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ARTIFICIAL AUTHORITY: FEDERALISM, PREEMPTION, AND THE CONSTITUTIONAL STRUCTURE OF AI REGULATION

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0. ABSTRACT

Executive Order 14,179 ("EO 14,179"), signed by President Donald J. Trump in January 2025, heralds a new federal approach to artificial intelligence ("AI") governance focused on deregulation and national competitiveness. This Article analyzes EO 14,179's sweeping changes – notably its revocation of President Biden's AI executive order ("EO 14,110") and its directive to produce *America's AI Action Plan*–and contrasts them with emerging state-level AI regulations. The July 2025 AI Action Plan emphasizes deregulation, infrastructure expansion, and international competition, even directing federal agencies to consider withholding funds from states enacting burdensome or restrictive AI laws.[1] Such measures set the stage for a federalism clash with states like Colorado, which passed a landmark Colorado AI Act (SB 24-205) to regulate "high-risk" AI systems, which becomes effective February 1, 2026.[2] This Article explores the resulting legal tensions under the Spending Clause, Dormant Commerce Clause, and preemption doctrines. It argues that the Administration's attempt to preempt or penalize state AI regulations by executive fiat raises constitutional red flags under the Spending Clause and tests the limits of executive authority. Simultaneously, state laws like Colorado's invite scrutiny under Dormant Commerce Clause jurisprudence as potential burdens on interstate commerce. The analysis reviews these constitutional dimensions, including the applicability of Spending Clause constraints and Dormant Commerce Clause precedents, and examines whether federal preemption could override state AI

[1] *See Winning the Race: America's AI Action Plan*, WHITE HOUSE OFFICE OF SCI. & TECH. POL'Y (July 23, 2025), https://www.whitehouse.gov/wp-content/uploads/2025/07/Americas-AI-Action-Plan.pdf (hereinafter 'America's AI Action Plan').

[2] *An Act Concerning Consumer Protections in Interactions with Artificial Intelligence Systems*, ch. 198, §§ 1–10, 2024 COLO. SESS. LAWS 198 (enacted May 17, 2024, to be codified at COLO. REV. STAT. § 6-1-1701 et seq. (eff. Feb. 1, 2026)).

laws. Finally, the Article offers a balanced policy discussion weighing the imperative of innovation and AI leadership against the need for risk mitigation and accountability.

I. INTRODUCTION

In early 2025, the United States government dramatically pivoted its approach to AI governance. Upon taking office, President Donald Trump issued Executive Order 14,179 titled "Removing Barriers to American Leadership in Artificial Intelligence," ("EO 14,179") signaling a decisive shift toward deregulation and rapid innovation.[3] EO 14,179 explicitly revoked prior federal AI policies deemed impediments to innovation – most notably rescinding President Biden's October 2023 executive order on the "Safe, Secure, and Trustworthy Development and Use of AI" ("EO 14,110").[4] In its place, EO 14,179 set a national policy of sustaining American "global AI dominance" and directed the creation of a comprehensive federal *AI Action Plan* to accelerate U.S. AI leadership.[5]

This federal push for unfettered AI development soon met resistance at the state level. As Washington promoted a light-touch regulatory stance, several states had begun crafting their own rules to address emerging risks perceived in AI. For example, in May 2024, Colorado became one of the first states to enact a broad AI governance law, Senate Bill 24-205, known as the Colorado Artificial Intelligence Act ("Colorado AI Act" or "CAIA").[6] Set to take effect on February 1, 2026, the Colorado AI Act imposes transparency, fairness, and accountability obligations on "high-risk" AI systems used in "consequential decisions" like employment, lending, or healthcare.[7] Colorado's law–and similar initiatives in states such as Utah and draft proposals in California – reflect growing

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[3] *See* Exec. Order No. 14,179, 90 Fed. Reg. 8741 (Jan. 23, 2025).

[4] Exec. Order No. 14,110, 88 Fed. Reg. 75191 (Oct. 30, 2023) (revoked by Exec. Order No. 14,148, 90 Fed. Reg. 75192 (Jan. 20, 2025)).

[5] Exec. Order 14,179, *supra* note 3, at § 2.

[6] *An Act Concerning Consumer Protections in Interactions with Artificial Intelligence Systems*, ch. 198, §§ 1–10, 2024 COLO. SESS. LAWS 198 (enacted May 17, 2024, to be codified at COLO. REV. STAT. § 6-1-1701 et seq.) (eff. Feb. 1, 2026)).

[7] *Id.*

concern over "algorithmic discrimination" and other AI caused harms in the absence of federal regulation.[8]

This divergence between a deregulatory federal agenda and proactive state regulations has teed up a classic federalism fight, this time over AI. To be sure, the Trump Administration's America's AI Action Plan, released in July 2025 pursuant to EO 14,179, not only lays out a national strategy favoring innovation and infrastructure, but also pointedly targets state laws that try to regulate AI as potential "barriers" to progress.[9] Trump's AI Action Plan recommends that federal agencies consider a state's AI regulatory climate when allocating discretionary funds, and to limit funding if state regulations are deemed "unduly restrictive."[10] It also directs the Federal Communications Commission ("FCC") to evaluate whether state AI rules interfere with federal mandates, hinting at possible preemption efforts.[11] These measures invert the usual federalism model – instead of enticing states to raise standards through funding, the federal government is pressuring states *not* to regulate AI in hopes that deregulation will spur innovation.[12]

The collision course is set: a deregulation-first federal policy versus state-level proactive risk regulation. This Article examines the constitutional and legal implications of this conflict. **Part I** provides background on Executive Order 14,179 and its corresponding AI Action Plan. **Part II** discusses Colorado's AI Act as a case study in state AI regulation and its potential burden on interstate commerce. **Part III** analyzes the conflict through constitutional lenses – the Spending

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[8] *Artificial Intelligence Policy Act*, S.B. 149, 2024 Gen. Sess. (Utah 2024) (enacted March 13, 2024) (codified at UTAH CODE ANN. § 13-2-12) (establishing transparency and disclosure requirements for AI interactions); Cal. Assemb. B. 331, 2023–24 Leg., Reg. Sess. (Cal. 2024) (proposing oversight for automated decision systems in sensitive contexts).

[9] *See* America's AI Action Plan*, supra note* 1, at 1.

[10] *See id.* at 3.

[11] *Id.*

[12] *See* South Dakota v. Dole, 483 U.S. 203, 211 (1987) (upholding a conditional highway-funding incentive for states to adopt a minimum drinking age of 21).

Clause's limits on conditioning federal funds, the Dormant Commerce Clause's constraints on state laws affecting interstate commerce, and principles of federal preemption and executive power. **Part IV** offers a policy analysis, weighing the benefits of innovation and national uniformity against the values of experimentation and public protection. The Article concludes by considering paths forward to reconcile innovation with governance, positing that a balanced national framework may be needed to avoid protracted federal-state conflict in the AI arena.

II. BACKGROUND

a. Executive Order 14,179: Resetting Federal AI Policy.

On January 23, 2025, President Trump issued EO 14,179, which aims to *"*solidify our position as the global leader in AI and secure a brighter future for all Americans.*"*[13] This Order marked a swift reversal of the previous administration's cautious approach to AI. Section 1 of EO 14,179 declared that certain existing AI policies and directives – viewed as "barriers to American AI innovation" – were revoked to clear the path for U.S. technological dominance.[14] Chief among the revoked measures was President Biden's Executive Order 14,110 (Oct. 30, 2023), which aimed to establish a framework for the "safe, secure, and trustworthy" development of AI.[15] Biden's EO 14,110 had foreshadowed a regulatory intensive approach, including numerous agency actions to oversee AI risks (indeed, the order mandated over 100 agency actions ranging from OMB guidance to the creation of an "AI Safety Institute").[16] In direct opposition, EO 14,179, through *America's*

[13] *See* Exec. Order No. 14,179, *supra* note 3, at § 1.

[14] *See id.* (revoking prior directives and identifying them as "barriers to American AI innovation").

[15] *See* Exec. Order No. 14,110, *supra* note 4 ("My Administration places the highest urgency on governing the development and use of AI safely and responsibly, and is therefore advancing a coordinated, Federal Government-wide approach to doing so").

[16] *See* Exec. Order No. 14,110, *supra* note 4, at §§ 4–11, 98 (directing over 100 federal actions, including AI risk assessments, OMB implementation guidance, and the establishment of the AI Safety Institute at NIST).

AI Action Plan, rejected this "onerous regulatory regime".[17] The Plan's premise was that AI is "far too important to smother in bureaucracy at this early stage" – a principle explicitly applied to both federal and state regulation.[18]

EO 14,179 articulated a broad national policy to "sustain and enhance America's global AI dominance" for the sake of "human flourishing, economic competitiveness, and national security".[19] In service of that goal, the Order's operative sections set two major processes in motion. First, EO 14,179 mandated the development of a comprehensive AI Action Plan. To achieve that, section 4 directed the Assistant to the President for Science and Technology (along with other top advisors) to submit an AI Action Plan within 180 days, coordinating across agencies to achieve and maintain U.S. AI leadership.[20] This aimed to ensure that deregulation and innovation would be formalized in a strategic roadmap. Second, EO 14,179 targeted the remnants of the prior administration's AI initiatives. Specifically, section 5 ordered officials to review and suspend or rescind any regulations, guidance, or other agency actions issued under EO 14,110 that might impede the new pro-innovation policy.[21] It also instructed the Office of Management and Budget ("OMB") to revise or repeal certain AI-related OMB memoranda from 2024 that had implemented EO 14,110, aligning them with the new deregulatory philosophy.[22] In short, EO 14,179 not only erased the prior federal AI regulatory blueprint, but also proactively set the stage for an aggressive, innovation-centered federal strategy.

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[17] *See* America's AI Action Plan, *supra* note 1, at 3.
[18] *Id.*
[19] *See* Exec. Order No. 14,179, *supra* note 3, at § 2.
[20] *Id.* at § 4.
[21] *Id.* at § 5.
[22] *Id.*

b. America's AI Action Plan: Deregulation, Infrastructure, and Competition.

On July 23, 2025, and right on time, the Administration unveiled their finished product, "*Winning the Race: America's AI Action Plan*", as the fulfillment of EO 14,179's mandate.[23] The AI Action Plan is sweeping in scope, outlining over 90 federal policy actions organized under three thematic "pillars": (1) **Accelerating AI Innovation**; (2) **Building American AI Infrastructure**; and (3) **Leading in International AI Diplomacy and Security**.[24] These pillars correspond to the Plan's core themes of deregulation, infrastructure investment, and global competition, respectively.[25] At its heart, the Plan doubles down on the Administration's view that freeing the private sector from regulatory "red tape" and "ideological biases" is essential to win the global AI race.[26]

i. Innovation Pillar.

Under the Innovation Pillar, the Action Plan's first focus is eliminating or reforming rules that "unduly burden AI innovation".[27] The Plan calls for *"Removing Red Tape and Onerous Regulation"* by taking several steps. For example, it directs OMB to work with all agencies to identify and repeal or revise regulations and guidance that hinder AI development.[28] It also launches a government-wide request for information to gather input on which federal rules impede

[23] *See* America's AI Action Plan, *supra* note 1, at 3.
[24] *Id.* at 1.
[25] *Id.*
[26] *Id.* at 3, 6–7.
[27] *Id.* at 3, 4.
[28] *Id.*

AI adoption.[29] Notably, the Plan extends this deregulatory ethos to state-federal relations: it instructs federal agencies with discretionary grant programs to consider a state's AI regulatory climate when making funding decisions and to limit funding if state regulations "hinder the effectiveness" of federally funded AI projects.[30] In tandem, it tasks the FCC with evaluating whether state AI laws interfere with the FCC's duties under the Communications Act, hinting at a possible administrative preemption strategy.[31] And it requires a review of Federal Trade Commission investigations and decrees from the prior administration to ensure they aren't advancing novel algorithmic bias theories that would burden AI businesses.[32] These actions underscore that deregulation at every level – federal and state – is a centerpiece of the federal plan.

ii. Infrastructure Pillar.

The second pillar, Infrastructure, emphasizes unleashing construction of AI-supporting facilities and energy projects. The Administration aims to "Build, Baby, Build!" vast AI infrastructure, from cutting-edge data centers to expanded energy capacity, unencumbered by environmental "red tape".[33] In fact, on the same day as the Action Plan's release, President Trump signed a companion executive order to accelerate federal permitting of data center infrastructure, underscoring the push to fast-track AI-related construction.[34] The Plan calls for modernizing permitting processes and investing in domestic semiconductor and supercomputing capabilities – steps seen as vital to support AI development at scale.[35]

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[29] *Winning the Race: America's AI Action Plan*, WHITE HOUSE OFFICE OF SCI. & TECH. POL'Y (July 23, 2025), at 1, https://www.whitehouse.gov/wp-content/uploads/2025/07/Americas-AI-Action-Plan.pdf.
[30] *Id.* at 3.
[31] *Id.*
[32] *Id.*
[33] *Id.* at 1.
[34] *See* Exec. Order No. 14,318, 90 Fed. Reg. 35385 (July 23, 2025).
[35] *See America's AI Action Plan*, *supra* note 1, at 14.

The Infrastructure Pillar further details a suite of recommended policy actions to achieve this accelerated buildout, including the creation of new categorical exclusions under the National Environmental Policy Act ("NEPA") for data center-related activities lacking significant environmental impact,[36] expansion of the Fixing America's Surface Transportation Act of 2015 ("FAST-41") permitting process to cover data center energy projects,[37] and reforms to environmental regulations under the Clean Air Act, Clean Water Act,[38] and Comprehensive Environmental Response, Compensation, and Liability Act to expedite construction timelines.[39]

The Plan also proposes making federal lands available for data center and power generation projects, securing the AI computing stack against adversarial foreign technology,[40] and leveraging Department of Energy initiatives such as "PermitAI" to accelerate environmental reviews.[41] In the energy domain, the Administration outlines a three-phase grid strategy—stabilization, optimization, and expansion—to meet AI-driven demand,[42] while in manufacturing, it seeks to restore domestic semiconductor production through a streamlined, return-on-investment–focused CHIPS Program Office.[43] Workforce initiatives include developing national skill frameworks for priority AI infrastructure occupations and expanding Registered Apprenticeships,[44] while security measures emphasize creating high-security AI data centers for defense and intelligence use and

[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.* at 15.
[40] *Id.*
[41] *Winning the Race: America's AI Action Plan* at 15, WHITE HOUSE OFFICE OF SCI. & TECH. POL'Y (July 23, 2025), https://www.whitehouse.gov/wp-content/uploads/2025/07/Americas-AI-Action-Plan.pdf.
[42] *Id.*
[43] *Id.* at 16.
[44] *Id.* at 17.

establishing an AI Information Sharing and Analysis Center ("AI-ISAC") to safeguard critical infrastructure from AI-specific cyber threats.[45]

iii. International Diplomacy and Security Pillar.

The third pillar, International Diplomacy and Security, focuses on global AI competition and safeguarding U.S. technological leadership. The Plan vows to promote American AI exports and set international standards aligned with U.S. values.[46] It contemplates alliances with "like-minded countries" to present a united front in AI governance, countering rival models, with implicit reference to China's state-driven approach. For example, the Administration signaled it would scrutinize foreign AI products (like a Chinese-developed model that sparked concern when released in the U.S.[47]) and tighten export controls on critical AI components.[48]

The International Diplomacy and Security Pillar also outlines concrete measures to expand exports of the full American AI technology stack—including hardware, models, software, applications, and standards—to allied nations willing to join a U.S.-led AI alliance.[49] It calls for coordinated interagency programs to operationalize these exports while ensuring adherence to U.S.-approved security requirements.[50] The Plan further directs U.S. diplomatic and commercial leadership in international standard-setting bodies to counter Chinese influence, particularly efforts to shape global AI rules toward authoritarian surveillance norms.[51] To secure the AI supply

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[45] *Id.* at 18.

[46] *Id.* at 20.

[47] Jasmine Wu & Deirdre Bosa, *How China's new AI model DeepSeek is threatening U.S. dominance*, CNBC (Jan. 27, 2025, 12:03 PM), https://www.cnbc.com/2025/01/24/how-chinas-new-ai-model-deepseek-is-threatening-us-dominance.html.

[48] *See* America's AI Action Plan, *supra* note 1, at 15–16.

[49] *Id.* at 20.

[50] *Id.*

[51] *Id.*

chain, it proposes strengthening advanced compute export control enforcement by using location verification features and expanding end-use monitoring in high-risk jurisdictions.[52] It also calls for closing loopholes in semiconductor manufacturing export controls by adding restrictions on component sub-systems not currently covered.[53] Recognizing the need for global alignment, the Plan promotes plurilateral controls, complementary protection measures, and diplomatic initiatives to ensure allied adherence to U.S. export restrictions.[54] Finally, it emphasizes proactive evaluation of national security risks in frontier models and bolstering biosecurity through mandatory screening of "nucleic acid synthesis" and enhanced data sharing among synthesis providers.[55] In short, America's AI Action Plan marries a domestic agenda of laissez-faire innovation with an international agenda of competitive dominance – portraying stringent regulation as a strategic liability in the "race" for AI supremacy.

iv. The Unique Approach of EO 14,179.

Crucially, the AI Action Plan's approach to state regulations departs from traditional federalism norms. Historically, federal initiatives (particularly under the Spending Clause) have coaxed states to enhance regulatory protections or meet minimum national standards.[56] Here, however, the Administration is effectively using federal tools to discourage state regulation of AI. The Plan makes plain that the White House views state-imposed AI rules as potential obstacles to national objectives: "AI is far too important to smother in bureaucracy…whether at the state or

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[52] *Id.* at 21.

[53] *Id.*

[54] *Winning the Race: America's AI Action Plan*, WHITE HOUSE OFFICE OF SCI. & TECH. POL'Y (July 23, 2025), at 21-22, https://www.whitehouse.gov/wp-content/uploads/2025/07/Americas-AI-Action-Plan.pdf.

[55] *Id.* at 22–23.

[56] *Dole*, 483 U.S. at 206–08.

Federal level".[57] To that end, it bluntly states that the federal government "should not allow AI-related Federal funding to be directed toward states with burdensome AI regulations that waste these funds".[58] The directive for OMB and agencies to factor state AI laws into funding decisions is unprecedented – essentially warning states that aggressive AI regulations might cost them grants or other support. At the same time, the Plan briefly discusses not infringing on "prudent" state laws "that are not unduly restrictive to innovation,"[59] and leaves undefined what counts as "prudent" versus "restrictive." By keeping these terms vague, the Administration seemingly aims to retain maximum discretion to chill state regulatory efforts while claiming not to overtly commandeer state policymaking.

In sum, EO 14,179 and the AI Action Plan represent a concerted federal shift toward AI deregulation, rapid infrastructure expansion, and global strategic competition. They also portend rising friction with any state that opts to chart a different course on AI oversight. Nowhere is that tension more evident than in Colorado, which has positioned itself at the forefront of state AI regulation just as the federal government attempts to pull states back.

c. Colorado's AI Act: State Regulation of "High-Risk" AI.

Colorado's Artificial Intelligence Act, or SB 24-205 (2024), likely exemplifies the kind of state initiative the federal AI Action Plan deems unduly restrictive. Enacted on May 17, 2024, the Colorado law (colloquially the "Colorado AI Act" or "CAIA") is one of the first comprehensive state statutes regulating AI systems.[60] It is formally titled "*An Act Concerning Consumer Protections for Interactions with Artificial Intelligence*," and as the name implies, is a part of

[57] *See* America's AI Action Plan, *supra* note 1, at 3.
[58] *Id.*
[59] *Id.*
[60] *See* COLO. REV. STAT. § 6-1-1701 (2024).

Colorado's Consumer Protection Act, reflecting its consumer protection focus.[61] The CAIA's provisions take effect on February 1, 2026, allowing a nearly two-year lead time for implementation.[62] Colorado's move came on the heels of Utah's AI law (passed March 2024) and ahead of anticipated regulations in California and elsewhere, signaling a broader trend of state-level AI governance emerging in the absence of federal legislation.[63]

i. Scope and Definitions.

The Colorado AI Act targets "high-risk" AI systems—defined as automated systems that make or assist consequential decisions affecting individuals in areas like education, employment, housing, banking, insurance, health care, or access to basic services.[64] These "consequential decisions" are essentially decisions that can materially affect a person's life opportunities or rights.[65] By focusing on high-impact use cases, the law aims at AI applications most likely to produce significant harms if they malfunction or embed bias. Notably, the CAIA explicitly ties its definition of harm to *algorithmic discrimination*: it prohibits use of AI systems that result in discriminatory treatment or impacts on the basis of protected characteristics in those consequential decisions.[66] "Algorithmic discrimination" is defined broadly as any differential treatment or impact from AI that correlates with protected classes (like race, sex, etc.), essentially importing a civil rights disparate impact concept into AI regulation.[67] Certain trivial or narrowly purposed AI

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[61] *Id.*

[62] *See* COLO. REV. STAT. § 6-1-1702 (2024).

[63] *See Artificial Intelligence Policy Act*, S.B. 149, 2024 Gen. Sess. (Utah 2024) (enacted March 13, 2024) (establishing the first state-level AI consumer-transparency law through disclosure requirements and the Office of AI Policy); *see also,* Regulation of AI in the U.S., WIKIPEDIA, https://en.wikipedia.org/wiki/Regulation_of_AI_in_the_United_States (last visited Oct. 6, 2025) (noting Utah's law, California proposals, and Colorado as early movers).

[64] *See* COLO. REV. STAT. § 6-1-1701 (9)(a) (2024).

[65] *See* COLO. REV. STAT. § 6-1-1701 (3) (2024).

[66] *See* COLO. REV. STAT. § 6-1-1701 (1)(a)-(b) (2024).

[67] *Id.*

tools (such as simple calculators or cybersecurity filters) are exempted, as are AI systems that do not replace human decision-making or are strictly assistive.[68]

ii. Obligations on Developers and Deployers.

Colorado's law imposes duties on both sides of the AI supply chain – the developers who create AI systems and the deployers (end-users, *e.g.* businesses or employers) that use them in Colorado.[69] Both developers and deployers of high-risk AI systems owe a general duty of reasonable care to avoid foreseeable algorithmic discrimination.[70] This creates a statutory negligence standard specific to AI, reportedly the first of its kind in any U.S. jurisdiction.[71] In practice, a developer must design and test its AI product for bias risks and take reasonable steps to prevent discriminatory outcomes.[72] A deployer (say, an employer using an AI hiring tool) must use it in a manner that mitigates bias and must respond in a specific manner if it learns of discrimination by the AI.[73]

The CAIA also mandates transparency and accountability measures. Developers must provide deployers with a detailed product description covering the AI system's purpose, design, training data, performance evaluation, and known limitations or risks of bias.[74] Deployers, in turn, must disclose to individuals when a high-risk AI system is used in making a consequential decision about them, and they must conduct impact assessments evaluating the system's potential risks and

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[68] *Id.* at § (9)(b).

[69] *See* COLO. REV. STAT. § 6-1-1702(3) (2024).

[70] *Id.*

[71] *See* Tatiana Rice et al., *The Colorado Artificial Intelligence Act: FPF U.S. Legislation Policy Brief* (July 2024), at 1, https://leg.colorado.gov/sites/default/files/images/fpf_legislation_policy_brief_the_colorado_ai_act_final.pdf.

[72] *See* COLO. REV. STAT. § 6-1-1703(1) (2024).

[73] *See* COLO. REV. STAT. § 6-1-1703(2)(a) (2024).

[74] COLO. REV. STAT. § 6-1-1702(2),(5) (2024).

fairness before deployment.[75] If an adverse decision is made (*e.g.* denial of credit or a job), the individual is entitled to an explanation of the decision's principal factors and, more notably, an opportunity to appeal to a human decision-maker.[76] Only the Colorado Attorney General is empowered to enforce the law and to issue rules interpreting it, and the Act incorporates existing state consumer protection remedies (in some cases deeming violations an unfair or deceptive practice).[77]

Taken together, these provisions seek to bring "much-needed transparency and accountability" to AI systems affecting Coloradans' lives.[78] Advocates applaud the law as a "welcome step" to check biased and flawed AI decision-making, urging that it be strengthened further rather than weakened.[79] For instance, a coalition of civil rights and consumer groups has called on Colorado to maintain the Act's robust protections – notices, impact assessments, and broad coverage – and to close loopholes that might allow companies to evade compliance.[80] These supporters emphasize that Colorado's law provides "common-sense guardrails" on AI and could serve as a model for other states, demonstrating how to protect rights while still encouraging innovation.[81] Indeed, as of mid-2025, other states are closely watching Colorado. Lawmakers in various jurisdictions have introduced AI bills inspired by similar concerns.[82] Colorado's AI Act's

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[75] *See* COLO. REV. STAT. § 6-1-1703(4)(a)-(c) (2024).

[76] *Id.*

[77] *See* COLO. REV. STAT. § 6-1-1706(1)–(2) (2024).

[78] Elec. Priv. Info. Ctr., *Building on Colorado's AI Act to ensure sound Policy*, EPIC.ORG (July 2024), https://epic.org/documents/building-on-colorados-ai-act-to-ensure-sound-policy.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *See generally* CAL. PRIV. PROT. AGENCY, *DRAFT AUTOMATED DECISIONMAKING TECHNOLOGY REGULATIONS (2023),* https://cppa.ca.gov/meetings/materials/20231208_item2_draft.pdf.

influence may extend nationwide as companies operating across state lines adjust their practices to meet its standards, effectively setting a de facto benchmark for AI accountability in the U.S.

iii. Colorado's Self-Reflection and Pushback.

At the same time, Colorado's ambitious law has provoked debate, and even second thoughts, within the state. Governor Jared Polis signed the CAIA in 2024 but did so with strong reservations. In an unusual signing statement, Gov. Polis expressed concerns that the law's disparate impact standard and broad duties could overreach, and he urged the legislature to refine the Act before it takes effect.[83] Polis hoped the law would either be revised or, ideally, that it would spur an "overdue national conversation" leading to federal action and a uniform playing field across states.[84] By 2025, with a new federal administration signaling a "less restrictive AI policy" climate, Colorado's leadership moved to slow down or soften the AI Act. In May 2025 – over a year before CAIA's effective date – Governor Polis (along with the state Attorney General and others) formally requested the legislature to delay the law's implementation until January 2027.[85] This letter argued that more time was needed for stakeholders to "fine tune" the law to protect consumers "*without stifling innovation or driving business away*" from Colorado.[86] The legislature considered an amendment bill (SB 25-318) that would have significantly watered down the CAIA's provisions – *e.g.* removing the duty of care, narrowing the definition of "algorithmic discrimination," exempting smaller developers and certain uses, and delaying key requirements to

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[83] *Mayor Johnston, Governor Polis, Attorney General Weiser, Senator Bennet, Congressman Neguse & Congresswoman Pettersen Release Letter to the Colorado General Assembly on A.I.*, COLO. GOV. JARED POLIS (May 5, 2025), https://governorsoffice.colorado.gov/governor/news/mayor-johnston-governor-polis-attorney-general-weiser-senator-bennet-congressman-neguse

[84] *Id.*

[85] Marianne Goodland & Colorado Politics, *Gov. Jared Polis, Democrats press for delay in implementation of AI law*, COLO. POLITICS (May 5, 2025), https://www.coloradopolitics.com/2025/05/05/gov-jared-polis-democrats-press-for-delay-in-implementation-of-ai-law-846dfdaf-9175-5ce8-92ca-fb586da7bc20/

[86] *Id.*

2027.[87] That amendment bill failed in the final days of the 2025 session (it was postponed indefinitely amid political wrangling), leaving the original CAIA intact for now. Nevertheless, pressure from industry and some lawmakers to revisit the Act remains intense, with calls for a special legislative session to enact the requested delay.[88] As it stands, Colorado's AI Act is slated to go live in February 2026, but its fate hangs in the balance pending possible legislative or political interventions in late 2025.[89]

In short, Colorado's pioneering AI law encapsulates the state perspective in the emerging federal-state tug-of-war: a proactive attempt to govern AI risks and protect citizens, tempered by concerns about economic impact and a keen eye on what the federal government will do. This sets the stage for legal tensions – can the federal government thwart or preempt such state efforts, or can states proceed with their regulations in spite of federal opposition? We turn next to the constitutional and legal analysis of these questions.

III. LEGAL ANALYSIS

a. SPENDING CLAUSE LIMITS AND THRESHOLD SEPARATION-OF-POWERS ISSUES.

A central legal flashpoint in this federalism conflict is the Trump Administration's plan to condition federal funding on state AI policy. The AI Action Plan directs OMB and federal agencies to restrict "AI-related" grants or funds to states that enact "burdensome" AI regulations.[90] In effect,

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[87] *See* S.B. 25-318, 75TH GEN. ASSEMB., 1st REG. SESS. (COLO. 2025) (postponed indefinitely May 5, 2025).

[88] Nathaniel M. Glasser et al., *Will Colorado's Historic AI Law Go Live in 2026? Its Fate Hangs in the Balance in 2025*, HEALTH L. ADVISOR (May 13, 2025), https://www.healthlawadvisor.com/will-colorados-historic-ai-law-go-live-in-2026-its-fate-hangs-in-the-balance-in-2025

[89] *Id.*

[90] *See* America's AI Action Plan, *supra* note 1, at 3.

the executive branch is seemingly threatening to withhold federal money if a state like Colorado imposes regulations on the development or use of AI that is perceived as an inhibitor to innovation. This raises immediate issues under the Spending Clause of the U.S. Constitution[91] and related federalism doctrines, as the President's authority to act "must stem either from an act of Congress or from the Constitution itself."[92] Specifically, two initial questions arise: (1) Has Congress authorized the executive to impose such a funding condition and (2) even if so, would the condition be constitutional under Spending Clause jurisprudence?

i. Congress' Exclusive Power of the Purse.

The Constitution entrusts the immense power of the purse to Congress, not the President.[93] "As Alexander Hamilton succinctly put it, Congress 'commands the purse.'… [and] James Madison underscored the significance of that exclusive congressional power, stating, '[t]he power over the purse may [be] the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people.'"[94] When it comes to attaching strings to federal funds, the Supreme Court has long held that the spending power is of course "subject to several general restrictions" and that any conditions on federal grants to states must be *unambiguously established by Congress*.[95] As relevant here, Justice Kennedy noted, if "the decision to spend [is]

[91] U.S. CONST. art. I, § 8, cl. 1.

[92] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).

[93] U.S. CONST. art. I, § 9, cl. 7 (Appropriations Clause); City & Cty. of S.F. v. Trump, 897 F.3d 1225, 1231 (9th Cir. 2018); *Dole*, 483 U.S. at 206–07 ("The Constitution empowers Congress to 'ay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.' U.S. Const. art. I, § 8, cl. 1. Incident to this power, Congress may attach conditions on the receipt of federal funds and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'").

[94] *S.F. v. Trump*, 897 F.3d at 1231 (citing The Federalist Nos. 58 & 78).

[95] *Dole*, 483 U.S. at 206–07.

determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened."[96]

In short, without explicit congressional authorization, executive conditions on government spending fail. For example, in *City & County of San Francisco v. Trump*,[97] the Ninth Circuit struck down Executive Order 13,768, which directed federal agencies to withhold grants from "sanctuary jurisdictions" that did not comply with certain immigration enforcement requests. The Administration attempted to tether this directive to 8 U.S.C. § 1373, a statute prohibiting state or local governments from restricting the sharing of "information regarding the citizenship or immigration status" of individuals with federal immigration authorities.[98] The Ninth Circuit found this connection unconvincing for two reasons. First, § 1373 contains no language authorizing the Executive to impose funding conditions, let alone to direct agencies to withhold large categories of congressionally appropriated grants.[99] Second, even if § 1373 were read as a substantive federal mandate, it does not supply the clear, unambiguous congressional authorization required to impose conditions on federal spending under the *South Dakota v. Dole* framework.[100]

Citing *Dole*, the panel emphasized that while Congress may set conditions on federal grants, those conditions must, as further discussed below, and among other things, be unambiguous, relate to the federal interest in the program, and be enacted through the constitutionally prescribed legislative process—not imposed unilaterally by the Executive.[101] The court also noted that § 1373's scope is narrow, dealing only with the exchange of immigration

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[96] *S.F. v. Trump*, 897 F.3d at 1232.
[97] *See generally id.*
[98] *Id.* at 1233.
[99] *See id* at 1225.
[100] *See id.* at 1239.
[101] *S.F. v. Trump*, 897 F.3d at 1232.

status information, and therefore, could not justify the sweeping grant-eligibility requirements the Executive Order attempted to impose.[102] In the panel's words, if "it were to enforce the Executive Order, the Executive would assert a power that belongs solely to Congress by withdrawing funds in the absence of congressional authorization."[103]

Relying on Justice Jackson's *Youngstown* framework, the Ninth Circuit reinforced that when the President "takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."[104] Applying that principle, the court concluded that, absent clear congressional authorization, the executive branch "may not redistribute or withhold properly appropriated funds in order to effectuate its own policy goals."[105] This holding underscores that the separation-of-powers defect was not a technicality—it was a structural violation arising from the Executive's attempt to usurp Congress's exclusive spending power.

ii. *San Francisco* Applied to EO 14,179.

Applying the Court's rationale in *San Francisco v. Trump,* to EO 14,179 and America's AI Action Plan, the same structural infirmity is apparent. *San Francisco v. Trump* makes plain that an executive order cannot supply its own spending authority; it must ride on a statute that actually empowers agencies to impose the particular condition at issue.[106] No statute presently delegates to the President—or to any executive agency—the authority to condition broad categories of federal funding on a state's choice whether to regulate AI. The Administration has not identified, nor does the U.S. Code contain, any provision comparable to 8 U.S.C. § 1373 that could plausibly serve as

[102] *Id.*
[103] *Id.* at 1245.
[104] *Id.* at 1233.
[105] *Id.* at 1235.
[106] *See* 5 U.S.C. § 706(2)(C) (1966); *See also S.F. v. Trump*, 897 F.3d at 1234–35.

a tether, however tenuous, for such a funding condition. Even if one were located, it would almost certainly lack the clear and unambiguous statement Congress must provide before the Executive may attach new conditions to state funding. As further explained below, *Dole* and its progeny require that Congress, not the President, set those terms through legislation, and that the conditions be directly related to the federal interest in a particular program, not to an overarching deregulatory philosophy untethered to the purpose of specific grants.

In theory, the Administration might point to one or more existing statutes touching on AI, research funding, or infrastructure as an implicit source of authority, but none of the likely candidates—the National AI Initiative Act of 2020,[107] the CHIPS and Science Act, the Public Works and Economic Development Act,[108] the Infrastructure Investment and Jobs Act,[109] or the NSF/NIH research-grant statutes—speaks with the "clear voice" *Dole* requires. At most, these laws provide program-specific discretionary criteria that could be stretched to consider "regulatory climate" as one factor; such stretching would collide head-on with the clear-statement rule. By contrast, when Congress intends to impose a uniform, cross-cutting funding condition, it says so explicitly, as in Title VI, Title IX, or § 504 of the Rehabilitation Act. Nothing comparable exists for state AI regulation, and OMB's Uniform Guidance cannot create substantive eligibility rules untethered to statute.[110]

Further demonstrating there is no current statute to which EO 14,179 can be implemented through is a recently failed attempt to regulate the development of AI on the federal level. In May

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[107] *See* National Artificial Intelligence Initiative Act of 2020, Pub. L. No. 116-283, §§ 5001–5502, 134 Stat. 3388, 4523–62 (2021) (codified within sections of 15 U.S.C. & 42 U.S.C.).

[108] *See* CHIPS and Science Act of 2022, Pub. L. No. 117-167, 136 Stat. 1392 (2022); *See also* Public Works and Economic Development Act of 1965, Pub. L. No. 89-136, 79 Stat. 552 (1965) (codified as amended at 42 U.S.C. §§ 3121–3244).

[109] Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

[110] *See* 2 C.F.R. pt. 200*; See* also Pub. L. No. 117-158, §§ 200-208.

2025, the U.S. House of Representatives passed a reconciliation package containing a ten-year moratorium on state and local AI regulation—an express, cross-cutting prohibition that would have barred states from enforcing any law governing "artificial intelligence models, artificial intelligence systems, or automated decision systems."[111] This language was structurally similar to Title VI–style conditions: sweeping in scope, uniform in application, and keyed directly to the technological objects EO 14,179 characterizes as "burdensome." In the Senate, the moratorium provision encountered both political opposition and procedural hurdles under the Byrd Rule, which restricts provisions deemed "extraneous" to the budget from passing in reconciliation bills.[112] Staff floated a narrower "plan B" that would condition eligibility for specific Commerce Department and broadband (BEAD) program funds on a state's non-enforcement of AI laws—a tacit recognition that any such condition must be enacted through fresh statutory text tied to particular programs.[113] That approach failed to gain traction. A subsequent compromise proposal shortened the moratorium to five years and carved out exceptions for issues like children's safety, deepfakes, and consumer protection, but even this scaled-back version collapsed when the Senate voted 99–1 to strike the provision entirely.[114] The bill was enacted with no moratorium and no funding condition of any kind.[115]

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[111] *See* One Big Beautiful Bill Act, H.R. 1, 119th Cong. § 2(c) (2025); *See also* Carolyn Metnick, et al, *The One Big Beautiful Bill Act's Proposed Moratorium on State AI Legislation: What Healthcare Organizations Should Know*, SHEPPARDMULLIN (Jun. 9, 2025), https://www.sheppardhealthlaw.com/2025/06/articles/artificial-intelligence/the-one-big-beautiful-bill-acts-proposed-moratorium-on-state-ai-legislation-what-healthcare-organizations-should-know/

[112] Will Oremus & Andrea Jiménez**,** *A bid to bar states from regulating AI is getting pushback.*, THE WASH. POST (May 22, 2025), https://www.washingtonpost.com/politics/2025/05/22/state-ai-laws-moratorium-pushback-blackburn/.

[113] *See* S. Commerce Amendment (June 9, 2025) (proposing to condition BEAD broadband funding on a state's non-enforcement of AI laws); *See generally* One Big Beautiful Bill Act, H.R. 1, 119th Cong. § 2(c) (2025).

[114] See One Big Beautiful Bill Act, H.R. 1, 119th Cong. § 2(c) (2025); *See also Senate Strikes AI Moratorium from Budget Reconciliation Bill in Overwhelming 99-1 Vote*, U.S. S. COMM. ON COM., SCI. & TRANSP. (July 1, 2025), https://www.commerce.senate.gov/2025/7/senate-strikes-ai-moratorium-from-budget-reconciliation-bill-in-overwhelming-99-1-vote/8415a728-fd1d-4269-98ac-101d1d0c71e0

[115] One Big Beautiful Bill Act, H.R. 1, 119th Cong. § 2(c) (2025).

This sequence matters for Spending Clause analysis. Congress not only refrained from enacting a cross-program anti–state-AI condition; it fully considered, debated, and affirmatively rejected such language. Under Supreme Court jurisprudence, clarity must come from enacted text, not from executive gloss on diffuse program statutes. The failed attempt to graft a BEAD-linked funding restriction into the bill confirms that meaningful conditions require new statutory language; agencies cannot retrofit program-specific discretion into a generalized anti-regulatory filter. In the absence of such a statute, EO 14,179's contemplated funding consequences would rest on precisely the kind of "artificial authority" condemned in *San Francisco v. Trump*.

b. Constitutional Criteria for Spending Clause Conditions.

Assuming Congress were to come together to enact a statute expressly authorizing the Executive to condition certain categories of federal funding on a state's adoption (or avoidance) of particular AI regulatory policies, that delegation would not end the constitutional inquiry. The Constitution, as construed in *South Dakota v. Dole*,[116] imposes substantive constraints on any such condition—limits that apply with equal force to newly enacted AI-specific legislation. To be valid, the condition must: (1) promote the "general welfare"; (2) be stated in unambiguous terms so that states can knowingly decide whether to accept the funds; (3) be germane to the federal interest in the particular program; (4) not induce the state to violate an independent constitutional prohibition; and (5) avoid the kind of "coercion" that transforms encouragement into compulsion.[117] These requirements ensure that even where Congress has spoken clearly, the spending power cannot be used as an all-purpose lever to reshape state regulatory policy in unrelated or unduly forceful ways. The subsections below examine each relevant *Dole* factor in the AI context.

[116] *See* 483 U.S. at 203.
[117] *Id.*

i. Clarity Requirement.

The first *Dole* factor relevant here—clarity—requires that any funding condition be stated in terms "so unambiguous" that the states can "voluntarily and knowingly accept the terms of the 'contract.'"[118] The Supreme Court has emphasized that Spending Clause statutes are "much in the nature of a contract" between Congress and the states, such that "the legitimacy of Congress's power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"[119]

In *Dole*, the Court upheld a federal statute directing the Secretary of Transportation to withhold 5% of federal highway funds from any state that did not adopt a minimum drinking age of 21.[120] The Court stressed that Congress had made the condition "expressly stated" and "unambiguous," giving states the ability to weigh the benefits of the federal funding against the policy tradeoff. [121] By contrast, in *Arlington Central*, the Court refused to infer an obligation to reimburse expert witness fees under the Individuals with Disabilities Education Act because Congress had not provided "clear notice" about such liability.[122] The Court explained that where Congress intends to impose a financial or regulatory burden on states in exchange for federal funds, it must do so "unambiguously" in the statutory text—not through post-hoc agency interpretation.[123]

The Sixth Circuit's decision in *Kentucky v. Yellen*,[124] illustrates the contemporary rigor of this requirement. There, the court invalidated the so-called "tax mandate" in the American Rescue

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[118] Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (explaining that "[i]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously").
[119] *See id*. at 17; *See also* Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006) (holding that a state is bound only if it had "clear notice" of the obligations).
[120] *See* 483 U.S. at 207.
[121] *Id.*
[122] *Murphy*, 548 U.S. at 300–01.
[123] *Id.* at 298.
[124] *See generally* 54 F.4th 325 (6th Cir. 2022).

Plan Act of 2021, which prohibited states from using COVID-19 relief funds to "directly or indirectly offset" a reduction in net tax revenue.[125] The court found this language "largely indeterminate" because the statute failed to define critical terms, establish a baseline year, or specify how causation would be determined.[126] The panel further held that post-enactment Treasury regulations providing definitions and safe harbors could not cure the original statutory vagueness, citing *Pennhurst* for the principle that only Congress can speak with the "clear voice" necessary to bind states.[127]

Applied to the AI context, these cases make plain that Congress could not simply authorize agencies to "consider a state's AI regulatory climate" or withhold funds from states with "burdensome" or "unduly restrictive" AI laws. Such terms, without statutory definition, would be the kind of open-ended and malleable triggers that *Pennhurst* and *Yellen* reject. To satisfy the clarity requirement, Congress would need to precisely define the covered conduct — for example, by enumerating the types of AI systems and specific state regulatory measures that trigger the funding condition (e.g., statutory requirements for algorithmic impact assessments, mandatory bias audits, or prohibitions on certain AI training data). Vague policy labels like "hindering AI innovation" would invite interpretive discretion by the Executive and thus fail the *Pennhurst* standard. Next, Congress must identify the affected funding streams — specifying in the statute which grants or programs are subject to the condition, whether the ineligibility applies to all awards under that program, and whether the penalty is partial or total. As *Dole* demonstrates, the scope of the penalty must be knowable *ex ante* to allow a state to make a meaningful choice.[128] In addition,

[125] *Id.* at 330.
[126] *Id.* at 346–47.
[127] *Id.* at 353–54 (quoting *Pennhurst*, 451 U.S. at 17).
[128] *Dole*, 483 U.S. at 207.

any statute would likely need to codify compliance metrics and adjudicatory procedures — defining in statutory text the criteria for determining when a state law is "covered," the evidentiary burden, and the reviewing authority. This avoids the *Yellen* problem of leaving critical terms to future agency rulemaking. Finally, Congress could only apply the condition prospectively—consistent with *Bennett v. New Jersey*,[129] Congress would have to ensure that no penalty applies to AI laws already enacted before the effective date of the statute.

Without this degree of specificity in the statutory text itself—not in agency guidance—an AI-linked funding restriction would be vulnerable to invalidation under the *Pennhurst*/*Dole* clarity requirement. Congress cannot rely on broad and all-encompassing language that leaves the Executive to decide which state policies are disfavored; doing so risks transforming the clarity prong into an open-ended delegation of spending power to the President, which the Court has repeatedly refused to countenance.[130]

ii. Germaneness Requirement.

The second relevant *Dole* factor—germaneness—requires that any condition on federal funding bear "some relationship" to the purpose of the federal program being funded.[131] The Court in *Dole* upheld the condition at issue—a 5% withholding of federal highway funds from states that failed to raise their legal drinking age to 21—because Congress was pursuing the general welfare in promoting safe interstate travel and reducing drunk-driving fatalities, which were closely connected to the purpose of the highway program.[132]

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[129] Bennett v. New Jersey, 470 U.S. 632, 638 (1985) (holding that conditions on federal grants must be imposed unambiguously by Congress and apply only to future obligations).

[130] *See Pennhurst*, 451 U.S. at 17; *See also Yellen*, 54 F.4th at 345–46.

[131] *See Dole*, 483 U.S. at 207–08.

[132] *Id.* at 208–09.

While the relatedness standard has historically been applied with some flexibility, the Supreme Court has signaled that conditions must be more than a loose policy alignment—they must be tied to the statutory objectives of the program in question.[133] Conversely, where a condition operates as a regulatory "lever" detached from the funded program's objectives, it risks failing the germaneness requirement. For example, in *Planned Parenthood of Houston & Se. Tex. v. Sanchez*,[134] the Fifth Circuit explained that conditions on federal funding must be consistent with Congress's statutory design in holding that Texas's funding condition risked impermissibly excluding entities deemed eligible under Title X.[135] The court reasoned that such a restriction would obstruct Congress's objectives in administering the federal family planning program.[136]

The germaneness requirement presents particular challenges in the AI context because AI technologies cut across numerous sectors and funding streams—many of which have statutory purposes only tangentially related to AI policy. For example, conditioning Department of Transportation formula funds on a state's repeal of "burdensome" AI employment-screening laws would raise serious relatedness questions. Transportation funding is typically authorized for infrastructure development, safety, and mobility, not for regulating workplace technologies. Unless Congress could demonstrate a direct connection—such as AI-based traffic management systems hampered by state restrictions—the nexus required by *Dole* would be missing. Invoking broad aims such as "national competitiveness" or "innovation" may be politically compelling, but courts have been reluctant to treat such abstractions as substitutes for statutory purpose. For AI,

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[133] *See* New York v. United States, 505 U.S. 144, 167–68 (1992) (upholding a monetary incentive under the Low-Level Radioactive Waste Policy Amendments Act because the surcharge was directly related to ensuring adequate waste disposal, the statute's core purpose).

[134] *See* 403 F.3d 324, 336–37 (5th Cir. 2005).

[135] *Id.*

[136] *Id.*

this means Congress cannot simply say that every federal program serves "innovation" and thereby justifies attaching AI-related conditions to all grants.

A properly tailored condition could, however, pass the germaneness test where AI regulations directly affect the funded activity. For example, a Department of Commerce AI research program designed to develop high-risk AI models for public-sector applications might condition funding on the state not imposing restrictions that prohibit the testing of those models within the program's research facilities. In such a case, the condition targets a regulatory barrier to the program's execution, satisfying *Dole*'s "some relationship" requirement.[137] However, attempting to use AI conditions to influence unrelated state regulatory policy by leveraging large, unrelated funding streams—such as Medicaid, highway funds, or general education block grants—would stretch relatedness to the breaking point. The Supreme Court has warned that the Spending Clause cannot be used as a back door for achieving regulatory goals unrelated to the funded program.[138]

In short, germaneness in the AI context demands a program-specific nexus, not merely an ideological alignment. The broader and more generalized the funding condition—particularly if it sweeps across unrelated programs—the more likely it is to fail the relatedness requirement. Congress would need to craft AI-related funding restrictions with careful attention to the underlying statutory purposes of each affected program, ensuring that the condition targets only those state laws that directly impede the execution of federally funded AI projects or objectives.

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[137] *See* Sabri v. United States, 541 U.S. 600, 605 (2004).

[138] Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion).

iii. Coercion Prohibition.

The final relevant *Dole* factor—sometimes called the "coercion" or "anti-compulsion" limitation—requires that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation."[139] In *Dole*, the Court upheld the 5% highway fund reduction as "relatively mild encouragement," reasoning that the amount at stake was modest in relation to the state's overall budget and to the total highway funding available.[140]

The Supreme Court gave this limit sharper teeth in *Nat'l Fed'n of Indep. Bus. v. Sebelius* ("*NFIB*").[141] There, the Court addressed the Affordable Care Act's Medicaid expansion provision, which conditioned a state's entire existing Medicaid funding—often exceeding 10% of a state's total budget—on the state's agreement to expand coverage. Chief Justice Roberts, writing for the controlling plurality on this point, held that this "threatened loss of over 10 percent of a State's overall budget…is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion."[142] The plurality emphasized two key indicators of coercion: (1) the magnitude of funds at risk and (2) the novelty of the condition—here, a fundamental change to a long-standing program upon which states had come to rely.[143] Justice Roberts contrasted the ACA's "gun to the head" with the permissible mild inducement in *Dole*, underscoring that when the State has no choice, the Federal Government can achieve its objectives without accountability.[144]

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[139] *Dole*, 483 U.S. at 211 (describing this as the point at which pressure turns into compulsion).

[140] *Id.*

[141] *See generally* 567 U.S. 519 (2012).

[142] *Id.* at 523 (opinion of Roberts, C.J.).

[143] *Id.* at 580–82.

[144] *See id* at 578–79; S*ee also* New York v. United States, 505 U.S. 144, 176 (1992) (explaining that the federal government may not "commandeer" the legislative processes of the states).

In the AI context, if Congress attached AI-related conditions to large, formula-based funding streams—such as broadband deployment funds under the Infrastructure Investment and Jobs Act, general transportation grants, or significant education block grants—the financial loss could be so severe that states would have no practical choice but to conform their AI policies. This risk is magnified if the affected funds represent an entrenched component of the state's budget, as in *NFIB*. Moreover, AI is relevant to numerous federal funding streams—research grants (NSF, DOE, NIST), infrastructure (NTIA broadband, DOT "Smart" grants), health IT (HHS programs), and even education technology. Conditioning multiple streams simultaneously on a state's repeal or non-enactment of "burdensome" AI laws could create cumulative fiscal pressure comparable to the "economic dragooning" condemned in *NFIB*. Even if each program's penalty were modest in isolation, their aggregate effect could be coercive.[145] Also, in *NFIB*, the Court stressed that Congress was not merely attaching conditions to "new" funds, but was threatening existing funding for a program with "no resemblance" to the expansion.[146] Likewise, using long-standing transportation or healthcare grants to leverage unrelated AI policy changes could be seen as transforming the program's terms midstream, heightening the coercion concern.

Congress could reduce coercion risk by limiting AI conditions to genuinely new discretionary AI-related program, capping penalties at a small percentage of a program's funds, as in *Dole,* and ensuring conditions are clearly and narrowly tailored to program performance rather than to general state policy.[147] It could also provide states with procedural protections, such as advance notice and opportunities to comment on proposed conditions. Additionally, Congress

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[145] *See Sebelius*, 567 U.S. at 582 (finding coercion where the financial inducement…is much more than relatively mild encouragement).

[146] *Id.* at 583.

[147] *See Dole*, 483 U.S. at 211.

should clarify the scope and duration of any AI-related funding conditions to ensure predictability and reduce the risk of undue influence.

In sum, the coercion prohibition limits Congress's ability to use AI-related funding conditions as an all-purpose deregulatory tool. The greater the fiscal impact, the more disconnected the condition is from the program's original terms, and the more funding streams are leveraged simultaneously, the more likely a court is to view the measure as a "gun to the head" under *NFIB*. For Congress to withstand judicial scrutiny, any AI-linked condition must leave states with a genuine, *economically realistic* choice.

c. Dormant Commerce Clause: State AI Laws and Interstate Burdens.

The constitutional limits on Congress's spending power are only part of the federalism equation at play here. Even if EO 14,179's funding-based strategy falters under the *Dole* framework, the Administration—or private challengers—could turn to another doctrinal front to combat AI regulation: the Dormant Commerce Clause ("DCC"). The DCC operates not as an affirmative grant of power, but as a negative implication of Article I, Section 8, restraining states from enacting laws that discriminate against or unduly burden interstate commerce in the absence of federal legislation. In the AI context, where products and services are inherently borderless—flowing across state lines via cloud infrastructure, APIs, and online platforms—state regulation can have sweeping extraterritorial effects. That raises the question: can states like Colorado impose "high-risk" AI obligations without crossing the constitutional line from permissible local regulation into impermissible interference with the national digital economy?

The analysis that follows applies established DCC doctrine to emerging AI rules, exploring whether Colorado's AI Act—and similar state initiatives—would withstand scrutiny under the twin pillars of DCC review: (1) the prohibition on facial or practical discrimination against out-of-

state interests, and (2) the *Pike* balancing test, which invalidates even nondiscriminatory laws whose burdens on interstate commerce are "clearly excessive in relation to the putative local benefits."[148] This framework not only tests the constitutional durability of state AI laws, but also highlights the structural tensions between state-level experimentation and the need for a coherent national AI market.

i. Parameters of the Dormant Commerce Clause.

The DCC is an implied constitutional limitation derived from Congress's exclusive power over interstate commerce.[149] It prevents states from enacting laws that discriminate against or unduly burden interstate commerce, even if Congress has not yet legislated on the subject.[150] In the AI regulatory space, where the technology's development, deployment, and data flows inherently cross state and national borders, these constraints become especially salient. AI products and services – from machine-learning software to algorithmic decision tools – typically flow across state lines (often globally) via the internet and cloud infrastructure. As a result, a state law regulating AI almost inevitably has interstate effects and thus sits within the DCC's field of concern. Indeed, as one commentator noted, "state regulations tend to have a large effect" in tech markets, citing how California's rules often *de facto* set national standards as companies adapt their products globally to comply.[151] Given AI's ubiquity as a general-purpose technology, a single

[148] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[149] *See U*.S. CONST. art. I, § 8, cl. 3.

[150] Ward v. United Airlines, 986 F.3d 1234, 1237 (9th Cir. 2021).

[151] *See Constitutional Constraints on Regulating Artificial Intelligence*, BROOKINGS (July 13, 2024), https://www.brookings.edu/articles/constitutional-constraints-on-regulating-artificial-intelligence.

state's requirements could "cascade across the entire economy," raising the question of constitutional limitations on such state authority.[152]

There are two main ways a state law can violate the Dormant Commerce Clause: (1) discriminatory laws that explicitly or in practical effect favor in-state interests over out-of-state competitors (which are per se suspect), and (2) even nondiscriminatory laws that incidentally burden interstate commerce in an excessive way relative to local benefits.[153] For example, in *Pike v. Bruce Church, Inc.*,[154] the Court invalidated an Arizona requirement that a cantaloupe grower build and operate an in-state packing plant, finding that although the law applied evenhandedly, the State's minimal interest in promoting its growers' reputations was clearly outweighed by the substantial burden and cost the requirement imposed on interstate operations.

ii. Applicability of the Dormant Commerce Clause on State Level AI Regulation.

Colorado's AI Act is not discriminatory on its face – it applies neutrally to any developer or deployer of high-risk AI, regardless of origin.[155] For example, a California tech firm selling an AI system in Colorado is subject to the same duties as a Colorado-based firm. In fact, the law explicitly reaches out-of-state entities ("developers" of AI systems are covered even if they are not Colorado companies, so long as their system is used in Colorado).[156] This extraterritorial reach could be a point of contention, though it is structured as regulating conduct connected to Colorado (usage affecting Colorado residents), which states are generally allowed to do.

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[152] Kristian Stout, Federal Preemption and AI Regulation: A Law-and-Economics Case for Strategic Forbearance, Wash. Legal Found. (May 30, 2025), https://www.wlf.org/2025/05/30/wlf-legal-pulse/federal-preemption-and-ai-regulation-a-law-and-economics-case-for-strategic-forbearance/

[153] *Pike*, 397 U.S. at 141-44.

[154] *Id.* at 142–46.

[155] COLO. REV. STAT. § 6-1-1702-3 (2024).

[156] *Id.*

Because the CAIA is nondiscriminatory and addresses a legitimate local public interest (preventing discrimination against Colorado residents), a court would likely apply the *Pike* balancing test. Under *Pike*, a law will be invalidated only if the burden it imposes on interstate commerce "is clearly excessive in relation to the putative local benefits."[157] Colorado can readily articulate significant local benefits: protecting its citizens from biased or unfair AI-driven decisions in jobs, finance, etc., and increasing transparency and trust in AI used within the state. These are classic exercises of the state's police powers (consumer protection, civil rights enforcement). The challenge, as in many DCC cases involving technology regulation, is how courts will weigh those benefits against claims of economic disruption to a nationwide market.

iii. Burden of State AI Regulations on Interstate Commerce.

From an industry perspective, the burdens are substantial. Compliance costs and fragmentation are key concerns. AI developers often serve nationwide markets; if each state sets its own rules for "high-risk" AI, developers might face a maze of inconsistent obligations, raising the cost of doing business across state lines.[158] As the Washington Legal Foundation observed, over a thousand AI-related bills have been introduced in various states, creating a "regulatory cacophony" and legal uncertainty that can chill investment.[159] A company deploying AI nationally cannot simply follow the least restrictive state's rules – it must effectively comply with the strictest state's requirements everywhere, or tailor its operations state-by-state.[160] This can lead to a *de facto* "highest common denominator" effect (or what WLF terms a "race to the bottom" from the

[157] *Pike,* 397 U.S. at 142.
[158] Stout, *supra* note 152.
[159] *Id.*
[160] *Id.*

industry viewpoint, where the most stringent state sets the functional standard).[161] In the context of Colorado's law, a firm offering an AI hiring platform in all 50 states might have to implement Colorado's notice, assessment, and bias mitigation features universally, or else geofence Colorado – potentially losing that market. Many companies will choose nationwide compliance with Colorado (and any similar state) standards, effectively turning a state rule into a nationwide norm. This dynamic—state law setting a de facto national baseline—is precisely the type of regulatory ripple effect that DCC challenges often target.

Courts have sometimes struck down state laws that exert such extraterritorial control. For instance, in *Healy v. Beer Institute*,[162] the Court invalidated a Connecticut law that effectively regulated beer pricing beyond Connecticut's borders, holding that a state may not project its legislation into other states.[163] By analogy, one could argue that Colorado's law, by regulating out-of-state AI developers' conduct (imposing duties at the design stage for any AI that might be used in Colorado), is attempting to govern commercial conduct occurring wholly outside Colorado's borders – a possible DCC violation if proven true. However, modern case law, including the Supreme Court's recent decision in *National Pork Producers Council v. Ross*,[164] suggests a reluctance to invalidate state laws merely because they have nationwide impact. In *NPPC v. Ross*, the Court upheld California's animal welfare law (which required out-of-state pork producers to meet California's standards for any pork sold in California) despite its extraterritorial ripple effects.[165] The Court emphasized that the law did not directly discriminate against out-of-state

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[161] *Id.*

[162] *See* 491 U.S. 324, 333 (1989) (a state law that has the "practical effect" of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause.…).

[163] *Id.*

[164] *See* 598 U.S. 356 (2023).

[165] *Id*. at 390-1.

producers and that claims of burden (increased compliance costs) did not clearly outweigh California's moral and health interests, especially as courts are ill-equipped to balance complex economic and moral considerations in such cases.[166] By analogy, Colorado's AI Act could survive *Pike* balancing if a court finds that the burden on commerce (compliance costs, etc.) is not "clearly excessive" relative to Colorado's powerful interest in preventing algorithmic bias and protecting consumers.

It is worth noting that Colorado's law, if anything, seems carefully tailored to avoid gratuitous interference with commerce. It targets only *high-risk AI in consequential decisions*, not every imaginable AI use (thus not every tech company is affected – only those in sensitive sectors like hiring, lending, etc.). It also provides lead time and exemptions for small businesses,[167] which mitigate some burden. And it leverages familiar legal concepts (like disparate impact and duties of care) that align with existing anti-discrimination laws, arguably integrating AI oversight into the fabric of established commerce rather than upending it. These aspects would bolster Colorado's defense under *Pike*: the law's local benefits (fairness in significant transactions) are concrete, while the burdens, though not trivial, may be seen as the acceptable cost of doing business in the modern era – much like differing state employment laws or safety standards that companies routinely navigate.

Nevertheless, one can anticipate legal challenges by industry groups or even federal enforcers (should the Administration take an aggressive stance) arguing that state-by-state AI regimes will impede the growth of a national AI market and innovation ecosystem. They might cite evidence that fragmented compliance imposes heavy, fixed costs, disproportionately hurting

[166] *Id.* at 382.

[167] *See* COLO. REV. STAT. § 6-1-1703(6) (2024).

startups and smaller firms and reducing overall innovation output.[168] For example, an AI startup might struggle to meet Colorado's documentation and assessment mandates, effectively raising a barrier to entry that entrenches larger incumbents (ironically, the very outcome the Trump Administration warned onerous regulation would cause[169]). Courts considering such claims under the DCC would have to weigh these economic burdens against Colorado's right to secure its residents' welfare. If more states follow Colorado's lead, the cumulative burden could strengthen the case that a patchwork regime unduly hampers interstate commerce, possibly tipping the *Pike* scale. Conversely, a court might also say: if the burden becomes truly onerous, that is a sign Congress should step in and legislate uniform national standards – but until Congress acts, states retain their police powers.

The shadow of the Commerce Clause also hangs over the political debate: industry advocates use the threat of 50-state fragmentation as an argument for federal preemption or a national moratorium on state AI rules.[170] Indeed, as discussed below, there is an emerging law-and-economics case for Congress to preempt state AI regulation to avoid a "regulatory race to the bottom" that could stifle innovation.[171] Until Congress does so, however, states like Colorado stand on relatively firm ground to defend their AI laws against Dormant Commerce Clause challenges, especially if those laws are thoughtfully tailored and address genuine risks within the state.

In summary, under prevailing doctrine, Colorado's AI Act likely survives Dormant Commerce Clause scrutiny as a legitimate, non-discriminatory exercise of state authority addressing local concerns about AI harms. The burdens on interstate commerce, while real, are not

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[168] Stout, *supra* note 152.

[169] *See* America's AI Action Plan, *supra* note 1 at 3.

[170] Kevin Frazier, *Why the Feds — Not the States — Should Take the Lead on Regulating AI*, GOVERNING (May 28, 2025), https://www.governing.com/policy/why-the-feds-not-the-states-should-take-the-lead-on-regulating-ai.

[171] *Id.*

clearly excessive relative to the law's benefits, especially in light of recent judicial hesitance to second-guess state policy choices in emerging areas.[172] That said, the DCC analysis is fact-specific, and future developments (such as a proliferation of divergent state AI laws, or proof that such laws materially impede national AI deployment) could alter the balance.

d. Preemption and the Limits of Executive Authority.

The Dormant Commerce Clause constrains states from imposing undue burdens on the national AI market in the absence of federal legislation, but the doctrine only operates as a shield for interstate commerce—it does not supply the federal government with affirmative authority to displace state law. That affirmative displacement, or preemption, arises under the Supremacy Clause when valid federal law overrides conflicting state enactments. In the AI context, however, the preemption landscape is unusually sparse: as discussed, Congress has not yet enacted a comprehensive AI statute, nor included in existing federal laws any express provision nullifying state AI regulations. This leaves the Administration with limited tools if it seeks to negate laws like Colorado's AI Act.

The absence of a federal AI statute means that preemption arguments must proceed on narrower grounds—field preemption based on a related regulatory scheme, conflict preemption where state law obstructs federal objectives, or "administrative preemption" through agency rulemaking. Yet each of these routes encounters significant legal headwinds in the post-*Chevron*,[173] major-questions era, where courts demand clear congressional authorization for agency actions of broad economic and political significance. The following subsections examine these pathways, assessing whether EO 14,179 or the AI Action Plan could serve as the foundation

[172] *Ross*, 598 U.S. at 356.

[173] *See generally* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

for preempting state AI laws, and, more importantly, where the constitutional and statutory limits on executive authority will likely foreclose such attempts.

i. No Federal Statute Preempts State AI Regulation.

As previously discussed, Congress has begun to consider AI legislation – *e.g.*, there are proposals for AI oversight bodies or safety standards – but nothing has passed to date.[174] If Congress were to enact an AI law, it could choose to preempt state laws (either partially or completely) to ensure a uniform framework. Some scholars and industry groups advocate for such federal preemption to avoid the fragmentation problem discussed above, and unsurprisingly, some advocate for no federal intervention. In the words of one commentary: "Congress should preempt state AI safety legislation" when it targets the development of AI models, which is inherently national/international in scope, while perhaps leaving room for states to regulate specific AI *uses* (like deepfakes or sector-specific applications). [175] Indeed, *bipartisan federal AI legislation* could create an "even playing field" across states – an outcome even Governor Polis hinted might be preferable.[176] Until and unless that happens, though, we operate in a statutory vacuum where preemption must be implied or asserted via executive action.

ii. Executive Order vs. State Law: Does EO 14,179 or the AI Action Plan Itself Preempt State Law?

The short answer is no—an executive order, standing alone, does not carry the force of a congressional enactment capable of nullifying state statutes.[177] Executive orders generally function

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[174] Laurie Harris, Artificial Intelligence and National Security, Congress.Gov (last updated June 5, 2024), https://www.congress.gov/crs-products/2024/R48555.

[175] BROOKINGS, *supra* note 151.

[176] Letter from Jared Polis, Governor of Colo., to the Colo. Gen. Assembly (May 17, 2024).

[177] *See Youngstown Sheet & Tube Co.*, 343 U.S. at 585–86 (holding that the President's power "must stem either from an act of Congress or from the Constitution itself"); *see also* S.F. v. Trump, 897 F.3d at 1233–34 (rejecting the notion that an executive order could impose funding conditions absent statutory authorization).

to "direct the internal management of the executive branch," not to alter legal rights and obligations outside of it, particularly in areas of traditional state concern where Congress has not spoken.[178]

EO 14,179 does not purport to expressly preempt state AI laws on its face. Rather, it articulates a deregulatory policy—removing perceived barriers to AI innovation—and directs federal agencies to identify state-level impediments to federal objectives.[179] The accompanying America's AI Action Plan reinforces this deregulatory stance and specifically instructs agencies, such as the Federal Communications Commission, to evaluate whether state AI regulations interfere with their mandates.[180]

However, even this "evaluation" language does not itself operate as preemption. Preemption must rest on a valid source of federal law—either a statute or a properly promulgated regulation authorized by statute.[181] Without clear statutory footing, neither EO 14,179 nor the Action Plan can, by themselves, override state law. At most, they can initiate processes—such as agency rulemakings or adjudications—that could lead to preemption if supported by a valid delegation of authority.[182]

iii. The FCC and "Administrative Preemption".

The Plan singles out the Federal Communications Commission to consider if state AI regulations interfere with its mandate under the Communications Act of 1934.[183] The FCC's core jurisdiction is over communications networks (telephony, radio, internet infrastructure, etc.), not

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[178] *See* Meyer v. Bush, 981 F.2d 1288, 1297 (D.C. Cir. 1993).

[179] *See* Exec. Order No. 14,179, *supra* note 3.

[180] *See* America's AI Action Plan, *supra* note 1, at 27–28.

[181] *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (explaining that "pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose").

[182] *See* Wyeth v. Levine, 555 U.S. 555, 576–77 (2009) (rejecting "obstacle" preemption where agency position lacked force of law and conflicted with the presumption against preemption in areas of traditional state regulation).

[183] *Id.*

AI governance broadly. Perhaps the rationale is that some state AI laws could impact internet services or online platforms (for instance, an AI-driven content moderation algorithm might be seen as part of communications services). However, nothing in the Communications Act explicitly grants the FCC power to regulate AI or to preempt state AI laws.[184] As critics note, the FCC would be "hard-pressed" to ground AI-related preemption in its existing authority; any attempt would have to stretch general provisions or ambiguous clauses, which is unlikely to hold up in court.[185]

Moreover, the legal environment for broad agency action has shifted. The Supreme Court, especially after the 2024 *Loper Bright v. Raimondo*[186] decision overruling *Chevron* deference, insists on clear congressional authorization for agency initiatives of major economic and political significance. AI regulation writ large is arguably a "major question" – it affects vast swaths of the economy and implicates sensitive social policy. Under the major questions doctrine, an agency like the FCC cannot simply discover a new preemptive power over AI in an old statute absent "clear congressional authorization".[187] Similarly, the Federal Trade Commission or other agencies would face hurdles in trying to preempt state AI laws without explicit mandates. For example, the FTC's consumer protection authority might overlap with some aspects of AI (unfair or deceptive practices), but it doesn't automatically negate state laws that provide greater consumer protections (indeed, federal consumer protection laws often preserve state power unless expressly preempted).

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[184] David S. Rubenstein,*The AI Action Plan and Federalism: A Constitutional Analysis,* JUST SEC. (July 30, 2025), https://www.justsecurity.org (explaining that "nothing in the Communications Act confers FCC authority to regulate AI" or to preempt state AI reg.

[185] *Id.*

[186] 603 U.S. 369 (2024).

[187] *See* West Virginia v. EPA, 597 U.S. 697, 711–12 (2022) (providing major-questions doctrine imposes requirement of "clear congressional authorization" before agencies may decide issues of vast economic and political significance); *see also* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (holding that agencies must have unambiguous congressional authority when regulating matters of major economic impact); *see also* MCI Telecommunications Corp. v. AT&T Co., 512 U.S. 218, 231–32 (1994) (refusing to treat FCC's extension of tariff-modification power as authority to preempt state-route regulation absent clear statutory grant).

In short, federal agencies currently lack a strong legal basis to preempt state AI regulations. Any move to do so through rulemaking or adjudication would invite legal challenge under both administrative law (as exceeding statutory authority) and constitutional law (possible Tenth Amendment/federalism concerns). The courts' current posture – skepticism of agency overreach and emphasis on Congress's role – suggests such preemption would likely be struck down. The AI Action Plan's nod to FCC action might therefore be more of a political signal than a viable legal strategy. It's telling that the Plan uses language like "evaluate" and "consider," rather than outright ordering preemption.[188] This caution likely reflects awareness that executive agencies cannot simply declare a state law void unless backed by a valid federal law.

iv. Preemption through Conflict?

Another angle is conflict preemption – i.e., if a state law "stands as an obstacle" to the accomplishment of federal objectives. The federal objective here (per EO 14,179 and the Action Plan) is to promote AI innovation by avoiding onerous regulation.[189] One could argue that Colorado's AI Act undermines that objective by imposing burdens on AI developers, thus creating an obstacle to the federal goal of rapid AI deployment. However, conflict preemption generally requires a conflict with a federal law or regulation that has the force of law. The AI Action Plan is

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[188] *See Loper Bright*, 603 U.S. at 369 (overruling *Chevron*, requiring courts to independently assess statutory authority rather than defer to agencies); *see also West Virginia v. EPA*, 597 U.S. at 711-12 (major-questions doctrine bars agency assertions of broad authority absent clear congressional authorization); *see also* Chris Carr, *Trump Plan Thwarting State AI Laws to Spur Preemption Fights*, BLOOMBERG L. (July 28, 2025, 5:05 AM), https://news.bloomberglaw.com/daily-labor-report/trump-plan-thwarting-state-ai-laws-to-spur-preemption-fights (courts reluctant to permit FCC to preempt state AI laws where no specific statutory authority exists); *see also* Cody Venzke, *Trump AI Action Plan Raises Legal Questions*, TECHPOLICY.PRESS (July 31, 2025) (noting legal analysts' skepticism that the FCC has power to preempt AI laws under the Communications Act absent clear congressional direction).

[189] *See* Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (preempting state alien-registration law as an obstacle to federal policy); *see also* Geier v. American Honda Motor Co., 529 U.S. 861, 875 (2000) (providing state tort-law requirement preempted as undermining federal regulatory scheme); *see also* Arizona v. United States, 567 U.S. 387, 399 (2012) (state immigration laws preempted where they conflicted with federal objectives).

a policy document, not a law. EO 14,179 itself, while having the force of a directive to federal agencies, does not have the same preemptive effect as a statute or properly promulgated federal regulation. Moreover, courts are wary of finding "obstacle" preemption based on broad policy goals, especially if it would nullify a state's exercise of police power in the absence of explicit congressional intent. For example, in *Wyeth v. Levine*,[190] the Supreme Court rejected an obstacle preemption claim that state-law failure-to-warn claims frustrated the FDA's labeling objectives, emphasizing the high bar for implying preemption without clear congressional guidance. Here, Congress has been silent on AI; an Administration's general desire to avoid regulation is not enough to preempt state law in court.

v. State Sovereignty and 10th Amendment Backdrop.

It's also important to recognize that regulating the conditions of commerce and protecting citizens from discrimination or fraud are traditional state powers under the Tenth Amendment of the Constitution. Unless Congress clearly speaks, courts often presume state laws are not preempted (the "presumption against preemption") in areas of historic state police powers, especially health and safety.[191] AI's impacts on employment bias, consumer privacy, etc., likely fall into that realm. So, while the federal government can encourage a deregulatory approach, it runs into constitutional guardrails if it tries to simply erase state law. The Tenth Amendment, while mostly declaratory, undergirds the principle that the federal government cannot commandeer states or force them to govern a certain way, outside of valid spending conditions or preemption by law. We've seen this principle in *New York v. United States*,[192] and *Printz v. United States*,[193] which

[190] *See* 555 U.S. 555 (2009).
[191] *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).
[192] *See* 505 U.S. 144 (1992).
[193] *See* 521 U.S. 898 (1997).

struck down federal laws that effectively coerced or commanded states to enact or enforce federal programs. The Trump Administration's AI Plan stops short of directly ordering states to repeal their laws (which would plainly violate anti-commandeering doctrine), but by threatening financial pain and seeking preemption, it edges toward an interference with state legislative autonomy that courts may regard with suspicion.[194]

vi. Summary on Preemption and Executive Limits.

At present, state AI laws like Colorado's are not preempted by federal law, because no sufficient federal law exists on point. The executive branch's tools to countermand state regulation are limited and face legal barriers. EO 14,179 and the AI Action Plan, while setting a contrary policy, do not override state statutes on their own. Any attempt by agencies to preempt would likely be struck down absent clear congressional authorization – especially given the post-*Chevron*, pro-federalism judicial climate.[195] Thus, the limits of executive authority are starkly visible here: the President can advocate, coordinate federal policy, and incentivize or pressure – but cannot unilaterally negate state law or rewrite the conditions Congress attached to funding.

In the long term, the resolution of federal-state conflicts over AI may require Congress to legislate. If Congress prefers a hands-off, innovation-first approach, it could pass a law preempting certain types of state AI regulation, effectively codifying the Trump Administration's philosophy. Conversely, Congress might set federal safeguards and allow states to go further (a floor

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[194] *See N.Y. v. U.S.*, 505 U.S. at 167 (declining to force states to enact federal policy via "take-title" provision, reaffirming that Congress cannot commandeer state legislatures); *Printz*, 521 U.S. at 935. (holding the federal government may not compel state executive officers to enforce federal duties); Murphy v. NCAA, 584 U.S. 453 (2018) (extending anti-commandeering to prohibitions on state legislation); *Sebelius*, 567 U.S. at 581 (invalidating threat to revoke all Medicaid funds as unconstitutionally coercive under Spending Clause constraints and commandeering concerns).

[195] *See Wyeth*, 555 U.S. at 576 (refusing to infer preemptive authority absent *clear* congressional intent, even where federal regulation exists); *West Virginia v. EPA*, 597 U.S.at 711–12 (applying the major-questions doctrine, requiring express congressional authorization before agencies may regulate areas of vast economic and political significance).

preemption model). But until such legislative action, the legal landscape will be one of uneasy coexistence: states experimenting with AI oversight, and a federal executive trying to blunt those efforts through indirect means.

IV. POLICY DISCUSSION: INNOVATION VS. RISK – FINDING THE BALANCE

Beyond the legal doctrines, the clash between EO 14,179's deregulatory approach and Colorado's regulatory approach reflects a deeper policy debate: how to strike the right balance between fostering innovation in AI and managing the risks that AI poses to society. Both sides of this debate offer compelling arguments, and a nuanced policy must reconcile these competing priorities.

a. The Case for Innovation and Deregulation.

The Trump Administration's position, as articulated in EO 14,179 and the AI Action Plan, is that aggressive innovation and deployment of AI is an economic and strategic imperative.[196] The U.S. is presented as being in a high-stakes race with global rivals (especially China) to achieve AI dominance.[197] Under this lens, regulation is seen as a brake on progress – particularly premature or heavy-handed rules that could stunt the growth of a nascent industry.[198] Proponents of

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[196] *See* Exec. Order No. 14,179, *supra* note 3.

[197] *See* Sebastian Mallaby et al., *Opportunities and Risks Inherent to Trump's AI Action Plan*, COUNCIL ON FOREIGN REL. (July 24, 2025, 3:30 PM), https://www.cfr.org/article/opportunities-and-risks-found-trumps-ai-action-plan (noting the Plan opens by declaring "America is in a race to achieve global dominance in artificial intelligence (AI)" with China); Anthony Kimery, *White House AI action plan charts high-stakes path to global dominance*, BIOMETRIC UPDATE (July 23, 2025, 5:48 PM), https://www.biometricupdate.com/202507/white-house-ai-action-plan-charts-high-stakes-path-to-global-dominance (describing the Plan's ambition for "unquestioned and unchallenged global technological dominance") ; Navin Girishanker et al., *Experts React: Unpacking the Trump Administration's Plan to Win the AI Race*, CTR. FOR STRATEGIC & INT'L STUD., (July 25, 2025), https://www.csis.org/analysis/experts-react-unpacking-trump-administrations-plan-win-ai-race (observing the administration's framing of AI strategy as a competition for U.S.–China supremacy).

[198] *See* Reuters, *Bosch CEO warns Europe against regulating 'itself to death' on AI*, YAHOO! FIN. (June 25, 2025), https://sg.finance.yahoo.com/news/bosch-ceo-warns-europe-against-090611206.html (warning that overregulation in Europe is causing policymakers to "regulate themselves to death," making the region a less attractive venue for AI innovation); Neil Chilson, *Experts: We're better off with less – not more – AI regulation*, STAND TOGETHER (Apr.

deregulation argue that AI technology is evolving rapidly, and imposing strict rules now, without full understanding of AI's capabilities or consequences, could lock in suboptimal practices or drive innovation overseas. They point to historical analogies: for example, the early internet flourished under a light-touch regulatory environment, whereas overly cautious regulation might have strangled it in the cradle. The Action Plan explicitly warns that restrictive regulations would "unfairly benefit incumbents" and "paralyze" one of the most promising technologies of our time.[199] This aligns with concerns that big tech firms can handle compliance costs, but startups cannot, thereby reducing competition and the very innovation we seek.[200]

Economically, eliminating "red tape" is argued to have direct benefits. A study on regulatory compliance costs found that such costs act like a significant tax on firms' profits, reducing aggregate innovation output by around 5.4%.[201] The implication is that trimming unnecessary regulation could correspondingly boost innovation. Moreover, fragmented state regulations exacerbate these costs: a company might navigate one set of rules, but a patchwork

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2025), https://standtogether.org/stories/the-economy/why-experts-say-we-are-better-off-with-less-ai-regulation-not-more (arguing that sweeping AI rules could undermine innovation by disrupting the sector's flexibility and momentum); Issac Heller, *Will Regulating AI Hinder Innovation?*, TRULLION (Feb. 2023), https://trullion.com/blog/ai-regulation/#:~:text=Overregulation%20can%20stifle%20innovation%20by,transformative%20solutions%20to%20societal%20challenges (observing overregulation dangers in slowing progress in a fast-evolving AI field).

[199] *See* America's AI Action Plan, *supra* note 1, at 2 (warning that overly restrictive AI regulation "would unfairly benefit incumbents… it would mean paralyzing one of the most promising technologies we have seen in generations"); Vivek Chilukuri et al., *Noteworthy: America's AI Action Plan*, CNAS (July 23, 2025), https://www.cnas.org/press/noteworthy/noteworthy-americas-ai-action-plan (same quote attributed to Vice President J.D. Vance in support of deregulation ethos).

[200] See Sarah Kreps, *The global AI race: Will US innovation lead or lag?*, BROOKINGS INST., (Dec. 6, 2024), https://www.brookings.edu/articles/the-global-ai-race-will-us-innovation-lead-or-lag/ (noting regulatory and reporting costs disproportionately burden startups while Big Tech can absorb them, reducing competition); Kevin Frazier, *Clear Rules, Bold Innovation: Finding the Regulatory Sweet Spot for AI*, YALE J. REG. (Apr. 6, 2025) (arguing that fragmented regulation creates massive compliance burdens that large firms can bear but inevitably exclude smaller AI firms).

[201] *See Kristian Stout, AI regulation and the Case for a Federal Moratorium*, INT'L CTR. FOR L. & ECON. (June 10, 2025) (citing study finding compliance costs function like a 2.5% profit tax, reducing national innovation output by ~5.4%).

multiplies the compliance burden, diverting resources from R&D to legal processes.[202] For AI, which benefits from scale and network effects (improving with more users and data), fragmentation can be especially harmful.[203] Different state rules on data usage or algorithmic auditing could silo data and prevent systems from reaching their full potential, thereby undermining AI effectiveness on a broader scale. In short, the innovation camp asserts that uniform, minimal regulation (preferably set at the federal level or via industry self-governance) is essential to allow AI to reach its transformative potential for economic growth and societal benefit.

National security and global leadership arguments also loom large. If the U.S. over-regulates, developers might relocate to jurisdictions with fewer constraints, potentially causing America to fall behind in AI advancements. The Administration's framing – "just like we won the space race, it is imperative we win the AI race" – resonates with those who fear ceding technological leadership.[204] Another prominent aspect of EO 14,179 was the insistence that U.S.

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[202] *See id.* (warning that fragmented state AI rules impose fixed compliance costs that function as a tax on innovation and reduce aggregate output) ; Francesco Trebbi & Miao Ben Zhang, A Note on Regulatory Compliance Costs Across U.S. States (Draft) (Dec. 2024), https://ftrebbi.com/research/Note%20on%20State%20Regulatory%20Compliance%20Costs%20Dec_3_2024.pdf (showing compliance burdens rise unevenly across jurisdictions, multiplying when firms must meet multiple state regimes); Weiyue Wu & Shaoshan Liu, *Compliance Costs of AI Technology Commercialization: A Field Deployment Perspective*, CORNELL UNIV. (Jan. 31, 2023, 7:22 AM), https://arxiv.org/abs/2301.13454 (reporting startups often devote disproportionate resources to compliance in a fragmented landscape, undermining innovation).

[203] *See* Daniel J. Mallinson et al., *The Future of AI Is in the States: The Case of Autonomous Vehicle Policies*, CAMBRIDGE UNIV. PRESS (July 31, 2023) (noting that fragmented sub-national regulations increase compliance complexity, raise cognitive barriers for entrepreneurs, and deter investment in new technology fields); Kristian Stout, *supra* note 201 (emphasizing that regulatory fragmentation undermines AI scale and economies of scale); William Ciconte et al., *AI Regulation and Its Mixed Impact on Business*, GIES COLL. OF BUS., UNIV. OF ILL. (Jan. 28, 2025), https://giesbusiness.illinois.edu/news/2025/01/28/ai-regulations-and-their-mixed-impact-on-business (finding state-level piecemeal rules create uncertainty that tends to suppress innovative firm activity).

[204] *See* America's AI Action Plan, *supra* note 1, at 1-2 (stating that "to remain the leading economic and military power, the United States must win the AI race" and invoking the space-race analogy); Chantelle Lee, *Trump Unveils Plan to Win AI 'Race' by Stripping Away Regulations: What to Know*, TIME (July 23, 2025, 6:54 PM), https://time.com/7304994/trump-ai-regulation-plan/ (reporting that the Plan declares "Just like we won the space race, it is imperative that the United States … win this race"); Scott Rosenberg, *AI's global race in the dark*, AXIOS (July 27, 2025), https://www.axios.com/2025/07/27/trump-ai-race-china (analyzing how government rhetoric presents the AI race with China as a zero-sum competition essential for technological leadership).

AI must be free from "ideological bias or engineered social agendas".[205] This reflects a view that some AI regulations (e.g., around fairness or misinformation) could inject political or value-based constraints that skew AI development. From this perspective, emphasizing free-market principles, viewpoint neutrality, and maximal technical performance is key to ensuring American AI is superior and widely adopted.

Finally, innovation proponents often argue that existing laws are sufficient to handle many AI-related harms, a stance called "technology neutrality." Rather than writing AI-specific rules, they suggest using traditional legal frameworks (anti-discrimination laws, product liability, consumer protection) to address outcomes, whether or not AI is involved.[206] For instance, if an AI hiring tool discriminates, one can use Title VII employment law; if a self-driving car causes an accident, tort law and auto safety standards apply. This approach avoids singling out AI with special regulations that might become quickly outdated, and it ensures continuity with well-tested legal principles. The Colorado Act's critics invoked this logic when pushing to narrow its scope – arguing that overly specific rules might be unnecessary or even conflict with federal EEO laws and others already on the books.[207] In sum, the deregulatory policy argument is that innovation

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[205] Exec. Order No. 14,179, *supra* note 3, at § 1, (stating that "American development of AI systems must be free from ideological bias or engineered social agendas").

[206] *See* Jovan Kurbalija, Rethinking *AI Regulation: Why Existing Laws Are Enough - If We Enforce Them*, CIRCLEID (Feb. 11, 2025), https://circleid.com/posts/rethinking-ai-regulation-why-existing-laws-are-enoughaif-we-enforce-them#:~:text=Home%20%2F%20Blogs-,Rethink (arguing that traditional liability, privacy, and consumer-protection laws already govern AI harms without needing new statutes); Patrick Glauner, *An Assessment of the AI Regulation Proposed by the European Commission*, CORNELL UNIV. (May 26, 2021), https://arxiv.org/abs/2105.15133 (asserting that existing EU laws sufficiently address AI risks and that new AI-specific regulation may pose overregulation risks).

[207] *See* John Frank, *Colorado's AI bill set for overhaul as the clock ticks*, AXIOS (Apr. 29, 2025), https://www.axios.com/local/denver/2025/04/29/colorado-ai-bill (noting tech-industry and legislative concerns that SB 24-205's expansive obligations could inhibit startups, conflict with existing laws, and pose undue compliance burdens); Matthew G. White & Alexander F. Koskey, *The Colorado AI Act Shuffle: One Step Forward, Two Steps Back*, BAKER DONELSON (Feb. 11, 2025), https://www.bakerdonelson.com/the-colorado-ai-act-shuffle-one-step-forward-two-steps-back (describing task force recommendations to clarify or narrow the Act in areas where it may overlap federal EEO or anti-discrimination frameworks).

thrives in an environment of legal certainty, low compliance costs, and broad flexibility, with general laws ready to catch the truly bad actors, rather than detailed ex ante controls on technology.

b. The Case for Risk Regulation and Accountability.

On the other side, proponents of AI regulation emphasize the very real risks and harms that unregulated AI can inflict – many of which are already documented. AI systems used in hiring have been found to exhibit bias, advertising algorithms have shown discrimination in housing ads, credit models might inadvertently redline, and generative AI can produce false or malicious content. Colorado's legislative findings cited "ample evidence" of AI systems that are "deeply biased and flawed" in ways that affect people's lives.[208] Without tailored regulations, these harms might slip through gaps in existing law: for example, disparate impact bias might be hard to prove under current anti-discrimination statutes if AI decision-making is opaque. The CAIA's supporters argue that new transparency and accountability measures (like requiring impact assessments and disclosures) are crucial to uncover and correct algorithmic discrimination that would otherwise remain hidden.[209]

Moreover, the AI context raises novel issues of scale and speed: AI systems can make thousands of decisions per minute, affecting many individuals simultaneously, and learning or changing over time. Traditional case-by-case litigation (*e.g.*, one could sue if an AI product is negligent) may not be sufficient to proactively prevent widespread harm. That's why advocates push for preventative regulation – setting standards and duties up front so that AI developers build

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[208] *See* Matt Scherer, *Joint Civil Society Statement on Colorado Senate Bill 24-205*, CTR. FOR DEMOCRACY & TECH. (Dec. 10, 2024), https://cdt.org/insights/joint-civil-society-statement-on-colorado-senate-bill-24-205/ (endorsing Colorado's legislative findings that AI systems are "deeply biased and flawed").

[209] *See Building on Colorado's AI Act to Ensure Sound Policy*, ELEC. PRIV. INFO. CTR., (July 2025), https://epic.org/documents/building-on-colorados-ai-act-to-ensure-sound-policy/ (advocating that the Act's impact assessment and disclosure provisions are necessary for detecting and remediating AI-related discrimination risks).

in fairness and safety from the ground up.[210] From this vantage point, laws like Colorado's are not anti-innovation; they are trust-enablers. By ensuring AI is deployed responsibly, these laws can increase public trust in AI systems, which in the long run *favors* innovation because people and institutions will be more willing to adopt AI if they're confident it's safe and fair. This is analogous to how consumer protection and quality standards can actually expand markets by overcoming user skepticism.

Pro-regulation voices often cite the "Europe vs. U.S." contrast. The European Union's comprehensive AI Act (expected to be enacted around 2025) takes a strict risk-based regulatory approach. While some fear that might stifle European innovation, others note that clear rules can also attract investment by delineating acceptable practices. If the U.S. entirely eschews AI regulation, it may face issues of interoperability or adequacy when dealing with Europe or other regions, potentially putting U.S. companies at a disadvantage in global trade if their products are seen as less trustworthy. Additionally, if AI technologies cause serious incidents (imagine an AI failure leading to physical harm, or egregious discrimination), a lack of regulation could erode public support and provoke a harsher backlash later. There's a "stitch in time" argument: modest regulation now can prevent scandals and crises that lead to draconian regulation later.

State-level initiatives can be seen as laboratories of democracy – trying out AI governance strategies in the absence of federal action. Colorado's experiment, for instance, might provide valuable lessons on what works and what doesn't in AI oversight. The policy balance might not

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[210] *See* Robert Booth, *Regulation 'done properly' can help with AI progress, says Microsoft chief scientist*, THE GUARDIAN (June 22, 2025, 6:00 PM), https://www.theguardian.com/technology/2025/jun/22/trump-ban-us-states-ai-regulation-microsoft-eric-horvitz (arguing that well-crafted regulation can accelerate rather than hinder AI innovation); *Will Henshall, AI Experts Call for Policy Action to Avoid Extreme Risks*, TIME (Oct. 24, 2023, 5:40 PM), https://time.com/6328111/open-letter-ai-policy-action-avoid-extreme-risks/ (24 leading AI researchers—including Geoffrey Hinton and Yoshua Bengio—urge governments to adopt preventive AI governance to address systemic and large-scale risk).

be all-or-nothing: it could involve *targeted* regulations on the most high-risk AI uses (as Colorado does), while leaving low-risk innovation unfettered. The July 2025 Colorado developments highlight this nuance: stakeholders weren't calling to scrap the AI Act entirely, but to fine-tune it (*e.g.*, clarifying definitions, adjusting compliance timelines) so that it protects people without unduly burdening business.[211] That suggests a middle ground is achievable – one that protects privacy, fairness, and safety and promotes competition and innovation. Indeed, as the EPIC coalition letter put it, "Colorado has an opportunity to lead… with policy that places common-sense guardrails on AI… that both protects the rights and privacy of residents and encourages technological innovation".[212]

c. Navigating to a Balanced Federal Framework.

The policy challenge is to avoid the extremes of *a completely laissez-faire approach* (which could yield unaccountable AI and public harm, eventually undermining the technology's social license) and *an overly restrictive regime* (which could needlessly hamper beneficial innovation and cede leadership). Some principles that emerge from the debate include:

- **Risk-Based Regulation:** Focus rules on uses of AI that pose high risks to humans (e.g., decisions affecting employment, credit, safety), while keeping low-risk uses free of new

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[211] *See Colorado's Landmark AI Law Still on Track for 2026, But Push to Delay Continues – What Should Employers Do?*, FISHER PHILLIPS LLP, (May 15, 2025), https://www.fisherphillips.com/en/news-insights/colorados-landmark-ai-law-still-on-track-for-2026.html (describing continued pressure from tech groups and bipartisan stakeholders—including Governor Polis and state officials—to delay implementation, narrow definitions, and scale back reporting requirements); *accord Chas Sisk, Colorado lawmakers leave Capitol with the clock still ticking on AI law*, KUNC (May 8, 2025, 5:08 PM), https://www.kunc.org/politics/2025-05-08/colorado-lawmakers-leave-capitol-with-the-clock-still-ticking-on-ai-law (reporting failure of SB 318 compromise and shared calls for further stakeholder work to "fine-tune" the law).

[212] *See Building on Colorado's AI Act to Ensure Sound Policy*, ELEC. PRIV. INFO. CTR., (July 2025), https://epic.org/documents/building-on-colorados-ai-act-to-ensure-sound-policy/ (asserting that "Colorado has an opportunity to lead the nation with innovative policy that places common-sense guardrails on the development and use of AI … that both protects the rights and privacy of Colorado residents and encourages technological innovation").

burdens. This is essentially what Colorado's law does by targeting "consequential decisions."

- **Transparency and Assessment:** Require transparency measures (like disclosing when AI is used and conducting bias audits) that impose relatively low cost but yield high benefit in accountability. These can often integrate with existing compliance processes.
- **Flexibility and Sunset Clauses:** Given the fast evolution of AI, regulations could include sunset or review clauses (like the FAA's moratorium on new spaceflight regulations[213]). A temporary moratorium on *federal* regulation – as the Administration seems to prefer – combined with ongoing monitoring might make sense. Conversely, states might delay enforcement of certain provisions (as Colorado considered delaying to 2027) to give industry time to adapt and regulators time to refine rules with more data.
- **Federal-State Collaboration:** Instead of confrontation, a cooperative approach could involve federal agencies providing guidance or standards (*e.g.*, NIST's AI Risk Management Framework, which the Biden Administration promoted) that states can adopt or reference. The federal government might set baseline principles (*e.g.*, transparency, non-discrimination) and allow states to implement them in detail, avoiding a vacuum but also avoiding overly prescriptive one-size-fits-all rules at the national level. This would harness states' innovative policymaking while keeping an overarching coherence.
- **Stakeholder Engagement:** Both innovation and regulation advocates agree that stakeholder input is crucial. The Colorado case saw multi-month stakeholder work, and even then, Governor Polis felt more was needed. The federal RFI initiated by the AI Action Plan is a positive step to hear from industry and public. Ongoing dialogue can identify where regulation is truly needed (*e.g.*, where market forces won't naturally fix a problem) versus where it might be safely minimal.

In evaluating the trade-offs, it's useful to recall that unchecked innovation can carry societal costs that, if not managed, can themselves dampen innovation in the long run. For

[213] Stephen Clark, *A nearly 20-year ban on human spaceflight regulations is set to expire*, ARS TECHNICA (July 17, 2023, 7:00 AM), https://arstechnica.com/space/2023/07/a-nearly-20-year-ban-on-human-spaceflight-regulations-is-set-to-expire/.

example, if consumers or other countries lose trust in AI "Made in USA" due to scandals, American companies could suffer. Conversely, over-regulation can stifle the creative trial-and-error process that drives technological breakthroughs. Policy must therefore aim for a "Goldilocks" solution – not too hot, not too cold. Some observers suggest a phased approach: encourage innovation in the early stage but ramp up accountability measures as technologies mature and their impacts become clearer (this reflects the notion of a "regulatory learning period"[214]).

At present, the Trump Administration's stance heavily favors the innovation side, while states like Colorado emphasize the risk mitigation side. A balanced national strategy might involve elements of both: for instance, federal investment in AI R&D and infrastructure (to boost innovation), combined with targeted federal safeguards or guidelines on AI ethics and safety (to address risks). Such an approach could preempt the worst-case scenario of completely divergent state regulations without abandoning important protections. It could also blunt the constitutional conflicts – a well-crafted federal law could set a uniform floor and resolve Spending Clause issues by legitimately conditioning funds on compliance with that law, rather than on an ad hoc executive preference.

The policy debate underscores that innovation and regulation are not mutually exclusive. Thoughtful regulation can channel innovation in socially beneficial directions (for example, spurring the creation of AI audit tools or fairness techniques), and robust innovation can occur within guardrails that ensure public trust. The current federalism fight over AI, while framed in oppositional terms, is an opportunity to calibrate how we govern transformative technology. By learning from both the deregulatory impulse and the precautionary impulse, policymakers can ideally craft a regime that maximizes AI's benefits – economic growth, improved services,

[214] Stout, *supra* note 152.

scientific advancement – while minimizing its harms – bias, privacy invasion, safety failures. Achieving this balance is crucial to sustain AI's long-term viability and legitimacy in the eyes of the public.

V. CONCLUSION

The unfolding saga of Executive Order 14,179 and Colorado's AI Act is a microcosm of the broader challenge society faces with artificial intelligence: how to reap AI's rewards without courting its dangers. On one side, the federal government under EO 14,179 has taken an emphatic stand for deregulation and rapid innovation, viewing any impediment – even seemingly well-intentioned state rules – as a strategic disadvantage in a global contest for AI leadership. On the other side, states like Colorado represent a ground-up push for responsible AI governance, born of real concerns that, without oversight, AI could perpetuate discrimination or other harms at scale.[215] This conflict is not merely political; it strikes at constitutional allocations of power and tests the adaptability of legal doctrines to fast-moving technology.

Legally, the federalism fight over AI illuminates the checks and balances at play. The Trump Administration's gambit to leash state regulations by conditioning funding and exploring preemption runs up against constitutional guardrails: the Spending Clause's prohibition on coercive or unrelated funding conditions, the principle that only Congress can authorize such conditions, and the limits of executive agencies' authority without clear statutory mandates.[216] At the same time, state laws like the CAIA must operate within the boundaries of the Dormant

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[215] Anjana Susarla, *States Take the Lead in AI Regulation as Federal Government Steers Clear*, ARS TECHNICA, (Aug. 6, 2025), https://arstechnica.com/ai/2025/08/states-take-the-lead-in-ai-regulation-as-federal-government-steers-clear/.

[216] *S.F. v. Trump*, 897 F.3d at 1231; *Dole*, 483 U.S. at 206–07; *Sebelius*, 567 U.S. at 575–85; *Youngstown Sheet & Tube Co*., 343 U.S. at 585-86.

Commerce Clause and not fracture the national economic union with undue burdens. So far, Colorado's law appears on solid footing, but as more states innovate in this area, pressure will mount for a cohesive national policy – lest a patchwork become too onerous.

This period, therefore, may be a transitional moment. The current Administration has, in essence, thrown down a gauntlet, prioritizing innovation at almost any cost and signaling to states to step aside. The states, supported by consumer and civil rights advocates, have countered that now is the time to put guardrails on AI, precisely because it is beginning to permeate high-stakes decisions. The resulting friction could be ultimately productive if it forces a national reckoning on AI governance. It is conceivable that through negotiation, litigation, and perhaps congressional intervention, a compromise framework will emerge. Such a framework might establish baseline federal standards – for transparency, risk assessment, and non-discrimination – that preempt extreme outliers among state laws, while still allowing states room to address particular local concerns. Concurrently, it could enshrine the positive aspects of the Action Plan (*e.g.* investment in infrastructure, support for innovation) without the constitutionally suspect punitive measures.

In navigating this, policymakers should remember that federalism need not be a zero-sum tug-of-war. There can be synergy: federal leadership and resources combined with state-level experimentation and enforcement can together create a robust ecosystem for AI development and oversight. The cooperative federalism model that the AI Action Plan inverted could perhaps be righted – instead of using funds to silence states, use funds to help states implement thoughtful AI programs, training state regulators, sharing best practices, and even funding state-level AI sandboxes or pilot projects that inform federal policy.

Ultimately, AI is too important – "too vital," as the Action Plan itself says – to be left in a regulatory void, but also too important to smother under a patchwork of imprudent rules. The goal

should be smart regulation, not heavy regulation; governance that is agile and evidence-based, evolving as the technology evolves. That is a daunting task for our legal system, which is often slower than technological change. However, the present clash might accelerate legal evolution: courts will clarify how old doctrines apply to AI, and legislators (spurred by the urgency of both innovation and protection) may craft new laws.

"Artificial Authority" is more than a headline for a conflict between a President's executive order and a state statute. It encapsulates the crossroads at which we stand in the AI era. Down one path, unfettered innovation promises unprecedented growth but carries latent perils; down the other, precaution promises safety and fairness but could curb the dynamism that drives progress. The challenge for law and policy is to chart a middle path that harnesses innovation's power while steering clear of its excesses. The tussle between EO 14,179 and state AI laws like Colorado's may be the first significant test of how we strike this balance in practice. The outcome – whether through courts or compromise – will likely shape the federalism frontier of AI governance for years to come, setting precedents for how we allocate authority and responsibility in the age of intelligent machines. The stakes – for technological leadership, for constitutional principles, and for the everyday lives of citizens who will increasingly interact with AI – *could not be higher*. The hope is that from the current conflict will emerge a consensus that innovation and regulation are not enemies but rather partners in guiding AI toward enhancing human flourishing while respecting our timeless values of equality, liberty, and the rule of law.