



Four Options to Tame the Artificial Intelligence Patchwork

By Logan Kolas

Introduction

Concerned with the rapid pace of change and the disruptive nature of artificial intelligence (AI) technology, states have introduced an estimated total of more than [500 AI regulatory proposals](#). That potential patchwork of confusing, and conflicting rules threatens to derail the AI revolution before its benefits are realized. As concerns escalate, state proposals will fester unless Congress restores leadership in technology and AI policy. By taking appropriate measures, Congress can mitigate some of the harm inflicted by an AI patchwork, restore market principles to guide AI development, promote American interests abroad, and help spur interstate competition and collaboration on AI issues.

Option 1: Full Scale Pre-emption of State Laws

Unlike the relatively free-market development of the internet, states have lit an anti-innovation fuse across the country that will detonate as regulatory proposals become law. Diverging AI regimes risk burdensome regulatory chokepoints in model development, create prohibitively high and inefficient compliance costs, and threaten to delay product access that will undermine U.S. global AI competitiveness. Congress should restore appropriate oversight by creating a national framework that permits technological experimentation and progress in AI development and pre-empts state laws—but only if it can be clear, concise, and consistently enforced.

Option 2: A *Choice of Law* Framework for Federal AI Pre-emption

A national AI framework centralizes power in the federal government. The current patchwork approach to AI policy centralizes that power in policymakers and bureaucrats in large states like California that dictate policy for the rest of the states. Not only are many technology companies based in California—including [many](#) AI companies—its policymakers have historically [leveraged](#) its size to craft laws that rope in businesses and consumers in other states if their businesses transact with in-state residents.

In the absence of full federal preemption, Congress should rebalance power in the states by adopting a *choice of law* approach to AI policy. Technology policy and legal experts Geoffrey Manne and Jim Harper first [proposed](#) this idea to mend the data privacy patchwork, but its lessons should also be applied to AI policy. Under a *choice of law* approach, Congress would create a statute that requires states to honor compliance with other states' AI legislation, so companies can follow the AI law of their choosing. As Manne and Harper [detail](#) for data privacy, this arrangement could promote competition in regulatory regimes.

Unlike privacy—which has largely followed a model of user-based consent—AI legislative approaches broadly fall into [three](#) main regulatory types: model-based, use-based, and conduct-level. A combination of different pre-emptive rules and options would need to be used. For example, given the limitations of effectively applying model-based restrictions, Congress could pre-empt model-based rules entirely. Choice of law statutes could then be used to streamline certain use-based and conduct-level rules—focusing on how AI models are deployed, not on how they are developed.

Option 3: Promote Multi-State Compacts

Another approach to mitigating a legal patchwork would require that Congress promote collaborative lawmaking in the states as they debate an appropriate national framework. One way to do this is to exclude state AI laws that develop as a part of multi-state compacts from preemption in the event of federal legislation. Importantly, all model-based laws would still be pre-empted regardless of whether agreements are reached, but compacts could still be used to encourage convergence of appropriate deployment-based AI rules. States already use [compacts](#) to homogenize rules in healthcare, agriculture, education, taxation, licensure, transportation, and environmental issues. Yet, no states have pursued compacts in AI policy. That should change.

Option 4: Vest Standard-Setting Authority in the National Institute for Standards and Technology

The National Institute of Standards and Technology (NIST) has been successful in developing best practices because it relies on a voluntary and flexible framework of multi-stakeholder processes to guide decision-making. Given a proven track record, and in the absence of better alternatives, NIST standards could serve as the uniform rules the AI industry desperately needs.

NIST has a long and proven track record of facilitating emerging technology innovation—but encouraging widespread adoption of these standards is imperfect. Forcing compliance could erode NIST benefits by turning the benefits of flexibility into the perils of rigidity. The NIST agency is underfunded, and some worry the Biden administration will abuse the NIST [AI Risk Management Framework](#) to bully companies with [backdoor](#) regulatory requirements that side-step the legislative process. Still, NIST already has AI expertise and, without a federal framework, is better than the known alternative patchwork of AI rules—both nationally and globally.

China has developed its own set of standards and exports them abroad. As Tim Fist at the Institute for Progress [notes](#), standard-setting is part of the CCP's Belt and Road Initiative, and concerns linger that China will use these guidelines to encourage widespread adoption of CCP-friendly technology standards. The United States needs its own set of competing standards internationally—and it could further that objective through NIST while reducing patchwork concerns at home.

Conclusion

More than 500 AI proposals swell in America's laboratories of democracy. Congress has no choice but to establish leadership on AI policy. Congress should pre-empt state laws entirely by creating their own national AI framework. Alternatively, Congress could pursue competitive and collaborative approaches to AI pre-emption that ensure that ballooning AI laws do not harm consumer interests and undermine the next great American technological revolution.