Technology Policy Institute

How Should We Regulate the Digital World?

Aspen Forum 2024 Panel Discussion

Panelists:
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Monday, August 19, 2024
9:05AM – 9:55AM

Event Page: https://www.youtube.com/watch?v=fQn27_NuQQc

Alan Raul
I'm Alan Raul, senior counsel at Sidley Austin, as well as a lecturer on Digital Governance Cybersecurity at Harvard Law School and former Vice Chairman of the Privacy and Civil Liberties Oversight Board. We've got a great panel that I'm going to introduce in a moment. This next panel is on How We Regulate the Digital World, which is literally about everything. It's about data privacy, cybersecurity algorithms, AI, the environment, monopoly power, intellectual property and innovation bias, civil and human rights, the future of any and all jobs, innovation, military superiority, national security and our very survival, or the nature of our future existence as humans, or perhaps as humanoids. So, fortunately, we've got 50 minutes to figure this all out.

So while we are fortunate to have a fantastic panel, we are down one due to Peter Brown from the EU. He's senior policy advisor, strategy innovation unit of the European Parliament. In his absence, we have committed to go easy on the EU and not criticize them constantly, but I hope we criticize them effectively. So the panel that will be with us today is Andrew Devore. He has served as Amazon's Vice President and Associate General Counsel since August 2010. He's a former federal prosecutor from the Southern District of New York, where he co-founded the Computer Hacking and Intellectual Property Unit, and he founded and ran his own law firm, Devore and DeMarco, in New York City, specializing in digital investigations and litigation, and for many years was an adjunct professor at Columbia Law School, teaching internet and computer crimes. Kat Duffy is senior fellow for Digital and Cyberspace Policy at the Council on Foreign Relations and is also the founder and CEO of Wright Duff, which I think is a pun.

Kat Duffy
Who doesn't love a pun?

Alan Raul
And she has advised companies, governments and non-governmental organizations on building socially responsible business practices within the technology sector, developing strategies to align emerging technologies with democratic norms and human rights. And Adam Thierer, resident senior fellow at R Street Institute. He specializes in technology, media, internet and free speech policies, with a particular focus online safety and digital privacy. His latest book is Permissionless Innovation, the Continuing Case for Comprehensive Technological Freedom. And if anybody can give the EU a run for its money on being prolific and prodigious in writing, but in this case, really great stuff, that would certainly be Adam. So, since our EU representative, Peter isn't going to be joining, I just wanted to set the stage a little bit on all of the panoply of EU digital regulatory initiatives, which are truly awe inspiring.

There's the Digital Markets Act, the Digital Services Act, the AI Act, the Data Act, the Data Governance Act, various cybersecurity acts, including Network Information Security Directive, Cyber Resilience Act, Dora, et cetera. And of course, there's the mother of all bureaucratic data regulations, the General Data Protection Regulation. So the EU has really given us a lot to work with there. The United States, of course, is also hot on the trail. President Biden issued his AI executive order on safe, secure, and trustworthy development and use of artificial intelligence. That was back in October of 2023. The Federal Trade Commission has proposed and threatened to adopt its commercial surveillance and lax data security proposal, which former Federal Trade commissioner, Noah Phillips, called the majority's “dystopic view of American digital commerce.” I'm sure that there'll be a lot of commentary about that.

Congress is always thinking about whether it should have buyer's remorse on Section 230, and from the Supreme Court, we've seen lots of activity on that. But remarkably, they have been quite restrained in taking, the Supreme Court has been tackling algorithms in its various decisions on First

Amendment and social media, as well as the government's efforts to jawbone and cajole the platforms into content moderation. The UK has also been involved, conducting under the prior government of Rishi Sunak, AI Safety Summit in Bletchley Park, which resulted in the declaration, which, very interestingly, China signed, which reflected some international commitments to working together on AI. And most recently, in a follow up to that in Seoul, Korea, there was a declaration in May where many of the world's leading AI developers agreed to certain principles on best practices.

And of course, the Brussels come to Sacramento, California has been very active as well. There will be a vote on California's SB 1407 perhaps tomorrow on the Safe and Secure Innovation for Frontier Artificial Intelligence Models Act, which, interestingly enough, has been the subject of various amendments and moderation at the behest of industry to bring it more in line with what may be manageable practices. So hopefully, our esteemed panelists are about to enlighten us on what the right analogy for digital regulation might be. Is it GDPR? Is it the atomic energy nuclear proliferation model, or the FDA type approval model? Climate change, Digital Millennium Copyright Act, section 230? Or is it the cryptocurrency model of regulation, which is really not to do anything at all about it?

And then, of course, if there does turn out to be regulation of artificial intelligence at the federal level in the United States, or other digital technologies, will the Supreme Court allow it to persist in light of the Major Questions Doctrine and the reversal of the Chevron Doctrine? So with that, let me turn it over to Andrew. And what's the perspective that you see from the US that big tech firms like Amazon are exposed to, both from the EU side? And what do you see as some risks that grow out of that approach?

Andrew DeVore
Thanks, Alan. Good morning, everyone. Very happy to be here. I couldn't possibly presume to answer the question.

Kat Duffy
Is it that you don't deal in hypotheticals?

Andrew DeVore
What it does underscore, I think, the foundation. And what I would like to try to unpack a little bit, which is this conversation about so called digital regulation is incredibly important to all of us. And particularly in light of the last conversation, it's also incredibly timely. And so I think it's critical that we bring a high degree of analytical rigor to that analysis in endeavoring to answer that question. And I do worry that in the rush to address perceived political problems, the discussion of quote unquote “digital regulation” has been imprecise. And that has produced a number of unintended consequences that risk very real harm to innovation and to the economic and employment benefits that innovation so clearly drives.

And I think there's a problem at the foundation, which is that the premise that there's a quote unquote “digital world,” which is distinct from all of our other economic activity, is inherently misleading. The world is digital today. I felt a little old with the introduction from Alan about the computer crimes and intellectual property. It sounds quite antiquated now, but that, you know, the world has become digital over the course of at least the last 40 or 50 years with the advent of the internet, a proliferation of digital technology. And that technology is not just ubiquitous in all of our daily lives, but in every sector of the economy. And that is accelerating again now with this incredibly exciting new wave of innovation that we see coming with generative artificial intelligence.

So, in truth, I think asking how we should regulate the quote unquote “digital world” is really asking

how we should regulate the modern economy. And regulation that's aimed at just certain, quote unquote, “big tech companies” that are fundamentally different and fundamentally different business models as diverse as search, social media devices, multi-channel retail is fundamentally unsound. And instead, it's most likely to produce all kinds of unintended consequences that will harm innovation and the benefits that it drives. And this is not, at this point, it's not just an academic assessment. We now have increasingly strong evidence of the different regulatory regimes around the world and the effects that they're having on the additional economy.

And that evidence, I think, demonstrates increasingly clearly, that a regulatory approach that doesn't carefully distinguish between different business models and theories of harm, and doesn't look closely at specific evidence, results in a blunt approach with vague and burdensome standards that harm innovation and investment. The most notable examples of this are coming out of the European Union over the last several years, and the evidence is already coming in. Any benefits from those regulations, I think, is at best uncertain. And instead, from the perspective of the business community both here and there, they're having real negative consequences on investment and innovation. And we see analogous push today in major jurisdictions around the world to fundamentally alter merger policy and to block any significant transaction, regardless of its pro-competitive impact. And that's producing similar effects.

In an example that's unfortunately close to home to me, the blocking of Amazon's acquisition of iRobot, which didn't have any prospect of serious competitive harm, and instead harmed a highly innovative company that was badly in need of additional investment and had the net effect of benefiting Chinese competitors who were already dominating the global retail segment for robot vacuum cleaners. And again, we see troubling signs of a similar development in the AI space today, where innovation is measured in days and weeks, and inconsistent regulatory innovation. Risks, whether intended or not, having the effect of picking winners and losers. So at the end of the day, poorly conceived regulatory regimes will harm the economies of the companies, sorry, the countries that implement them, making their consumers worse off and harming the competitiveness of their companies globally.

Given the demonstrated power of innovation to improve standards of living, particularly at a time we're on a cusp of a new wave of technological advance, policymakers should think hard about replicating these regulatory regimes and the unintended consequences that they produce, which ultimately harm the investment and risk taking that's required for innovation. It's also worth observing that these twin developments, regulatory regimes with rules that apply broadly, irrespective of the underlying segment, and blocking transactions irrespective of harm, have been premised largely on the claim that traditional antitrust tools are insufficient. But that premise also has been overblown and appears unsound. Whatever you might think about the outcome, the recent decision in the Google case demonstrates clearly that we do have the ability to work closely with the evidence, investigate the evidence, interrogate the evidence, apply hard analysis, and produce outcomes that blunt regulatory regimes never could.

So, absolutely, regulation plays a critical role for all of us, and I think in all democracies seeking the benefits of free market economies. But it must be done carefully and consistent with the rule of law principles that have served all of us so well and for so long. And I would submit to all of you, for all of the conversations today and going forward, that these principles are as relevant and important today as they ever have been.

Alan Raul
Thanks.

Andrew DeVore
That’s the answer.

Alan Raul
That's the answer that gets us, I think, 50% of the way there. Thanks for bringing to the front of our mind that the digital world today is actually the world. It is just the world. And for also suggesting that we, that regulatory policy that doesn't distinguish between the actual harms is likely to cause more harm than benefit for us. As Amazon and you handicap the harms that arise in the digital context and artificial intelligence, what do you see as those at the top of that hierarchy that may warrant a different degree of regulation from those at the bottom, which may warrant none at all? And does any of that factor into the impact on Amazon and the other companies that signed on to the White House's voluntary commitments, kind of a soft law approach to best practices and so on? How do you, what are the risks that you think are important to deal with, and how do they kind of commitments that companies like Amazon have made address them?

Andrew DeVore
Yeah, I wouldn't call it a soft law approach to regulation. I think what it is, is an effort to accurately assess where we are today with AI, which, as the previous panel demonstrated, is we don't really know. We're starting to generative AI really sort of came into all of our conscience just about a year ago. So it's a very short period of time, and we're starting to see some really interesting and powerful implementations in a number of sectors that were identified earlier. But I think the critical point for all of us, and certainly for Amazon, we don't really know yet what those benefits are most likely to be or the kinds of implications that they may have. Nor do I think at this point do we have a really accurate view of what the potential harms may be.

We're all, I think, in violent agreement that there can be potential harms and that they're important to address. But I think the benefit of the regulatory framework that's outlined in the AI principles and that has since been continued to be built on and reinforced in a number of other international forum with many, you know, leading AI companies participating, as well as regulators from around the globe, is to try to find a way to develop a flexible framework that will allow all of us to find our way forward with transparency, with a commitment to responsible development of AI, and with real collaboration between industry and government to be as clear as we can be about both what those benefits are and what the potential risks may be so that we can identify those risks with the right level of precision as we identify them.

And I think that's it's. And so I'm not quarreling with the soft law reference, but it really is. It's a different way of thinking about how to address the regulatory problem with a high degree of precision at a very early stage, where we just don't see it as clearly as any of us might want to do. Much like the advent of the Internet so many years ago and a number of other technological developments that have preceded it.

Alan Raul
One of the questions that we have from the audience is, if the world has changed, wouldn't that be an argument for comprehensive regulation rather than none? Given your focus on precision and waiting to see what the, the harms. I'm not going to presume to answer the question for you, but do you have a point of view on whether comprehensive regulation is warranted? And if so, is it warranted at this particular juncture?

Andrew DeVore
I do. I think the AI frame is a really useful frame for thinking about the problem, and particularly at an early stage of rapid technological advancement. The idea that you can see clearly enough to what

the potential risk may be that you should put in a heavy weight slate of regulations to prevent those risks from being realized. By the time those things are hammered out and go through a legislative process, those risks very likely will already be outdated and won't produce the benefits that are sort of ascribed to them, and instead pose risks to continued innovation. And we've seen that in a number of examples historically, those examples are now repeating in some geographies in particular today, and we're seeing continued repetition. And it is interesting just to observe that in Europe. Europe thought they were pretty close to done with the AI Act. Right?

And this was just before Gen-AI kind of hit this general consciousness and it was like, oh, well, we better revisit, since there's this new piece of the technology that we didn't even anticipate fully and we couldn't possibly have addressed at the time. It's a really nice example of the problem of sort of prescribing at the front end before you have the requisite understanding.

Alan Raul
Yeah, great point that they were, the EU was overtaken by innovative developments. Even, because I think it was a French company itself, Mistral, that brought up issues that sent them back to the drawing board. If I may go to Kat. So how does the USAI and tech reg policy making look to you from the rarefied salons of the Council on Foreign Relations? Is the US well organized to exercise good judgment, be smart about these policies? Is OMB doing its job? And as an old OMB, hand myself, helping out in assessing the costs and benefits and risks on digital regulations. And perhaps most surprising of all, how did the Commerce Department end up as the cool kid on AI?

Kat Duffy
In defense of my many federal government employees colleagues here, I want to say I think you're all the cool kids. If you'll let me sit with you at lunch, that'd be really great. I feel like the halls of CFR are more rarefied in our New York office than they are in our DC office, which feels much more like popcorn ceilings. But it's really interesting to be looking at this moment for context. I've spent about half of my career outside of the United States, about half my career inside the United States. And the countries that I've lived in are part of what I call the global majority, what a lot of other people call the global south, or what the tech sector so charmingly refers to as rest of world.

And so Cuba, Colombia, Tunisia, South Africa, those are the countries in which I have lived and done a fair chunk of my work. From a foreign affairs angle, what's really interesting is in the foreign affairs space, countries are monoliths, right? It's what is the United States going to do vis a vis India, vis a vis China? And that places a critical assumption that I think is quite false in the United States executive branch's capacity to operate at the same, in the same way and with the same level of autonomy that most other countries executive branches can operate.

Federalism is a weird quirk into this scenario, and one that I think given Chevron, given Corner Post, given the major questions doctrine is potentially given, or sort of it broad shifts at administrative law and our understanding of the role of the administrative state right now constitutionally in the United States. That, I think, is going to be a real question in tension over the next couple of years, and one that in foreign affairs I suspect we are dramatically underestimating. Because if you are a diplomat coming in from another country, it can be really confusing as to why the US says one thing and does another thing, and it's because legally we can't do the thing we're saying, because the executive branch doesn't necessarily control that. Right?

So there's, I think, an under indexed complexity there that is going to rise to the top as we see more and more bills like the AI bill in California. So that's one thing I'm kind of tracking. And I think this election is going to be really critical to that, because some of the Supreme Court's decisions on administrative law, depending on how Congress shapes up, could be shifted very easily through

some codification. But you have to be sort of pro-administrative state to want to do that. It's a very pie in the sky thing. And if there's any administrative law folks in the room, I would love to talk more about it. Right. I know, of course, you.

So in terms of what the executive branch has actually been doing, I mean, it's been incredible to see how the Biden administration has ramped up its response, given AI. They were working on the data security executive order for probably a year longer than they were working on the AI executive order. And that thing was produced in, I don't know, a record time for any executive sort of authority to have come out. But executive orders are also inherently limited in what they can do. And I think what you've seen across the board with the administration, and you see this with commerce, too, is pushing executive branch authority to the absolute stretching of the seams, like me trying to fit into my skinny jeans like situation. And it's not necessarily a good look, y'all.

So one of the things that you're seeing, because we have such profound congressional dysfunction, because we have such profound legislative dysfunction at the national level, is as much creativity as they can exert on the executive branch side, because we've got to get something, we've got to do something. There has to be some response, and then you're seeing all of this activity bubbling up on the state legislative side as well. So in the 2024 legislative cycle, 40 different states, at least 40 different states and multiple territories, all had proposed AI regulations, legislation, frameworks. They're all sort of different. It's hell, from a forecasting standpoint for businesses. It's not actually good for business or for innovation.

And so I think this coming year and this sort of coming legislative cycle at the federal level is actually going to be mission critical in terms of what congressional authorities, what executive authorities Congress would actually codify in order to put some of these administrative questions to rest and whether Congress can move forward in a meaningful way. I personally don't actually think trying to regulate AI as AI, necessarily makes the most sense. At least if you think of regulating or legislating, if you're gonna, you know, get nitpicky, governing AI through regulatory mechanisms or legislative mechanisms, we've been in a real zone of reactive panic, of focusing on constraint and constraining and tightening. And where I'm hoping we're going to move is towards a more creative zone of incentivizing and course correcting and balancing. So we know that VC is powering most of this, right?

We know that most R and D in this space is not coming from the federal government. But when private money and corporate money is governing transformation, the governance model for that is corporate risk. It's corporate governance, which means it's managing investor risk, not societal risk. It wasn't designed to manage societal risk. That's what big G Government is for. And big G Government has really been struggling with balancing the market incentives and balancing the need to protect for societal risk. And now we keep pushing on businesses to take that job on for us. I don't necessarily want businesses taking that job on for us. They’re not going to be very good at it.

And so how we think about if you take a short term investor horizon, which is what we've got more and more and more VC powering this space, what are the federal government investments that we need to course correct for the things that aren't going to serve the market, that aren't going to be revenue generating? Right? What does that look like? Red teaming that is specifically focused on individual communities? How are we going to protect for marginalized communities and vulnerable populations? There's a question in here around like, well, there's already state and federal regulations around employment and lending and insurance. That's correct. Also, how fast and effective have those regulations been at offering those protections? How hard has it been to exert those protections? And what has that timeframe been?

Because we know that whatever breakage we've got, these new generative AI technologies in particular are likely to scale. And so I think the question then becomes, how do we, where we have existing laws, is there a way that we can dramatically improve their effectiveness in this space? Or if we know that the market is going to take us in one direction, what does governance look like that is more pro-social in its design and more creative in its design and less constraint focused.

Alan Raul
I love your characterization of federalism as just a little quirk of the United States. That's great.

Kat Duffy
It's tricky, man.

Alan Raul
We're going to take that away. It's a takeaway here on the executive order and pushing executive authority to the max. My read of the executive order is that a lot of it is directing agencies to use their existing authorities to do whatever they think they ought to do with AI. And that'll all play itself out, maybe not need new specific regulations or even legislation. But on the highly capable frontier models that could affect national security, the executive order invokes the International Emergency Economic Powers Act, IEEPA, the Defense Production Act. You know, is that going to work where there is a, just a kind of a mandate by the President? If you have one of these highly capable models, you have to report your development or acquisition of those models to the Department of Commerce, red team it and report that. Is that going to hold or are they going too far there?

Kat Duffy
Well, I think there's the use of IEEPA, and then there's the thing that they said to do with the IEEPA authority. Right. And I would divorce those things a little bit. I think to me, the use of IEEPA is, it's kind of, again, like it falls into my skinny jeans bucket, right. Of, if you want to control for something and, you know, there needs to be a response, and also Congress isn't going to act, then you're going to exert your authority in the executive branch. But it's to some degree a vacuum of leadership in the other branch that I think is powering that. What I think is, what I worry about, and the National Security Memorandum, by the way, is going to come out sort of any day now under the AIEO. So there's two, those who haven't been tracking, the executive order of artificial, for artificial intelligence, puts out one memo, that is the OMB memo, that really governs the non-national security services AI sector in the federal government. And then the national security memorandum governs national security uses. And that is, that has been a much trickier, I think, document to draft and one that some of us here have been deeply involved with. But so, anyway, I am very concerned that if we don't solve these fundamental questions of authorities, of administrative law authorities, that we end up sort of like we saw, frankly, I think with the TikTok ban, in this world of claiming national security as the rationale for why you are making a decision, regardless of how, of whether that is truly a critical national security concern.

Because national security are two magic words that you can put on something that clearly makes it the purview of the executive branch to deal with. And if you say national security, it's suddenly much harder to question that the executive branch is authorized to manage there. And so if we continue to get into this broader environment of pressure on the executive branch to be sort of unable to move in the tech policy space, I do think we incentivize the use of a national security framework for movement in areas that defensively might not actually be at their core national security. And that then dilutes the true national security concerns and arguments. It hurts the brand, diminishes the brand. And so this is my big concern and then also just implementation.

So as one quick example, the data security EO, which came out, which basically bans the sale, in part, bans sales of certain different categories of personal data to countries of concern under commerce, including China, Venezuela, Iran and others. One of those is that you can't sell data that involves the PII of US military officials or their families. Right. US military members are their families. Okay, somebody walk me through random Fitbit company, that's got their Fitbit, and is selling their data but has nothing in their interface to say like, are you a member of the US military? Are you a family member of a person in the US military? And we're going to ask you this question all over the world. And then if you say yes, you're going to somehow end up in some other data repository that is not the data repository that we use or sell. Like, the implementation of all of this stuff is just so unclear in terms of how it's actually going to get done.

Alan Raul
TikTok, I thought that was about the bomb. So there really isn't a national security angle to it? No, I--

Kat Duffy
I have a hot take on that one you can talk about at happy hour.

Alan Raul
Sometimes it can be a pretext. Adam, so you've been a longtime antagonist of the application of in regulatory policy, the so called precautionary principle, and applying it to digital regulatory policy. And you've certainly been an effective advocate of permissionless innovation. That's gotten us to where we are. So what do you think about the EU? What do you think about where the US, and I know also federalism is an issue of yours. A quirk, not a quirk. So how's this? You know, how are we going to preserve what's good and at the same time address the issues, harms, risks and otherwise that are genuine?

Adam Thierer
Sure. Well, thanks, Alan, and thanks for having me back here. I think it's important we take a step back and when thinking about the topic of this panel, about how should we regulate the digital future. Understand, of course, this is a really, actually now, a very old debate. In fact, 25 years ago this week, this Thursday, in fact, Ira C. Magaziner of the Clinton administration came here to Aspen before an earlier version of this summit and delivered a speech on this exact topic almost with the exact same title. And Ira C. Magaziner had just finished serving as a senior advisor to the Clinton administration and he was the principal architect of the Clinton-Gore administration's framework for global electronic commerce. In his remarks here at Aspen in 1999, some of you I know may have also been in the crowd, a couple of old timers like me here. Ira laid out a passionate vision for how we should govern this new, exciting world. We have to remember at this point in time, in the late nineties, there was still a lot of skepticism about the internet. A lot of people thought it would be a passing fad. Many of you recall that in 1997, Nobel Prize winning economist Paul Krugman even said that the internet's impact on society and economy will be no greater than that of the fax machine. Nobels are cheap, folks. I mean. But anyway, President Clinton had a decidedly different vision, as did Ira Magaziner, where they predicted the potential to unleash massive economic growth and other important things.

Magaziner began his remarks here at Aspen in ‘99 by arguing that the internet is a medium that has tremendous potential for promoting individual freedom and individual empowerment, and we should use this medium to maximize the opportunity for human freedom. The framework for Global Electronic Commerce, which, again, he helped author with the Clinton Gore administration in 1997, said government should avoid undue restrictions on electronic commerce and allow the digital world to develop, as, quote, “a market driven arena, not a regulated industry.” The goal was bottom up

governance through a variety of different decentralized mechanisms. And where government involvement was needed, its aim should be “to support and enforce a predictable, minimalist, consistent and simple legal environment for commerce.” Importantly, in his remarks here at Aspen in ‘99, Ira actually had something to say about the European model that were here to discuss again today.

And his view was that our main concern about the European approach, is that it will create more bureaucratic and inflexible solutions than is necessary, and that such a system will be unpredictable. Well, I'm here to say that the Clinton-Gore-Magaziner vision for the internet, digital commerce, electronic commerce, has been vindicated and then some. I think there's obviously a lot of people who are skepticism about the state of technology and the internet today, but let's take a look at just a few facts, if we can. We live in a world today of, I don't know if Hal Varian's still here, but Hal used a term in a 2010 piece that I love, “combinatorial innovation,” or what a new book by Jamie Metzl called “Super Convergence,” where we see all sorts of interesting technologies coming together to create very powerful outputs and outcomes for society.

So much so that in one generation we've moved from a world of information poverty to a world of information abundance. That used to be the primary focus of ICT, of information communications technology policy. How to get more, how to move out of a world of scarcity. Right, we got it. And now everybody complains, “information overload!” I'm here to say that's a better problem to have than information poverty. But more importantly, let's just talk about some really hard numbers about what this has meant for the American economy relative to Europe. A recent US Bureau of Economic Analysis survey found that for just 2022 alone, the US digital economy accounted for $4 trillion of gross output, 2.6 trillion of value added, which is 10% of US GDP, $1.3 trillion of compensation, and 8.9 million jobs.

These are astonishing numbers, but let's talk about it in terms of geopolitical standing for the US relative to Europe and other nations. Today, 18 of the 25 largest digital technology companies in the world are US headquartered companies. Fully 50% of the largest employers in the digital technology space are US headquartered companies. By contrast, it is always a challenge that I love to put to my students and other audiences, name me some leading digital innovators out of Europe. Now, you're in a smart crowd, you'll be able to name me a couple, because there are a few, but there's not many. And most people really struggle to answer that question. Meanwhile, the European Union has decided that its leading digital export will be regulation, not products.

This seems to be the goal today, which is to figure out how to regulate all of America's winners on digital technology, and now AI. The Wall Street Journal summarized it best with a headline that said, Europe, now, quote, “regularly regulates its way to last place in digital technology.” Not my words, theirs. Now, that doesn't mean that we should have no regulation of digital technology. And Ira Magaziner and the Clinton administration did not say that. They said we need to take more of a bottom up approach to these things. We need to figure out, as Ira said in his speech in ‘99 and understand that the digital age will, quote, “have some negative side effects.”

But he also noted, when we look to address these concerns, the ultimate question should be, quote, “how do you deal with those side effects while allowing mankind to reap the benefits of the internet and related digital technologies?” It's the exact same discussion we're having here today about AI in the realm of new emerging computational algorithms technologies. Right? But what Clinton and Magaziner are said then, and is still true today, in my opinion, is that we should first and foremost understand the benefits of allowing for experimentation in trial and error. And that it gives some time for things to sort of work out and figure out targeted solutions as needed.

The best way for governments to keep pace with the amazing pace of digital technology, Magaziner argued, was through agile, iterative responses, multi stakeholder approaches, and different types of more flexible, agile governance frameworks compared to the more technocratic, top down, bureaucratic approach that Europe and many other nations were approaching. And so when we think about the future, and about to get back to the title of the panel, How Should We Regulate the Digital Future? I'd like to suggest we go back to that Clinton-Gore-Magaziner framework and begin with its four principles. First and foremost, we must reiterate that the freedom to code, the freedom to compute, the freedom to innovate, and the freedom to speak are the foundational elements of American technology governance.

Second, we should seek to stop or block any new creations of sort of newfangled licensing schemes or bureaucracies when we already have 439 federal departments in the US government, 2.2 million people working at them, and plenty of other regulations to deal with. Which leads to the third principle, which is finding those flexible, iterative approaches and understanding we need to identify where existing laws and regulations may create barriers to new entry, investment and entrepreneurialism. That requires a serious look and a comprehensive house cleaning of existing regulatory structures that deal with computation and algorithmic technologies, of which there are many. And then fourth, and finally, and this is probably the hardest part in the age of AI, which we actually got right in the Internet Age. But I think we're about to get it right wrong now, which is we need a national framework. The Clinton framework was called the Global Framework for Electronic Commerce. It's true. It was a global resource, and so is AI and advanced computation and all sorts of new technologies. But we are off and running right now with a completely different approach. Back then, we comprehensively preempted a lot of things. We had even federal moratoria. Anybody remember the Internet Tax Freedom Act of 1998? Does anybody remember the forbearance language in the Telecom Act of 1996? We took a lot of time and effort to stop these localized, parochial barriers to new innovation, entry, and investment. Unfortunately, today, as of this morning, there are roughly 800 AI bills pending in the United States. 678 of them are state bills, about 115 of them are federal. And this does not count all the various municipal measures being introduced today.

The federal legislation that is pending has zero language about preemption. Zero. So this is the beginning of a turn, potentially against the Clinton sort of Gore vision for the internet and a whole new world of a sort of patchworks of patchworks like we've never seen really, in my lifetime of 33 years of covering technology policy. This is an absolutely unprecedented amount of legislative and regulatory activity we're witnessing. And so, in closing, I just basically say that let's double down on the vision of understanding that our regulation and our governance of emerging technology could be again premised in a more open, freedom-minded kind of vision, that does require some regulation, but more on the back end. We need targeted, sectoral, risk based, outcome focused regulation through existing mechanisms. Tap the extensive. Again, I mentioned the 439 federal agencies. How about all the laws and regulations that already apply to consumer protection, to civil rights? How about recall authority? People don't even realize how much the FDA, the FAA, NHTSA, Consumer Product Safety Commission already regulate artificial intelligence outputs and even sometimes pull them off the market through recall. That's already happening today. I've got papers on it if you want to read it. It's really nerdy, boring stuff, but it's real. It's happening. And then finally, we have the quartz and torts. I mean, people forget we have the most overly litigious society in the world in the United States. Luckily, the Congress put some barriers in front of the courts, messing things up, too, with Section 230. Right. And thank God we've got the First Amendment in the United States to stop other sorts of speech related stupidity. We need more of that. A lot more of that. That's a vision. That's not anarchy. That's a vision of governance based on bottom up, pro freedom to innovate type

of thinking. I think it worked for us well in the past. I think it will work for us well in the future. Thank you.

Alan Raul
Thank you, Adam. Yeah, that was great. So, back to the future and back to Clinton-Gore-Magaziner and the Aspen Summit back in 1999. That really gives us, in the audience had a very, I think, appropriate and suitable reaction to that. Let me ask the other panelists. I think we got started a little bit late, but I think we need to think about wrapping up and see if there are any closing comments or response thoughts. And in particular, to Adam's thought about needing a national framework. And all those agencies, all those laws coming from the States, is there a suitable framework, an effective framework to help coordinate all of that? You know, I did say I was going to be nice to the EU, nicer than I would usually be, even, because Peter Brown wasn't here.

The UK, which is not in the EU, but has an interesting framework called the Digital Regulation Cooperation Forum, DRCF, made up of the telecom regulators, the privacy regulators, the competition regulators and the financial regulators to try to coordinate. I think that's a good step and might be interesting to see if OMB could do something here. But do you see. Andrew, Kat, and then close out with Adam, that we have some model, some framework that will bring some sense, common sense, if you will, rather than overload to where we're heading on digital regulation and AI. Andrew and any other closing thought you'd like to make, and then if we get dispensation since we started late for some audience questions, maybe we'll have time for that. Andrew.

Andrew DeVore
Yeah, I think that framework is coming much more clearly into view with the work of the last year and some of the things that you talked about at the outset, Alan, with the executive order and the following global activity and the cooperation between government and private sector. And it starts with private sector making a commitment to responsible development, responsible AI and I think to transparency so that we can help to unpack what's really going on with AI, what some of the most concrete and powerful benefits will be, and to bring more clarity to what kinds of risks there may be and how we should be thinking about those risks. And I think it will take real partnership and continued partnership between government and private industry to do that highly effectively.

I think that what was identified as “the patchwork of patchworks” is a very real risk. And again, going back to my premise, that we're just in the very early days of this and trying to bring the kind of broad thinking that helped to set us up to really realize in a very powerful way the benefits of innovation from the internet and digital technology. I think we're on the cusp of something similar again today and having a “patchwork of patchworks,” of laws that are developed by folks who are also, by definition, at the front end of understanding what those risks might be and to think clearly about what the benefits will be and the ways that they may impede continued innovation that's required to realize those benefits, I think, is concerning.

Alan Raul
And as we go down--

Andrew DeVore
I do think the framework is coming together with some nice clarity. Now, given all the work of the last year.

Alan Raul
Kat, before turning over to you, there's a question from Baron Zhoko that you and perhaps, Adam, in the closing remarks, might be interested in addressing, that the GDPR has been rightly criticized for

not focusing on risk, but the AI Act, for all its flaws, does exactly that. Do you object to requiring systemic risk impact assessment in principle, or merely how the AI Act implements it. So the question of risk assessment, if you would like to address that, you and Adam. Go ahead, Kat.

Kat Duffy
Sure. I would say on. I think we have a lot of lessons learned over the years in terms of due diligence and risk impact assessments. I think it can be very challenging in a technology that is as broad as AI, the risk really rests in the use case often, rather than the actual foundation of any particular model. And so thinking through what that, what implementation and effective realization of that will look like against various use cases and their security thresholds, I think that's going to really be the trick. And that, you know, the EU AI Act is not even going to be implemented for, you know, years at this point. The field will have changed, I think, dramatically by that point. And so it'll be interesting to see what it looks like in reality.

I would say on the point of innovation, I just, whenever I dig into what people mean when they say innovation and protecting innovation, it comes back to, we ended up having enormous companies with enormous amounts of money that produced enormous amounts of revenue, and that is innovation. Like, there's a tie in here that I just have not entirely bought into. And I would ask at what cost? Because when you say, for example, that something has been a kind of unparalleled success, right, or an unquestionable success, I'm also looking at levels of democracy globally that have returned to 1989 levels. I'm looking at the rise of autocracy around the world. I'm looking at a global surveillance technology network. I'm looking at human beings who have lost any sense that their personal data, that their movement, that where they go in the world or who they talk to is something that should be private, because instead it's better for that to be commodified. I'm not convinced that this is the, that sort of unfettered allowance, has necessarily been good for us in terms of society or human dignity. And so I want to push back a little bit on that. People say, you know, Europe regulates and America innovates. Well, Europe litigates in America-- or, sorry, Europe regulates and America litigates, frankly, is the way that I think about it. But Europe innovates incredibly powerful ways. Right?

Especially when you think about green energy, when you think about pharma, when you think about biotech, when you think about fields where we're open to regulation, Europe has been a leader innovation. Asia is a leader in robotics innovation. We've fallen far behind innovation, in areas like quantum and batteries and semiconductor chips, because from 1995 to 2019, 83% of all venture capital investments went into IT and life sciences, and that was primarily software, whereas really capital heavy investments were left to sort of chug along. And so I just, I want us to push a little bit on this idea of what innovation truly means and, like, what it is that we're protecting here. And that would be my sort of closing thought.

Adam Thierer
Yeah, very brief. Well, innovation just isn't about the big numbers for big companies. It's about what it means for every man, woman and child having a soapbox to stand on and speak to the world and do things that were just unprecedented, impossible when some of us were growing up in the analog age. I mean, we enjoy now, just as I mentioned, an unprecedented amount of information. And granted, sometimes there are costs and consequences to having a world of information abundance. But again, I don't want to walk that back. I don't want to go backwards in time. We can deal with these problems as they come at us. And there are some certain serious ones out there. I can't go through them all right now, I'm sure we'll get into a lot of them at the dinner tonight.

Let me address Baron's point really quick, though, because in thinking about how we might want to target some of our new regulations, the EU does, as he suggested, have a risk based model. The

problem with the EU model is that everything is high risk and everything is critical risk. They want everything to go into that bucket and be regulated. And so there's very limited effort, sort of forbearance there and sort of a more wait and see approach like we have in the United States, quite rightfully. But we can have these targeted approaches. I want to reiterate again, we already do have those targeted approaches in, you know, very well defined sectoral bodies of law and regulatory bureaucracies that address algorithmic outputs and risks as they develop. I, again, just take a look.

If you don't think the FDA is regulating AI, I've got a really boring 80 page paper I can hand you on that and just walk you through how they've been doing digital health regulation going back to 1981-- was their first major NPRM on digital computerized medicine. So these things happen at every agency at every level. I mean, this is the better way to do it. Let's make that process work as opposed to a new high level regulating. And Kat, you said earlier regulating AI qua AI doesn't make sense. That's essentially the world we might be heading into where they're trying to regulate all things algorithmic, all things computational. This is the problem with the California Bill 1047, which somebody asked a question about. You know, regulating at that high level means that we can't have a computation or revolution. It means that we're going to cripple that revolution in place. So we have to take that more targeted, sectoral, risk based, bottom up approach, build on our existing success, and go from there.

Alan Raul
Great. That's fantastic. What a tour de force from our panel. Please join me in thanks.