What the Supreme Court Doesn't Understand About AI

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When the very creators of artificial intelligence warn that AI could cause the "extinction" of humanity, as they did recently in the Statement on AI Risk, it is time for lawmakers and regulators to act. Yet in its ruling in *Twitter v. Taamneh*, the U.S. Supreme Court made it clear that not only do the justices misunderstand the technology and its potential to cause catastrophic harm, but they may frustrate any effort to prevent it.

We are scholars who study AI technology and how courts engage with science, and fear what will happen if the law does not catch up with AI. Technology moves fast and courts move slowly. That is why Congress must step up now to avoid – or at least mitigate – AI's most sinister capabilities.

In *Twitter v. Taamneh*, the family of an ISIS terror attack victim sued Facebook, Twitter, and Google under a law that permits liability from those who "knowingly" aid and abet international terrorism. The plaintiff argued that these platforms knew terrorists made use of their algorithms to direct content to recruit, fundraise, and spread propaganda.

In its unanimous opinion, the justices dismissed the claims, holding that "aiding and abetting" liability requires providing some "culpable" and "active" assistance to the specific terrorist attack. They described the social media platforms as passive actors that never gave ISIS "special encouragement" and were no more culpable than the creators of "the internet generally." The platforms simply transmitted content with no person "consciously" inspecting it first, the justices wrote.

Gonzalez v. Google, a separate case with similar facts, was also dismissed in a short per curiam opinion. Here as well, the Justices presumably concluded that humans at Google's YouTube platform, which promoted ISIS videos, were not controlling their AI creation. Which is exactly the point of AI.

The justices viewed the AI-enabled algorithms used by these platforms as benign, "passive" and separate from the "conscious" will of their human creators, and they sent a clear message: If the machines promote terrorism, their human owners cannot be held responsible. Indeed, they may profit without fear of liability.

That is why Congress must act. If the anti-terrorism law at issue in the Twitter case is not specific enough to ensure accountability, lawmakers need to step in. The tech companies themselves are crying out for regulation and licensing of AI – not because they want to be sued but because they want the government to avert the most serious risks and protect the compliant actors from liability, while putting noncompliant products out of business .

Good regulation can protect industry and the public. The European Union is poised to enact its Artificial Intelligence Act this summer, which would regulate all high-risk uses of AI. At this point, Congress has only held hearings on the topic. But Congress can and should begin to draft legislation that anticipates concerns over AI, or call for regulations that clearly establish the use of AI in terms that apply to its autonomous operation. Legislators can define the power of regulators over AI and the criteria for liability for AI abuses, which could include imposing strict products liability to avoid any questions of "intent" of AI systems.

Congress also may need to strip the Supreme Court of jurisdiction to review the time-sensitive decisions needed to conduct these regulatory reviews. And it may need to require deference to the factual record in lower court proceedings so that appellate judges cannot blithely disregard evidence of liability for AI acts. These circumventions must be considered because the Supreme Court has signaled how narrowly it will construe general legislation applying to major corporations.

Indeed, size seems to matter to this court. In *Twitter v. Taamneh*, the size of the platforms – the "billions of people" using them – was a reason to *not* hold them liable, based on its understanding of traditional tort law principles. In another recent case involving the EPA's regulatory power, several Justices gave new life to the "major questions doctrine," opining that Congress cannot delegate large subjects to administrative agencies to regulate. By contrast, the EU's Act leaves the details of identifying the risks and setting out the regulations to experts.

The Supreme Court is clearly highly skeptical of holding a corporation liable for the acts of AI without the "direct" and "active" aid of its human creators. Whether autonomous AI will deserve to be called "conscious" or not remains to be seen, but it certainly acts independently of its creators. Now that we know our Supreme Court is blind to its risks, it is all the more critical that Congress double down and act where the court will not.

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