pushback from the Executive Branch, have been consistently created by Congress and continue to be a viable option for regulation with relatively minimal partisan influence.⁶¹ A full analysis of independent agencies must look beyond formal independence to their regulatory benefits.⁶² These advantages include reduced presidential influence, nonpartisan decision-making, the capacity for broad authority, and the ability to provide centralized expertise and consistent regulatory standards.

The role of Congress is essential in ensuring independence from the Executive Branch for independent agencies.⁶³ Congress's authority to create independent agencies derives from its statutory power to vest decision-making authority in officers other than the President and to establish substantive standards through legislative delegations of authority.⁶⁴ Congress may further reinforce agency independence by imposing procedural safeguards that limit executive interference.⁶⁵ This separation from executive control is especially beneficial during periods of divided government.⁶⁶ In doing so, Congress ensures that presidential authority cannot override legislative intent through control of independent agencies.

The purpose of independent agencies is to remain insulated from the shifts in political majorities that accompany each presidential administration and ensure

59 *Trump v. Cook*, 146 S. Ct. 2234 (2026), 2256.

60 *Ibid.*

61 Verkuil, 'The Purposes and Limits of Independent Agencies', 1988 *Duke L.J.* (1988) 257, at 258.

62 *Ibid.*, at 259.

63 Osuch, *supra* note 41, at 131.

64 *Ibid.*

65 *Ibid.*

66 Barkow, 'Insulating Agencies: Avoiding Capture Through Institutional Design', 89 *Tex. L. Rev.* (2010) 15, at 25.

that regulatory policies are guided by expertise and empirical evidence rather than politics.⁶⁷ Independent agencies, at time of their creation, are typically assigned a defined mission to guide regulatory initiatives and promote transparency in governance.⁶⁸ Furthermore, these agencies are predominantly governed by boards rather than single officers, promoting deliberation and stability.⁶⁹ Together, these features help ensure consistent regulations based on expert judgment in the complex and technical field they oversee.⁷⁰ This type of consistent expertise is particularly critical for regulating a field as complex and rapidly evolving as AI.

Independent agencies have the potential to exercise broad authority within a designated field upon congressional creation. An example of this was the creation of the CFPB following the 2008 Financial Crisis, when it was granted the authority to create and manipulate consumer protection laws, including investigative and enforcement powers, without prior approval from the Department of Justice.⁷¹ With similarly broad authority in a field like AI, an independent agency could implement and enforce regulations across multiple industries, which will be increasingly critical as AI continues to expand into virtually all sectors of the U.S. economy.

After their creation, Congress expects agencies to develop expertise in the specific industries within their regulatory domain.⁷² Without such expertise, an agency risks failing to meet the standards and objectives intended by Congress.⁷³ Accordingly, the level of expertise an agency can show is a crucial factor in determining if the agency may be independent and effectively serve its congressional purpose.⁷⁴ The specialized expertise and information-gathering capacity of independent agencies is one of the primary justifications for granting broad discretion in policymaking.⁷⁵ AI is a technology of a complexity that few can assess without specialist assistance. For this reason, an AI agency would be particularly well suited to consolidate technical expertise and craft informed regulatory approaches that balance effective oversight with continued innovation in private industry.

III Disadvantages of Independent Agency Regulation

Now that the advantages of federal independent agencies have been reviewed, it is appropriate to examine the drawbacks associated with Congress creating a new federal agency. These disadvantages of federal independent agencies highlight concerns regarding hindered innovation, an argument emphasized by President Trump at the outset of his presidency in 2025. Innovation may be slowed due to

67 Ibid., at 20.

68 Kwoka, 'An Information Commission', 112 *Geo. L.J.* (2024) 841, at 880.

69 Verkuil, *supra* note 61, at 260.

70 Barkow, *supra* note 66, at 24.

71 Baird, 'The Future of the Consumer Financial Protection Bureau (CFPB)', 2020 *Advanced Real Estate Drafting* 19-II (State Bar of Tex. 2020).

72 Verkuil, *supra* note 61, at 262.

73 Ibid., at 263.

74 Ibid.

75 Kwoka, *supra* note 68.

the significant startup costs associated with establishing a new agency, as well as geopolitical costs that could impede the United States' ability to maintain global dominance in AI development.

Starting up a new federal agency will require crucial startup costs.⁷⁶ There would be substantial expenses associated with enabling the agency to reach an expert level, particularly because recruitment would be required to obtain technical experts from the private sector into public service.⁷⁷ Agencies generally have two options for funding: the Executive branch, through the Office of Management and Budget ("OMB"), or Congress.⁷⁸ Both routes carry partisan influence; an alternative is independent funding.⁷⁹ The leading AI firms generate substantial revenues from which a regulatory agency could be funded. As a result, an AI agency could impose operating or assessment fees on industry participants to fund regulatory activities and reduce reliance on political actors for funding.

Not only are there direct financial costs associated with the creation of an agency but there are also significant geopolitical costs. As the new agencies create regulations, innovation in the private sector will slow, which can put the U.S. behind in terms of industrial dominance relative to rivals like China.⁸⁰ This is of particular importance as AI has become a critical technology shaping geopolitical competition between the U.S. and China, with implications for military capabilities, economic growth, and political influence.⁸¹

While independent agencies are designed to be free from direct Executive Branch influence, there remains a degree of presidential oversight. Specifically, the President appoints the members of independent agencies subject to the advice and consent of the Senate.⁸² However, agency statutes put in place by Congress will require a political balance, meaning that no single political party may hold a majority of seats on multi-member agencies.⁸³ While this could be seen as control by the President over the heads of agencies, Congress could mitigate this concern by including statutory requirements ensuring bipartisan representation in the management of an independent AI agency.

IV Historical Case Studies of Independent Agency Creation

Independent federal agencies are created by Congress with a defined regulatory scope.⁸⁴ Throughout U.S. history, many of these federal agencies have been created in direct response to crises and major technological advances that significantly

76 Kurtz, 'Regulating into the Void: Existential Uncertainty from A.I. Necessitates a New Federal Research Agency', 2024 *B.C. Intell. Prop. & Tech. F.* (2024) 1, at 12.

77 *Ibid.*, at 13.

78 Barkow, *supra* note 66, at 43.

79 *Ibid.*, at 44.

80 Kurtz, *supra* note 76, at 14.

81 Budhiraja, 'AI Race Between China, USA and Europe' (7 September 2024) (unpublished manuscript), available at <https://doi.org/10.2139/ssrn.4949888>.

82 Breger and Edles, 'Established by Practice: The Theory and Operation of Independent Federal Agencies', 52 *Admin. L. Rev.* (2000) 1111, at 1139.

83 *Ibid.*

84 Kurtz, *supra* note 76, at 8.

impacted society.⁸⁵ Some examples of this are the creation of the Atomic Energy Commission (“AEC”), the Consumer Financial Protection Bureau (“CFPB”), Securities and Exchange Commission (“SEC”), and the Federal Aviation Administration (“FAA”).

The AEC was created in 1946 through the Atomic Energy Act, shortly after the use of atomic weapons in World War II, with the vision of promoting the peaceful use of atomic energy.⁸⁶ Congress believed that the act was necessary for cooperation between government and atomic energy, given that nuclear technology has potential for both significant benefits and grave harm.⁸⁷ Subsequently, the Energy Reorganization Act of 1974, established the Nuclear Regulatory Commission (“NRC”) assuming the functions of the AEC.⁸⁸ Ultimately, the NRC was created following the Three Mile Island nuclear accident as Congress determined that the AEC had failed to adequately regulate nuclear energy.⁸⁹

While AI is not in the same field as nuclear energy, it is important to highlight the shared characteristics that both technologies have immense benefits alongside significant risks requiring regulation. The creation of the AEC originally was to avoid the potential dangers of atomic energy while ensuring it can be used to help society. Similarly, the FAA was established under the Federal Aviation Act of 1958 as aviation technology became more advanced and impactful on society.⁹⁰ With the primary objective of ensuring safety and maintaining structure in the field of aviation, the FAA was tasked with regulating a potentially dangerous technology while enabling public benefits and technological progress.⁹¹ The same rationale applies to AI, where an independent agency could effectively regulate the technology to safeguard society while still allowing innovation and a positive impact on consumers.

However, regulation needs to be carried out effectively, otherwise major accidents may result from inadequate oversight like the Three Mile Island accident. Without a properly structured regulatory body in place, the governance of dangerous technologies can have lasting and widespread negative impacts on society. For example, the 2008 Financial Crisis led to the creation of the CFPB to prevent consumer harm in the financial industry ensuring the financial well-being of consumers.⁹² Ultimately, unprecedented technological advances require

85 Ibid., at 7.

86 Maleson, ‘The Historical Roots of the Legal System’s Response to Nuclear Power’, 55 *S. Cal. L. Rev.* (1982) 597, at 599.

87 Ibid., at 600.

88 6 *Ohio Jur. 3d* Atomic Energy and Ionizing Radiation, § 2.

89 Breger and Edles, *supra* note 82, at 1213.

90 Boula, ‘Taking Flight or Landing: Implied Field Preemption under the Federal Aviation Act of 1958 and *Wyeth v. Levine*’, 24 *DCBABR* (2012) 34, at 35.

91 Ibid.

92 Cuasmasma, ‘Commissioning the Consumer Financial Protection Bureau’, 31 *Loy. Consumer L. Rev.* (2019) 426, at 428.

proactive regulation, and such regulation must be properly instilled with experts and sound public policy to minimize future societal harm.

Machine learning has been in use since the early 2000s on platforms such as Facebook and Google, but those applications marked only the beginning of its development.⁹³ With the advancement of generative AI, the technology is being deployed across all industries, as it can produce insightful content in response to human prompts.⁹⁴ ChatGPT reached an estimated 100 million monthly users within two months of its release in November 2022, an unprecedented rate of consumer adoption that traditional regulatory responses are ill-equipped to match.⁹⁵ While society is reaping substantial benefits, there remains a real possibility of a crisis-level event arising from the widespread use of AI.

With this in mind, an independent federal agency could be the most effective legislative solution for AI regulation. Equipped with experts, institutional insulation from political influence, and broad regulatory authority, an AI agency would be uniquely positioned to handle AI technology. By establishing an AI agency proactively, there is a reduced likelihood of a crisis-level AI event, as a dedicated regulatory body would be in place to address emerging issues rather than being formed reactively after widespread harm has occurred. Accordingly, this approach could serve as a solution to the present risks of the current U.S. regulatory scheme, which relies on fragmented oversight by existing agencies and industry self-regulation.

C Existing Agency and Industry Self-Regulation is Insufficient

I *The 2025 AI Regulatory Strategy*

The current U.S. regulatory approach to AI is to let existing agencies address issues that fall within their respective statutory authorities, while industry self-regulation fills gaps of AI-related activities. During President Trump's first term in office, one of his stated objectives was to narrow the gap between the Executive Branch and federal independent agencies.⁹⁶ President Trump pursued the same objective at the outset of his second term in 2025. Specifically, the first day in office consisted of significant actions removing or requesting a resignation from officials across federal agencies including the Privacy and Civil Liberties Oversight Board and the Equal Employment Opportunity Commission, both of which have no removal protections.⁹⁷ While these are not traditional independent agencies, these actions nevertheless reflect the administration's broader effort to assert greater executive control over the administrative state, including independent agencies.⁹⁸

93 Trautman and Foster II, 'Sam Altman, OpenAI, and the Importance of Corporate Governance', 16 *Case W. Reserve J.L. Tech. & Internet* (2024) 133, at 139-140.

94 Jabotinsky and Sarel, 'Co-Authoring with an AI? Ethical Dilemmas and Artificial Intelligence', 56 *Ariz. St. L.J.* (2024) 187, at 189.

95 *Ibid.*, at 190.

96 Shah, 'Executive (Agency) Administration', 72 *Stan. L. Rev.* (2020) 641, at 644.

97 Jones et al., 'Testing the Independence Hypothesis', 77 *Admin. L. Rev.* (2025) 575, at 576-577.

98 *Ibid.*

This objective can be seen in the federal government's current plan for AI regulation. In January 2025, President Trump issued an EO titled "Removing Barriers to American Leadership in Artificial Intelligence," the purpose of which was to remove any policies or orders that would act as a barrier to innovation for American companies.⁹⁹ Additionally, the Assistant to the President for Science and Technology, the Assistant to the President for National Security Affairs, and the Special Advisor for AI and Crypto were tasked with ensuring that no further actions are made to hinder innovation in AI.¹⁰⁰ The primary rationale for this strategy of AI regulation is to promote American leadership in AI while addressing safety concerns through the limited and fragmented regulatory authority of existing agencies.

This executive order has been in place for nearly a year, revealing both advantages and weaknesses. First, leveraging existing agencies for AI regulation has merit because they possess subject-matter expertise in their field; however, there are potential issues for agencies with low resources and industries historically subject to minimal oversight. Second, promoting industry innovation is important for geopolitical reasons, but without adequate oversight, certain industries may increase efficiency at the expense of consumer protection.

II Analyzing Existing Agency Regulation of AI

Existing agencies should be involved in the regulation of AI by the federal government. These agencies contain some of the most qualified individuals to protect consumers, but an issue arises when regulation is so broad that it requires coordination among several different agencies. AI technology will become so advanced that virtually all industries will be forced to use it or risk a significant loss in business efficiency. Consequently, existing agencies will likely be overwhelmed and struggle to regulate effectively as AI continues to expand across all industries.

Existing agencies are well positioned to address major technological advances in their field of regulation, including AI.¹⁰¹ Agencies have adapted successfully to technological change before: the FTC and the SEC both did so when the internet became a prevalent medium for trading.¹⁰² Agencies have already implemented regulatory strategies related to AI. Specifically, the FTC, the Department of Health and Human Services and the U.S. Copyright Office have adopted rules targeting AI related issues that fall under their domain of regulation.¹⁰³ Nevertheless, as AI advances technologically, it will be more difficult for existing agencies to keep pace without the proper resources and structural support.

Without the proper technical expertise, overseeing their domains will be challenged by the progressive adoption of AI among industries.¹⁰⁴ Existing agencies

99 Hail & Huffman, 'Regulatory and Legislative Action Addressing AI Usage in Financial Services', in 2025 *Advanced Consumer & Commercial Law* 4-III (State Bar of Tex. 2025).

100 Ibid.

101 Kurtz, *supra* note 76, at 9.

102 Ibid., at 10.

103 Ibid.

104 Rookard, 'The Common Threats of Artificial Intelligence and Privatization', 12 *Tex. A&M L. Rev.* (2025) 831, at 886.

will likely struggle to recruit the necessary AI expertise under the current regulatory strategy, which prioritizes private domain innovation.¹⁰⁵ With the money being invested by private industries, the public domain will struggle to compete in hiring those AI experts.¹⁰⁶ As a result, public agencies will struggle to handle oversight of AI use among industry participants as well as the main innovators in the AI industry.¹⁰⁷

In 2021, the National Security Commission on Artificial Intelligence argued that in 2025 the federal government would not be properly equipped to handle the increased capabilities of AI technology.¹⁰⁸ This argument centered around two main ideas: it is hard to get AI talent in federal government and that talent is necessary to install the proper AI testing standards and procedures.¹⁰⁹ For example, the FAA is going to need expertise to understand how AI is going to be used in their domain and analyze the best way to regulate it, but the agency has previously outsourced similar responsibilities for want of expertise and resources.¹¹⁰ While outsourcing to private parties is generally acceptable for agencies, it presents potential drawbacks, and the creation of an independent AI agency could offer a solution by reducing reliance on external outsourcing.

II Analyzing Industry Self-Regulation of AI

With a significant reduction in AI regulation by the federal government, private AI industry participants have initiated self-regulation to foster responsible AI development and promote transparency to the public.¹¹¹ Self-regulation allows companies to innovate and release products based on market-driven incentives including competitive pressures, reputation concerns related to consumer trust, and strategic efforts to avoid stringent government oversight.¹¹² This is not necessarily bad for regulation for a few reasons. First, these companies are often better positioned to address any unique AI challenges that would normally be difficult for federal agencies.¹¹³ Industry self-regulation can promote consumer trust by emphasizing transparency and accountability, and these private initiatives may serve as a structural blueprint for future government regulation.¹¹⁴ However, private industries may fail to maintain this accountability as AI continues to grow.

105 Kurtz, *supra* note 76, at 12.

106 *Ibid.*

107 Rookard, *supra* note 104, at 886.

108 Corrigan et al., *Governing AI with Existing Authorities* (Center for Security and Emerging Technology, 23 July 2024), available at <https://cset.georgetown.edu/publication/governing-ai-with-existing-authorities/>.

109 *Ibid.*

110 *Ibid.*

111 Kelley, 'All the Regulatory Light We Cannot See: The Impact of Loper Bright on Regulating Artificial Intelligence in the Workplace', 49 *Seton Hall J. Legis. & Pub. Pol'y* (2025) 708, at 719.

112 Cajueiro and Celestino, 'A Comprehensive Review of Artificial Intelligence Regulation: Weighing Ethical Principles and Innovation', 4 *J. Econ. & Tech.* (2026) 77, at 87.

113 Kelley, *supra* note 111, at 719.

114 *Ibid.*, at 719-720.

Self-regulation poses significant risks because it leaves substantial discretion in the hands of private parties, thereby increasing the likelihood that AI systems will be misused by innovators and users.¹¹⁵ The central issue driving this risk is that AI innovators will likely face a dilemma of responsibility of use versus maximizing profit.¹¹⁶ Developers may therefore prioritize profit over the safety measures needed to ensure the AI systems do not pose a significant risk to consumers.¹¹⁷ This concern is particularly acute for AI regulation because as the systems continue to grow in capabilities, they will be adopted across virtually all industries, intensifying the conflict of interest between public safety and economic incentives.

Overall, the current regulatory scheme that relies on existing agencies and promotes private industry self-regulation provides certain benefits. The problem, however, is that there remains a need for a regulatory body capable of supporting existing agencies that lack the necessary resources to oversee AI regulation while also holding private AI innovators accountable. Ultimately, this gap in the current U.S. AI regulatory strategy needs to be filled with a qualified body of individuals with the proper expertise and jurisdiction to assist all parties tasked with the AI regulatory challenge.

D The EU AI Act as a Foundation for Horizontal AI Regulation

I Review of Current AI Regulatory Efforts in the United States

AI systems are increasingly capable and growing in use across businesses in the United States. As a result, federal agencies are tasked with adapting to the new complicated technology that is being utilized within their jurisdictions. So far, it appears that some federal agencies in place are effectively regulating by leveraging their existing expertise and resources.¹¹⁸ At the same time, newly created advisory committees within the Executive Branch are trying to establish themselves within the AI regulatory system.¹¹⁹ Nevertheless, there still remain gaps in AI regulatory efforts within specific areas of AI use or potential harm.

1 Effective Sectoral Regulation: The FTC and SEC

Section 5 of the FTC Act authorizes the regulation of companies engaging in “unfair or deceptive” business practices, a broad mandate that reaches a wide range of business practices, including the misuse of AI against consumers.¹²⁰ The FTC has

115 'Chapter Three: Co-Governance and the Future of AI Regulation', 138 *Harv. L. Rev.* (2025) 1609, at 1613.

116 Cajueiro and Celestino, *supra* note 112, at 87.

117 Bryan and Teodoridis, 'Balancing Market Innovation Incentives and Regulation in AI: Challenges and Opportunities' (Brookings Institution, 24 September 2024), available at <https://www.brookings.edu/articles/balancing-market-innovation-incentives-and-regulation-in-ai-challenges-and-opportunities/>.

118 Spiro, 'The FTC and AI Governance: A Regulatory Proposal', 10 *Seattle J. Tech., Envtl. & Innovation L.* (2020) 26, at 49.

119 Vogel, 'Michael Chetoff, Jim Wiley & Rebecca Kahn, Is Your Use of AI Violating the Law? An Overview of the Current Legal Landscape', 26 *N.Y.U. J. Legis. & Pub. Pol'y* (2023) 1029, at 1105.

120 Spiro, *supra* note 118, at 51.

accordingly responded to technological change by acting to protect consumers who have been harmed.¹²¹ This approach aligns with the current AI regulation scheme promoting industry innovation while punishing industry participants only once consumer harm is identified.¹²²

In 2024, the FTC responded to the increased use of AI by creating a task force known as Operation AI Comply.¹²³ This initiative expanded the FTC's oversight of AI by targeting companies that mislead consumers through exaggerated claims on the capabilities of AI-powered products or services.¹²⁴ As part of this effort, the FTC brought five suits against companies, including DoNotPay, which advertised that its AI chatbot could replace human lawyers.¹²⁵ Overall, the FTC is well equipped to handle AI in their regulatory scope as the technology did not dramatically change enforcement policies for the agency.

Another federal agency that has effectively adapted to the emergence of AI technology within its regulatory domain is the SEC.¹²⁶ One major area of focus for the SEC is "AI washing," which occurs when companies overstate their use of AI in order to attract investors.¹²⁷ This involves fraudulent misrepresentation in relation to securities and allows the SEC to enforce securities regulations against these businesses.¹²⁸ However, while the SEC has imposed sanctions against companies for AI washing, other forms of misconduct arising from deliberate design or misaligned systems are going unaddressed, highlighting the need for regulatory adaptation as businesses increasingly rely on AI technologies.¹²⁹

2 Advisory Bodies and Their Structural Limits

The White House has two advisory committees, the National Artificial Intelligence Initiative Office ("NAIIO") and National AI Advisory Committee ("NAIAC"), which are both used to assist in implementing AI policy.¹³⁰ Neither has binding authority; both are advisory to the White House.¹³¹ As a result, these entities do not provide direct enforcement of AI regulation and instead serve to inform and support the formulation of AI policies within the Executive Branch.¹³²

121 Ibid., at 49.

122 Ibid.

123 Armato, 'False Advertising: The Application and Influence of the Federal Trade Commission Act', 67 *NO. 4 DRI For Def.* (2025) 2, at 5.

124 Ibid.

125 Hail and Huffman, 'Litigation Involving AI in the Consumer Financial Services Industry', in *Advanced Consumer & Commercial Law* (2025) 4-IV.

126 Donohue and Abramenko, 'AI washing: The SEC is Focused on Your AI Disclosures', 40 *No. 08 Westlaw Journal Corporate Officers & Directors Liability* (2024) 01.

127 Ibid.

128 Gonzalez, 'A New Blue Sky: SEC Consideration in the Regulation of Autonomous AI Misconduct', 10 *ALR Accord* (2025) 33, at 50.

129 Ibid., at 52.

130 Vogel, *supra* note 119, at 1105.

131 Center for AI and Digital Policy, 'National AI Advisory Committee', available at <https://www.caidp.org/resources/naiac/> (last visited 18 December 2025).

132 Ibid.

The NAIIO provides a technical understanding of AI for administration of public AI initiatives.¹³³ While created within the White House, the office serves as a point of contact for all federal AI activities, with an emphasis on industry and protecting the public.¹³⁴ The NAIAC is a group of AI experts appointed by the President who advise and provide recommendations for a broad range of AI policy issues for the White House.¹³⁵ The group is composed of representatives from private industry, academic institutions, nonprofit and civil society organizations, as well as federal research laboratories.¹³⁶ This composition creates a diverse group of individuals when it comes to the use and dangers of AI as they are appointed.

The unfortunate reality of both the NAIIO and NAIAC is that they are situated within the White House, meaning they are limited to making recommendations to the President.¹³⁷ Accordingly, neither the NAIIO nor the NAIAC function as a regulatory body; instead, they serve as advisors to the President about initiatives and policies in AI. Having a well-informed Executive Branch on AI is important for AI regulation, but these groups will likely be an extension of the Executive Branch partisan beliefs. By contrast, an independent AI agency would be insulated from the partisan decision-making in AI governance. This insulation would allow the agency to focus solely on what is the best policy rather than the preferences of any particular political party.

3 *Regulatory Gaps in Environment, Healthcare, and Labor*

While there are well-sourced agencies in place to handle the AI boom within their jurisdiction, others lack the resources to effectively regulate AI. As a result, there are gaps in AI regulation that have reduced oversight in AI activities. Accordingly, the federal government must establish clear guidelines for existing federal agencies going forward. An independent federal agency for AI would be able to solve this issue by helping coordinate AI regulatory efforts among existing agencies and providing guidance or assistance in the efforts.

First, there are regulatory issues related to the potentially dramatic impacts that AI will likely have on labor in the United States.¹³⁸ Issues such as job displacement, wage suppression, employee surveillance, and workplace discrimination are among the challenges that are expected to arise in the labor market as a result of AI.¹³⁹ While there is currently no federal legislation in place for workplace AI, the Department of Labor (“DOL”) and Equal Employment Opportunity Commission (“EEOC”) have both made some steps in AI regulation by releasing

133 Vogel, *supra* note 119, at 1105.

134 Baker et al., ‘Advancing America’s Dominance in AI: The 2021 National Defense Authorization Act’s AI Developments’, 4 *J. Robotics, Artificial Intelligence & L.* (2021) 251, at 252.

135 Vogel, *supra* note 119, at 1105.

136 Baker et al., *supra* note 134, at 252.

137 Center for AI and Digital Policy, *supra* note 131.

138 Connor, ‘A New Cog in the Machine: The future of Labor Rights in a World with Generative Artificial Intelligence’, 48 *Suffolk Transnat’l L. Rev.* (2025) 261, at 275.

139 *Ibid.*, at 276-282.

statements on proper practices with AI in the workplace.¹⁴⁰ Although this guidance is important for ensuring public safety, questions remain as to whether the DOL and EEOC can handle dramatic changes AI may bring to the workplace in the future.

Another area of regulation with no clear regulatory body concerns the environmental impact of AI. As AI continues to grow in use, more resources will be needed to power the systems, meaning the data centers that power them will need more energy and water in order for the AI to function and improve.¹⁴¹ At this time, the only apparent solution is congressional legislation restricting such activity in order to prevent water shortages.¹⁴² If a federal agency were established with an understanding of AI and its environmental impact, it could exercise the authority necessary to hold AI innovators accountable. This oversight would be particularly important given the current lack of transparency surrounding industry-reported environmental impacts.¹⁴³

Lastly, there is a need for increased regulation related to AI use in the health care industry.¹⁴⁴ The increased use of AI is essential to help those in the health care industry, but there are risks associated including the use of biased data in AI systems and improper health data collection practices.¹⁴⁵ The Food and Drug Administration is involved in regulation of the health care industry, but its traditional regulation is not adaptive to the AI advancements.¹⁴⁶ An independent AI agency could provide the necessary expertise to respond to the AI advancements and develop updated regulatory approaches for the health care industry.

II The Need for Horizontal Regulation

While some federal agencies are transitioning well to the technological advancements coming from AI others are struggling to keep up with the rapid changes that come with the technology.¹⁴⁷ This structural issue in AI regulation can be addressed with horizontal regulation, which involves creating a regulatory body that has authority across sectors rather than specific industries.¹⁴⁸ One potential solution is that the federal government is to establish an independent agency that provides an expertise in AI to help assist other agencies in regulation along with having its own regulatory authority to fill gaps in the current framework.

The creation of an independent AI agency will require clear statutory authority that enables it to assist several regulatory bodies with their respective jurisdiction

140 Crow and Blanco, 'Is AI the New Decision Maker in the Workplace?', 109 *The Advoc. (Texas)* (2024) 34, at 35.

141 Garcia, 'AI Uses How Much Water? Navigating Regulation of AI Data Centers' Water Footprint Post-Watershed Loper Bright Decision', 57 *Tex. Tech L. Rev.* (2025) 517, at 520.

142 Ibid.

143 Ibid., at 524.

144 Maurer, 'Managing the Medical Matrix: A "DAIS" for Artificial Intelligence in Health Care (and Beyond)', 13 *Case W. Reserve J.L. Tech. & Internet* (2021) 107, at 118.

145 Ibid., at 118-119.

146 Ibid., at 131.

147 Kelley, *supra* note 111, at 709.

148 Finocchiaro, 'The Regulation of Artificial Intelligence', 39 *AI & Soc.* (2024) 1961, at 1964 (discussing conceptual and geopolitical approaches to AI regulation).

while acting as a catch all for AI regulation that does not fall within a specific agency's jurisdiction. Right now, a comprehensive model that can be used as a foundation for a horizontal regulatory scheme is the EU AI Act. Accordingly, the independent agency that is created should be structured with regulatory authority closely aligned to EU AI Act.

C Review and Takeaways from the EU AI Act

1 What Is the EU AI Act?

On 13 March 2024 the European Parliament adopted the EU Artificial Intelligence Act, which was formally adopted by the Council on 21 May 2024, published on 12 July 2024 and entered into force on 1 August 2024. The Act establishes a risk-based regulatory framework designed to protect human rights and promote market competitive innovation in AI technology.¹⁴⁹ A risk-based approach means that the Act prioritizes regulating the risks posed to humans by developers, deployers, and users of AI rather than the technology itself.¹⁵⁰ The framework is designed to address a wide range of risks associated with AI, including disinformation, labor displacement, and threats to national security.¹⁵¹ By articulating these risks broadly, the Act captures a wide spectrum of dangerous AI applications including cybercrime, fraud, and other forms of serious misuse.¹⁵² Rather than imposing a rigid regulatory scheme, the Act is designed to function as an adaptable framework capable of evolving alongside AI technology as it rapidly advances in capability and societal deployment.¹⁵³

2 Key Critiques of the EU AI Act

The Act has been criticized by some scholars for not being a long term solution for AI regulation, but the Act should be looked at as a first attempt at comprehensive horizontal legislation.¹⁵⁴ The Act provides a good starting point to create a foundation for AI regulation going forward. To properly analyze, it is important to first identify the Act's shortcomings before reviewing the lessons and structural takeaways for the United States.

First, there are critiques arguing that the Act's risk-based approach has misclassified the risks associated with certain types of AI systems.¹⁵⁵ The Act uses

149 Regulation (EU) 2024/1689, art. 6, 2024 O.J. (L 1689) 1; Keane et al., 'AI and the European Union Artificial Intelligence Act: An Overview', 35 *Midwest L.J.* (2025) 1.

150 Keane et al., *supra* note 149, at 11.

151 *Ibid.*

152 *Ibid.*

153 *Ibid.*, at 26.

154 Boine and Rolnik, 'Why the AI Act Fails to Understand Generative AI', 26 *Minn. J. L. Sci. & Tech.* 61, 63–64 (2025); Sandra Wachter, Limitations and Loopholes in the EU AI Act and AI Liability Directives: What This Means for the European Union, the United States, and Beyond', 26 *Yale J. L. & Tech.* (2024) 671, at 677.

155 Boine and Rolnik, 'Why the AI Act Fails to Understand Generative AI', 26 *Minn. J. L. Sci. & Tech.* (2025) 61, at 63–64.

an AI system's intended purpose to determine whether the system qualifies as high-risk for regulatory purposes.¹⁵⁶ As a result, the product safety requirements for the AI systems can be manipulated when AI providers limit their product purpose in marketing or documentation when advertising.¹⁵⁷

Second, there is a lack of comprehensive requirements for AI developers.¹⁵⁸ A central challenge in imposing liability on AI developers is that many harms are not readily observable; as a result, they cannot be inferred from a model's classification, marketing materials, or public disclosures.¹⁵⁹ Therefore, future regulatory efforts should clearly define disclosure requirements obligating developers to publish information to reveal potential harms, affected parties, and any relevant testing history.¹⁶⁰ Lastly, there are potential gaps in regulation by using the risk-based approach.¹⁶¹ Because prohibited actions under the Act are tied to the intended purpose rule, gaps in developer liability may arise where harmful uses fall outside the predefined categories.¹⁶² A more flexible method in risk level designation would help minimize these issues and strengthen accountability.

3 Takeaways from the EU AI Act for a U.S. Agency

This article does not recommend that the U.S. strictly adopt the Act, as there are identified shortcomings that the U.S. should seek to avoid. The Act still provides a functional legislation to regulate AI, and certain components merit adoption in the United States' own regulatory efforts.¹⁶³ Accordingly, there are three potential takeaways from the Act that warrant emphasis.

First, the main takeaway for the U.S. is the need for horizontal regulation of AI; without it, significant areas of AI use will go unregulated.¹⁶⁴ As discussed earlier, AI has wide-ranging applications, and the structure of the Act allows for broad application to AI systems deployed in both the public and private sectors.¹⁶⁵ By adopting a horizontal regulatory strategy for AI, the U.S. could be better positioned to protect consumers in areas of AI use that fall outside the jurisdiction of existing agencies.

Second, because transparency among AI innovators is one of the central goals in the U.S. regulatory strategy, the U.S. should consider adopting portions of the Act that impose detailed disclosure requirements. The Act provides transparency

156 *Ibid.*, at 87.

157 *Ibid.*, at 86-88.

158 Wachter, 'Limitations and Loopholes in the EU AI Act and AI Liability Directives: What This Means for the European Union, the United States, and Beyond', 26 *Yale J. L. & Tech.* (2024) 671, at 677.

159 *Ibid.*, at 714.

160 *Ibid.*, at 715.

161 Leufer et al., 'The Pitfalls of the European Union's Risk-Based Approach to Digital Rulemaking', 71 *UCLA L. Rev. Discourse* (2024) 156, at 160.

162 *Ibid.*, at 168.

163 Chapman, 'The Ideal Approach to Artificial Intelligence Legislation: A Combination of the United States and European Union', 78 *U. Miami L. Rev.* (2023) 265, at 294-295.

164 Hillman, 'Smart Regulation: Lessons from the Artificial Intelligence Act', 37 *Emory Int'l L. Rev.* (2023) 775, at 823.

165 Chang, 'The First Global AI Treaty: Analyzing the Framework Convention on Artificial Intelligence and the EU AI Act', 2024 *U. Ill. L. Rev. Online* (2024) 86, at 92.

requirements and documentation obligations for both developers and users of AI systems.¹⁶⁶ If adopted in the U.S., such requirements would require disclosure by AI innovators and deployers in the private sector. This approach could enhance regulation without significantly hindering innovation in the U.S. economy, while still mandating transparency and building consumer trust.

Third, the U.S. could recognize that, despite concerns regarding the Act's risk-based tiers for types of AI systems, the framework can still be used to address high-risk AI applications. By drawing from the regulations in place for high-risk AI systems, the U.S. would have a strong initial framework for regulating AI use in industries with vulnerable individuals.¹⁶⁷ Lastly, this approach would be especially beneficial for industries with traditionally heightened regulatory oversight, such as healthcare, labor, and financial services.¹⁶⁸

IV A Hybrid Regulatory Model: An Independent AI Agency

1 Structure and Authority of a Hybrid AI Regulatory System

The current U.S. AI regulatory system relies on existing agencies to adapt to the AI advances in their jurisdiction while encouraging industry self-regulation to promote innovation in AI from U.S. based companies. Existing agencies, like the FTC and SEC, are successfully adapting to the AI developments in their field, but gaps remain in AI regulation, such as the environmental, healthcare, and labor sectors. Although expert committees advise the U.S. government on AI policy, they function solely as advisors within the Executive branch. As the capabilities of AI continue to grow rapidly, deployment will grow with them. Therefore, horizontal regulation is necessary to help address current and future AI issues.

The EU AI Act demonstrates that horizontal regulation across all industries developing and deploying AI systems is feasible. Accordingly, the United States should adopt a hybrid model in which sector-specific regulators retain their jurisdictions while an independent AI agency provides cross-sector standards and exercises backstop authority.

For this recommendation, "hybrid" means that the independent AI agency would not replace the current U.S. regulatory strategy but would instead complement it. Existing agencies would continue to regulate AI within their respective sectors, and the independent agency could help enforce their regulations. Agencies that lack the proper expertise and resources to regulate AI could seek assistance from the independent agency. In doing so, this will prevent private outsourcing for regulatory issues for existing agencies and keep oversight within

166 Novak, *supra* note 34, at 20.

167 Joseph, 'Should the United States Adopt Federal Artificial Intelligence Regulation Similar to the European Union', 20 *Loy. U. Chi. Int'l L. Rev.* (2023) 105, at 121-122.

168 *Ibid.*, at 122.

the federal government. Finally, industry self-regulation would continue to operate subject to the independent AI agency's horizontal framework.

2 *Benefits of an Independent AI Agency as a Regulatory Backstop*

By utilizing an independent agency for AI, regulations will be created outside of the slow-moving legislative process and be dynamic, changing as AI grows in capability. Although the Executive Branch has sought and continues to seek power over independent agencies, separation still remains as independent agencies have natural insulation. As a result, when political majorities shift, regulations are likely to remain consistent, thereby promoting sound governance.

An independent AI agency should adopt a board structure composed of AI experts from diverse sectors of the economy. This will allow varied perspectives and areas of expertise to inform the development of horizontal regulations across industries. The creation of an independent agency would also facilitate the transfer of AI expertise into the public sector, rather than allowing such expertise to remain concentrated among private-sector AI innovators.

However, board must be structured with the constitutional limitations identified in *Trump v. Slaughter* in mind. To preserve bipartisan representation without directly restricting unitary executive theory, Congress should establish statutory requirements governing both the partisan composition of the board and the voting procedures for significant agency actions. Bipartisan membership requirements would ensure that the board includes members with differing perspectives on AI policy, while bipartisan voting requirements would ensure that those perspectives remain part of the agency's substantive decision-making process. These requirements would provide a structural safeguard against the possibility that changes in presidential administration could result in the complete exclusion of minority-party perspectives from agency decision-making.

Specifically, an independent AI agency should require that at least one member from the minority party approve any final regulation before it takes effect. Such a requirement would not prevent the President from exercising the removal authority recognized in *Slaughter*. Instead, it would require the agency to maintain bipartisan participation in its most consequential decisions. The requirement would encourage majority and minority members to deliberate with one another and would reduce the possibility that a single political faction could unilaterally determine the agency's regulatory policy. In this manner, Congress could preserve professional diversity within the agency while respecting the President's constitutional authority over executive officers.

Additionally, the agency should incorporate several of the institutional strengths discussed above, including independent funding, procedural rulemaking authority, and authority to adjudicate disputes within its jurisdiction. The agency could be funded, in part, through fees assessed on regulated industry participants, thereby providing the agency with a stable source of funding while reducing its dependence on annual appropriations. A carefully structured fee system could also limit the influence that individual outside funders might otherwise exert over agency decision-making, although Congress should establish appropriate safeguards

to ensure that regulated entities do not exercise undue influence through the funding mechanism itself.

Procedural rulemaking and adjudicatory authority should also be vested in the agency for matters within its statutory jurisdiction. An agency staffed by individuals with specialized expertise in AI would be better positioned to develop procedures and adjudicate disputes involving technically complex AI systems. Concentrating these functions within a specialized agency could promote consistent regulatory standards, facilitate the development of institutional expertise, and allow the government to respond more effectively to rapidly evolving AI technologies.

The EU AI Act is far from perfect, but there are several key characteristics that an independent agency should adopt in order to act as a hybrid horizontal regulator. By providing horizontal regulation, an independent agency could serve as a regulatory backstop or gap filler. This can be done with clear statutory language conferring authority to regulate AI uses falling outside existing agencies' jurisdictions and future issues requiring oversight. The agency could implement a tier-based strategy that is sufficiently flexible to designate which innovators warrant heightened oversight. Furthermore, this can help protect vulnerable industries that are increasingly reliant on AI, such as health care.

Additionally, an independent agency could adopt disclosure requirements similar to those in the Act to ensure that AI innovators in the U.S. comply with transparency policies. By strengthening the enforcement of public disclosure requirements, the agency would promote consumer trust and increase transparency regarding AI systems' technical capabilities.

3 *Anticipated Challenges and Administrative Tradeoffs*

There are several challenges that will come with the increase in AI regulation through an independent agency. First, the current administration's policy emphasizing private AI company innovation may be hindered. As regulatory requirements increase, innovation may be slowed due to increased compliance costs for industry participants. However, an independent agency does not need as strict initial regulations as the EU AI Act and instead could adopt a responsive approach as risks emerge. This flexibility represents a key advantage of agency regulation over legislatively enacted rules.

The second major issue is the administrative burden associated with implementing new regulations. In the early stages, there will be regulatory overlap and coordination challenges among the actors involved in AI governance. Over time, however, an independent agency should be able to effectively coordinate with existing agencies, supporting their efforts without encroaching on their jurisdictions and addressing regulatory gaps within its authority.

A hybrid AI regulatory system should be adopted in the U.S., under which existing agencies retain their jurisdictions, an independent AI agency complements those efforts by filling regulatory gaps, and industry self-regulation continues to be promoted. This structure would help bring AI expertise into the public sector and address regulatory gaps for AI related issues. The independent agency will promote stability in AI regulation by operating insulated from political pressure, adapting to

emerging AI issues, and ensuring AI companies build and maintain consumer trust through meaningful disclosures.

E Conclusion

Artificial intelligence is a rapidly advancing technology with the potential to be utilized across virtually all industries in the United States. Its rate of development is unprecedented in the context of technological regulation. AI also has the potential to be the next major technological disruption, capable of triggering a crisis-level event in the economy. If such a crisis were to occur, having an established independent AI agency would allow the U.S. to respond proactively rather than reactively. Accordingly, the federal government should not continue relying solely on its current strategy of existing agency oversight and industry self-regulation.

In order to avoid reliance on the slow-moving legislative process of the federal government, the U.S. should establish an independent federal agency with broad horizontal authority to regulate AI while complementing the authority of existing agencies. Under this hybrid model, the federal government would have the institutional capacity and regulatory structure to address both current and emerging AI-related issues. Ultimately, the independent AI agency will ensure the protection of consumers as AI continues to rapidly expand its influence and reshape society.