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# Hindsight Should Not Hasten AI Regulation

by

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## I. Introduction and Summary

On May 22, 2025, the House of Representatives passed the budget reconciliation bill, which includes a 10-year moratorium on enforcement of state laws regulating artificial intelligence.[1] The potential emergence and scope of early-stage AI regulatory regimes are now significant public policy issues for lawmakers. But the discussion informing AI-specific regulation calls for careful scrutiny. This *Perspectives from FSF Scholars* provides an analysis and a critique of what it calls the "argument from hindsight," as applied to prospective regulation of artificial intelligence (AI).

The argument from hindsight, in summary, is that the failure to regulate certain technologies – such as combustion car engines and social media services – early on was a mistake and that the consequences of such early inaction – such as global warming or the propagation of misinformation – demonstrate that AI should be regulated sooner rather than later.[2] Concerns that

[1] Justin Hendrix and Christiano Lima-Strong, "US House Passes 10-Year Moratorium on State AI Laws," Tech Policy Press (May 22, 2025), https://www.techpolicy.press/us-house-passes-10year-moratorium-on-state-ai-laws/

[2] See, e.g., Kate Forscey, "Congress Should Not Repeat Social Media Mistakes in an AI World," Opinion: Center for AI Policy (March 19, 2024) ("America has already missed the mark on social media, and lawmakers acknowledge this mistake… Congress needs to step up and advance legislation that walks the fine line between preserving AI's benefits and preserving our agency.")

lawmakers' have failed to timely address intractable problems posed by socially influential technologies can be an emotional driver for the related view that lawmakers should enact a broad array of regulations to limit the risks of AI immediately. This paper provides a dispassionate and more systematic portrait of the argument from hindsight and illustrates its flaws.

Artificial intelligence (AI) is defined in the U.S. Code as "a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments. The argument from hindsight for regulating AI requires proof of two controversial propositions. First, the argument from hindsight is persuasive only if its proponents can show that policymakers erred in failing to regulate a technology early on. Implicit in this proposition is a claim that early regulation would have avoided error and created a better world. Second, the argument from hindsight is persuasive only if its proponents can show that early regulation of AI would be likely to avoid costly errors.

Both of these controversial propositions are difficult—if not impossible—to demonstrate. To the extent that they are plausible, other technology-specific policy considerations supply counterweights. Early policies for technologies such as social media cannot fairly be presumed mistaken. Policymakers still struggle today to identify the best policies for this technology application.

Although supporters of regulation of social media variously list concerns with social media that AI may exacerbate or replicate—such as negative effects of free or ad-supported business models, tracking of users, dominant platform lock-in, and monopolization—there is no consensus about which concern ought to be on that list or what the solutions ought to be. Nor is there consensus over which regulatory proposals should be implemented to address those perceived concerns—such as age limits on access, common carrier regulation, or broad data protection or information fiduciary rules. Moreover, some experts reasonably argue that such concerns are mistaken. The complexity of each debate about each concern calls into question the weightiness of the assertion that past policymakers erred. In short, the argument from hindsight for social media regulation relies on oversimplification.

Historical experience of regulation also supplies counterweights to the propositions underlying the argument from hindsight for regulation of AI. Regulatory proposals for social media mentioned above are hard to reconcile with the free speech rights of tech platforms and with policies favoring growth and innovation. The valuable contributions of digital tech platforms appear to fulfill the expectations of market-friendly policymakers of the 1970s, 1980s, and 1990s. These policymakers had witnessed the stagnation of communications technologies such as cable TV and voice telephony under the FCC's "public interest" standards, legacy licensing regimes, and inflexible price regulation—especially in contrast with the growth associated with the less-regulated development of personal computing in the 1980s and beyond.

Lawmakers and regulators of the 1990s and early 2000s have demonstrated that comparative freedom from regulation for major technological advances yields socially beneficial advances, even if those innovations also create uncertainty. The rise of dominant tech platforms, including social media, has yielded extraordinary value for consumers. Between 2000 and 2022, the concentration of valuable new firms shifted away from Europe and towards the United States and

Asia, as European regulators moved away from permissionless innovation and towards the precautionary principle. Due, at least in part, to light-touch regulatory policies in the United States, many dominant platforms worldwide are based in the U.S. and not, for example, in China.

Notably, proponents of the argument from hindsight do not allege that the lack of regulation of personal computing or the Internet generally was a mistake. AI is more analogous to a general development like personal computing than to a particular application like social media. This historical experience should shift the burden of proof onto proponents of regulation of AI.

In a nation under the rule of law, basic laws that support capital markets, property rights, freedom of contract, and tort rules provide a framework for a growth economy. In the context of AI, the most relevant and applicable basic laws include intellectual property law and tort law. Regulations such as price controls, quality standards, or licensing of new entrants fall outside of the category of basic laws. It is unlikely that applying such regulation to AI would provide the same spur to growth as basic laws, further supporting a shift of the burden of proof onto proponents of regulation of AI.

Policymakers should have strong reasons to believe that the benefits of any proposed regulation of AI will exceed the costs *before* its enactment, rather than experimenting first and correcting their mistakes later. Private-sector actors have strong incentives to correct errors for which they typically bear the costs. But public-sector officials do not have similar incentives, as the consequences of bad policies are typically externalities paid for by the public.

Moreover, advocates of the argument from hindsight cannot show that their proposals are reasonably likely to succeed, given the complex issues presented by AI. Countless products, services, users, and producers will be involved. Risk assessments of individual AI systems are difficult because such technologies may be implemented or cause effects in ways that are unpredictable. Even so, many uses of AI technology present almost no risk. Also, the overall effects of AI on the economy and society are uncertain, just as the overall effects of the automobile or the Internet could hardly have been foreseen when first deployed. The takeaway is that regulation before risks are sufficiently understood is more likely to go wrong; assessment of costs and benefits for any regulatory proposal for AI will require patience and time.

Furthermore, the argument from hindsight assumes that regulators are inevitably competent and successful in their work. It invites legislators to indulge anxiety about barely understood or remote risks involving AI. In essence, the argument from hindsight is an unsystematic variant on the precautionary principle, according to which the owner of a technology or provider of a technology service must bear the burden of proving that it is safe from speculative or at least possible dangers, and prescriptive regulation must be used to address such dangers. The precautionary principle is an alternative to the permissionless innovation that has served the United States well for decades.

Permissionless innovation is the superior policy for a general-purpose technology like AI, whose applications are numerous and certainly evolving. Basic laws of general applicability, such as tort law or intellectual property law, already apply to different applications of AI. Policymakers should favor adaptations of such laws of general applicability to AI over time rather than rush to

regulate AI through prescriptive regimes involving licensing, price controls, and other interventions. Specialized rules may be developed when risks about AI are better understood.

## II. Some Species of the Argument From Hindsight

The argument from hindsight crops up in various regulatory contexts, including antitrust and competition policy matters under the jurisdiction of the Federal Trade Commission. Usually the argument is offered informally, as a rhetorical gesture. For example, in discussing AI regulation in 2023, Senator Richard Blumenthal (echoed by Senators Graham and Durbin) stated:

> Congress has a choice now. We had the same choice when we faced social media. We failed to seize that moment. The result is predators on the internet, toxic content, exploiting children, creating dangers for them. . . . Congress failed to meet the moment on social media. Now we have the obligation to do it on AI before the threats and the risks become real.[3]

A more formal version of the argument is offered by Nathan Sanders and Bruce Schneier's article "Let's Not Make the Same Mistakes with AI That We Made with Social Media." They call for AI to be regulated immediately, because it will otherwise be put to harmful uses just as social media has been. The authors state:

> The biggest mistake we made with social media was leaving it as an unregulated space. Even now—after all the studies and revelations of social media's negative effects on kids and mental health, after Cambridge Analytica, after the exposure of Russian intervention in our politics, after everything else—social media in the US remains largely an unregulated "weapon of mass destruction."

Below, I explore the main claims upon which the argument from hindsight must rely: first, the claim that light regulation of technology was an error in the past; and, second, the claim that early broad regulation of AI would be likely to avoid errors.

## III. Advocates of the Argument From Hindsight Offer Insufficient Evidence That Lawmakers Erred in Failing to Regulate Social Media Technology Early On

Past policy regarding a technology should be understood as mistaken if, given the limitations of political and legal institutions, the state of technology, and problems inherited from previous generations, the world was worse off because of the policy than without it. In other words, past policy should be considered as mistaken if problems were not solved that realistically could have been solved without causing other problems of greater magnitude.

[3] Oversight of A.I.: Rules for Artificial Intelligence: Hearing Before the S. Subcomm. on Privacy, Technology, and the Law of the S. Comm. on the Judiciary, 118th Cong. 1-3 (2023) (statement of Sen. Richard Blumenthal, Chair, S. Subcommittee on Privacy, Technology, and the Law) (speaking of Section 230, failure to regulate social media, failure to prevent commercial use of data as mistakes).

Satisfying this standard will not be easy for any issue. Deciding whether the standard has been met must start with an extensive inquiry into regulatory details, analogous to the play-within-a-play in *Hamlet*. What candidate policies were considered, or ought reasonably to have been considered? Would some of these alternatives have had a better outcome than the policy that was chosen? Also, additional methodological questions must be resolved. How is policy success to be measured? Must gains be "Pareto optimal"—that is, must a policy bring about gains without making anyone worse off? Or is some kind of averaging enough?

These abstract concerns are illuminated by closer examination of a particular instance of the argument from hindsight. Consider Nathan Sanders' and Bruce Schneier's arguments that leaving social media unregulated was an error: they list problems with social media that AI may exacerbate or replicate. These problems include: the rise of business models based on free services and funded by advertising; tracking of users by tech platforms (surveillance); concern that false information will go viral more readily than true information; concerns that users will be locked in to dominant platforms; and monopolization. But these arguments cannot be taken at face value, because some experts argue that such concerns—at least in part, but nonetheless in some essential sense—are mistaken.[4] Notably, some concerns—such as the use of social media platforms in the commission of a crime—were left off the list, even though other proponents of the argument from hindsight include them. If there were anything like consensus on these issues, more of the proposed rules for social media would enjoy broad support today and would be enacted. The complexity of each debate about each issue and the consequent absence of consensus is significant in any consideration of how much weight to give the assertion that past policymakers erred. In short, the argument from hindsight relies on oversimplification.

Assuming, however, that we are all persuaded that each (or any) concern is truly pressing, considerable work nonetheless must be done to show exactly what regulators ought to do about each. What form should the regulation of social media have taken? How exactly would it have made us better off? Some legislators suggest that Section 230 of the Communications Decency Act of 1996, which provides that social media platforms may moderate user-generated content without being treated as publishers of that content for liability, was a mistake. Others argue that antitrust enforcement of big tech generally should have been more stringent. One might consider, also, age limits on access, imposition of common carrier status, broad data protection or information fiduciary rules, or the application of the precautionary principle. Even now, no one can show that any of the proposed forms of social media regulation would have yielded better outcomes then, or that they would do so today. The upshot of all this is that the claim that light regulation of social media was an error essentially assumes what needs to be demonstrated. Perhaps that is the argument from hindsight's greatest strength, but it seems just as fair to say that it is the argument from hindsight's greatest weakness.

The claim that some other type of regulation of social media would have yielded a better outcome is not simply unproven when one considers the details of each candidate regulation. More generally, the claim is implausible. The regulatory proposals mentioned above are hard to

[4] *See, e.g.*, Geoff Manne, Why US Antitrust Law Should Not Emulate European Competition Policy, Statement Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights (2018).

reconcile with the free speech rights of tech platforms and with policies favoring growth and innovation. The rise of dominant tech platforms (including social media) has yielded extraordinary value for consumers. Economist Erik Brynjolfsson estimates that the value to consumers of tech platforms like Meta amounts to about $2.5 trillion, about six percent of GDP.[5] Digital platforms have supported the growth of many third-party businesses that offer goods, services, or serve as intermediaries between buyers and sellers. Between 2000 and 2022, the concentration of valuable new firms shifted away from Europe and towards the United States and Asia, as European regulators moved away from permissionless innovation and towards the precautionary principle.[6] Due, at least in part, to liberal or light-touch regulatory policies in the United States, many dominant platforms worldwide are based in the U.S. and not, for example, in China.

The valuable contributions of digital tech platforms, though not predictable decades ago, are consistent with the expectations of market-friendly policymakers of the 1970s, 1980s, and 1990s. These policymakers had witnessed the stagnation of communications technologies under the FCC's public interest standards, licensing regimes, and price regulation of regulated communications services such as cable TV and voice telephony—especially in contrast with the growth associated with the less-regulated development of personal computing in the 1980s and beyond. Notably, proponents of the argument from hindsight do not allege that the lack of regulation of personal computing or the internet generally was a mistake. AI is more analogous to a general development like personal computing than to a particular application like social media. Lawmakers and regulators of the 1990s and early 2000s have demonstrated that comparative freedom from regulation for major technological advances yields socially beneficial advances, even if those innovations also create uncertainty. This historical experience arguably shifts the burden of proof going forward onto proponents of regulation.

A proponent of the argument from hindsight might respond that the mistake that should be avoided is not light regulation in general, but the failure to address narrowly defined problems on their list. However, the list is long. Items on the list like "monopoly" are generally addressed by broad interventions, such as abandonment of the consumer welfare standard in antitrust. Once all the boxes on the list are checked, it is hard to see what would be left of light regulation.

## IV. Why Regulation Does Not Always or Usually Create a Better World

Before assessing the second major claim upon which the argument from hindsight relies—that early, broad regulation of AI would have optimal results—I explore some reasons that regulation generally may not have optimal results. Regulatory lessons of the twentieth century led policymakers of the 1970s, 1980s, and 1990s to favor light regulation and open markets for information technology. A proponent of the argument from hindsight might argue that intractable problems caused by technology (global warming, for example) mean that proponents of regulation should not now have to work so hard to make their case. If the private sector may innovate, speeding into the future in the face of uncertainty, why should regulators not match this

[5] Erik Brynjolfsson, Measuring the Value of the Digital Economy, presentation at Wellbeing Research Centre (University of Oxford) (January 27, 2023).
[6] Erik Brynjolfsson and Andrew McAfee, The EU-US Tech Gap, DLD Conference Channel (January 14, 2023).

pace, crafting new rules to limit risk and fixing any problems later? Any exploration of such questions requires a nuanced understanding of how regulation works and its likely costs and benefits—especially when considering disruptive technologies like AI, which defies ordinary methods of risk assessment.

Two schools of thought offer competing general theories of the function of regulation.[7] The public interest school (following Arthur Pigou) proposes that the function of regulation is to serve the public interest, correct market failures, and resolve uncertainty. By contrast, the public choice school holds that the function of regulation has been to serve special interests. While industry may object to the imposition of regulation,[8] well-defined interest groups (often producers in the regulated industry) may capture the regulatory process to benefit themselves.[9] Alternatively, politicians and regulators will use the regulatory process to benefit themselves.[10] Regulators may solve (or claim to solve) market failures if regulatory outcomes increase the pool of wealth they redistribute to participants in the political process. Relatedly, regulators will tend to avoid actions that will dissipate the pool of wealth;[11]which means that both public-interest theories and public-choice theories may initially appear to be correct. Deregulation may be explained by public choice theory when regulation increases costs to the point that every participant benefits from deregulation; however, occasionally, deregulation is better explained by public interest theory, if neither industry participants nor state actors receive concentrated benefits from the change.[12]

How might we determine which theory is correct? Generally, if the "public interest" thesis is correct, studies should show that more regulation yields measurable benefits across the economy, such as improved product quality, better health, or growth. If the public choice theory is correct, regulation will tend to impede growth and yield few if any benefits.

Empirical studies have provided mixed results. For example, one study of the 50 states showed that states with more laws and regulations enjoyed more economic growth, but noted that the states might be a special case, because they compete with one another for residents and

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[7] *See* Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, The Regulation of Entry, The Quarterly Journal of Economics, Vol. CXVII, Issue 1, 1-37, 2 (2002) (describing Pigou's theory of regulation).
[8] Sam Peltzman, The Durable Impact of Stigler's Theory of Economic Regulation, ProMarket (April 15, 2021).
[9] *See* George Stigler, "The Theory of Economic Regulation," Bell Journal of Economics and Management Science, Vol. II, 3-21 (1971).
[10] *See, e.g*., McChesney, Fred S., "Rent Extraction and Rent Creation in the Economic Theory of Regulation," Journal of Legal Studies, XVI (1987), 101–118; Hernando De Soto, The Other Path (Harper and Row, 1990); Andrei Shleifer and Robert Vishny, "Corruption," Quarterly Journal of Economics, CVIII 599-617 (1993).
[11] *See* Sam Peltzman, The Economic Theory of Regulation after a Decade of Deregulation, Brookings Papers (1989).
[12] An example of deregulation perhaps best explained by public interest theories would be the deregulation of airlines and trucking under Alfred Kahn. *See also* Sam Peltzman, The Economic Theory of Regulation after a Decade of Deregulation (regulators may solve market failures to give themselves more resources to distribute and may posit "market failure" where none exists for the same purpose; deregulation will occur if the economic realities of an industry change and participants would profit more from deregulation, especially when regulation has pushed costs higher).

investment;[13] also, the study did not distinguish basic laws from regulation. Other studies show that regulation hinders growth, competition, or suggest opportunistic behavior by regulators.[14]

More generally, in a nation under the rule of law, basic laws that support capital markets, property rights, freedom of contract, and tort rules provide a framework for an economy that spurs growth. In the context of AI, basic laws of this type would include intellectual property law and tort law. But many regulations—price or quality regulations, or licensing of new entrants—fall outside of the category of basic laws. Indeed, one recent study concludes that an increase in law and regulation promotes economic growth up to a point, but past that point will discourage it; and most developed nations are past the point where regulation encourages growth.[15] Recognition that AI technology-specific regulation constitutes a layer of government intervention beyond foundational laws that apply not only to AI but broadly across the economy, coupled with findings that additional regulation is not growth-enhancing, proponents of regulation should bear a heavy burden of proof, particularly with regard to licensing or entry regulation which reduces competition.[16]

Policymakers should have strong reasons to believe that benefits of any proposed rule will exceed the costs *before* enactment, rather than experimenting first and correcting their mistakes later. That is because the regulatory process is more likely to defend its own errors than to correct them: participants in the process will defend the status quo. Private-sector actors have strong incentives to correct their errors, but public-sector officials do not.[17] Producers of inferior products or services lose (their own) money. However, a legislator who supports a bad law will face consequences only if the law's consequences affect the outcome of an election. An unelected regulator will almost never personally bear the consequences of supporting a bad policy; those consequences are borne by the public, and it is often difficult to perceive causal relationships between enactment of a regulation and its consequences. The private-sector actor's incentive to self-correct is less, perhaps, with respect to externalities such as pollution. But this observation only means that neither public-sector actors nor private-sector ones have a strong incentive to self-correct when it comes to externalities.

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[13] Elliot Ash, Massimo Morelli, and Matia Vannoni, More Laws, More Growth? Evidence from U.S. States (April 25, 2022). BAFFI CAREFIN Centre Research Paper No. 2022-178, available at http://dx.doi.org/10.2139/ssrn.4095044 (accepted for publication).

[14] *See* William F. Long, Richard Schramm, and Robert Tollison, The Economic Determinants of Antitrust Activity, Journal of Law & Economics, Vol. 16, No. 2 (October 1973) (finding that the Justice Department was more likely to bring antitrust actions against firms in large industries with many firms, as opposed to focusing on firms that had engaged in anti-competitive behavior), available at: https://www.jstor.org/stable/724772; Robert Crandall, Controlling Industrial Pollution: The Economics and Politics of Clean Air (Brookings Institution Press, 1983) (showing that legislators from northern states used 1977 Clean Air Act amendments to strike out at competitors in southern states by requiring tighter emissions standards for undeveloped areas than for more developed areas); Dustin Chambers, The Emerging Connections Between Income Distribution and Regulation, The Regulatory Review (July 13, 2020) (regulation is associated with a higher degree of wage inequality across states).

[15] Jac C. Heckelman and Bonnie Wilson, "The Growth-Maximizing Level of Regulation: Evidence from a Panel of International Data, European Journal of Political Economy, Vol. 59, 354-368 (2019).

[16] *See, e.g.*, Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, The Regulation of Entry, The Quarterly Journal of Economics, Vol. CXVII, Issue 1, 1-37, 4-5 (2002) (A study of business entry regulation across 85 countries found that heavy regulation of entry was associated with corruption, but not with higher quality of products, better health, or more growth.).

[17] *See* Reuven Brenner, The Force of Finance: Triumph of the Capital Markets (Texere, 2002).

Rules intended to serve the public interest do not always do so. We do not understand exactly how policymakers may systematically create laws and regulations that do more good than harm. Neither do we understand how to systematically detect and correct the harm done by regulation. Recognition of the limits of our knowledge and understanding of the regulatory process and outcomes also explains that proponents of regulation generally bear the burden of proof.

## V. Advocates of the Argument From Hindsight Cannot Show That Their Proposals are Reasonably Likely to Succeed, Given the Complex Problems Presented by AI

Is broad regulation of AI imposed early on in a spirit of urgency likely to have good results? This would be hard to demonstrate, because AI presents especially complex problems.

Returning to the example of social media, suppose, for the sake of argument, that we agree that a particular social media regulation has an optimal outcome. This would tell us little about AI because AI is a general-purpose technology with an extraordinary array of uses, and not a single type of service like social media. The alleged consequences of failure to regulate social media lie in the realm of speech—involving information, psychology, and ideas. Some AI-related risks fall into the speech realm, others into the realm of economic or social effects, but some risks of AI include physical harms (for example, damage associated with a failure of AI-controlled utilities). Policymakers will not be able to optimize AI policy early on by thinking of it as being essentially like social media.

The enterprise of adapting law and regulation to AI will be of immense complexity. Countless products, services, users, and producers will be involved. Risk assessments of individual AI systems are difficult, because such technologies may be implemented or cause effects in ways that are unpredictable. Even so, many uses of AI technology present almost no risk. Furthermore, the overall social and economic effects of AI on the economy and society are uncertain, just as the overall effects of the automobile or electricity could hardly have been foreseen when those technologies were first deployed. Regulation before risks are understood is more likely to go wrong; assessment of costs and benefits for any regulatory proposal for AI will require patience and time.

Simplistic analogies are likely to lead policymakers in the wrong direction. One past policy mistake sometimes invoked in discussions of AI policy is the delay in regulating automobiles, or with internal combustion engines more generally, giving rise to global warming. However, global warming is a pollution-related externality problem. It would be a mistake to generalize from this one intractable externality problem to derive lessons for our general approach to AI regulation. Many of the risks associated with AI will not involve externalities.

The uncertainty associated with AI breeds tremendous anxiety. This will tempt policymakers to allow concern about very small risks of extreme harm to drive policy. One concerned commentator urging Congress to act immediately states:

> WALL-E depicts a society where the humans have essentially become living lumps who vegetate on a spaceship, and don’t really do anything but watch

> screens because tech does everything for you, and are okay with that. Today, these kinds of sci-fi are becoming increasingly possible. That is why our friends in Washington are trying to figure out what to do about AI.[18]

Doomsday visions should be greeted with skepticism. How was this threat identified? Why is this scenario at the center of analysis, as opposed to some of the other doomsday scenarios proposed for AI? How could it reasonably be prevented, short of a ban on some of the most useful types of AI?

Policymakers with a sole focus on the set of infinitesimally microscopic chances of universally terrible AI outcomes, or inspired by careless comparisons to other technologies, will inevitably drift towards the adoption of something like the precautionary principle. When it comes to AI, precautionary principle-style regulation *is itself a risk*. Intervention that hinders the development of medical AI, for example, might mean that life-saving methods are offered too late or not at all. Regulation that hinders the use of certain types of data for use by AI intended to enhance airport security might mean that an explosive device is not detected when it could have been.

Lawmakers might also be led astray by interested participants in the regulatory process. Some key AI players have called for licensing of AI providers; special interests may seek to limit competition in the name of safety. To best represent the public interest, public support for new rules should be as nearly unanimous as reasonably possible.[19] Considerable progress has been made by some bodies towards building consensus as to how best to address AI risk, and policymakers should follow and promote consensus-building processes.

Like the proponents of the argument from hindsight's first claim, their second claim would be difficult to establish; early, ambitious regulatory action is not reasonably likely to succeed in a policy realm that presents especially complex problems.

Appropriate regulation of AI will first require careful thinking about the ground rules that serve as a framework for markets. Many basic laws of general applicability, such as tort law or intellectual property law, already apply to different applications of AI.[20] Here, a non-simplistic analogy to regulation of automobiles is instructive.[21] The most obvious problems associated with automobiles were collisions, and this risk was addressed in stages, and at many layers: local traffic rules were developed; courts adapted doctrines of tort liability, and finally the safety problem was addressed at the federal level. Overall, the generation of rules applicable to vehicles equipped with internal combustion engines was decentralized, shared among federal and state

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[18] Kate Forscey, "Congress Should Not Repeat Social Media Mistakes in an AI World, Opinion: Center for AI Policy" (March 19, 2024).
[19] *See* James M. Buchanan and Gordon Tullock, The Calculus of Consent (1962).
[20] Oversight of A.I. Hearing (Statement of Sen. Richard Durbin, Chair of Committee on the Judiciary) ("when it came to online platforms, the inclination of the Government was, 'Get out of the way. This is a new industry. Don't overregulate it. In fact, give them some breathing space and see what happens.' I'm not sure I'm happy with the outcome, as I look at online platforms . . . [a]nd the harms that they've created, problems that we've seen demonstrated in this Committee: child exploitation, cyberbullying, online drug sales, and more. I don't want to repeat that mistake again. And what I hear is the opposite suggestion from the private sector, and that is, 'Come in on the front end of this thing and establish some liability standards, precision regulation.'").
[21] *See* Oversight of A.I. Hearing (Statement of Sen. Booker) (making analogy to regulation of automobiles).

courts, insurers, and ultimately many federal agencies. The evolution of rules for AI is likely to involve many institutions that adapt laws of general applicability to AI over time, with more specialized rules evolving when the problem is well understood.

As a starting point, federal legislators should think about how basic laws that exist today may shape the effect of AI on society. For example, tax rules that encourage investment in capital equipment rather than hiring of labor may artificially encourage the use of AI to replace workers. Recognition of such effects may reasonably prompt legislators to make adaptations to basic laws that are applicable to AI. At the same time, any regulation of AI that involves second-guessing of market transactions should be preceded by careful thinking about costs and benefits and continuous re-evaluation of research.

## VI. Conclusion: The Argument From Hindsight Is Inconsistent With Permissionless Innovation

Proponents of the argument from hindsight insist that failure to regulate social media early on was a mistake. This assertion is impossible to support, however; there is no consensus even today as to whether and how social media should be regulated. More generally, given our awareness of the costs to consumers that arise from interventionist communications regulation and the benefits unleashed by much-less-regulated computer services, proposals for broad regulation of technology platforms are unlikely to produce more benefits than costs.

Public choice insights highlight that the state's regulatory toolbox (including antitrust) consists largely of crude instruments. By accident or design, these rules may easily come to channel wealth to special interests rather than yield public benefits. The fact that a set of rules is intended to promote competition or help consumers does not mean it will do so.

AI will be used in thousands of different products and services, not just a single type of product. Simplistic analogies to social media or automobiles will lead to policy hubris. Risk-averse lawmakers will adopt ambitious regulatory regimes in haste, before AI-related problems are well understood. The argument from hindsight is in essence an unsystematic variant of the precautionary principle. Permissionless innovation is the superior policy. Casual hindsight offers no shortcuts to figuring out what ground rules for AI make sense.

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**Further Readings**

Seth L. Cooper, "Copyright Office Report Confirms Copyrightability of AI-Generated Works," Perspectives from FSF Scholars, Vol. 20, No. 9 (February 19, 2025).

Seth L. Cooper, "AI-Generated Copies of Creative Works Can Infringe Copyrights," Perspectives from FSF Scholars, Vol. 19, No. 42 (November 22, 2024).

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Seth L. Cooper, "It Sounds Like Generative AI Music Services Are Infringing Copyrights," *Perspectives from FSF Scholars*, Vol. 19, No. 24 (July 22, 2024).

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