

# REGULATORY ENTREPRENEURSHIP

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*This Article examines what we term “regulatory entrepreneurship”—pursuing a line of business in which changing the law is a significant part of the business plan. Regulatory entrepreneurship is not new, but it has become increasingly salient in recent years as companies from Airbnb to Tesla, and from DraftKings to Uber, have become agents of legal change. We document the tactics that companies have employed, including operating in legal gray areas, growing “too big to ban,” and mobilizing users for political support. Further, we theorize the business and law-related factors that foster regulatory entrepreneurship. Well-funded, scalable, and highly connected startup businesses with mass appeal have advantages, especially when they target state and local laws and litigate them in the political sphere instead of in court.*

*Finally, we predict that regulatory entrepreneurship will increase, driven by significant state and local policy issues, strong institutional support for startup companies, and continued technological progress that facilitates political mobilization. We explore how this could catalyze new coalitions, lower the cost of political participation, and improve policymaking. However, it could also lead to negative consequences when companies’ interests diverge from the public interest.*

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## INTRODUCTION

In recent years, a number of high-profile companies have devoted an enormous amount of resources to pursuing lines of business that carry tremendous legal risk. The laws governing these new business lines are unclear, unfavorable, or even prohibit the activity outright. These companies' fortunes—whether they will go bankrupt or be worth billions<sup>1</sup>—often depend not only on the whims of the markets, but also on the resolution of legal issues concerning a core aspect of their business. These companies understand this, and each makes changing the law a material part of its business plan. We call this activity “regulatory entrepreneurship,” and refer to the companies that engage in it as regulatory entrepreneurs.

Regulatory entrepreneurs have experienced surprising political successes, securing significant policy victories over some of the country's most entrenched industry groups. Perhaps the country's most famous regulatory entrepreneur, and an example that we will return to throughout this Article, is Uber. Uber's business is built around its popular smartphone app.<sup>2</sup> The app connects people who want rides with drivers in the vicinity who are willing to provide them. Fares are determined based on an algorithm that takes into account factors related to supply and demand, and Uber takes a percentage of each fare.<sup>3</sup> Uber is essentially running a taxi dispatch service for the smartphone age.

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<sup>1</sup> See *In re Napster Copyright Litig.*, Nos. C MDL 00-1369 MHP, 2006 WL 1348555 (May 17, 2006) (“[Napster] declared bankruptcy after abandoning its efforts to comply with the preliminary injunction entered by this court.”); *In re Aereo, Inc.*, No. 14-13200-2hl, 2014 WL 7721237 (Bankr. S.D.N.Y. 2014); Nathan McAlone, *How Uber Became the Most Valuable Startup in the World*, BUS. INSIDER (Sept. 14, 2015), <http://www.inc.com/business-insider/how-uber-became-the-most-valuable-startup-in-the-world.html>; Sara Ashley O'Brien, *Uber Is the Most Valuable Startup in the World*, CNN MONEY (July 31, 2015, 3:47 PM), <http://money.cnn.com/2015/07/31/technology/uber-50-billion-valuation/>.

<sup>2</sup> Uber, <https://www.uber.com> (last visited Feb. 11, 2016) (explaining that a user can use their phone to “Tap the app, get a ride.”).

<sup>3</sup> See Aswath Damodaran, *A Disruptive Cab Ride to Riches: The Uber Payoff*, FORBES (June 10, 2014, 2:37 PM), <http://www.forbes.com/sites/aswathdamodaran/2014/06/10/a-disruptive-cab-ride-to-riches-the-uber-payoff/#10a27ac664b8> (explaining the Uber business model).

However, in most cities, the taxi cab industry is heavily regulated.<sup>4</sup> Rules vary across jurisdictions, but they frequently require cabs to have a special government-issued license or medallion; these licenses are typically in very limited supply.<sup>5</sup> Fares are often based on rigid prescribed formulas.<sup>6</sup> A decade ago, many observers would have said that the legality of Uber’s business was questionable at best.

Uber was undeterred by these legal issues. It has aggressively taken on taxi regulations (and regulators) and worked to change the laws that govern taxi services. In a very concrete sense, Uber and many other businesses are built around and based upon a plan to change the law—and, in some instances, to simply break the law in the meantime.<sup>7</sup> For these companies, political activity has become a critical part of business strategy.

To be sure, corporate political activity is not a new phenomenon. Such activity has been the subject of federal regulation for more than a century,<sup>8</sup> and has long been the subject of public controversy.<sup>9</sup> But the conventional image of corporate lobbying is working to influence the law that applies to an existing, established, legal business. Such lobbying often seeks to prevent or weaken cost-increasing regulations, or insulate incumbents from competition.<sup>10</sup> For example, U.S. auto manufacturers have long lobbied against increased fuel efficiency and emissions requirements, because they would make cars more expensive to

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<sup>4</sup> See Paul Stephen Dempsey, *Taxi Industry Regulation, Deregulation & Reregulation: The Paradox of Market Failure*, 24 *TRANSPORTATION L.J.* 73, 75-76 (1996) (“[N]early all large and medium-sized communities regulate their local taxicab companies.”).

<sup>5</sup> See, e.g., *id.* at 78 (explaining that “[t]ypically, taxis are regulated at the local level, with city or county boards restricting the number of firms and number of taxis (with the issuance of medallions)” and that municipalities like New York City have strictly limited medallions, causing the price “to reach exorbitant levels”); Josh Barro, *Under Pressure From Uber, Taxi Medallion Prices Are Plummeting*, *N.Y. TIMES* (Nov. 27, 2014), <http://www.nytimes.com/2014/11/28/upshot/under-pressure-from-uber-taxi-medallion-prices-are-plummeting.html> (explaining the medallion system and market).

<sup>6</sup> Barro, *supra* note 5.

<sup>7</sup> See *infra* Part II.A.

<sup>8</sup> The Tillman Act prohibited “any national bank or corporation” from making “a money contribution in connection with any election to any political office.” Ch. 420, 34 Stat. 864 (1907) (codified at 18 U.S.C. § 610 (1948)). See generally Adam Winkler, *Other People’s Money: Corporations, Agency Costs, and Campaign Finance Law*, 92 *GEO. L.J.* 871 (2004) (providing history).

<sup>9</sup> See Winkler, *supra* note 8, at 873-74 (arguing that early state and federal regulation of corporate political spending was motivated by concern about the corrupt nature of corporate managers misusing “other people’s money” as well as “fears about excessive corporate power”); see also LEE DRUTMAN, *THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE* 47-71 (2015).

<sup>10</sup> See DRUTMAN, *supra* note 9 (noting that when corporate political activity began to increase in the 1970s, corporations hired lobbyists and “[t]hey killed a major labor law reform, rolled back regulation, lowered their taxes, and helped to move public opinion in favor of less government intervention in the economy.”).

produce—but these companies were not founded on a plan to roll back already-existing laws that made automobile production unprofitable or outright illegal.<sup>11</sup>

Regulatory entrepreneurship differs from conventional corporate lobbying efforts. A regulatory entrepreneurial car company would be one that goes into the business of making cars knowing that changing the law is a material part of the company's business plan and vision for success. Electric car manufacturer Tesla Motors provides a good illustration: Tesla believes that it must sell its electric cars directly to consumers in order for its business to succeed.<sup>12</sup> This has required Tesla to battle state laws that require car manufacturers to sell through franchised dealerships.<sup>13</sup> To date, Tesla has achieved significant victories in several states.<sup>14</sup>

Moreover, modern regulatory entrepreneurs are using new tactics to achieve their political goals. The conventional story of corporate political power relies on gaining quiet access to officials, then leveraging that access to exert influence behind the scenes.<sup>15</sup> While regulatory entrepreneurs have sometimes used these tried-and-true methods, they have become better known, and arguably have experienced greater success, from the opposite strategy: They make an issue as publicly salient as possible, rally the public to their cause, then use their popular support as leverage to win the change they want from resistant officials.

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<sup>11</sup> Alan Fram, *U.S. Auto Lobby's Clout Flagging*, ASSOC. PRESS (June 17, 2009, 12:01 AM), <http://www.presselegram.com/article/ZZ/20090617/NEWS/906179854>.

<sup>12</sup> There is some reason to think that traditional car dealerships have had poor incentives to promote electric cars to date. Electric cars require salespeople to invest time and energy to learn about them, and it currently takes a salesperson more time to complete the sale of an electric car than a gasoline-powered one. Service centers are a major part of modern dealerships, and electric cars such as Tesla's do not require dealer servicing in the way that gasoline-powered cars do. Many dealerships that sell electric and gas-powered cars discourage customers from buying the former and encourage them to buy the latter. *See, e.g.*, Consumer Reports, *Dealers Not Always Plugged in About Electric Cars, Consumer Reports' Study Reveals*, CONSUMER REPORTS (Apr. 22, 2014, 8:00 AM), <http://www.consumerreports.org/cro/news/2014/04/dealers-not-always-plugged-in-about-electric-cars-secret-shopper-study-reveals/index.htm>; Cliff Weathers, *How Tesla and New Car Technologies Could Make Auto Dealers Obsolete*, SALON (Oct. 11, 2014, 5:00 AM), [http://www.salon.com/2014/10/11/how\\_tesla\\_and\\_new\\_car\\_technologies\\_could\\_make\\_auto\\_dealers\\_obsolete\\_partner/](http://www.salon.com/2014/10/11/how_tesla_and_new_car_technologies_could_make_auto_dealers_obsolete_partner/).

<sup>13</sup> Daniel A. Crane, *Tesla and the Car Dealers' Lobby*, REGULATION (Summer 2014), available at <http://object.cato.org/sites/cato.org/files/serials/files/regulation/2014/7/regulation-v37n2-3.pdf>.

<sup>14</sup> *See, e.g.*, Jonathan Stempel, *Tesla Prevails in Top Massachusetts Court Over Direct Sales*, REUTERS (Sept. 15, 2014, 5:16 PM), <http://www.reuters.com/article/tesla-motors-massachusetts-lawsuit-idUSL1N0RG22Y20140915>; Matthew DeBord, *Maryland Carved Out an Innovative Special Exception for Tesla to Sell Cars Directly to Customers*, BUS. INSIDER (Apr. 15, 2015, 5:31 PM), <http://www.businessinsider.com/maryland-carved-out-a-special-exception-for-tesla-to-sell-cars-directly-to-customers-2015-4>.

<sup>15</sup> DRUTMAN, *supra* note 9, at 30; *see also* PEPPER D. CULPEPPER, QUIET POLITICS AND BUSINESS POWER: CORPORATE CONTROL IN EUROPE AND JAPAN (2010).

For example, consider Uber's experience in New York City, the nation's largest market for taxi services and among the most tightly regulated.<sup>16</sup> When faced with resistance by New York Mayor Bill de Blasio, Uber's user base was its biggest weapon. Uber offered free rides to passengers willing to attend a protest at City Hall on its behalf.<sup>17</sup> It used its app to contact drivers and passengers and mobilize them to express their opposition to Mayor de Blasio's proposal, flooding city hall with over 20,000 e-mails in five days.<sup>18</sup> Uber also added a notable feature to its app: a "de Blasio" button that purported to show how users' experience would change if Mayor de Blasio implemented his proposed policy.<sup>19</sup> The app consistently predicted a twenty-five minute wait for a pick-up,<sup>20</sup> then directed users to a petition they could sign to oppose the mayor's proposed rule.<sup>21</sup>

Uber won its showdown in New York,<sup>22</sup> at least for the time being.<sup>23</sup> It has won many other fights in other jurisdictions across the country<sup>24</sup> and around the world<sup>25</sup> using a similar playbook. Though it has lost its share of battles,<sup>26</sup> Uber's overall success in taking on taxi regulations has enabled it to grow into the

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<sup>16</sup> See Alison Griswold, *Uber Won New York*, SLATE (Nov. 18, 2015, 5:01 AM), [http://www.slate.com/articles/business/moneybox/2015/11/uber\\_won\\_new\\_york\\_city\\_it\\_only\\_took\\_five\\_years.html](http://www.slate.com/articles/business/moneybox/2015/11/uber_won_new_york_city_it_only_took_five_years.html).

<sup>17</sup> Giulia Olsson, *Uber Protests Loudly Outside City Hall*, N.Y. OBSERVER (June 30, 2015, 4:50 PM), <http://observer.com/2015/06/uber-protests-loudly-outside-city-hall/>. Uber also offered free t-shirts and sandwiches to passersby if they agreed to join the protest. *Id.*

<sup>18</sup> Chris Smith, *Battlin' Bill de Blasio's Uber Fight*, N.Y. MAG. (July 22, 2015, 10:38 AM), <http://nymag.com/daily/intelligencer/2015/07/battlin-bill-de-blasios-uber-fight.html>.

<sup>19</sup> Matt Flegenheimer & Emma G. Fitzsimmons, *City Hall and Uber Clash in Struggle Over New York Streets*, N.Y. TIMES (July 16, 2015), <http://www.nytimes.com/2015/07/17/nyregion/city-hall-and-uber-clash-in-struggle-over-new-york-streets.html>; Tina Nguyen, *Uber Takes Its War on New York City to Another Level*, VANITY FAIR (July 16, 2015, 2:43 PM), <http://www.vanityfair.com/news/2015/07/uber-takes-on-nyc-deblasio-over-proposed-driver-cap>.

<sup>20</sup> Nguyen, *supra* note 19.

<sup>21</sup> Edward T. Walker, *The Uber-ization of Activism*, N.Y. TIMES (Aug. 6, 2015), [http://www.nytimes.com/2015/08/07/opinion/the-uber-ization-of-activism.html?\\_r=0](http://www.nytimes.com/2015/08/07/opinion/the-uber-ization-of-activism.html?_r=0).

<sup>22</sup> Matt Flegenheimer, *Ending Fight, for Now, City Hall Drops Plan for Uber Cap*, N.Y. TIMES, July 22, 2015, A20; Griswold, *supra* note 16.

<sup>23</sup> Josh Dawsey, *New York City Council Bypasses Mayor Bill de Blasio on Uber Policy*, WALL ST. J. (Jan. 7, 2016, 8:49 PM), <http://www.wsj.com/articles/new-york-city-council-bypasses-mayor-bill-de-blasio-on-uber-policy-1452217772>; Andrew J. Hawkins, *Uber Is on a Collision Course with New York City's Mayor Again*, THE VERGE (Dec. 4, 2015, 3:51 PM), <http://www.theverge.com/2015/12/4/9851000/uber-nyc-bill-de-blasio-report-investigation-cap-tax-cuomo>.

<sup>24</sup> Uber, Find a City (last visited Feb. 6, 2016), <https://www.uber.com/cities>; Karen Weise, *This Is How Uber Takes Over a City*, BLOOMBERG BUSINESS (June 23, 2015), <http://www.bloomberg.com/news/features/2015-06-23/this-is-how-uber-takes-over-a-city>.

<sup>25</sup> Uber, Find a City (last visited Feb. 6, 2016), <https://www.uber.com/cities>; see also Ellen Huet, *Uber's Global Expansion In Five Seconds*, FORBES (Dec. 11, 2014, 6:00 AM), <http://www.forbes.com/sites/ellenhuet/2014/12/11/ubers-global-expansion/#690cc0177a7a>.

<sup>26</sup> Jenny Che, *9 Countries That Aren't Giving Uber An Inch*, HUFFPOST BUSINESS (Aug. 12, 2015, 12:29 PM), [http://www.huffingtonpost.com/entry/uber-countries-governments-taxi-drivers\\_us\\_55bfa3a9e4b0d4f33a037a4b](http://www.huffingtonpost.com/entry/uber-countries-governments-taxi-drivers_us_55bfa3a9e4b0d4f33a037a4b).

world's most valuable private start-up corporation,<sup>27</sup> with an estimated value of nearly \$70 billion.<sup>28</sup>

And while Uber is the country's highest-profile regulatory entrepreneur, there are numerous others as well. For example, consider Airbnb, the country's second-most-valuable private start-up.<sup>29</sup> Its business is connecting property owners and renters with travelers in need of short-term lodging.<sup>30</sup> This model has required Airbnb to contend with the many jurisdictions that limit short-term rentals to hotels and similar enterprises; Airbnb has changed these laws in many cities, including its hometown of San Francisco.<sup>31</sup> Furthermore, regulatory entrepreneurship is not a new phenomenon. In the early 1900s, airline industry pioneers knew that their success required significant changes to existing laws.<sup>32</sup> For example, airlines lobbied for, and secured, federal legislation that repealed the venerable common law doctrine that landowners owned all of the airspace above their land.<sup>33</sup>

While regulatory entrepreneurship has enormous implications for the law, it has received scant scholarly attention. This Article fills this gap in the literature, making four original contributions.

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<sup>27</sup> McAlone, *supra* note 1; O'Brien, *supra* note 1.

<sup>28</sup> Eric Newcomer, *Uber Loses at Least \$1.2 Billion in First Half of 2016*, BLOOMBERG (Aug. 25, 2016), <http://www.bloomberg.com/news/articles/2016-08-25/uber-loses-at-least-1-2-billion-in-first-half-of-2016>.

<sup>29</sup> Scott Austin et al., *The Billion Dollar Startup Club*, WALL ST. J. (Feb. 18, 2015), <http://graphics.wsj.com/billion-dollar-club/>; Davey Alba, *AirBnB Confirms \$1.5 Billion Funding Round, Now Valued at \$25.5 Billion*, WIRED (Dec. 7, 2015, 7:49 PM), <http://www.wired.com/2015/12/airbnb-confirms-1-5-billion-funding-round-now-valued-at-25-5-billion/>.

<sup>30</sup> Roberta A. Kaplan & Michael L. Nadler, *AirBnB: A Case Study in Occupancy Regulation and Taxation*, 82 U. CHI. L. REV. DIALOGUE 103, 103-05 (2015).

<sup>31</sup> See, e.g., *id.* at 107-12; Emily Badger, *How Airbnb Just Changed the Housing Laws in San Francisco*, WONKBLOG (Oct. 8, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/10/08/how-airbnb-just-changed-the-housing-laws-in-san-francisco/>.

<sup>32</sup> See, e.g., NICK A. KOMONS, BONFIRES TO BEACONS: FEDERAL CIVIL AVIATION POLICY UNDER THE AIR COMMERCE ACT, 1926-1938, 3-22 (1978); Christine Chmura, *The Effects of Airline Regulation*, FOUND. FOR ECON. EDUC., Aug. 1, 1984, <https://fee.org/articles/the-effects-of-airline-regulation/> (“airline firms lobbied” for new laws and, without them, “the industry would not have begun or become established as early as it did”); Federal Aviation Administration, History, [https://www.faa.gov/about/history/brief\\_history/](https://www.faa.gov/about/history/brief_history/) (“Aviation industry leaders believed the airplane could not reach its full commercial potential without federal action . . . . At their urging, the Air Commerce Act was passed in 1926.”).

<sup>33</sup> See Air Commerce Act of 1926, 44 Stat. 568 (69th Cong. 1926); Civil Aeronautics Act of 1938, 52 Stat. 973 (75th Cong. 1938). While this law's protections were dialed back somewhat, the Supreme Court upheld the main thrust of the repeal. *United States v. Causby*, 328 U.S. 256, 260-61 (1946) (“It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*Cujusest solum ejus est usque ad coelum*. But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared.”) (footnote omitted).

First, in Part I, we define regulatory entrepreneurship and place it into context. We discuss how regulatory entrepreneurship differs from other forms of corporate political activity, and why regulatory entrepreneurship is a politically and economically significant phenomenon.

Second, in Part II, we examine techniques that regulatory entrepreneurs often employ in their efforts to change the law. We identify three creative techniques that modern regulatory entrepreneurs have adopted in various combinations: They break the law and take advantage of legal gray areas, real or imagined, asking forgiveness instead of permission. They seek to grow “too big to ban” before regulators can act, sometimes referred to as “guerilla growth.” Perhaps most dramatic, they mobilize their users and stakeholders as a political force. We illustrate each of these techniques with multiple real-world examples. We also discuss how regulatory entrepreneurs have embraced conventional lobbying activities.

Third, we build on this analysis to determine the conditions that are most likely to foster regulatory entrepreneurship. In Part III, we identify and consider three variables that are of particular importance: the nature of the business, the nature of the laws creating uncertainty, and the company’s stage and status. We observe that businesses that are easy to scale up quickly, that foster significant interaction between the company and its stakeholders, and that appeal to an economically diverse audience are well-suited for a regulatory entrepreneurship model because they can accumulate a large body of stakeholders and mobilize them politically. We also observe strategic reasons why state and local laws that do not carry criminal penalties are often the target of regulatory entrepreneurship, and why startups are more prevalent regulatory entrepreneurs than more established companies.

Fourth, we explore the future of regulatory entrepreneurship. We begin Part IV by analyzing the prospects for regulatory entrepreneurship going forward. There are reasons to think that some of the best opportunities for regulatory entrepreneurship are already being exploited. However, the market has become increasingly comfortable with regulatory entrepreneurship as a business strategy, and the economic infrastructure that has been assembled to date will facilitate new attempts at regulatory entrepreneurship. Perhaps most importantly, information technology continues to advance, making people more connected, generating large amounts of data about people’s preferences and activities, and making it easier for citizens to express their preferences to policymakers. Combined, these factors will create new opportunities for companies to mobilize large groups of people on their behalf. Accordingly, we conclude that regulatory entrepreneurship is likely to increase in the years to come.

We also consider how regulatory entrepreneurship will affect the mix of laws and regulations that society ultimately enacts. One intriguing aspect of

regulatory entrepreneurship is its potential to combat laws and regulations that provide concentrated benefits to particular interest groups, while imposing diffuse costs on the public. In these circumstances, the members of the relevant interest group have a strong incentive to advocate for the law in question. However, because the law's costs are spread over a much larger group, those who would be hurt by the law have little incentive to actively resist it.<sup>34</sup> This is a well-known problem in the political economy literature,<sup>35</sup> and can result in laws being enacted whose costs exceed their benefits.<sup>36</sup> Regulatory entrepreneurs can be a force against such laws because they can lower the cost of civic engagement for their users—the public—and create a dynamic in which a new actor is willing to actively push for change.

Yet regulatory entrepreneurship is neither a panacea nor an unmitigated good. Regulatory entrepreneurs are profit-seeking entities and they will generally use their political power to pursue the results that are best for themselves, not the results that are best for society. Accordingly, regulatory entrepreneurship is unlikely to fully solve any of the pathologies of the political system. Moreover, in some instances, regulatory entrepreneurship may have significant negative effects on society. Overall, the likely effect of regulatory entrepreneurship is to make the government more responsive to business interests in general and certain types of companies in particular. Whether one considers this a positive or negative development will depend on one's view of those interests and may vary by context, taking into account a full range of social and economic implications.

## I. DEFINING REGULATORY ENTREPRENEURSHIP

All businesses face legal issues as part of their business operations. And companies naturally would like the laws that apply to them to be favorable.

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<sup>34</sup> See Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 189 (1990) (“[T]he high costs to the public of becoming informed on issues which are specialized in their concentrated impact considerably influence the competition for public attention.”); see also Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. 335, 343 (1974) (discussing the economic theory of regulation and the idea that “economic regulation serves the private interests of politically effective groups”).

<sup>35</sup> Public choice theory elucidates how citizens can rationally decide not to participate in the political process because the costs outweigh the benefits to individual actors. See, e.g., Levine & Forrence, *supra* note 34, at 189. Further, given the rational apathy of the public, the law itself may reflect the interests of small, cohesive interest groups rather than the public as a whole. See Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty*, 15 CARDOZO L. REV. 909, 920-21 (1994); Zachary J. Gubler, *Public Choice Theory and the Private Securities Market*, 91 N.C. L. REV. 745, n.131 (2013).

<sup>36</sup> See George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (discussing when and why interest groups and industries are able to use regulations and the state for their own interests); FRED MCCHESNEY, *MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION* (1997) (discussing how rent extraction and political extortion can result in law making to the detriment of the general public).



But some companies pursue a line of business that has a legal issue at its core—a significant uncertainty regarding how the law will apply to a main part of the business operations, a need for new regulations in order for products to be feasible or profitable, or a legal restriction that prevents the long-term operation of the business. For these entrepreneurs, political activity is generally a major component of their business models. Essentially, these companies are in the business of trying to change or shape the law. We term such businesses “regulatory entrepreneurs,” and this class of business activity “regulatory entrepreneurship.” Regulatory entrepreneurship is not a new phenomenon, but a spate of recent startup and technology companies have made it an increasingly salient one.

Of course, businesses have long engaged in political activity; corporations have been involved in U.S. politics since at least the 1800s.<sup>37</sup> U.S. corporations and their trade associations spend billions of dollars each year on lobbying efforts.<sup>38</sup> Nonetheless, regulatory entrepreneurship differs in several significant ways from what most observers envision when they think of corporate political activity.

Historically, corporate lobbying has been primarily a reactive endeavor. Companies have long lobbied to insulate themselves against competition.<sup>39</sup> The growth of the regulatory state, and the increasing involvement of the government in the economic sphere, spawned a responsive increase in corporate politicking as companies fought to resist cost-increasing regulations—and, if possible, to capture the regulators and use them as another tool to insulate themselves against competition.<sup>40</sup>

But by and large, corporate political activities have been, and continue to be, conducted by established businesses focused on protecting existing profit centers. It has been rare for a company to pursue a line of business with the plan of making that new business succeed by changing the law. When companies have attempted to change the law, it has often been around the edges of established, legal, profitable businesses in order to protect them or give them more room to grow: Energy companies lobby the Federal Energy Regulatory Commission.<sup>41</sup>

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<sup>37</sup> See MARK A. SMITH, *AMERICAN BUSINESS AND POLITICAL POWER: PUBLIC OPINION, ELECTIONS AND DEMOCRACY* 6 (2000); Winkler, *supra* note 8, at 881.

<sup>38</sup> See, e.g., DRUTMAN, *supra* note 9, at 8 (“A total of 3,587 individual corporations reported a combined \$1.84 billion in lobbying expenditures, roughly 56 percent of *all* the disclosed money spent on lobbying in 2012. Add in another \$553 million in spending by trade associations and \$175 million in spending by business-wide associations, and that’s \$2.57 billion in combined spending—78 percent of all the money spent on lobbying in 2012.”).

<sup>39</sup> See DRUTMAN, *supra* note 9, at 3 (noting that corporate lobbying was historically “sparse and mostly defensive”).

<sup>40</sup> See *id.* at 55 (describing “the political awakening of corporate lobbying” that began in the 1970s after a period of new major regulatory laws).

<sup>41</sup> Edmund Sanders & Richard Simon, *Enron Refuels Energy Debate*, L.A. TIMES, Jan. 22, 2002, [articles.latimes.com/2002/jan/22/news/mn-24113/2](http://articles.latimes.com/2002/jan/22/news/mn-24113/2).

Car companies resist higher fuel efficiency standards.<sup>42</sup> Pesticide companies fight regulations on the use of pesticides.<sup>43</sup> Other examples abound. But these are not regulatory entrepreneurship. In each of these cases, changing the law has been a relatively small component of the companies' overall operations, and not a material part of the business plan.<sup>44</sup>

Regulatory entrepreneurs face a different set of circumstances. They pursue lines of business knowing that changing the legal environment is crucially important for the business's growth, or even its legality, and with the intention of effecting that change. Changing the law is not a side project, it is a material part of the business plan.

For example, many states prohibit vehicle manufacturers from selling directly to customers ("direct distribution"); instead, manufacturers must sell their cars through independent dealers.<sup>45</sup> States enacted these laws to protect car dealers; in addition to imposing dealers as mandatory middlemen, they also make it difficult for manufacturers to terminate a dealership, even in the event of poor service or salesmanship.<sup>46</sup> These laws have been in place for over fifty years, despite multiple attempts by the major car companies to pare them back.<sup>47</sup>

Electric car manufacturer Tesla Motors was founded in 2003 with the goal of proving that electric cars could be better than gasoline-powered cars.<sup>48</sup> Because of the differences between gasoline-powered cars and Tesla's electric cars, especially with respect to the way that they are serviced, Tesla concluded that car dealers would not have good incentives to promote their cars, and that the company needed to be able to sell directly to consumers.<sup>49</sup> Yet direct distribution was prohibited in many states. Tesla thus started its business with the

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<sup>42</sup> See Fram, *supra* note 11.

<sup>43</sup> Anne C. Mulkern, *Pesticide Industry Ramps Up Lobbying in Bid to Pare EPA Rules*, N.Y. TIMES, Feb. 24, 2011, [nytimes.com/gwire/2011/02/24/24greenwire-pesticide-industry-ramps-up-lobbying-in-bid-to-42970.html](http://nytimes.com/gwire/2011/02/24/24greenwire-pesticide-industry-ramps-up-lobbying-in-bid-to-42970.html).

<sup>44</sup> Of course, this does not mean that these forms of corporate politicking are unimportant. Even individually minor lobbying efforts can have major effects on the law and the political process, particularly over long periods of time.

<sup>45</sup> *Death of a Car Salesman*, THE ECONOMIST (Aug. 22, 2015), <http://www.economist.com/news/business/21661656-no-one-much-likes-car-dealers-changing-system-will-be-hard-death-car-salesman>; Elon Musk, To the People of New Jersey, Open Letter, Mar. 14, 2014, <https://www.teslamotors.com/blog/people-new-jersey>.

<sup>46</sup> Musk, *supra* note 45.

<sup>47</sup> See *Death of a Car Salesman*, *supra* note 45; Crane, *supra* note 13, at 12.

<sup>48</sup> Tesla Motors, <https://www.teslamotors.com/about> (last visited Jan. 16, 2016).

<sup>49</sup> Nikki Gordon-Bloomfield, *Consumer Reports: Dealerships Don't Understand, Like Electric Cars*, TRANSPORT EVOLVED (Apr. 22, 2014), <https://transportevolved.com/2014/04/22/consumer-reports-dealerships-dont-understand-like-electric-cars/>; Cliff Weathers, *How Tesla and New Car Technologies Could Make Auto Dealers Obsolete*, SALON (Oct. 11, 2014, 12:00 PM), [http://www.salon.com/2014/10/11/how\\_tesla\\_and\\_new\\_car\\_technologies\\_could\\_make\\_auto\\_dealers\\_obsolete\\_partner/](http://www.salon.com/2014/10/11/how_tesla_and_new_car_technologies_could_make_auto_dealers_obsolete_partner/).

understanding that a change in the law was a vital piece of its business model.<sup>50</sup> Given the political realities surrounding dealer franchise laws, Tesla knew that it had to create its own lobbying efforts to battle the car dealers' lobby for state legislative reforms.<sup>51</sup> Car dealers have successfully blocked Tesla in several states, but the company has fought back and is slowly winning most of its direct distribution fights.<sup>52</sup>

Regulatory entrepreneurship often happens when businesses are built upon new technology, and many of our examples involve companies in the technology sector. There are several reasons why this is the case. First, new technologies can shift the tradeoffs surrounding particular laws; restrictions that made sense, or at least had little impact, before a new technological development may become real problems afterwards. Second, many new technologies and technology companies in recent years have been based on platform models or more broadly related to communications, which have made it easier to inform and mobilize large groups of people. As we discuss below, mobilizing users and other stakeholders has been a key driver of contemporary regulatory entrepreneurship.<sup>53</sup> Finally, new technologies and technology companies are often hyped as the “way of the future.” This can provide a certain degree of cachet that is politically useful.<sup>54</sup>

But, while regulatory entrepreneurs are often technology-related companies, they do not need to be; nothing about our definition of regulatory entrepreneurship requires that. The ultimate fighting championship (“UFC”) provides a good illustration: When Lorenzo and Frank Fertitta bought the business in 2001, the UFC’s main product—mixed martial arts combat for money—was barred in almost every state.<sup>55</sup> Through a concerted and strategic lobbying effort led by president Dana White, UFC ultimately reversed these laws;

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<sup>50</sup> Tesla’s registration statement in its initial public offering acknowledged: “Implementing our business model is subject to numerous significant challenges, including obtaining permits and approvals from local and state authorities, and we may not be successful in addressing these challenges. . . . [W]e will need to persuade customers, suppliers and regulators of the validity and sustainability of our business model.” Tesla Motors, Inc., Amendment No. 1 to Form S-1 Registration Statement, Jun. 2, 2011, at 22-23, available at <http://ir.teslamotors.com/sec.cfm?view=all>. See also Tesla Motors, <https://www.teslamotors.com/about> (last visited Jan. 16, 2016); Crane, *supra* note 13, at 1.

<sup>51</sup> Crane, *supra* note 13, at 1; Catherine Ho, *PowerMoves*, WASH. POST (Nov. 18, 2015), <https://www.washingtonpost.com/news/powerpost/wp/2015/11/18/powermoves-scrambling-to-shape-refugee-policy-after-paris/> (noting that Tesla Motors hired lobbyist to lobby on automotive industry issues).

<sup>52</sup> *Death of a Car Salesman*, *supra* note 45. The FTC has come out in support of direct distribution auto sales. See Marina Lao et al., *Direct-to-Consumer Auto Sales: It’s Not Just About Tesla*, FTC (May 11, 2015), <https://www.ftc.gov/news-events/blogs/competition-matters/2015/05/direct-consumer-auto-sales-its-not-just-about-tesla>.

<sup>53</sup> See Part II.A-C, *infra*.

<sup>54</sup> See note 161, *infra*, and accompanying text.

<sup>55</sup> Adam Hill, *A Timeline of UFC Rules: From No-Holds-Barred to Highly Regulated*, BLEACHER REPORT, Apr. 24, 2013, <http://bleacherreport.com/articles/1614213-a-timeline-of-ufc-rules-from-no-holds-barred-to-highly-regulated>.

New York, the final holdout, legalized UFC in March 2016.<sup>56</sup> Four months later, the Fertittas sold the UFC for \$4 billion—2,000 times what they paid for it in 2001.<sup>57</sup> This makes UFC a very successful regulatory entrepreneur, even though neither its product nor its primary means of distributing that product (television) was built on new technology.

There are other examples of regulatory entrepreneurs pushing to change laws based on changing social preferences instead of new technological tradeoffs. For instance, ResponsibleOhio is a would-be seller of marijuana. It spent over \$20 million unsuccessfully pushing a marijuana legalization initiative that would have made its business viable (and likely extremely profitable).<sup>58</sup> It is a regulatory entrepreneur, but not a technology company.

Four more points about the definition of regulatory entrepreneurship merit emphasis. First, we define regulatory entrepreneurship as a phenomenon that applies with respect to a line of business. For example, Google (now Alphabet) runs a well-known, clearly legal, and highly profitable search engine business. It is also pouring large amounts of resources into developing self-driving cars. Assuming that Google successfully develops the necessary technology to support this business, it still will not be viable or financially successful in the long term unless states change their laws in order to permit self-driving cars to use public roads.<sup>59</sup> Google was well aware of this, and entered the self-driving car business intending to convince states to open their roads to its cars. By doing so, Google is engaging in regulatory entrepreneurship, even if Google's other lines of business

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<sup>56</sup> Bryan Armen Graham, *New York Ends Ban and Becomes 50th State to Legalize Mixed Martial Arts*, GUARDIAN, Mar. 22, 2016, <https://www.theguardian.com/sport/2016/mar/22/new-york-legalizes-mma-ufc>.

<sup>57</sup> Martin Rogers, *UFC Sold to WWE-IMG for \$4 Billion; Dana White Will Still Run Day-to-Day Operations*, USA TODAY, July 11, 2016, [usatoday.com/story/sports/ufc/2016/07/11/ufc-sale-wwe-img-dana-white/86937834/](http://usatoday.com/story/sports/ufc/2016/07/11/ufc-sale-wwe-img-dana-white/86937834/).

<sup>58</sup> Anne Saker, *What You Need to Know About Marijuana Initiative*, CINCINNATI (July 24, 2015, 12:52 PM), <http://www.cincinnati.com/story/news/2015/06/17/marijuana-ohio-ballotinitiative-responsibleohio/28897081/>. The group, ResponsibleOhio, ultimately failed. Jackie Borchardt, *Pro-Marijuana Group ResponsibleOhio Dead, Founder Says, Won't Press Ballot Issue in 2016*, CLEVELAND (Jan. 14, 2016, 6:10 PM), [http://www.cleveland.com/open/index.ssf/2016/01/pro-marijuana\\_group\\_responsibl.html](http://www.cleveland.com/open/index.ssf/2016/01/pro-marijuana_group_responsibl.html); David A. Graham, *Why Did Ohio's Marijuana Legalization Push Fail?*, ATLANTIC (Nov. 3, 2015), <http://www.theatlantic.com/politics/archive/2015/11/where-did-ohios-marijuana-legalizers-go-wrong/414061/>.

<sup>59</sup> See Claire Cain Miller, *When Driverless Cars Break the Law*, N.Y. TIMES (May 13, 2014), <http://www.nytimes.com/2014/05/14/upshot/when-driverless-cars-break-the-law.html> (“Only four states and the District of Columbia have passed laws specific to driverless cars, some just allowing manufacturers to test cars and none answering every legal question that might come up.”); Salvador Rodriguez, *California, Google Ready For Autonomous Vehicle Showdown in 2016*, I.B. TIMES (Feb. 15, 2:20 AM), <http://www.ibtimes.com/california-google-ready-autonomous-vehicle-showdown-2016-2233290> (“California's lead in the race to autonomous, self-driving vehicles could come to a grinding halt should the state adopt draft measures announced this week that would all but make Google's driverless vehicles illegal.”).

and the continued viability of Google as a company overall do not depend on a change in the law. In other words, we focus on defining regulatory entrepreneurship with respect to a line of business, rather than with respect to business entities, because that functionally captures the distinctive type of entrepreneurial and political activity that we believe merits study and discussion.

Second, because regulatory entrepreneurship is primarily a profit-driven activity, it does not depend on legal formalities. Regulatory entrepreneurs do not necessarily care whether they effect a legal change on a de facto or de jure basis. For example, if the relevant regulatory body credibly commits to not enforcing the law on the books, that is roughly as good, from the entrepreneur's perspective, as formally amending the law on the books.

Third, regulatory entrepreneurship is conceptually distinct from regulatory arbitrage. Regulatory arbitrage arises when parties change the form of their transaction, but not its economic substance, in order to effect more favorable regulatory treatment.<sup>60</sup> Regulatory arbitrageurs essentially take the law as a given, then try to take advantage of the law as best they can by making minor alterations to their behavior. Regulatory entrepreneurs, in contrast, seek to change the law as part of their plan to earn profits. Rather than adjusting to the legal environment, regulatory entrepreneurs seek to shape the legal environment to suit their needs instead.

Finally, we note that the definition of regulatory entrepreneurship raises a natural question of boundaries: At what point does changing the law become "important enough" to a company's business plan to make the company a regulatory entrepreneur? The answer hinges on the specific facts and circumstances, and there will be marginal cases about which reasonable people will disagree. Regulatory entrepreneurship is best thought of as a matter of degree. We do not think that the exact location of the boundary is the main issue; rather, defining and providing a term for regulatory entrepreneurship enables it to be studied for the distinctive activity it is and for ease of discussion. We are more interested in examining the implications that follow from the phenomenon than policing its precise boundaries, and we readily acknowledge that this is a rich area for further inquiry and debate.

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<sup>60</sup> See Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 229-30 (2010) (defining regulatory arbitrage as "the manipulation of the structure of a deal to take advantage of a gap between the economic substance of a transaction and its regulatory treatment"); see also Jordan M. Barry, *On Regulatory Arbitrage*, 89 TEX. L. REV. SEE ALSO 69, 73 (2011) ("[R]egulatory arbitrage is a phenomenon that follows from having regulations that fail to take economic reality into account."); see also Frank Partnoy, *Financial Derivatives and the Costs of Regulatory Arbitrage*, 22 J. CORP. L. 211, 227 ("Regulatory arbitrage consists of those financial transactions designed specifically to reduce costs or capture profit opportunities created by differential regulation or laws.").

## II. HOW REGULATORY ENTREPRENEURS INSTIGATE LEGAL CHANGE

In this Part, we explore how effective regulatory entrepreneurs weave together both time-tested and innovative new tactics to create a larger strategy for changing the law.

### A. Breaking the Law or Taking Advantage of Legal Gray Areas

Many regulatory entrepreneurs follow the maxim that it is better to beg forgiveness than to ask for permission. In this context, that translates to “it is better to enter markets and start providing services to the public—legally or otherwise—than to seek approval from regulators.”

Companies often justify this behavior by construing some gray area in the law as permitting the action in question. A motivated entrepreneur can often manufacture a legal gray area, blurring the line between outright lawbreaking and aggressive interpretation. For example, consider an entrepreneur with a business built around a new technology. Even if existing regulations or statutes use broad language that, when read literally, prohibit the company’s activity, the company can take the view that officials were not considering the company’s activity when they wrote those rules—how could they, when the technology the business is built on did not yet exist?<sup>61</sup>

It is difficult to know from an outside perspective whether particular companies are deliberately violating laws, and in many instances there is at least room for argument about the matter. For our purposes, it suffices (and we believe it is fair) to say that when regulatory entrepreneurs move into a market, they often take an aggressively favorable reading of the relevant law, and that the correctness of their interpretation—that is, whether or not they are actually complying with the law initially—is not a first-order concern.<sup>62</sup>

Yishan Wong, a Silicon Valley angel investor who was an early PayPal employee and the CEO of Reddit, explained a similar view:

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<sup>61</sup> Cf. Jordan M. Barry & Paul L. Caron, *Tax Regulation, Transportation Innovation, and the Sharing Economy*, 82 U. CHI. L. REV. DIALOGUE 69, 73-74 (2015) (“[N]ew [transaction] structures . . . may simply not fit well into an existing regulatory regime that was designed with a particular transaction template in mind.”).

<sup>62</sup> The many public reports of startup companies ignoring notifications of their illegal activity suggests that this is part of a larger strategy combining business and politics. See, e.g., Serena Saitto, *Inside Big Taxi’s Dirty War with Uber*, BLOOMBERG BUSINESS (Mar. 11, 2015, 5:00 AM), <http://www.bloomberg.com/news/articles/2015-03-11/inside-big-taxi-s-dirty-war-with-uber> (“Uber’s strategy has been to launch services regardless of the rules and then leverage its popularity to force regulators to adapt. So far, that approach has succeeded in about 30 markets in North America . . .”).

[I]f you are a startup who feels that the violation of a law (or an excursion into a grey and questionable/undefined area of the law) will allow you to create a business that provides enormous value to people, the tactically wise thing to do is to move forward and try to build the business.<sup>63</sup>

This state of affairs—operating and growing a business, while taking the questionable position that the company is acting within the bounds of the law—generally benefits regulatory entrepreneurs. Sometimes regulatory entrepreneurs proactively engage regulators, but often they simply push forward with the business while hoping that the regulators and enforcement agencies will not come knocking. Thus, in sum, many regulatory entrepreneurs’ approach includes strategically operating in a zone of questionable legality or breaking the law until they can (hopefully) change it.

For example, early in Uber’s operations, the company was reported to have received and ignored a cease-and-desist demand from transit regulators in its first city, San Francisco.<sup>64</sup> The company has followed the same playbook in other cities when problems have arisen, even internationally. Uber and its executives have been embroiled in legal battles in Paris, for instance, after refusing to shut down its “UberPop” service following the passage of a transportation law that made it illegal.<sup>65</sup> Despite police crackdowns, Uber repeatedly paid drivers’ fines and continued to advertise on radio stations.<sup>66</sup>

Uber’s main competitor, Lyft, has taken a similar approach. In a court filing, the New York state attorney general’s office claimed:

As it has done in every other city in which it operates, defendant has simply waltzed into New York and set up shop while defying every law passed whose very purpose is to protect the People of the State of New York. Despite being warned and told to cease and desist by three separate regulatory and enforcement agencies,

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<sup>63</sup> Yishan Wong’s answer to “Airbnb: Why has Airbnb not been sued or regulated out of existence?”, <https://www.quora.com/Airbnb/Why-has-Airbnb-not-been-sued-or-regulated-out-of-existence>.

<sup>64</sup> Marcus Wohlsen, *Uber’s Brilliant Strategy to Make Itself Too Big to Ban*, WIRED (July 8, 2014, 6:30 AM), <http://www.wired.com/2014/07/ubers-brilliant-strategy-to-make-itself-too-big-to-ban/>.

<sup>65</sup> See Aurelien Breeden & Mark Scott, *Uber Executives’ Trial in Paris Is Postponed*, N.Y. TIMES (Sept. 30, 2015), <http://www.nytimes.com/2015/10/01/business/uber-france-trial-executives.html>; Liz Alderman, *Uber’s French Resistance*, N.Y. TIMES (June 3, 2015), <http://www.nytimes.com/2015/06/07/magazine/ubers-french-resistance.html>.

<sup>66</sup> Alderman, *supra* note 65 (quoting the general manager of Uber France: “We tell [drivers], if you get fined, come to us and we’ll support you. We want them to feel as confident as we feel about what we’re doing and our interpretation of the law.”).

defendant has thumbed its nose at the law and continued with its plan to launch in what could become its largest market.<sup>67</sup>

As another example, technology investors have placed bets in the mobile payments and virtual currencies space, an area of innovation that raises significant legal questions. Marc Andreessen, the principal of a leading venture capital (VC) firm, recounted the advice that one of his lawyers had given on the topic of the virtual currency bitcoin<sup>68</sup>: “Good news guys. Here you have a financial instrument that can be simultaneously regulated as a currency, a commodity, and a security. . . Regulators will fight over who, exactly, gets to regulate it, and *VC’s job is to sneak through the fight.*”<sup>69</sup>

## B. Growing Too Big to Ban

Timing plays an important role in a strategy to break the law or operate in a gray area of the law: Early movers may establish a market position that will in turn affect their leverage vis-à-vis the government and the ultimate success of their business model. To again quote angel investor Mr. Yishan Wong, “[t]he law and its subsequent enforcement are often defined by the will of the people.”<sup>70</sup> Moreover, “if there is a business that a lot of people like but is in gross violation of the law, it is typically allowed to stand, either via a subsequent modification of the law, clarifications in the grey area which end up being favorable to the business, or lax enforcement.”<sup>71</sup> He also explains succinctly how this applies with respect to Airbnb:

[T]he likely time it will take for entrenched business interests to react to Airbnb, for a debate about enforcement and clarification of the law, and then for regulations to be proposed, debated,

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<sup>67</sup> Memorandum of Law in Support of Motion for Temporary Restraining Order and Preliminary Injunction, *People of the State of N.Y. v. Lyft, Inc.*, July 11, 2014, available at <http://cdn2.vox-cdn.com/assets/4744462/MOL.PDF>.

<sup>68</sup> Kevin V. Tu & Michael W. Meredith, *Rethinking Virtual Currency Regulation in the Bitcoin Age*, 90 WASH. L. REV. 271, 277 (2015) (“As a type of virtual currency, Bitcoin is a medium of exchange that (1) is electronically created and stored, and (2) lacks the backing of a government authority, central bank, or a commodity like gold. Like traditional currency, virtual currencies such as Bitcoin can be used to purchase goods and services from any person that is willing to accept it as a form of payment.”).

<sup>69</sup> Carmel DeAmicis, *Andreessen: Bitcoin is Like the Early Internet*, PANDODAILY (Oct. 3, 2013), <http://pandodaily.com/2013/10/03/andreessen-bitcoin-is-like-the-early-internet/> (emphasis added); see also Written Statement of Aaron J. Greenspan, Chief Executive Officer, Think Computer Corporation, Before the U.S. Senate Comm. on Banking, Housing, and Urban Affairs, Nov. 19, 2013, at 13, available at <http://www.aarongreenspan.com/writing/20131118.hsgacstatement.pdf> (quoting Marc Andreessen); Noam Scheiber, *Uber and Airbnb Are Waging a Libertarian War on Regulators*, NEW REPUBLIC (May 20, 2014), <https://newrepublic.com/article/117837/airbnb-uber-wage-war-regulators-army-customers> (discussing that many financial and payment technology companies have made a “rational calculation” to take a “shoot-first/ask-questions-later strategy”).

<sup>70</sup> Wong, *supra* note 63.

<sup>71</sup> *Id.*



amended, passed, and then enforcement measures taken is likely to be more time than it will take for Airbnb—moving at internet speed—to establish itself as a globally viable business. By the time that happens, the market (i.e. the democratic majority) will probably have shifted to favor its interests, so long as they continue to operate the business in a way that benefits travelers and would-be amateur hoteliers.<sup>72</sup>

Other commentators have aptly described this approach as “guerrilla growth” or aiming to grow “too big to ban.”<sup>73</sup> Growth is important for almost any business, but it is particularly so for a regulatory entrepreneur. This is because in addition to improving the company’s valuation and prospects for profits, growth also strengthens the company’s prospects with regulators that might seek to ban or regulate the business activity. Business growth can translate to consumer popularity that becomes difficult for regulators to ignore.

Uber again illustrates this point clearly. Uber makes its money by taking a percentage of the driver’s fare.<sup>74</sup> On numerous occasions, Uber has dramatically cut its prices in order to increase its user base, valuing growth over profitability.<sup>75</sup> At times, Uber has cut its prices to such a great extent that it effectively paid customers to use its service.<sup>76</sup>

Loss leaders are well-known in business, but it is rare for a company’s main product to be one.<sup>77</sup> But for Uber, this was considered a savvy strategy because “[i]f [Uber] gets big enough quickly enough, the political price could become too high for any elected official who tries to pull Uber to the curb.”<sup>78</sup> Another commentator remarked: “[I]t has already outgrown the stage at which its growth could have been squelched by aggressive regulatory action, à la the Internet-TV startup Aereo. At this point, any regulatory crackdowns will only

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<sup>72</sup> *Id.*

<sup>73</sup> Wohlsen, *supra* note 64; Callum Borchers, *DraftKings and FanDuel Vie to Become ‘Too Big To Ban’*, WASH. POST (Nov. 12, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/11/12/why-are-draftkings-and-fanduel-all-over-your-tv-because-they-want-to-be-too-big-to-ban/>.

<sup>74</sup> Ellen Huet, *Uber Tests Taking Even More From Its Drivers With 30% Commission*, FORBES (May 18, 2015, 6:32 PM), <http://www.forbes.com/sites/ellenhuet/2015/05/18/uber-new-uberx-tiered-commission-30-percent/>.

<sup>75</sup> Wohlsen, *supra* note 64.

<sup>76</sup> *Id.* (describing how Uber usually takes a 20% commission, but that it cut fares in San Francisco and Los Angeles by 25% and made up the difference to drivers, essentially paying part of the fare for its passengers in those areas); *see also* Uber, Business (last visited Jan. 29, 2016), <https://www.uber.com/business> (noting that “the uberx option is up to 40% cheaper than a taxi”).

<sup>77</sup> A loss leader is a product intentionally sold at a loss in order to stimulate sales of other, profitable items.

<sup>78</sup> *Id.* (“By drastically lowering its prices, Uber is doing more than increasing its customer base. It’s cultivating constituents—the people who will complain when someone in power tries to take away their Uber.”).

serve to define the contours of Uber's dominance."<sup>79</sup> Politicians have taken notice of the political dimension to this growth. A California State Assembly member who sponsored a measure to regulate Uber remarked: "They wanted to get themselves established very quickly as the bully you didn't want to mess with."<sup>80</sup>

Another recent example of companies taking the too-big-to-ban strategy includes fantasy sports gaming sites FanDuel and DraftKings. These companies charge a fee for users to play online fantasy sports games; the companies keep a percentage of the fees and pay out the rest as prizes.<sup>81</sup> Both FanDuel and DraftKings have prioritized growth over profits; they have returned large percentages of their revenues back to users in the form of prize money and spent millions on advertising during sports broadcasts.<sup>82</sup> These firms are credited with creating a new multi-billion dollar industry in fantasy sports that barely existed just a couple of years ago.<sup>83</sup>

After a determination by New York's attorney general that the gaming sites were breaking the law, FanDuel and DraftKings both released statements invoking their size and popularity and questioning the state's attempt to shut them down. FanDuel's statement read, in part: "This is a politician telling hundreds of thousands of New Yorkers they are not allowed to play a game they love and share with friends, family, coworkers and players across the country."<sup>84</sup> DraftKings similarly stated: "We strongly disagree with the reasoning in [the] opinion and will examine and vigorously pursue all legal options available to ensure our over half a million customers in New York State can continue to play the fantasy sports games they love."<sup>85</sup>

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<sup>79</sup> Will Oremus, *The End of the Taxi Era*, SLATE (Jan. 8, 2016, 5:58 PM), [http://www.slate.com/articles/technology/technology/2016/01/yellow\\_cab\\_in\\_san\\_francisco\\_is\\_ju\\_st\\_the\\_beginning\\_uber\\_s\\_war\\_on\\_cabs\\_is.html](http://www.slate.com/articles/technology/technology/2016/01/yellow_cab_in_san_francisco_is_ju_st_the_beginning_uber_s_war_on_cabs_is.html).

<sup>80</sup> Rosalind S. Helderman, *Uber Pressures Regulators By Mobilizing Riders and Hiring Vast Lobbying Network*, WASH. POST (Dec. 13, 2014), [https://www.washingtonpost.com/politics/uber-pressures-regulators-by-mobilizing-riders-and-hiring-vast-lobbying-network/2014/12/13/3f4395c6-7f2a-11e4-9f38-95a187e4c1f7\\_story.html](https://www.washingtonpost.com/politics/uber-pressures-regulators-by-mobilizing-riders-and-hiring-vast-lobbying-network/2014/12/13/3f4395c6-7f2a-11e4-9f38-95a187e4c1f7_story.html).

<sup>81</sup> Ben Fischer, *FanDuel vs. DraftKings: Are We Seeing the Future of Sports Wagering?*, N.Y. BUS. J. (Nov. 18, 2014, 2:25 PM), <http://www.bizjournals.com/newyork/blog/techflash/2014/11/fanduel-vs-draftkings-are-we-seeing-the-future-of.html>.

<sup>82</sup> Noah Kulwin & Kurt Wagner, *It's No Good! DraftKings, FanDuel Deemed Illegal in New York*, RE/CODE (Nov. 10, 2015, 4:29 PM), <http://www.recode.net/2015/11/10/11620556/its-no-good-draftkings-fanduel-deemed-illegal-in-new-york>.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

FanDuel and DraftKings ultimately won that battle by securing legislation that made clear that their businesses are legal.<sup>86</sup> Their size and popularity were key factors in their victory.<sup>87</sup> In explaining his support for the bill, Governor Andrew Cuomo cited the sites' popularity and how legalization would result in more revenues that the state could use to fund education.<sup>88</sup> Other supporters of the bill raised the same points,<sup>89</sup> and several other states have since passed legislation.<sup>90</sup>

### C. Mobilizing Users and Other Stakeholders for Political Power

An especially interesting strategy in the regulatory entrepreneurship toolbox has been to use customers and other stakeholders to fight corporate political battles. Not all companies are well-loved enough by the public for this to be viable, but for those with the support of their users and stakeholders it has proven a particularly effective tactic.

Uber has repeatedly and successfully adopted this approach. One of its key political strategists, David Plouffe, has drawn explicit parallels between customers and campaign volunteers.<sup>91</sup> The company sends alerts to riders on their phones, asking them to sign petitions or contact public officials at key political moments for the company.<sup>92</sup> Its users often respond quickly and in vast numbers; the company reports that nearly half a million riders have signed its petitions.<sup>93</sup>

For example, Virginia's Department of Motor Vehicles sent Uber a cease-and-desist order notifying the company that its service was illegal and that it needed to immediately cease all operations in the state.<sup>94</sup> Uber responded by sending a notice to all of its Virginia users, along with the contact information for the ordinarily low-profile state official involved in the decision. Within a few days, hundreds of angry Uber customers had emailed the official, inundating his

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<sup>86</sup> Joe Drape, *Win for DraftKings and FanDuel Opens Door for Sports Betting in New York*, N.Y. TIMES, Aug. 3, 2016, [nytimes.com/2016/08/04/sports/new-york-fantasy-sports-law-opens-door-for-more-gambling.html](http://nytimes.com/2016/08/04/sports/new-york-fantasy-sports-law-opens-door-for-more-gambling.html).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* (quoting Assemblyman J. Gary Pretlow as saying that fantasy sports "have the potential to generate millions of dollars in revenue for New York State").

<sup>90</sup> *Id.*; Don Van Natta, Jr., *Welcome to the Big Time*, ESPN.COM (Aug. 24, 2016), [http://www.espn.com/espn/feature/story/\\_/id/17374929/otl-investigates-implosion-daily-fantasy-sports-leaders-draftkings-fanduel](http://www.espn.com/espn/feature/story/_/id/17374929/otl-investigates-implosion-daily-fantasy-sports-leaders-draftkings-fanduel); *Legislative Tracker: Daily Fantasy Sports, Sports Betting*, LEGAL SPORTS REPORT, <http://www.legalsportsreport.com/dfs-bill-tracker/> (last visited Aug. 19, 2016) (listing the adoption of daily fantasy sports legislation in Colorado, Indiana, Kansas, New York, and Massachusetts, Mississippi, Missouri, Tennessee, and Virginia).

<sup>91</sup> Uber, *Portland's Very Own Unipiper is Rider Zero!*, (Dec. 5, 2014), <https://newsroom.uber.com/pdx/portlands-very-own-unipiper-is-rider-zero/>.

<sup>92</sup> Helderman, *supra* note 80.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

inbox and requiring him to work all weekend to respond.<sup>95</sup> Within 48 hours, the state's transportation secretary instructed the DMV not to interfere with Uber drivers.<sup>96</sup> A few weeks later, state officials approved a temporary operating permit that allowed the company (as well as its competitor Lyft) to continue its normal operations.<sup>97</sup>

Similarly, when the Illinois General Assembly passed a restrictive measure that would negatively impact Uber's business, Uber responded by mobilizing its army of Illinois users. It inserted a splash screen on its smartphone app and emailed Illinois riders requesting that they sign a digital petition asking the state governor to veto the bill. Twenty-five thousand supporters signed the petition in its first hour, and the governor eventually vetoed the bill.<sup>98</sup>

In Portland, when faced with a city ordinance that was an obstacle to its black car ride service, Uber announced on its blog that it would run a one-day promotion delivering free ice cream around the city.<sup>99</sup> The ice cream "delivery" event provided the company with a database of people who were likely to be sympathetic to its goals, and who it could then turn into advocates for its ride sharing service.<sup>100</sup> Almost 1,700 people signed a petition to "tell Uber to bring their stylish rides to Oregon."<sup>101</sup> When Uber later launched its UberX service in Portland before the service had been officially sanctioned, the company carefully used hyper-local marketing to appeal to local residents, such as creating an ad with a well-known quirky unicyclist bagpiper as the first rider.<sup>102</sup> The company then threw itself a party at which attendees could take photos with protest signs or send a postcard to the mayor.<sup>103</sup> In the first four hours, more than 7,000 people signed a new petition in support of Uber operating its service in Portland.<sup>104</sup>

Airbnb has also leveraged its users for political advantage. The company announced plans to create and support "home-sharing clubs" in 100 U.S. cities.<sup>105</sup> The purpose of these clubs is to help residents campaign against local rules

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Weise, *supra* note 24.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Uber, Portland's Very Own Unipiper is Rider Zero!, (Dec. 5, 2014), <https://newsroom.uber.com/pdx/portlands-very-own-unipiper-is-rider-zero/>.

<sup>103</sup> Weise, *supra* note 24.

<sup>104</sup> *Id.*

<sup>105</sup> Heather Somerville, *Airbnb to Create 100 Clubs to Advocate for Home-Sharing*, REUTERS (Nov. 4, 2015, 7:06 PM), <http://www.reuters.com/article/us-airbnb-sanfrancisco-idUSKCN0ST2RL20151105> (quoting Airbnb's global policy chief as stating, "We'll spend what it takes to succeed.").

restricting short-term rentals. Airbnb expects hosts and guests who use their service to run the clubs, which have been likened to local unions.<sup>106</sup>

Airbnb adopted this strategy on the heels of its \$8.4 million ground campaign in San Francisco, in which the company mobilized hosts and guests to defeat a local proposition that would have limited short-term rentals.<sup>107</sup> Over 2,000 volunteers knocked on over 285,000 doors in the city in order to gain political support for Airbnb’s cause.<sup>108</sup> Until recently, such mobilized grassroots support for a multibillion-dollar company has been unheard of, or is at least highly unusual.<sup>109</sup>

And, indeed, this kind of regulatory entrepreneurship raises the question of whether such political support can be called grassroots when it has been catalyzed from the top-down as part of a corporate strategy. It was Airbnb’s own global policy chief, previously a D.C. political operative, who framed the business as a “movement” at a San Francisco news conference.<sup>110</sup>

Similarly, when fantasy sports gaming sites FanDuel and DraftKings found themselves in the political spotlight, they catalyzed fans and informed them of their efforts and what the fans could do to help.<sup>111</sup> FanDuel’s CEO sent an open letter to users, including a link to a petition that users could sign “to protect your right to play fantasy sports” and “to remind officials how deep and wide the support for fantasy sports is.”<sup>112</sup> Within two weeks, the company secured more than 145,000 signatures.<sup>113</sup> These companies have parlayed their popular support into considerable legislative success.<sup>114</sup>

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<sup>106</sup> *Id.*; Conor Dougherty & Mike Isaac, *Airbnb and Uber Mobilize Vast User Base to Sway Policy*, N.Y. TIMES (Nov. 4, 2015), <http://www.nytimes.com/2015/11/05/technology/airbnb-and-uber-mobilize-vast-user-base-to-sway-policy.html>.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Airbnb was recently valued at \$24 billion—higher than the valuation of the mega-hotel chain Marriott International. See Dougherty & Isaac, *supra* note 106.

<sup>110</sup> *Id.* (“There is going to be more people doing home-sharing tomorrow than there are today, there is going to be more the day after that. This is now a movement.”). Some examples more closely resemble a grassroots model, such as food truck entrepreneurs that have rallied their customers to help change laws governing their business. See Beth Kregor, *Food Trucks, Incremental Innovation, and Regulatory Ruts*, 82 U. CHI. L. REV. DIALOGUE 1, 14 (2015) (“Because [the new generation of food trucks] use social media to connect with their customers, they can rally the public to participate in political debates, upending the usual public-choice paradigm. They have done so successfully in DC and other cities.”).

<sup>111</sup> Nigel Eccles, *FanDuel Open Letter* (Oct. 2015), <http://www.legalsportsreport.com/wp-content/uploads/2015/10/FanDuel-Regulation-Letter.pdf>.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> See *Legislative Tracker: Daily Fantasy Sports, Sports Betting*, *supra* note 90.

#### D. More Traditional Political Techniques

Finally, regulatory entrepreneurs have also taken advantage of the full range of traditional lobbying techniques that established firms have typically employed. This includes tactics such as putting political operatives on the board of directors or hiring them as key advisers and using professional lobbyists.<sup>115</sup>

Placing political operatives on the board of directors of a company, particularly an early-stage startup company, signals that regulatory affairs are crucial to the business and that changing existing laws or making new laws may be key to the business model. Take, for example, Hyperloop One, a regulatory entrepreneur startup inspired by billionaire technology mogul Elon Musk’s idea of a futuristic vacuum-tube transport network that could transport passengers and freight at over 700 miles an hour.<sup>116</sup> The company was started with the understanding that it would have to change the law or create new law to support its nascent, never-done-before technology—persuading governments to support futuristic infrastructure, obtaining rights-of-way through cities and across vast distances, and navigating transportation laws written for a different era. The technical challenges involved in developing a hyperloop transportation network are enormous, but the political challenges are equally monumental.

Hyperloop has prepared for political and legal battles by getting influential political operatives involved before those battles have even begun. When the Chief Technology Officer of Hyperloop first met the company co-founder, he said “I can build the technology—you’ve got to get me the right of way to do it.”<sup>117</sup> The co-founder replied, “We’ve got Jim Messina on our board,” referring to former White House deputy chief of staff and the campaign manager for President Obama’s 2012 reelection.<sup>118</sup> In its early stages, the company had also met with major politicians, such as then-U.S. Senate Democratic leader Harry Reid.<sup>119</sup> President Obama himself had been briefed on the early-stage startup company and its vision for ultra-high-speed transportation.<sup>120</sup> The company has also developed a relationship with Eric Garcetti, the mayor of Los Angeles, where the startup is

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<sup>115</sup> These tactics are anything but new. For example, in the 1830s, the Philadelphia and Trenton Railroad Company acquired a New Jersey turnpike with the plan of converting it into a railroad track connecting New York and Philadelphia—even though it knew that the New Jersey legislature had ostensibly granted another company the exclusive right to railroad transportation between those cities. To overcome this obstacle, the company hired prominent lawyers, including then-U.S. Attorney General Roger B. Taney, to issue opinions stating that the prior grant was no obstacle. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 134-36 (1977).

<sup>116</sup> Bruce Upbin, *Hyperloop Is Real: Meet the Startups Selling Supersonic Travel*, FORBES (Feb. 11, 2015, 6:05 AM), <http://www.forbes.com/sites/bruceupbin/2015/02/11/hyperloop-is-real-meet-the-startups-selling-supersonic-travel/#2715e4857a0b7dd0afd7313c>.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* Jim Messina has also worked for Uber and Airbnb. *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

based.<sup>121</sup> He has joked: “I’ve been part of the marketing department. I talk about it all the time. I’ve talked to [U.S. Secretary of Transportation Anthony Foxx], the vice president, the president—and they’re not paying me a thing!”<sup>122</sup> Many other companies have adopted similar strategies.<sup>123</sup>

Hiring professional lobbyists is another technique that regulatory entrepreneurs use. For example, consider once more electric car manufacturer Tesla Motors. To succeed in its fight against dealer franchise laws, Tesla has had to battle the car dealers lobby and create its own lobbying efforts for state legislative reforms.<sup>124</sup> The lobbyists that Tesla has hired have been key to its efforts to help win over state legislators. In Texas, for example, Tesla has spent over half a million dollars on lobbyists in each of the past couple of years.<sup>125</sup> Tesla hired several notable local lobbyists, including Mike Toomey, a trusted advisor to Governor Rick Perry; Karen Steakley, an ex-deputy legislative director for Governor Rick Perry; Craig Chick, a former senior policy adviser for notable Texas legislators; and Adam Goldman, whose brother is a state lawmaker.<sup>126</sup> The company started building a coalition of lawmakers and business groups supportive of their cause and hosting legislative staffers at policy forums and company receptions.<sup>127</sup> These traditional political lobbying techniques have been aimed at helping the company to level the playing field against the powerful car dealer lobby, which has been politically active and generous in making political expenditures for years.<sup>128</sup> A Tesla vice president explained: “We understood the

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<sup>121</sup> Caroline O’Donovan, *Hyping the Hyperloop: How A Moonshot Technology Could Become a Reality*, BUZZFEED (Oct. 11, 2015, 7:01 AM), <http://www.buzzfeed.com/carolineodonovan/hyping-the-hyperloop-how-elon-musks-dream-could-become-a-rea#.ccRqWaX5k>.

<sup>122</sup> *Id.*

<sup>123</sup> Other notable examples of companies involving political strategists in key business positions include Uber (David Plouffe), Airbnb (Chris Lehane), and Theranos (Henry Kissinger; George Shultz; Sam Nunn; Bill Frist). Helderman, *supra* note 80; Dougherty & Isaac, *supra* note 106; Jennifer Reingold, *Theranos’ Board: Plenty of Political Connections, Little Relevant Expertise*, FORTUNE (Oct. 15, 2015, 12:49 PM), <http://fortune.com/2015/10/15/theranos-board-leadership/>. Regulatory entrepreneurs have also engaged consultants who come through the “revolving door.” For example, William Haraf, who had been the Commissioner of the California Department of Financial Institutions, and on whose watch California’s money transmission law was implemented, became Managing Director of Promontory Financial Group, a consultancy which advises startups in the virtual currency space. See Greenspan testimony, *supra* note 69.

<sup>124</sup> Crane, *supra* note 13.

<sup>125</sup> Grant Gerke, *Tesla Motors Secret Weapon: Thoughts and Lobbying Efforts*, TESLARATI (Mar. 16, 2015), <http://www.teslarati.com/tesla-motors-secret-weapon-thoughts-lobbying-efforts/>; David Saleh Rauf & Neal Morton, *Tesla Gears Up for Texas Lobbying Blitz*, SAN ANTONIO EXPRESS NEWS (Dec. 18, 2014), <http://www.expressnews.com/news/local/article/Tesla-gears-up-for-Texas-lobbying-blitz-5967219.php>.

<sup>126</sup> Saleh & Morton, *supra* note 125.

<sup>127</sup> *Id.*

<sup>128</sup> See, e.g., Bob Adelman, *Tesla Sales Model Upsetting Traditional Auto Dealers*, THE NEW AMERICAN (Mar. 24, 2104), <http://www.thenewamerican.com/economy/markets/item/17906-tesla-sales-model-upsetting-traditional-auto-dealers> (“In the 2011-2012 election cycle, according to the

political equations. We would be stupid not to prepare and equip ourselves to argue effectively in this Legislature.”<sup>129</sup>

We emphasize that many regulatory entrepreneurs have used these traditional political tactics as complements, not substitutes, to their more innovative techniques. Consider Uber’s experience in Virginia after receiving its cease-and-desist letter.<sup>130</sup> At the same time that Uber was mobilizing its Virginia riders to e-mail their displeasure to state officials, it also hired a team of lobbyists to work on its behalf behind the scenes.<sup>131</sup> These same lobbyists submitted the proposed temporary operating permit that state officials later granted.<sup>132</sup> Similarly, when faced with unfavorable state legislation in Illinois, Uber did more than mobilize its riders. It “assembled a powerhouse Springfield lobbying team” that included a former lawyer for top Illinois Democrats, a former state Republican chairman, and Jack Lavin, who had served as the governor’s chief of staff eight months earlier.<sup>133</sup> After Illinois’s governor vetoed the bill, Uber used traditional lobbying techniques to successfully fight the legislative effort to override the veto. Ultimately, the issue was resolved “in a private meeting room in the Capitol.”<sup>134</sup> Uber struck a deal with the bill’s sponsor; he agreed to abandon the veto override effort and company executives agreed to support less onerous legislation, which became law that year.<sup>135</sup>

Many other regulatory entrepreneurs echo Uber’s experience of quietly maneuvering behind the scenes at the same time that they are rallying the public on their behalf.<sup>136</sup> To help pass legislation in New York, FanDuel employed well-connected political heavy hitters, including Michael Garcia, a former United States Attorney for the Southern District of New York, and Michael Mukasey, formerly a federal judge in the Southern District of New York and Attorney General of the United States.<sup>137</sup>

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National Institute on Money in State Politics, auto dealers and their employees donated more than \$15 million to state and local candidates. In that same cycle, Tesla donated \$500.”)

<sup>129</sup> *Id.* For a discussion of how lobbyists achieve influence and theories of lobbying, see Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 219-21 (2012); Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV. 69 (2006).

<sup>130</sup> See notes 94-97, *supra*, and accompanying text.

<sup>131</sup> Helderman, *supra* note 80.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*; Ray Long, *Quinn Lays Political Traps for Rauner on Way Out the Door*, CHI. TRIB., Jan. 13, 2015, <http://www.chicagotribune.com/news/local/politics/chi-quinn-leaves-political-traps-for-rauner-on-way-out-door-20150112-story.html>.

<sup>136</sup> Drape, *supra* note 86 (“Lobbying and legal costs . . . have shredded [FanDuel and DraftKings’] bottom lines and will continue to do so.”).

<sup>137</sup> Eccles, *supra* note 111. It also worked with state lawmakers to craft legislation that would address critics’ concerns, such as verifying the age of fantasy sports players. *Id.*



### III. CONDITIONS THAT FOSTER REGULATORY ENTREPRENEURSHIP

In this Part, we use the insights from our analysis in Part II to identify and consider three basic groups of factors that are particularly important to fostering or discouraging regulatory entrepreneurship. First, we explore factors related to the line of business in question. Second, we consider law-based factors related to the nature of the regulatory uncertainty that the entrepreneur faces. Third, we compare the relative advantages of startup corporations versus more established businesses.

#### A. Business-Related Factors

Some lines of business are better suited to a regulatory entrepreneurship model than others.

One important factor is the amount of profit that the entrepreneur stands to gain from the business, assuming that the law in question is amended or shaped in the entrepreneur's favor. The larger the potential profits, the greater the incentive to enter the business and take on the task of changing the law.

Further, as discussed in Part II, modern regulatory entrepreneurs often employ both conventional politicking strategies as well as a mix of more innovative techniques to effect legal change. The traditional methods that corporations have used to exert influence—hiring lobbyists, putting politically connected people on their boards, revolving door hiring practices, and spending money on political advertisements—primarily require money. The amount of money that the company will be willing and able to commit to a particular effort to change the law is capped by the future profits that the company expects to earn from the change.<sup>138</sup> The more profitable that the company anticipates its business will be, the more effectively it will be able to employ conventional politicking strategies.<sup>139</sup>

Money is also helpful for implementing the newer techniques that regulatory entrepreneurs have pioneered. But for these strategies, the most important input is a user base that can be mobilized as a political force. What, then, characterizes businesses with the “right” kind of user base? Such businesses possess three chief characteristics: scalability, connectedness, and mass appeal.

Scalability refers to the business being able to expand its user base quickly and easily. For businesses to successfully mobilize users against a regulatory

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<sup>138</sup> This includes indirect gains. For example, if the company believes that winning a big regulatory battle in one jurisdiction increases the chances that it will win victories in other jurisdictions as well, then the profits from those jurisdictions should factor into the company's resource allocation decision.

<sup>139</sup> See also Part III.C, *infra*.

crackdown, they must have sufficient users to fight back at an early enough point in time. It helps to grow quickly so that regulators, who often move slower than entrepreneurs, are unable to squelch the business before it reaches a critical mass. Many regulatory entrepreneurs employ a guerrilla growth strategy to achieve exactly this result. The success of such a strategy depends on growing quickly, and this cannot be done if expanding one's user base requires customized service or extensive and slow capital investment. For example, an advertising agency's business is not scalable because its service is customized for each client and cannot be standardized. By contrast, a company whose main product is software is easily scalable; the extra cost of adding a new user is negligible.

But while having a large user base is often necessary, it is not sufficient. A large user base is of little help if those users are unwilling to act; the company must also be able to mobilize its users. This likely depends on several things. The first is the frequency with which users interact with the company. User interactions are opportunities for the company to inform and activate users; the more interactions, the better the company's prospects. Next is whether the format through which the company interacts with its users makes it easy for the company to send users information or otherwise direct them to action. How much information the company has about its users matters as well; the more that the company knows about its users, the more it can engage them in a targeted manner. For example, legislators are likely to be more responsive to comments received from their own constituents than from voters they do not represent. If the company knows where its users live, it may be able to direct individual users' gestures of support (e-mails, phone calls, signed petitions, etc.) to their particular representatives, amplifying their effect. Finally, how motivated will the company's user base be to act on the company's behalf? This will depend not only on the frequency with which users interact with the company, but also on the significance of those interactions. To the extent that the company taps into feelings of identity or more significant needs, users are likely to be more willing to engage.

The composition of the company's user base matters as well. Several studies have examined what drives policy changes in the United States, and two findings are key for regulatory entrepreneurship: First, there is a strong status quo bias; it is hard to change the law.<sup>140</sup> Second, some studies find that the chances of changing the law are greatest when high-earning citizens support the change.<sup>141</sup>

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<sup>140</sup> See, e.g., Martin Gilens, *Inequality and Democratic Responsiveness*, 69 PUBLIC OPINION QUARTERLY 778, 786 (2005); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 573 (2014).

<sup>141</sup> See, e.g., Gilens, *supra* note 140, at 788-89 (using the preferences of Americans at the ninetieth income percentile as a measure of what high-earning citizens prefer); Gilens & Page, *supra* note 140, at 568-70 (similar). But see Omar Bashir, *Testing Inferences About American Politics: A Review of the "Oligarchy" Result*, RESEARCH & POLITICS, Oct-Dec. 2015 at 1 (taking issue with this conclusion); J. Alexander Branham et al., *When Do the Rich Win?*, available at

Thus, a user base that contains affluent users may significantly increase a company's chance of success.

At the same time, however, anecdotal evidence suggests that it is also helpful to have a compelling story to tell. People remember personal stories; putting the right face on an issue is a potent political tool.<sup>142</sup> Thus, it helps to have a product that benefits economically diverse consumers and users, including middle or working-class people, whose stories may be more likely to evoke sympathy and support among viewers.<sup>143</sup>

For example, in November 2015, San Francisco was considering Proposition F, an initiative that would have increased restrictions on short-term rentals in San Francisco. In the days leading up to the vote, Airbnb and its supporters blanketed the airwaves with advertisements urging voters to oppose the measure.<sup>144</sup> A number of ads opposing Proposition F featured the stories of people who frequently rent out various spaces on a short-term basis.<sup>145</sup> These people talked about the difficulties of living in such an expensive city, and most told stories about particular financial needs that short-term renting helped them to manage, such as financially supporting elderly parents and paying for childcare.<sup>146</sup> One ad featured a couple stating that home sharing enables them to volunteer and teach English to Tibetan refugees and impoverished children.<sup>147</sup> By contrast, Proposition F supporters' advertisements suggested a more unflattering view of their opponents, such as "Save the Moguls," which cast rich commercial landlords as the face of short-term rentals.<sup>148</sup>

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<https://jabranham.com/papers/when-do-the-rich-win.pdf> (similar); Peter Enns, *Relative Policy Support and Coincidental Representation*, 13 PERSP. ON POL'Y 1053 (2015) (similar).

<sup>142</sup> See TED BRADER, *CAMPAIGNING FOR HEARTS AND MINDS: HOW EMOTIONAL APPEALS IN POLITICAL ADS WORK* (2006).

<sup>143</sup> Middle class support may be as important as the support of the most affluent voters. See Bashir, *supra* note 141; Branham et al., *supra* note 141; Enns, *supra* note 141.

<sup>144</sup> Nancy Watzman, *Pro-Airbnb Advertising Dominated Recent Political TV Ads in San Francisco*, ARCHIVE (Nov. 4, 2015), <http://webcache.googleusercontent.com/search?q=cache:UALLU18Mk5IJ:https://blog.archive.org/2015/11/04/pro-airbnb-advertising-dominated-recent-political-tv-ads-in-san-francisco/+&cd=4&hl=en&ct=clnk&gl=us> (finding that anti-proposition F ads constituted roughly two-thirds of all political TV ads; the ratio of television ad minutes opposing prop F to those supporting it was over 120:1; the ratio of television ad minutes opposing prop F to those related to the mayoral race was more than 35:1).

<sup>145</sup> See, e.g., SF Against F, *Maria Is Renting Out Her Home Office*, available at <https://archive.org/details/SFElections2015ads>.

<sup>146</sup> SF Against F, *Meet Cathryn, Your SF Neighbor*, available at <https://archive.org/details/SFElections2015ads>; SF Against F, *Meet Kate from Glen Park*, available at <https://archive.org/details/SFElections2015ads>.

<sup>147</sup> SF Against F, *Please Join Ken and Ashish from the Castro*, available at <https://archive.org/details/SFElections2015ads>.

<sup>148</sup> Sharebetter, "Save the Moguls", available at <https://archive.org/details/SFElections2015ads>; see also Broke[\*]Stuart, [\*] Against Prop F, available at <https://archive.org/details/SFElections2015ads>.

Airbnb ultimately won its battle against Proposition F, as voters rejected it by a 10-point margin. Other companies have successfully employed similar tactics in their political battles. To take another example, during Uber's battle for New York, it ran advertisements in which Uber drivers highlighted how becoming an Uber driver had improved their lives.<sup>149</sup> They spoke about how their pre-Uber lives were characterized by difficulties finding jobs, being unable to pay their mortgages, and struggling to make ends meet.<sup>150</sup> One said that becoming an Uber driver "was probably the best thing that's happened in [his] life."<sup>151</sup> Another described it as "a blessing . . . We don't just pick people up. We pick ourselves up. We pick our families up."<sup>152</sup> Uber asserted that it would create 10,000 jobs in New York City over the next year, and urged voters to tell mayor de Blasio, who had received significant donations from the taxi industry, "Don't put taxi donors ahead of jobs."<sup>153</sup> The advertisement closed with an Uber driver saying "millionaire [cab] medallion owners don't need help. People like us do."<sup>154</sup>

Companies who do not have sympathetic faces to put forward have had more difficulty achieving their political goals. Google's self-driving cars are haunted by public concern that driverless cars will eliminate thousands of existing jobs.<sup>155</sup> Or consider Tesla Motors' options for garnering mass public support. Until recently, its cheapest car had a \$70,000 price tag, which is well out of most people's price range, and its distribution centers do not hire large numbers of

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<sup>149</sup> Uber, Mayor de Blasio's Proposal Will Destroy 10,000 Jobs, *available at* <https://www.youtube.com/watch?v=xFOQ6ID6lvk&feature=youtu.be>; Uber, Killing 100,000 NYC Jobs, With One Taxi-Backed Bill (June 30, 2015), <https://newsroom.uber.com/us-new-york/killing-10000-nyc-jobs-with-one-taxi-backed-bill/>; *see also* Dan Rivoli, *Uber Slams Mayor de Blasio with TV Ad Claiming He's 'Giving in to the Taxi Industry'*, N.Y. DAILY NEWS (July 16, 2015), <http://www.nydailynews.com/news/politics/uber-slams-mayor-de-blasio-tv-ad-article-1.2293201>.

<sup>150</sup> Uber, Mayor de Blasio's Proposal, *supra* note 149.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*; *see also* Alan Feuer, *Uber Drivers Up Against the App*, N.Y. TIMES (Feb. 19, 2016), <http://www.nytimes.com/2016/02/21/nyregion/uber-drivers-up-against-the-app.html> ("Uber mobilized millions of dollars and an all-star team of political tacticians, but it also made use of the sympathetic image of hard-working immigrants telling City Hall that Uber put food on the table for their families.").

<sup>155</sup> *See, e.g.*, Martin Ford, *The Rise of Automated Cars Will Kill Thousands of Jobs Beyond Driving*, GIZMODO (May 7, 2015), <http://gizmodo.com/the-rise-of-automated-cars-will-thousands-of-jobs-and-n-1702689348>; Chunka Mui, *Will Driverless Cars Force A Choice Between Lives And Jobs?*, FORBES (Dec. 19, 2013), <http://www.forbes.com/sites/chunkamui/2013/12/19/will-the-google-car-force-a-choice-between-lives-and-jobs/#1f12eea9546e>; Zack Kanter, *How Uber's Autonomous Cars Will Destroy 10 Million Jobs And Reshape The Economy by 2025*, CBS LOCAL, (Jan. 27, 2015), <http://sanfrancisco.cbslocal.com/2015/01/27/how-ubers-autonomous-cars-will-destroy-10-million-jobs-and-reshape-the-economy-by-2025-lyft-google-zack-kanter/>; Sam Tracy, *Autonomous Vehicles Will Replace Taxi Drivers, But That's Just the Beginning*, HUFFINGTON POST (June 12, 2015), [http://www.huffingtonpost.com/sam-tracy/autonomous-vehicles-will-\\_b\\_7556660.html](http://www.huffingtonpost.com/sam-tracy/autonomous-vehicles-will-_b_7556660.html).

workers.<sup>156</sup> Tesla has made other arguments to support its regulatory aims, but they have not always resonated with the public.<sup>157</sup>

At the same time, in politics, perception and reality need not always match. DraftKings and FanDuel have tried to make their users the public face of their fight, lamenting that state governments are preventing fun-loving sports fans from playing games that they enjoy.<sup>158</sup> They have generally succeeded with this approach, even though the vast majority of winnings on these sites go to a small group of sophisticated players who treat it like a business, entering hundreds of contests a day and using advanced mathematical techniques to maximize their profits.<sup>159</sup> To the extent this information became publicly known, it weakened the companies' ability to effectuate legal change and they have had to make adjustments to the way their sites work.<sup>160</sup>

This underscores a larger issue regarding public perception of a company and its business. The more positively the business is viewed, the better its political chances, both in terms of mobilizing public support as well as in lobbying behind closed doors. Thus, companies and businesses that are seen as particularly beneficial to society, altruistic, or simply “cool,” have advantages in regulatory entrepreneurship.<sup>161</sup> Companies can also gain an edge when they are seen as representing the future; no politician wants to be seen as fighting the tide of progress, or of stifling a growing industry that would help constituents over the long run.

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<sup>156</sup> See, e.g., Farhad Manjoo, *The Genius of Tesla*, SLATE (May 10, 2013), [http://www.slate.com/articles/technology/technology/2013/05/tesla\\_model\\_s\\_the\\_electric\\_car\\_company\\_is\\_a\\_little\\_bit\\_apple\\_a\\_little\\_bit.html](http://www.slate.com/articles/technology/technology/2013/05/tesla_model_s_the_electric_car_company_is_a_little_bit_apple_a_little_bit.html).

<sup>157</sup> Tesla has argued that its cars will have a beneficial impact on the environment, particularly with respect to carbon emissions, and has appealed to the principle of consumer freedom. See, e.g., Musk, *supra* note 45.

<sup>158</sup> Kulwin & Wagner, *supra* note 82.

<sup>159</sup> See, e.g., Joshua Brustein & Ira Boudway, *You Aren't Good Enough to Win Money Playing Daily Fantasy Football*, BLOOMBERG (Sept. 10, 2015), <http://www.bloomberg.com/news/articles/2015-09-10/you-aren-t-good-enough-to-win-money-playing-daily-fantasy-football>; Drew Harwell, *All the Reasons You (Probably) Won't Win Money Playing Daily Fantasy Sports*, WASHINGTON POST, Oct. 12, 2015, <https://www.washingtonpost.com/news/the-switch/wp/2015/10/12/all-the-reasons-you-probably-wont-win-money-playing-daily-fantasy-sports/>. DraftKings and FanDuel must also contend with historic (though waning) unfavorable views of gambling and fighting battles in courts as well as in the political arena.

<sup>160</sup> Natta, Jr., *supra* note 90.

<sup>161</sup> Tesla is a good example of this. Many environmentally conscious consumers concerned about carbon emissions are excited about electric cars. Its openness with its intellectual property has also drawn accolades in certain circles. See, e.g., Mike Ramsey, *Tesla Motors Offers Open Licenses to Its Patents*, WALL ST. J., June 12, 2014, *available at* [wsj.com/articles/tesla-motors-says-it-will-allow-others-to-use-its-patents-1402594375](http://wsj.com/articles/tesla-motors-says-it-will-allow-others-to-use-its-patents-1402594375). This also potentially explains why Tesla has enjoyed success in its fight against dealer laws, while the major car manufacturers and Autozone failed in their attempts to do the same.

These business-related factors help explain why regulatory entrepreneurship has become salient in recent years. Many of the most successful startup companies in the last few years are “platform” companies.<sup>162</sup> Platform companies profit by using technology to connect buyers and sellers on a proprietary platform. Examples include Uber, Lyft, Airbnb, and others.<sup>163</sup>

Platform business models are enormously scalable; if new users wish to join the system, they can be added quickly and easily. Moreover, since these businesses are built around the platform, these companies are well-equipped to communicate with their users. Depending on the product and user in question, the user’s level of commitment to the company can be quite large. For example, an Uber driver or an Airbnb landlord—or a provider on a lesser-known platform, such as zTailors, the “Uber for tailors”—may reap hundreds or even thousands of dollars a week via their interaction with the app.<sup>164</sup> In addition, in many instances the regulatory entrepreneur will have a great deal of information about the user, such as where she lives and how much she uses the entrepreneur’s product, that may potentially allow the entrepreneur to leverage that user more effectively.<sup>165</sup>

The most successful of these businesses have wide appeal. New York Uber users include high earners willing to pay extra to get a ride home immediately at the end of a rainy night out, middle-class outer borough residents who have trouble finding cabs in their neighborhoods, and Uber drivers who

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<sup>162</sup> See Orly Lobel, *The Law of the Platform*, \_ MINN. L. REV. \_ (forthcoming 2016) (explaining the definition of platform companies and listing over two dozen); ARUN SUNDARARAJAN, *THE SHARING ECONOMY* 69-84 (2016) (explaining the business models of platform companies); Benjamin G. Edelman & Damien Geradin, *Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Uber?*, 19 STAN. TECH. L. REV. 293 (2016) (analyzing the regulation of platform companies); Daniel E. Rauch & David Schleicher, *Like Uber, But for Local Government Law: The Future of Local Regulation of the Sharing Economy*, 76 OHIO ST. L.J. 901 (2015) (discussing various sharing economy peer-to-peer platform companies); Fortune, *The Unicorn List*, available at <http://fortune.com/unicorns/> (last visited Jan. 29, 2016) (listing startup companies valued at \$1 billion or more and including platform companies such as Uber, Airbnb, Lyft, BlaBlaCar, FanDuel, and DraftKings).

<sup>163</sup> Fortune, *The Unicorn List*, *supra* note 162.

<sup>164</sup> See, e.g., Rachel Gillett, *Here’s How Much You Could Make As an Uber or Lyft Driver in 20 Major U.S. Cities*, BUSINESS INSIDER (July 20, 2015, 11:40 AM), <http://www.businessinsider.com/how-much-uber-drivers-make-in-each-city-2015-7>; Sarah Kessler, *Secrets of Running A Six-Figure AirBnB Business*, FAST COMPANY (Nov. 5, 2013, 1:25 PM), <http://www.fastcompany.com/3021179/secrets-of-running-a-six-figure-airbnb-business>; Davey Alba, *Instacart Shoppers Can Now Choose To Be Real Employees*, WIRED (June 22, 2015, 5:46 PM), <http://www.wired.com/2015/06/instacart-shoppers-can-now-choose-real-employees/>; Derek Thompson, *The Uber Economy*, ATLANTIC (Jan. 23, 2015), <http://www.theatlantic.com/business/archive/2015/01/is-uber-a-middle-class-job-creator-or-not/384763/>.

<sup>165</sup> See Nancy Scola & Andrea Peterson, *Data Is Uber’s Business. But Protecting It May Be Its Biggest Weakness.*, WASH. POST (Nov. 18, 2014), <https://www.washingtonpost.com/news/the-switch/wp/2014/11/18/data-is-ubers-business-but-protecting-it-may-be-its-largest-weakness/>; KENNETH CUKIER & VIKTOR MAYER SCHONBERGER, *BIG DATA: A REVOLUTION THAT WILL TRANSFORM HOW WE LIVE, WORK AND THINK* (2013).

might face serious hardships without the income they earn through Uber.<sup>166</sup> Airbnb landlords include those who need to rent out rooms to guests in order to cover the cost of their housing, as well as well-off people who buy investment properties and rent them for profit.<sup>167</sup> These types of broad user bases can maximize a company's chance of political success. Further, companies that offer new ways of doing business, such as platform companies, tend to benefit from the perception that they represent the future of their industries, which adds a bit of a halo effect to their appeal.<sup>168</sup>

## B. Law-Related Factors

The chance of successfully executing a regulatory entrepreneurship strategy depends on a number of factors related to the law in question. These relate to the kind and magnitude of regulatory uncertainty that the entrepreneur is taking on.

One important factor is the penalty that the law imposes on violators. For example, if the only penalty is a civil fine imposed on the corporation, pushing the boundaries of the law may be an attractive prospect.<sup>169</sup> If the fine is low enough, the business may not even have to worry about changing the law and can simply pay fines as they come up.<sup>170</sup>

On the other hand, if a law provides for the incarceration of the executives of a company that violates it, that may deter the guerrilla growth strategies that some modern regulatory entrepreneurs employ. For instance, in some states, operating an unlicensed money transfer business is a felony punishable by imprisonment and a criminal fine;<sup>171</sup> this has tamped down on companies' willingness to push the boundaries of mobile payment licensing regimes.<sup>172</sup>

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<sup>166</sup> See Carolyn Said, *Airbnb, Uber Cast Themselves As Saviors of the Middle Class*, S.F. CHRONICLE (Nov. 10, 2015, 8:16 PM), <http://www.sfchronicle.com/business/article/Airbnb-Uber-We-are-the-saviors-of-the-middle-6620729.php>.

<sup>167</sup> See Adam Chandler, *Is AirBnB a Credible Champion on Income Inequality?*, ATLANTIC (Dec. 1, 2015), <http://www.theatlantic.com/business/archive/2015/12/airbnb-new-york/418272/>; Kessler, *supra* note 164; Said, *supra* note 166.

<sup>168</sup> See, e.g., Lobel, *supra* note 162; Adam Chandler, *What Should the "Sharing Economy" Really Be Called?*, ATLANTIC, May 27, 2016, [theatlantic.com/business/archive/2016/05/sharing-economy-airbnb-uber-yada/484505/](http://theatlantic.com/business/archive/2016/05/sharing-economy-airbnb-uber-yada/484505/).

<sup>169</sup> See Wong, *supra* note 63 ("Moreover, if [a] business is not doing something morally egregious (e.g. killing people) but simply violating the law in a somewhat more minor way, the officers of the company bear little more risk than the company being sued out of existence, i.e. they bear little *personal* risk besides opportunity cost.").

<sup>170</sup> Uber has operated by paying drivers' fines in Paris, though this appears to be a temporary measure. Alderman, *supra* note 65.

<sup>171</sup> See Kevin V. Tu, *Regulating the New Cashless World*, 65 ALA. L. REV. 77, 79-98, n.101 (2013) (examining the legal and regulatory landscape affecting emerging payment systems).

<sup>172</sup> See *id.* at 109-13; Scheiber, *supra* note 69.

Moreover, a regulatory entrepreneur's chance of successfully changing a law may vary based on the public's level of support for the law in question: The more popular the law is, the more difficult it will likely be to change it. Unpopular laws, in contrast, are more attractive targets for regulatory entrepreneurship.

Relatedly, another key element is whether the law in question is determined at the local, state, or national level. Change at the state and local level is often possible more quickly than at the national level. This is largely by design; the framers wanted to ensure that state governments remained important centers of power and served as laboratories of democracy and reform.<sup>173</sup> The faster pace at which change is usually possible at the state and local levels makes regulatory entrepreneurship more feasible for startups with a limited "runway" of capital for operations.<sup>174</sup>

Further, state and local political fights generally attract smaller amounts of resources than national fights do.<sup>175</sup> It takes less money to make waves in state and local politics; at the national level, even a significant amount of money can be lost as a drop in the bucket. For example, consider the 2013 mayoral race in New York City, the nation's largest and wealthiest city. Two months before the election, the *New York Times* reported that in the course of the campaign the candidates had mustered a combined total of approximately \$35 million and spent about \$30 million.<sup>176</sup> In the 2014 New York gubernatorial campaign, the candidates spent a combined total of approximately \$55 million.<sup>177</sup> In the 2012 Presidential campaign, President Barack Obama and Mitt Romney's campaigns raised and spent roughly a billion dollars *each*,<sup>178</sup> spending on all federal elections

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<sup>173</sup> See *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

<sup>174</sup> See John F. Coyle & Joseph M. Green, *Contractual Innovation in Venture Capital*, 66 HASTINGS L.J. 133, 151 (2014) (noting that startup companies typically refer to the "runway" of capital they have raised for a certain period of operations).

<sup>175</sup> See *The Money Behind the Elections*, OpenSecrets.org, available at <https://www.opensecrets.org/bigpicture/> (last visited Feb. 1, 2016) (showing that the costs of federal congressional and presidential races in recent years have been in the billions versus state contributions each significantly less).

<sup>176</sup> *How Much the N.Y.C. Mayoral Candidates Have Raised and Spent*, N.Y. TIMES (Sept. 2, 2013), [http://www.nytimes.com/interactive/2013/03/16/nyregion/how-much-the-nyc-mayoral-candidates-have-raised-and-spent.html?\\_r=0](http://www.nytimes.com/interactive/2013/03/16/nyregion/how-much-the-nyc-mayoral-candidates-have-raised-and-spent.html?_r=0). These totals included potential candidates who had not officially declared their candidacies, as well as money that a candidate borrowed or transferred from another campaign. *Id.*

<sup>177</sup> *New York Gubernatorial and Lieutenant Gubernatorial Election, 2014*, BALLOTPEDIA, [https://ballotpedia.org/New\\_York\\_gubernatorial\\_and\\_lieutenant\\_gubernatorial\\_election](https://ballotpedia.org/New_York_gubernatorial_and_lieutenant_gubernatorial_election).

<sup>178</sup> *The 2012 Money Race: Compare the Candidates*, N.Y. TIMES, <http://elections.nytimes.com/2012/campaign-finance>. These numbers include amounts raised by the candidates, the national party committees, and each candidate's chief Super PAC, but not other PACS or each candidate's victory fund. *Id.*



in 2012 totaled approximately \$7 billion.<sup>179</sup> These examples focus on political contributions and campaign spending, but our broader point is that political efforts aimed at national level change can be prohibitively expensive.<sup>180</sup>

Another advantage of targeting state or local laws is the added flexibility. The large number of state and local jurisdictions enables companies to pick their battles in ways that increase their chances of success over time. The entrepreneur can start with the jurisdictions that it finds most promising, or hold off on pursuing a target until conditions are favorable. It can decide to abandon a particular strategy, delay, or expand. Moreover, the entrepreneur does not have to win every battle to achieve some measure of success.<sup>181</sup> These options are generally not available when the law in question is national.<sup>182</sup>

Further, flexibility is useful because political environments fluctuate over time, and changing political headwinds can make it easier or harder to exert influence and alter the law. These fluctuations are driven by economic and social conditions that are generally difficult or impossible to deliberately influence. Similarly, politicians rise and fall. An entrepreneur may benefit from the popular strength of a sympathetic official, or the weakness of an antagonistic one. For instance, in 2009, billionaire Michael Bloomberg spent \$102 million of his own money to help finance his successful mayoral campaign.<sup>183</sup> Non-billionaire Bill

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<sup>179</sup> Tarini Parti, *FEC: \$7B Spent on 2012 Campaign*, POLITICO (Jan. 31, 2013), <http://www.politico.com/story/2013/01/7-billion-spent-on-2012-campaign-fec-says-087051>.

<sup>180</sup> It is also worth noting that there are limits to what money can accomplish politically. Some economists have argued that campaign spending is much less influential than the conventional wisdom would dictate, and some donors have lamented that they are unable to buy more influence. See, e.g., Stephen J. Dubner, *How Much Does Campaign Spending Influence the Election? A Freakonomics Quorum*, FREAKONOMICS (Jan. 17, 2012), <http://freakonomics.com/2012/01/17/how-much-does-campaign-spending-influence-the-election-a-freakonomics-quorum/>; Eliza Collins, *Charles Koch Bemoans Lack of Influence Over 2016 Race*, POLITICO (Jan. 8, 2016), <http://www.politico.com/story/2016/01/charles-koch-2016-presidential-race-217499#.chuesce:A0Og>; Matthew Cooper, *Koch Brothers Money Hasn't Bought As Much As You Think*, NEWSWEEK (Apr. 24, 2014), <http://www.newsweek.com/2014/05/02/koch-brothers-money-hasnt-bought-much-you-think-248390.html>. On the other hand, money clearly has some impact on elections and donors must have some reason for making the contributions that they do.

<sup>181</sup> DraftKings and FanDuel are an example of this approach. They “have chosen which states to operate in based on the individual rules in that state” and they have lost some battles but persisted nonetheless. Daniel Roberts, *FanDuel, DraftKings File Lawsuits Against NY Attorney General*, FORTUNE (Nov. 13, 2015), <http://fortune.com/2015/11/13/fanduel-draftkings-lawsuits-schneiderman/>.

<sup>182</sup> See, e.g., Nav Athwal, *FinTech Startups Navigate Legal Gray Areas to Build Billion-Dollar Companies*, TECHCRUNCH (Apr. 19, 2015), <https://techcrunch.com/2015/04/19/fintech-startups-navigate-legal-gray-areas-to-build-billion-dollar-companies/> (describing how financial technology firms have faced much greater barriers to innovation than companies like Airbnb and Uber have because the former face significant federal regulation, while the latter do not).

<sup>183</sup> Celeste Katz, *Mayor Bloomberg Spent \$102M on Campaign to Win Third Term - or \$175 Per Vote*, N.Y. DAILY NEWS (Nov. 27, 2009), <http://www.nydailynews.com/new-york/mayor-bloomberg-spent-102m-campaign-win-term-175-vote-article-1.414005>.

de Blasio spent about one tenth of that during his successful campaign four years later.<sup>184</sup> If an entrepreneur were looking to use its money to pressure the mayor's office, it might well find that its chances were better during the latter's time in office. Conversely, if the mayor's office favored the entrepreneur's proposed change, acting earlier might have been preferable.

There are also tactics available at the state and local level that are not available at the national level. For example, in 2014, Uber wanted to open in Portland, but faced opposition from the city government.<sup>185</sup> In response, Uber began offering service in Vancouver, Washington, which is a stone's throw away from Portland, then sent the message "Hey Portland, we are just across the river . . . ."<sup>186</sup> Uber proceeded to begin offering service in several adjacent suburbs of Portland.<sup>187</sup> As Portland's mayor described the experience, "They basically forced their way into the market and surrounded us, then put the pressure on for us to do likewise."<sup>188</sup> This strategy, and others that rely on geographic proximity, are less likely to work well when applied at the national level; it seems harder to imagine a company pushing through a legal change in the United States on the grounds that Canada and Mexico both adopted it.

And, because regulatory entrepreneurship is a form of politicking, it is better-suited to the more political branches of government. An army of users is more likely to be a compelling tool against executive and legislative bodies than judicial ones. Judges are particularly unlikely to be swayed by popular opinion if their terms are longer and if they are appointed instead of elected.<sup>189</sup> This further advantages state battles over federal ones; in many states and cities, judges are elected, while judges in federal district and appellate courts are appointed for life.<sup>190</sup> On the other hand, when a company finds itself in court, the longer that it can drag out the proceeding, the more time it may have to grow its user base and lobbying arm and push for a legal change.

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<sup>184</sup> See Michael Howard Saul, *Here's How Much Money is in the Mayor's New Campaign Account*, WALL ST. J. (July 9, 2014), <http://blogs.wsj.com/metropolis/2014/07/09/heres-how-much-money-is-in-the-mayors-new-campaign-account/> (noting de Blasio "raised roughly \$10.7 million, received nearly \$4 million in public funds and spent about \$13.6 million").

<sup>185</sup> Weise, *supra* note 24.

<sup>186</sup> *Id.*; Uber, *Hey Portland, We Are Just Across the River... #WeWantUberPDX*, UBER NEWSROOM, July 18, 2014, <https://newsroom.uber.com/pdx/hey-portland-we-are-just-across-the-river-wewantuberpdx/>.

<sup>187</sup> Weise, *supra* note 24.

<sup>188</sup> *Id.*

<sup>189</sup> See Judith Resnik, *Judicial Independence and Article III: Too Little and Too Much*, 72 S. CAL. L. REV. 657, 666 (1999); Shirley S. Abrahamson, *Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence*, 64 OHIO ST. L.J. 3, 9 (2003) ("In exercising judicial independence, the stakes for the judges, that is, the loss of the judgeship, are clearly higher for judges with limited terms than they are for appointed judges with life tenure.").

<sup>190</sup> See David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265 (2008) (examining "elective versus nonelective judiciaries").

For example, DraftKings and FanDuel had been operating in the shadow of the law, each spending more than \$100 million on television advertising and signing up tens of thousands of users each day, before receiving a cease-and-desist order from the New York state attorney general.<sup>191</sup> The attorney general wrote: “It is clear that DraftKings and FanDuel are the leaders of a massive, multi-billion dollar scheme intended to evade the law and fleece sports fans across the country.”<sup>192</sup> Both companies hired high-profile counsel and filed lawsuits seeking an injunction against the cease-and-desist order.<sup>193</sup> Meanwhile, they continued to operate, while rallying users to their cause.<sup>194</sup> DraftKings filed a petition against the attorney general, seeking to stop him “from carrying out his threat to banish from this State a lawful industry beloved by hundreds of thousands of New Yorkers.”<sup>195</sup> The companies won this legal battle out of court by securing legislation that made clear that their businesses are legal.<sup>196</sup>

Many of the highest-profile companies that attempted a regulatory entrepreneurship strategy and failed did so because they found themselves fighting national laws in federal courts. One of the most famous examples was Napster, the peer-to-peer file sharing program.<sup>197</sup> Many of the files shared on Napster were copyrighted works, and the Recording Industry Association of America sued Napster in federal court for contributory and vicarious infringement of copyright.<sup>198</sup> The suit brought Napster publicity and further grew its user base, but this did not help Napster when it lost in court.<sup>199</sup> Napster was eventually

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<sup>191</sup> Walt Bogdanich et al., *Attorney General Tells DraftKings and FanDuel to Stop Taking Entries in New York*, N.Y. TIMES (Nov. 10, 2015), <http://www.nytimes.com/2015/11/11/sports/football/draftkings-fanduel-new-york-attorney-general-tells-fantasy-sites-to-stop-taking-bets-in-new-york.html>; Natta, Jr., *supra* note 90.

<sup>192</sup> State of New York Office of the Attorney General. Notice to Cease and Desist and Notice of Proposed Litigation Pursuant to New York Executive Law § 63(12) and General Business Law § 349 (Nov. 10, 2015), <http://www.nytimes.com/interactive/2015/11/10/sports/document-final-nyag-fanduel-letter-11-10-2015-signed.html>.

<sup>193</sup> DraftKings retained David Boies, who represented Al Gore in the 2000 presidential election; FanDuel hired Marc Zwillinger, a former U.S. Justice Department official. *Id.*

<sup>194</sup> Roberts, *supra* note 181.

<sup>195</sup> *Id.*

<sup>196</sup> Joe Drape, *Win for DraftKings and FanDuel Opens Door for Sports Betting in New York*, N.Y. TIMES, Aug. 3, 2016, [nytimes.com/2016/08/04/sports/new-york-fantasy-sports-law-opens-door-for-more-gambling.html](http://nytimes.com/2016/08/04/sports/new-york-fantasy-sports-law-opens-door-for-more-gambling.html). The war drags on. *Id.*; see also Davey Alba, *Now Texas Says DraftKings and FanDuel are Gambling*, WIRED (Jan. 19, 2016), [wired.com/2016/01/now-texas-says-draftkings-and-fanduel-are-gambling/](http://wired.com/2016/01/now-texas-says-draftkings-and-fanduel-are-gambling/) (noting legal battles for the companies in states other than New York).

<sup>197</sup> See Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J.L. & TECH. 253, 273-76 (2006) (recounting Napster’s history).

<sup>198</sup> See *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff’d in part, reversed in part*, 239 F.3d 1004 (9th Cir. 2001).

<sup>199</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

forced into bankruptcy.<sup>200</sup> Other companies in the same space have encountered similar problems, including Grokster, Kazaa, MusicCity, and Limewire.<sup>201</sup>

More recently, Aereo lost a high-profile Supreme Court case regarding the legality of its business.<sup>202</sup> Aereo provided its subscribers with broadcast network television content via streaming over the Internet.<sup>203</sup> This raised questions of copyright infringement.<sup>204</sup> Aereo attempted to lobby the FCC and Congress for changes in the relevant laws and regulations, both before and after it lost in court, but ultimately failed and had to enter bankruptcy.<sup>205</sup>

Of course, there have been some regulatory entrepreneurs who have succeeded with regulatory entrepreneurship strategies in federal court. In the early days of videocassette recorders (VCRs), it was unclear whether their use on copyrighted programming constituted copyright infringement.<sup>206</sup> If so, the manufacturers were potentially liable and the business model would not have been viable.<sup>207</sup> However, the VCR manufacturers successfully won in the Supreme Court, saving the business.<sup>208</sup>

The early days of Federal Express provide another good example of a company making its business viable by changing the law at the federal level.<sup>209</sup> Federal Express was founded in 1971, and in 1976 it began lobbying hard for the deregulation of air cargo transport.<sup>210</sup> It succeeded in 1977—a rapid turnaround

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<sup>200</sup> In re Napster Copyright Litig., Nos. C MDL 00-1369 MHP, 2006 WL 1348555 (May 17, 2006).

<sup>201</sup> Zittrain, *supra* note 197, at 286-93; *see also* JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD 105-125 (2006) (discussing the filesharing movement); Tim Wu, *When Code Isn't Law*, 89 VA. L. REV. 679, 726-44 (same).

<sup>202</sup> Am. Broad. Cos., Inc. v. Aereo, Inc., 573 U.S. \_\_\_, 134 S. Ct. 2498 (2014).

<sup>203</sup> Dan L. Burk, *Inventing Around Copyright*, 109 NW. U. L. REV. 547, 548-51 (2015) (describing Aereo's technology).

<sup>204</sup> *See id.*

<sup>205</sup> *See* In re Aereo, Inc., No. 14-13200-2hl, 2014 WL 7721237 (Bankr. S.D.N.Y. 2014); *see also* Katy Bachman, *Rockefeller Wants to Give Online Video Services Parity with Cable*, AD WEEK (Nov. 12, 2013), <http://www.adweek.com/news/technology/rockefeller-wants-give-online-video-services-parity-cable-153795>; Brian Fung, *Aereo to the FCC: Let Us Join the Cable Companies We Tried to Replace*, WASHINGTON POST (Oct. 12, 2014), <https://www.washingtonpost.com/news/the-switch/wp/2014/10/13/aereo-to-the-fcc-let-us-join-the-cable-companies-we-tried-to-replace/>.

<sup>206</sup> *See* Jessica Litman, *Campbell at 21/Sony at 31*, 90 WASH. L. REV. 651, 666-67 (2015) (describing how even after oral argument in *Sony*, the majority of Supreme Court justices were initially inclined to affirm the Ninth Circuit's copyright infringement ruling).

<sup>207</sup> *See id.* at 664 (noting that Sony "was making a significant amount of money selling devices designed to copy copyrighted television programs" and describing this as "the trumpet problem" of "making money because of works written by others"); *see also* JAMES LARDNER, FAST FORWARD (2002).

<sup>208</sup> Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

<sup>209</sup> For an excellent discussion of the *FedEx* case, *see* Jill E. Fisch, *How Do Corporations Play Politics?: The FedEx Story*, 58 VAND. L. REV. 1495 (2005).

<sup>210</sup> *Id.* at 1503-05, 1512-15.

for a change in federal law.<sup>211</sup> But in some ways this example shows how rare this kind of success can be, as a number of factors came together in ways that Federal Express could neither have controlled nor predicted. First, Flying Tiger Line, Federal Express's largest competitor, completely changed its position on the existing statutory regime and joined Federal Express in pushing for deregulation.<sup>212</sup> This was especially notable because the chair of the House Subcommittee on Aviation, which had killed Federal Express's prior attempts to change the law, represented the district in which Flying Tiger's headquarters were located.<sup>213</sup> Second, Federal Express benefited from a number of useful allies—in particular Alfred Kahn, the chair of the regulatory body charged with overseeing Federal Express.<sup>214</sup> This confluence of factors is rare, and generally beyond the control of the regulatory entrepreneur.

### C. The Prevalence of Startups as Regulatory Entrepreneurs

Finally, in addition to the general business and law-related factors at play, it seems significant, and not random, that startup companies represent a large share of regulatory entrepreneurs. There are several reasons for startups' relative prevalence or edge over more established businesses in the area of regulatory entrepreneurship.

First, by their nature regulatory entrepreneurs are innovators. A large body of literature examines startups and established companies' relative merits at fostering innovation and new technologies.<sup>215</sup> There may be a historical aspect to this narrative of innovation, as before 1980, fewer than 200 very large and established corporations accounted for most R&D in the United States.<sup>216</sup> But

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<sup>211</sup> *Id.* at 1515.

<sup>212</sup> *Id.* at 1514-16.

<sup>213</sup> *Id.* at 1514.

<sup>214</sup> *Id.* at 1513.

<sup>215</sup> See, e.g., Joshua Lerner, *Small Businesses, Innovation, and Public Policy*, in ARE SMALL FIRMS IMPORTANT? THEIR ROLE AND IMPACT (Zoltan J. Acs ed., 1999); CLAYTON M. CHRISTENSEN, THE INNOVATOR'S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL 45 (1997); DANIEL F. SPULBER, THE INNOVATIVE ENTREPRENEUR 78-122 (2014); Joseph Bankman & Ronald J. Gilson, *Why Start-ups?*, 51 STAN. L. REV. 289 (1999); Avishalom Tor, *The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy*, 101 MICH. L. REV. 482 (2002); CHRISTOPHER FREEMAN, THE ECONOMICS OF INDUSTRIAL INNOVATION 135-37 (2d ed. 1982); Zoltan J. Acs & Audretsch, *Innovation in Large and Small Firms: An Empirical Analysis*, 78 AM. ECON. REV. 678 (1988); Charles P. Himmelberg & Bruce C. Petersen, *R&D and Internal Finance: A Panel Study of Small Firms in High-Tech Industries*, 76 REV. ECON. & STAT. 38 (1994); Janet E. L. Bercovitz et al., *Firm Capabilities and Managerial Decision Making: A Theory in Innovation Biases*, in TECHNOLOGICAL INNOVATION: OVERSIGHTS AND FORESIGHTS (Raghu Garud et al. eds., 1997); but see Richard J. Pierce, Jr., *Small Is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms*, 50 ADMIN. L.R. 537, 551-52 (1998) (finding that numerous studies of innovation and small business are inconclusive).

<sup>216</sup> Robert M. Hunt & Leonard I. Nakamura, *The Democratization of U.S. Research and Development after 1980*, at 8-9, fig.2 (Soc'y for Econ. Dynamics, Working Paper No. 121, 2006), available at <http://www.repec.org/sed2006/up.12143.1138646305.pdf>.

since 1980, the growth in private R&D in the U.S. economy is attributable to relatively small and new companies.<sup>217</sup>

Second, as discussed in Part II, “guerilla growth” is one of the key tactics that some regulatory entrepreneurs have deployed to become “too big to ban” before regulators take action against them.<sup>218</sup> The regulators’ timeline and policy agenda are difficult for an entrepreneur to control. Thus, the success of this strategy hinges on the entrepreneur’s ability to enter a market and grow rapidly. Silicon Valley startups, which are known for trying to grow their user base as quickly as possible and to worry about making money later, are well-positioned to take advantage of this tactic.<sup>219</sup> For years, these startups have been pursuing businesses that did not have well-established precedents. It was not always clear how these businesses would monetize their user base. However, the industry consensus was that (1) it would be possible to monetize the user base—that is, the business would be profitable, one way or another—and (2) more users were essential to the company’s long-term value. A list of examples in this vein comes quickly to mind, such as YouTube,<sup>220</sup> Facebook, Twitter, and Instagram.<sup>221</sup> This created an environment in which industry executives prioritized rapid user growth over profits.<sup>222</sup> Over time, this produced an increased focus on how to achieve

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<sup>217</sup> *Id.* at 9; see also Michael J. Meurer, *Inventors, Entrepreneurs, and Intellectual Property Law*, 45 HOUS. L. REV. 1201, 1202 (2008).

<sup>218</sup> See Matthew T. Wansley, *Regulation of Emerging Risks*, 69 VAND. L. REV. 401, 407 (2016) (arguing for an experimentalist model of regulation because “agencies will often postpone regulation of emerging risks as they wait to acquire more information” and in the meanwhile “the political environment for regulation may change”).

<sup>219</sup> *E.g.*, Matthew Braga, *Twitter’s Road to IPO: Grow First, Monetize Later*, FIN. POST (Sept. 13, 2013), [http://business.financialpost.com/fp-tech-desk/twitters-road-to-ipo-grow-first-monetize-later?\\_lsa=61db-bf2c](http://business.financialpost.com/fp-tech-desk/twitters-road-to-ipo-grow-first-monetize-later?_lsa=61db-bf2c) (discussing companies like Twitter, Facebook, Dropbox, and Pinterest that had a “grow first, monetize later” philosophy); Nitasha Tiku, *Look At How Quickly the Values of Multi-Billion-Dollar Startups Have Multiplied*, THE VERGE (Feb. 20, 2015), <http://www.theverge.com/2015/2/20/8075053/look-at-how-quickly-the-value-of-multi-billion-dollar-startups-have> (“Build momentum now, figure out how to make money later—otherwise, you’ll miss out on the next near-mythic exit.”); Sarah Frier & Eric Newcomer, *The Fuzzy, Insane Math That’s Creating So Many Billion-Dollar Tech Companies*, BLOOMBERG (Mar. 17, 2015), <http://www.bloomberg.com/news/articles/2015-03-17/the-fuzzy-insane-math-that-s-creating-so-many-billion-dollar-tech-companies> (noting how startup investors look to the number of users in valuing the company and “salivate over what’s called ‘hockey-stick’ growth curves, indicating massive uptake”).

<sup>220</sup> *E.g.*, Nicholas Jackson, *Infographic: The History of Video Advertising on YouTube*, ATLANTIC (Aug. 3, 2011), <http://www.theatlantic.com/technology/archive/2011/08/infographic-the-history-of-video-advertising-on-youtube/242836/>; Rolfe Winkler, *YouTube: 1 Billion Viewers, No Profit*, WALL ST. J. (Feb. 25, 2015), <http://www.wsj.com/articles/viewers-dont-add-up-to-profit-for-youtube-1424897967>.

<sup>221</sup> See David Holmes, *Social Sites Have Found a New Monetization Strategy and It Leaves Indie Creators Out in the Cold*, PANDO (Feb. 13, 2015), <https://pando.com/2015/02/13/social-sites-have-found-a-new-monetization-strategy-and-it-leaves-indie-creators-out-in-the-cold/> (discussing the history of monetizing online technology); Braga, *supra* note 219.

<sup>222</sup> See Frier & Newcomer, *supra* note 219 (noting that a “tech startup’s cash flow is less important than you might think” but investors “look to find the number of people using the product, regardless of whether they pay for it”); Claire Cain Miller, *Popularity or Income? Two Sites Fight*

rapid growth, which in turn led to the development of people with expertise in how to accomplish this goal.<sup>223</sup>

By and large, many of these companies have become viewed as big success stories.<sup>224</sup> These successes have been supported by an ecosystem of investors who are willing to accept large amounts of risk and uncertainty,<sup>225</sup> support growth-focused strategies, and take a relatively long-term view. Angel investors, many of whom are successful ex-entrepreneurs, and the venture capital market make early-stage financing feasible for high-risk, high-return businesses.<sup>226</sup> Most angel investors like being involved in exciting new ventures, particularly those with the potential to disrupt entire industries.<sup>227</sup> Thus, startup

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*It Out*, N.Y. TIMES (Oct. 20, 2008), [http://www.nytimes.com/2008/10/21/technology/startups/21twitter.html?\\_r=1&hp](http://www.nytimes.com/2008/10/21/technology/startups/21twitter.html?_r=1&hp) (discussing several high profile tech startups that succeeded with a strategy of prioritizing user growth rather than profits); Dan Primack, *Tech IPOs: Profits Don't Matter*, FORTUNE (Mar. 26, 2014), <http://fortune.com/2014/03/26/tech-ipos-profits-dont-matter/> (noting that “profits don’t really matter when it comes to tech IPOs” and “[t]oday’s IPO buyers care about two key metrics: (1) Growth. (2) Total available market, into which that growth can be realized.”); Eric Kutcher et al., *Grow Fast or Die Slow*, MCKINSEY & CO. (April 2014), <http://www.mckinsey.com/industries/high-tech/our-insights/grow-fast-or-die-slow> (“Growth trumps all.”).

<sup>223</sup> See Laura K. Inamedinova, *20 Growth-Hacking Strategists You Should Follow in 2016*, FORBES (Aug. 7, 2016), <http://www.forbes.com/sites/laura-inamedinova/2016/08/07/20-growth-hacking-strategists-that-you-must-follow-in-2016/#3e56aa4c594d> (listing “growth hacking” experts).

<sup>224</sup> The companies are viewed as success stories because they succeeded in becoming profitable, were purchased by other companies at large valuations, or conducted successful initial public offerings. See, e.g., Miller, *supra* note 222 (“Successes like YouTube, the online video site sold to Google for \$1.65 billion in 2006, convinced some venture investors that building a Web site with a large number of users could still be more valuable than making money from paying customers.”); Larry Popelka, *What We Learned From Twitter’s IPO: The Value of Innovation Is at an All-Time High*, BLOOMBERG (Nov. 18, 2013), <http://www.bloomberg.com/bw/articles/2013-11-18/what-we-learned-from-twitter-s-ipo-the-value-of-innovation-is-at-an-all-time-high> (noting that Twitter had a successful IPO, becoming one of the most valuable companies in the world at a \$25B valuation based not on profit but on the value of its great innovation).

<sup>225</sup> Legal risks are just one of many types of bet-the-company risks that startup companies may be facing, and often is not even identified as one of the top risks in startup companies. See Sreekanth Ravi, *When Launching Your Startup, Consider These 5 Risks*, ENTREPRENEUR (May 21, 2014), <http://www.entrepreneur.com/article/234094> (discussing product risk, market risk, financial risk, team risk, and execution risk); Thomas Oppong, *The 10 Biggest Risks That Prevent VCs From Funding Your Startup*, ALL TOP STARTUPS (Aug. 27, 2014), <http://alltopstartups.com/2014/08/27/biggest-startup-risks/> (noting venture capitalist Marc Andreessen listed the following as risks that will cause potential investors to decide not to invest: founder risk, market risk, competition risk, timing risk, financing risk, marketing risk, technology risk, product risk, hiring risk, and location risk).

<sup>226</sup> Ronald J. Gilson, *Engineering a Venture Capital Market: Lessons From the American Experience*, 55 STAN. L. REV. 1067, 1068-69 (2003); Darian M. Ibrahim, *The (Not So) Puzzling Behavior of Angel Investors*, 61 VAND. L. REV. 1405 (2008).

<sup>227</sup> See Ibrahim, *supra* note 226, at 1412, 1419.

investors are often willing to focus on rapid user growth while taking the long view of companies' prospects for profitability.<sup>228</sup>

Third, changing the law is a highly uncertain proposition and startups may be more inclined to take on this uncertainty.<sup>229</sup> Politics is a complicated arena with many competing interest groups and variables. It is difficult to predict whether an attempt to change the law will succeed, or what unintended consequences it might produce, on the legal system or otherwise. Startups without established businesses have little to lose economically from such shakeups.<sup>230</sup> Culturally, startups often pride themselves on being disruptive and changing the world; startup employees tend to view these shakeups optimistically.<sup>231</sup> One prevalent cliché about startups, sometimes mocked in popular culture, is that they attract people who “want to make the world a better place.”<sup>232</sup> Startup entrepreneurs are “socialized to believe that most problems can be fixed with enough money and engineering.”<sup>233</sup> Furthermore, startup culture, particularly in Silicon Valley, has become known to foster a certain libertarian-leaning, free-market ideology that views technology that appeals to the masses as democratic.<sup>234</sup> Given this confluence of factors, it is not surprising that startups might be inclined to start a line of business fraught with legal uncertainty.

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<sup>228</sup> For example, Airbnb, valued at \$30 billion, forecasts that that it will not be profitable (even excluding interest, taxes, depreciation and amortization) until 2020. Rolfe Winkler & Douglas MacMillan, *The Secret Math of Airbnb's \$24 Billion Valuation*, WALL ST. J. (June 17, 2015), <http://www.wsj.com/articles/the-secret-math-of-airbnbs-24-billion-valuation-1434568517>; CB Insights, *The Unicorn List*, <https://www.cbinsights.com/research-unicorn-companies>, last visited Sept. 14, 2016. Uber, whose valuation of nearly \$70 billion makes it the world's most valuable private startup, reportedly incurred more than \$1 billion in losses in the first half of 2016. Newcomer, *supra* note 28.

<sup>229</sup> For a classic work that defines uncertainty and argues that it is entrepreneurs' willingness to take on uncertainty that gives rise to profit, see FRANK H. KNIGHT, *RISK, UNCERTAINTY AND PROFIT* 20, 232 (1921).

<sup>230</sup> See Barry & Caron, *supra* note 61, at 74 n.22 (“[I]ndustries with new business models sometimes have incentives to push the regulatory envelope . . .”).

<sup>231</sup> Indeed, the term “disruptive” has become so overused in Silicon Valley that some companies have started consciously avoiding it. See Max Nisen, *How 'Disrupt' Got Turned Into An Overused Buzzword*, BUS. INSIDER (Sept. 28, 2013), <http://www.businessinsider.com/how-silicon-valley-killed-disruption-2013-9>; Emily Inverso, *The Most Obnoxious and Overused Startup Jargon*, FORBES (Mar. 16, 2015), <http://www.forbes.com/sites/emilyinverso/2015/03/16/the-most-obnoxious-and-overused-startup-jargon/#785d552740c9>. The terminology originally came from Joseph L. Bower & Clayton M. Christensen, *Disruptive Technologies: Catching the Wave*, HARV. BUS. REV., Jan.-Feb. 1995, at 44.

<sup>232</sup> See, e.g., Adam Levene, *Beyond Disruption: The Age of the Impact Entrepreneur*, WIRED (Oct. 2014), <http://www.wired.com/insights/2014/10/the-age-of-the-impact-entrepreneur/>; Sam Biddle, *TechCrunch Speaker Combines Every Possible Startup Cliché*, VALLEYWAG (May 6, 2014), <http://valleywag.gawker.com/change-the-world-power-influence-innovation-hand-g-1573559085>.

<sup>233</sup> Brian Fung, *The Real World Is Undermining Silicon Valley's Apolitical Fantasyland*, WASH. POST (Aug. 20, 2014), <https://www.washingtonpost.com/news/the-switch/wp/2014/08/20/the-real-world-is-undermining-silicon-valleys-apolitical-fantasyland/>.

<sup>234</sup> Paul Carr, *Travis Shrugged: The Creepy, Dangerous Ideology Behind Silicon Valley's Cult of Disruption*, PANDO (Oct. 24, 2012), <https://pando.com/2012/10/24/travis-shrugged/> (“To proponents of Disruption, the free market is king, and regulation is always the enemy.”); Fung,



Established companies, almost by definition, have stable, profitable businesses. This gives them reason to worry about radical changes to the law that might undermine or even eliminate those businesses; no one wants to kill the golden goose in attempt to get more eggs. Moreover, a new and uncertain line of business will demand a large amount of managers' finite attention, which can detract from the company's already-developed business lines. Established companies might also be dissuaded from pivoting their business models to ones that require regulatory entrepreneurship because they fear the bad press that might come from being seen as operating in a legal gray area or breaking the law. More generally, established businesses and customer relations require a certain degree of stability and predictability. They tend to be larger and thus have more levels of internal hierarchy. They tend to attract employees who prefer the more stable prospects that come from working at an established business instead of high-risk, high-reward startup employment.

Despite these obstacles, established companies are capable of engaging in regulatory entrepreneurship as well. Google is perhaps the best example. Its founders have remained committed to taking on big and complex problems and applying creative solutions, and warned prospective IPO investors that Google would continue to take on moonshot projects after it went public.<sup>235</sup> One of the company's most important moonshot investments is the self-driving car project.<sup>236</sup> Since the beginning of the project, it was clear that Google would have to change the law for its self-driving car business to be viable. To date, Google is a leader in self-driving car technology, and has persuaded California, Florida, Michigan, Nevada, and Washington D.C. to pass laws that allow public road testing.<sup>237</sup>

Yet Google, in some ways, illustrates why regulatory entrepreneurs tend to be startups. Though now a well-established company, Google began as a startup

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*supra* note 233 (“A belief in permissionless innovation is what gives the tech industry its libertarian streak.”); Gregory Ferenstein, *Silicon Valley Represents An Entirely New Political Category*, TECHCRUNCH (Nov. 8, 2015), <http://techcrunch.com/2015/11/08/silicon-valley-represents-an-entirely-new-political-category/> (noting that author conducted a political psychology study of the tech industry and “[t]he results suggest that Internet startup founders represent an entirely distinct, libertarian-like ideology within the Democratic party. Tech startup founders see the government as an investor in citizens, rather than as a protector from capitalism.”).

<sup>235</sup> Alphabet Investor Relations, 2004 Founders' IPO Letter From the S-1 Registration Statement, “An Owner's Manual” for Google's Shareholders, *available at* <https://abc.xyz/investor/founders-letters/2004/ipo-letter.html> (“We will not shy away from high-risk, high-reward projects because of short term earnings pressure. . . Do not be surprised if we place smaller bets in areas that seem very speculative or even very strange when compared to our current businesses.”).

<sup>236</sup> Steven Levy, *Google's Larry Page on Why Moon Shots Matter*, WIRED (Jan. 17, 2013, 6:30 AM), <http://www.wired.com/2013/01/ff-qa-larry-page/>.

<sup>237</sup> Alex Knapp, *Nevada Passes Law Authorizing Driverless Cars*, FORBES (June 22, 2011), <http://www.forbes.com/sites/alexknapp/2011/06/22/nevada-passes-law-authorizing-driverless-cars/#70b70fa95b73>; Dino Grandoni, *Among the States, Self-Driving Cars Have Ignited a Gold Rush*, N.Y. TIMES (Aug. 6, 2015), <http://www.nytimes.com/2015/08/07/automobiles/self-driving-cars-ignite-gold-rush-among-states.html>.

that experienced tremendous success, and its startup culture persists, at least in part. Further, Google's founders put in place a dual-class stock structure which guaranteed that they would retain control of the company and could not be forced to change course by dissatisfied outside investors.<sup>238</sup> This structure, combined with the market's perception that they are visionary tech leaders who deserve some operational deference, gives Google significant freedom to engage in regulatory entrepreneurship, as well as take on other types of risky projects.

Google investors nonetheless became increasingly uneasy about both the amount and opacity of Google's spending on far-out technology projects that were unrelated to its core business of advertising and search.<sup>239</sup> As a former Google executive described it: "It was getting harder and harder to hide the costs of some of the company's projects," especially as some of these speculative ventures were bound to fail, and "It's easier to take the core business and run it like a Fortune 500 company."<sup>240</sup> Google, Inc. responded to mounting investor pressure by restructuring itself as a holding company, Alphabet, Inc., with a host of subsidiaries.<sup>241</sup> Under the new structure, the moonshot technology projects are partitioned into a separate subsidiary, X, framed as Alphabet's incubator.<sup>242</sup> The projects that turn into viable businesses will be spun off or "graduated" as their own standalone companies.<sup>243</sup> Google's self-driving car project is expected to "graduate" into its own company soon.<sup>244</sup>

#### IV. THE FUTURE OF REGULATORY ENTREPRENEURSHIP

In this final Part, we explore how regulatory entrepreneurship will likely continue to shape our laws in the years to come.

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<sup>238</sup> Edward B. Rock, *Shareholder Eugenics in the Public Corporation*, 97 CORNELL L. REV. 849, 900 (2012); Steven Davidoff Solomon, *New Share Class Gives Google Founders Tighter Control*, N.Y. TIMES DEALBOOK (Apr. 13, 2012, 9:17 AM), <http://dealbook.nytimes.com/2012/04/13/new-share-class-gives-google-founders-tighter-control/>; Steven Davidoff Solomon, *Thorny Side Effects in Silicon Valley Tactic to Keep Control*, N.Y. TIMES DEALBOOK (Sept. 3, 2013, 5:16 PM), <http://dealbook.nytimes.com/2013/09/03/thorny-side-effects-in-silicon-valley-tactic-to-keep-control/>.

<sup>239</sup> See Alistair Barr & Rolfe Winkler, *Google Creates Parent Company Called Alphabet in Restructuring*, WALL ST. J. (Aug. 10, 2015), <http://www.wsj.com/articles/google-creates-new-company-alphabet-1439240645>.

<sup>240</sup> *Id.*

<sup>241</sup> Google, *Google Announces Plans for New Operating Structure*, Aug. 10, 2015, <https://investor.google.com/releases/2015/0810.html>.

<sup>242</sup> Mark Bergen, *Google X Has a New Logo and New Plan to Turn Moonshots Into Actual Businesses*, RECODE (Jan. 13, 2016), <http://recode.net/2016/01/13/google-x-has-a-new-logo-and-new-plan-to-turn-moonshots-into-actual-businesses/>.

<sup>243</sup> See Barr & Winkler, *supra* note 239.

<sup>244</sup> Bergen, *supra* note 242.

## A. The Prospects for Regulatory Entrepreneurship Going Forward

The factors that we examined in Part III offer insight into the likely prevalence of regulatory entrepreneurship going forward.

Anticipating the law-related factors necessarily means making some predictions about the course of politics and future policy making, which is a difficult prospect at best. We simply note that the national government is currently divided and gridlocked due to increased political polarization, and that this state of affairs may continue for some time.<sup>245</sup> If so, relative inaction by the national government in many spheres will leave more issues for state and local governments to address, and more room for those governments to maneuver.<sup>246</sup> This could produce a fertile legal landscape for regulatory entrepreneurship.<sup>247</sup>

Similarly, future prospects for regulatory entrepreneurship will depend on the health of the ecosystem that supports and promotes startups. A mature industry has arisen around providing startups with capital; this has come with infrastructure—such as people with experience evaluating startup investment opportunities—that is likely to prove durable.<sup>248</sup> Venture capital is a crucial part of the ecosystem, but it includes other participants as well such as angel investors, accelerators, and incubators.<sup>249</sup> In addition, recent legal changes have opened up new avenues for investment in startups.<sup>250</sup> Also importantly, investors have become increasingly comfortable with regulatory entrepreneurship as a business strategy, and political strategy firms have emerged that focus on helping startups

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<sup>245</sup> See Pew Research Center, *Political Polarization in the American Public* (June 12, 2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/> (discussing upward trend in political polarization); Pew Research Center, *Partisan Polarization Surges in Bush, Obama Years* (June 4, 2012), <http://www.people-press.org/2012/06/04/partisan-polarization-surges-in-bush-obama-years/> (same); *Unprecedentedly Dysfunctional*, THE ECONOMIST (Sept. 22, 2014), 5:52 PM, <http://www.economist.com/blogs/democracyinamerica/2014/09/political-gridlock>.

<sup>246</sup> Moreover, at the federal level, congressional gridlock makes it more likely that Presidents will seek to accomplish their political goals through administrative agencies and other executive actions. To the extent that it is easier (harder) for companies to influence executive action, this may further promote (discourage) regulatory entrepreneurship.

<sup>247</sup> See *supra* Part III.B.

<sup>248</sup> See Nat'l Venture Capital Ass'n, *\$58.8 Billion in Venture Capital Invested Across U.S. in 2015, According to the MoneyTree Report*, Jan. 15, 2016, <http://nvca.org/pressreleases/58-8-billion-in-venture-capital-invested-across-u-s-in-2015-according-to-the-moneytree-report-2/>; Darian M. Ibrahim, *Financing the Next Silicon Valley*, 87 WASH. U. L. REV. 717 (2010).

<sup>249</sup> Brad Bernthal, *Investment Accelerators*, \_ STANFORD J.L. BUS. & FIN. \_ (forthcoming 2016); Ibrahim, *Angel Investors*, *supra* note 248; Dana Thompson, *Accelerating the Growth of the Next Generation of Innovators*, 8 OHIO ST. ENTREPRENEURIAL BUS. L.J. 379 (2013).

<sup>250</sup> See U.S. Securities and Exchange Comm'n, *SEC Adopts Rules to Permit Crowdfunding*, Oct. 30, 2015, <https://www.sec.gov/news/pressrelease/2015-249.html>; Darian M. Ibrahim, *Equity Crowdfunding: A Market for Lemons?*, 100 MINN. L. REV. 561 (2015).

navigate legislative and regulatory hurdles.<sup>251</sup> This assembled infrastructure will facilitate regulatory entrepreneurship on an ongoing basis.

But perhaps the most important factors for the future of regulatory entrepreneurship are business-related. As noted previously, the growth of platform companies has been a significant driver of increased regulatory entrepreneurship. One might therefore expect that the prospects for regulatory entrepreneurship are tied, at least in part, to the fate of new platform companies.

As discussed in Part III, large, connected user bases and significant amounts of capital are both important for regulatory entrepreneurship: Skillful use of a large, connected user base has become arguably the most effective weapon in the modern regulatory entrepreneur's arsenal. Money is also important—companies that can credibly threaten to commit lots of resources to political battles, and to be able to stay in the game for the long haul, are more likely to succeed than those that cannot.<sup>252</sup>

There are some reasons to think that new platform companies may struggle to acquire the requisite user bases and capital. One issue that platform companies face is that they are, by their nature, middlemen who profit from facilitating transactions between other parties. Consequently, those parties have an incentive to try and cut the platform company out of the transaction.<sup>253</sup> In many instances, this may be achievable.<sup>254</sup> Circumvention is generally a manageable problem for Airbnb and Uber because of the nature of their underlying businesses. Travelers usually go to different places over time, so they cannot simply reuse the same Airbnb host over and over. Uber passengers usually want to find the driver closest to their location at the moment they need a ride. This is not easy to do without their app. There are other platform companies whose business models provide similar safeguards against being easily circumvented.<sup>255</sup> But, for many platform companies, this is a major issue that can

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<sup>251</sup> For example, well-known lobbyist Bradley Tusk has started his own firm, Tusk Strategies, that has helped startups such as Uber and FanDuel launch campaigns and manage the regulatory process, and even accepts payment in equity. Tusk Strategies, *Case Studies: Uber*, <http://tuskstrategies.com/case-studies/uber/>, last visited Sept. 14, 2016; Stephanie Mehta, *Meet Uber's Political Genius*, VANITY FAIR (Jun. 17, 2016), <http://www.vanityfair.com/news/2016/06/bradley-tusk-fanduel-uber>. For a discussion of how people with political expertise and government connections have flowed into the startup ecosystem, see Elizabeth Pollman, *The Rise of Regulatory Affairs in Innovative Startups*, in THE HANDBOOK ON LAW AND ENTREPRENEURSHIP (Gordon Smith & Christine Hurt eds., Cambridge Univ. Press 2017).

<sup>252</sup> See, e.g., DRUTMAN, *supra* note 9, at 238; Helderman, *supra* note 80.

<sup>253</sup> Cf. Jordan Barry et al., *Voluntary Transaction Costs* (giving a similar example in more detail).

<sup>254</sup> For example, imagine a platform that connects people who need haircuts to stylists, similar to Glamsquad or StyleBee. The stylist and customer, once they have been introduced, can easily contact each other to conduct future business without going through the platform.

<sup>255</sup> For example, companies whose users cannot rely on past matches in the future may be difficult to circumvent. See, e.g., Semil Shah, *Iterations: Lessons We Can Draw from Cherry*,

greatly undermine the user base and financial resources that the company needs to be politically effective.<sup>256</sup> Furthermore, even if a new platform company did not suffer from circumvention issues, regulatory entrepreneurship will only be appealing if there is a potentially changeable law that materially affects the value of the business. Combined, this would seem to suggest that only a narrow range of businesses stand to gain from a regulatory entrepreneurship strategy.

However, we believe that there is an even stronger argument that the business fundamentals favor increased regulatory entrepreneurship in the years to come. This argument is sometimes referred to as the “back half of the chessboard” argument.<sup>257</sup> The name comes from a legend in which a king promises the inventor of chess a reward for his great invention. The inventor asks for a grain of rice to be placed on the first square of a chessboard; then two grains on the second square the next day; four grains on the third square the day after; eight grains on the fourth square the day after that, and so on, doubling the previous day’s total each day until the sixty-fourth day. Only later does the king realize that he has promised the inventor more rice than has been produced in the history of the world and bankrupted his kingdom.<sup>258</sup>

Like the grains of rice on the chessboard, technological progress has exhibited exponential growth.<sup>259</sup> This has been particularly true of the computer industry; for the last fifty years, computer technology has doubled in power approximately every two years.<sup>260</sup> This is sometimes referred to as Moore’s law, after the author of the paper that first predicted this pattern.<sup>261</sup> Even with the

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TECHCRUNCH (Jan. 13, 2013), <http://techcrunch.com/2013/01/13/iterations-lessons-we-can-draw-from-cherry/> (discussing Cherry, which allowed users to call someone nearby to clean their car). Companies that provide another service besides matching—such as DraftKings and FanDuel, which adjudicate the daily fantasy contests players enter—also have added protection.

<sup>256</sup> See, e.g., Zeel (provides massage therapists); Your-Mechanic (sends mechanics); TutorSpree (connected people with tutors, but now defunct); Urban-sitter (sends babysitters); Washio (laundry pick-up and delivery); DogVacay (pet-sitting services); Instacart (grocery shopping services); BloomThat (flower delivery); Pager (doctors); Glamsquad (hair and makeup stylists); Eaze (medical marijuana delivery).

<sup>257</sup> See ERIK BRYNJOLFSSON & ANDREW MCAFEE, *THE SECOND MACHINE AGE: WORK, PROGRESS, AND PROSPERITY IN A TIME OF BRILLIANT TECHNOLOGIES* (2014); ERIK BRYNJOLFSSON & ANDREW MCAFEE, *RACE AGAINST THE MACHINE: HOW THE DIGITAL REVOLUTION IS ACCELERATING INNOVATION, DRIVING PRODUCTIVITY, AND IRREVERSIBLY TRANSFORMING EMPLOYMENT AND THE ECONOMY* (2001).

<sup>258</sup> Accounts differ as to whether, upon this discovery, the king rewards the inventor for his cleverness by making him a high-ranking advisor, or executes him for tricking the king. See MALBA TAHAN, *THE MAN WHO COUNTED: A COLLECTION OF MATHEMATICAL ADVENTURES* 113-15 (1993); *SECOND MACHINE AGE*, *supra* note 257, at 45-47.

<sup>259</sup> This is because technological gains feed into each other, so that today’s gains lead to greater gains in the future.

<sup>260</sup> More precisely, the number of transistors in a dense integrated circuit doubles approximately every two years. Thomas L. Friedman, *Moore’s Law Turns 50*, N.Y. TIMES, May 13, 2015, at A27.

<sup>261</sup> See Gordon E. Moore, *Cramming More Components Onto Integrated Circuits*, ELECTRONICS MAGAZINE at 4 (1965). Gordon E. Moore is the founder of Intel.

benefit of hindsight, it is difficult to wrap one's head around this meteoric growth; many individuals now carry more computing power in their pockets than NASA possessed at the time of the moon landing.<sup>262</sup> Assuming that Moore's law continues to hold,<sup>263</sup> the next few years will add more computing power than the past fifty years, combined—and then the next few years will add much more still. And, even if technological progress slows significantly, we are still likely to see tremendous increases in computing power in the next few years.

It is hard to predict exactly how all of this additional computing power will be used.<sup>264</sup> However, it seems a safe bet that we will be increasingly connected and accessible—which will give companies new ways to mobilize large groups of people on their behalf. Companies are also likely to have more data about their users, and greater ability to organize and analyze this information.<sup>265</sup> This will make companies better able to channel and leverage their users for maximum effect. All of this suggests that regulatory entrepreneurship will be an increasingly attractive proposition and that we will therefore see more of it, even if we cannot quite anticipate the exact form that it is likely to take.

## **B. How Regulatory Entrepreneurship Will Affect the Law**

Because regulatory entrepreneurship may become an increasingly common phenomenon, we believe that its effects on lawmaking merit careful consideration. We begin with a discussion of scholarly accounts of the political process and how they relate to regulatory entrepreneurship generally. We then turn to some well-known political pathologies and consider the extent to which regulatory entrepreneurship might ameliorate them. Finally, we consider the limits of regulatory entrepreneurship's potential to improve political outcomes and assess its likely effects overall.

### **1. Companies as Drivers of Political Change**

The democratic political process involves a messy, complicated interplay of different groups of people pursuing varied goals. Changing the law often

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<sup>262</sup> See, e.g., *A Modern Smartphone or a Vintage Supercomputer: Which Is More Powerful?*, PHONEARENA (June 14, 2014), [http://www.phonearena.com/news/A-modern-smartphone-or-a-vintage-supercomputer-which-is-more-powerful\\_id57149](http://www.phonearena.com/news/A-modern-smartphone-or-a-vintage-supercomputer-which-is-more-powerful_id57149) (quoting physicist Michio Kaku).

<sup>263</sup> There have been many predictions that Moore's Law will fail over the last fifty years. To date, they have all proved wrong. For example, Gordon Moore himself predicted in 1995 that Moore's Law would not hold after 2005. He then updated his prediction in 2005, predicting that it would last until between 2015 and 2025. In 2015, he updated once again, saying that it would end in 2025. See *The End of Moore's Law*, THE ECONOMIST, Apr. 19, 2015, <http://www.economist.com/blogs/economist-explains/2015/04/economist-explains-17> (collecting these and other examples).

<sup>264</sup> See, e.g., Daniel Burrus, *The Internet of Things Is Far Bigger Than Anyone Realizes*, WIRED (Nov. 2014), <http://www.wired.com/insights/2014/11/the-internet-of-things-bigger/>.

<sup>265</sup> See CUKIER & SCHONBERGER, *supra* note 165.

requires action by multiple interest groups with divergent goals. This raises the question of how these groups coordinate their efforts. As one scholar put it, while both bootleggers and Baptists were influential in bringing about laws restricting liquor sales, “It seems unlikely that the local Baptist preacher and the moonshiners meet in someone’s parlor to discuss banning Sunday [liquor] sales.”<sup>266</sup> Someone or something else must act as intermediaries and coalition-builders, knitting together support from disparate groups in order to accomplish legal change.<sup>267</sup>

The dominant view is that, historically, politicians, and occasionally high-ranking bureaucrats, have taken on this role.<sup>268</sup> Such politicians are sometimes described as “political entrepreneurs.”<sup>269</sup>

Regulatory entrepreneurs have some similarities to political entrepreneurs, but they differ in several key ways. First, political entrepreneurs usually take advantage of pre-existing, organized interest groups.<sup>270</sup> Modern regulatory entrepreneurs, in contrast, have largely identified unorganized groups and mobilized them.<sup>271</sup> “People for Deregulated Taxicabs,” “People for Short-Term Rentals,” and “Citizens Against Car Dealerships” were not established political groups that adopted the cause of Uber, Airbnb, and Tesla; instead, these companies organized people who were sympathetic to these positions and mobilized them to take action.

Second, political entrepreneurs have usually had one of two primary (compatible) motivations: a values-based preference, rooted in ideology or otherwise, for a particular policy, or advancing their political careers. Regulatory entrepreneurs, in contrast, are primarily motivated by the desire to earn profits.

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<sup>266</sup> Randy T. Simmons et al., *Bootleggers, Baptists, and Political Entrepreneurs: Key Players in the Rational Game and Morality Play of Regulatory Politics*, 15 INDEPENDENT REV. 367, 368 (2011).

<sup>267</sup> Sociologists Neil Fligstein and Douglas McAdam have recently theorized the nature of social change, from political movements to market meltdowns, and have included the idea of “internal governance units” which they define as organizations or associations who play a connecting role with state actors and who provide information to actors within a “strategic action field.” NEIL FLIGSTEIN & DOUGLAS MCADAM, *A THEORY OF FIELDS* 77 (2012).

<sup>268</sup> Simmons et al., *supra* note 266, at 368.

<sup>269</sup> See, e.g., *id.*; see also LEADERSHIP AND INNOVATION: A BIOGRAPHIC PERSPECTIVE ON ENTREPRENEURS IN GOVERNMENT (Jameson Doig & Erwin C. Hargrove eds., 1987). The term is also sometimes used to refer to businesses who pursue a rent-seeking strategy. See, e.g., Matthew McCaffrey & Joseph T. Salerno, *A Theory of Political Entrepreneurship*, 2 MODERN ECONOMY 552 (2011).

<sup>270</sup> Simmons et al., *supra* note 266.

<sup>271</sup> Justin Fox, *Uber Is Lobbying for All of Us*, BLOOMBERG (June 29, 2015), <https://www.bloomberg.com/view/articles/2015-06-29/uber-s-nationwide-army-of-lobbyists-serves-the-public-interest>.

Third, while political entrepreneurs are individuals, usually elected officials, regulatory entrepreneurs are primarily privately owned businesses. One key implication of this pertains to how policies spread across jurisdictions.

Because of the structure of the U.S. political system, politicians usually have bases of support centered in particular geographic areas. A mayor is well equipped to influence policy in her city, but her network strength is unlikely to reach other jurisdictions. It is true that successful mayors often parlay that success into election to statewide office, and successful state politicians often parlay that success into national political office.<sup>272</sup> However, the positions available at higher levels of government are structurally limited—the number of governors, members of Congress, and Presidents are fixed—which constrains the amount of movement that can occur up the chain, especially when incumbents' well-documented electoral advantages are taken into account.<sup>273</sup> Moreover, in our federalist system, different levels of government have dominion over different questions. Thus, many issues that a mayor might build a coalition around do not translate to state politics; the same issue applies for state politicians moving to the national political arena. Furthermore, politicians in the United States generally do not move among parallel levels of government; a successful mayor of San Diego is not likely to run for mayor of Los Angeles, or to move from being governor of one state to another.<sup>274</sup>

Businesses, in contrast, are not constrained in the same ways. The number of businesses of a particular size or operating in a given industry is not intrinsically fixed. More importantly, businesses are focused on growing their customer bases geographically in a way that politicians generally are not. Thus, a business that succeeds in establishing a winning electoral coalition that works at the city level in San Diego is much more likely to try to repeat its success in Los Angeles, or from one state to another.

Taken together, these differences suggest that regulatory entrepreneurship will lead to different coalitions being formed, and therefore different laws being enacted, than has been the case historically. Regulatory entrepreneurship seems most likely to have the largest effect on policymaking at the local and state level and to feature groups that are not currently as organized in American politics.

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<sup>272</sup> Martin O'Malley, for example, was elected Mayor of Baltimore, then Governor of Maryland, then unsuccessfully sought the Democratic Party nomination for President.

<sup>273</sup> See, e.g., Gary W. Cox & Jonathan N. Katz, *Why Did the Incumbency Advantage in U.S. House Elections Grow?*, 40 AM. J. POL. SCI. 478 (1996).

<sup>274</sup> Bill Federer, *Only Man Ever Elected Governor of 2 States*, WND (Oct. 21, 2015), <http://www.wnd.com/2015/10/only-man-ever-elected-governor-of-2-states/>.



## 2. Potential Benefits to the Political Process

Every political process is imperfect,<sup>275</sup> and ours is no exception. Scholars have documented a number of pathologies that can lead to inefficient outcomes.<sup>276</sup> One common circumstance in which the political process can produce suboptimal outcomes is when there are asymmetries between how a policy's costs and benefits are distributed.

For example, consider a policy that produces concentrated benefits but diffuse costs—that is, it provides significant benefits to a relatively small group of people, while imposing relatively small costs on each member of a large group of people. In such circumstances, the beneficiaries of the proposed policy have a lot of incentive to fight for that policy. On the other hand, each of those who would be hurt by the policy has little incentive to resist it, since she would suffer only a small loss if it were enacted. These asymmetric incentives can result in the policy being enacted, even if the policy inflicts more aggregate harm to those hurt by it than it benefits the policy's proponents.

A number of policy areas embody this dynamic. Many involve incumbent members of an industry using legal restrictions to exclude potential competitors. This reduced competition enables the incumbent firms to charge higher prices, which can significantly raise their profits. Moreover, the incumbent firms are often organized into a trade association and, in some instances, a handful of firms may account for a large portion of total market share. This gives them strong incentive to push for these policies, and makes collective action easier. At the same time, the increased costs are spread over a large group of consumers as well as would-be competitors. This gives each of the policy's natural opponents little incentive to lobby against it and makes it difficult to organize and coordinate opponents' efforts.

One of the best-known ways in which incumbents enact protectionist legislation is occupational licensing—regulations that require individuals to obtain a government license or other official permission to pursue a particular vocation or profession. Occupational licensing requirements have expanded

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<sup>275</sup> See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1970). According to Arrow's "impossibility" theorem, there are no procedures for collective or social ordering of alternative choices that satisfy reasonable assumptions concerning the autonomy of the people and the rationality of their preferences. As such, there is no perfect set of decision-making processes or institutions. WILLIAM ROBERTS CLARK ET AL., *PRINCIPLES OF COMPARATIVE POLITICS* 11 (2d ed. 2012).

<sup>276</sup> See, e.g., JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962); Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 *AM. ECON. REV.* 291 (1974); Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 *J. LEGAL STUD.* 101 (1987); MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965); GORDON TULLOCK, *THE POLITICS OF BUREAUCRACY* (1965); Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 *W. ECON. J.* 224 (1967).

dramatically in the last sixty years; in 1950, fewer than 5% of Americans worked in jobs that required licenses, versus more than 30% today.<sup>277</sup> Clearly, occupational licensing can be useful;<sup>278</sup> few people favor abandoning all licensing for surgeons or architects, for example. But many commentators have questioned the rationale for licensing occupations such as auctioneers, boxing timekeepers, and hair braiders.<sup>279</sup> Furthermore, securing these licenses can be extremely costly; for example, in some states, braiding hair for money requires years of classes and thousands of dollars in tuition.<sup>280</sup>

Overly protectionist occupational licensing has many problems. It makes it harder for workers to shift between industries, fueling unemployment. It makes products and services more expensive for consumers and harder to obtain. Yet despite derision by politicians on both sides of the aisle,<sup>281</sup> these rules have proliferated because of their asymmetric benefits.<sup>282</sup> Regulated groups fight vigorously to get and keep their protections, but most voters pay little attention to these issues; elections rarely turn on the rules that govern hair braiders, opticians, interior designers, or athletes' agents.<sup>283</sup>

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<sup>277</sup> Robert Litan, *In Obama's Budget, an Effort to Rein in Occupational Licensing*, WALL ST. J. (Feb. 9, 2015), <http://blogs.wsj.com/washwire/2015/02/09/in-obamas-budget-an-effort-to-rein-in-occupational-licensing/>; Jacob Goldstein, *So You Think You Can Be a Hair Braider?*, N.Y. TIMES MAG. (June 12, 2012), at MM20, available at <http://www.nytimes.com/2012/06/17/magazine/so-you-think-you-can-be-a-hair-braider.html>.

<sup>278</sup> Consumers may not be well equipped to evaluate the quality of certain specialized fields, and the cost of incompetence may be high.

<sup>279</sup> See, e.g., Jacob Goldstein, *So You Think You Can Be a Hair Braider?*, N.Y. TIMES MAG. (June 12, 2012), <http://www.nytimes.com/2012/06/17/magazine/so-you-think-you-can-be-a-hair-braider.html>; Matthew Yglesias, *Bill Callegari Trying to Trim Occupational Licensing in Texas*, SLATE (Dec. 7, 2012, 12:27 PM), [http://www.slate.com/blogs/moneybox/2012/12/07/texas\\_occupational\\_licensing\\_state\\_rep\\_bill\\_callegari\\_aims\\_to\\_deregulate.html](http://www.slate.com/blogs/moneybox/2012/12/07/texas_occupational_licensing_state_rep_bill_callegari_aims_to_deregulate.html).

<sup>280</sup> See, e.g., Goldstein, *supra* note 279 (discussing one would-be hair braider's experience in Utah, which requires "nearly two years of school and \$16,000 in tuition" for a cosmetology license); Institute for Justice, Braiding Freedom Project, <http://braidingfreedom.com/> (discussing similar rules in Washington, Missouri, and Arkansas, among others).

<sup>281</sup> President Obama recently proposed \$15 million to study the effects of occupational licensing, to applause from both the left and the right. See Carrie Sheffield, *How Cutting Red Tape Helps Low-Income Families*, FORBES (Feb. 2, 2015, 8:43 PM), <http://www.forbes.com/sites/carriesheffield/2015/02/02/can-cutting-red-tape-generate-200b-for-low-income-families/#379d12283523>; Nick Timiraos, *White House Warns States On Job-Licensing Requirements*, WALL ST. J. (July 30, 2015, 7:44 AM), <http://blogs.wsj.com/economics/2015/07/30/need-a-license-for-that-job-the-white-house-warns-states-against-overdoing-it/>; Litan, *supra* note 277.

<sup>282</sup> Timiraos, *supra* note 281.

<sup>283</sup> See Edward J. Timmons & Anna Mills, *Short-Sighted Policy*, ECONOMIC INTELLIGENCE (Feb. 17, 2015); Matthew Yglesias, *The Trouble with State Government*, THINK PROGRESS (Feb. 28, 2009, 5:42 PM), [http://thinkprogress.org/yglesias/2009/02/28/191948/the\\_trouble\\_with\\_state\\_government/](http://thinkprogress.org/yglesias/2009/02/28/191948/the_trouble_with_state_government/) ("[T]he lack of public attention paid to policymaking at the state, county, and municipal level leads to much more pure interest-group capture than you see on the federal level. . . . At the state level, bad policy really runs amok.").

But regulatory entrepreneurship has made some inroads where more traditional politics has not. Restrictive taxicab regulations endured for decades nationwide, but Uber (and its competitor Lyft) have transformed the landscape in a short amount of time. For example, in the last seventy-five years, New York City increased its cab fleet by only a thousand, increasing from approximately 12,000 cab medallions to 13,000.<sup>284</sup> In just four years in New York City, Uber added almost 12,000 new for-hire cars to the city's streets.<sup>285</sup> Uber has had significant effects on taxi regulations in many other cities as well.<sup>286</sup>

State laws requiring car manufacturers to sell through independent dealers are another form of entry restrictions or protectionism that have proved similarly durable, withstanding several efforts from the big car companies to repeal them.<sup>287</sup> But in just a decade, Tesla Motors has made real inroads against these laws, including convincing several states to pass new legislation that allows direct sales of automobiles to consumers.<sup>288</sup>

There are many other examples of regulatory entrepreneurs taking on licensing regimes. State laws generally specify that only licensed optometrists and ophthalmologists are permitted to issue eyeglass and contact lens prescriptions. Opternative, a recent telemedicine startup, partially subverts this model: It offers free online eye examinations. If they wish, users can then pay an ophthalmologist (through the site) to examine the results of the examination and other medical information and provide a prescription for eyeglasses, contact lenses, or both. Opternative has been subject to aggressive pushback from

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<sup>284</sup> Ginia Bellafante, *Uber Makes Its Pain New Yorkers' Problem*, N.Y. TIMES (July 24, 2015), <http://www.nytimes.com/2015/07/26/nyregion/uber-makes-its-pain-new-yorkers-problem.html>.

<sup>285</sup> *Id.*

<sup>286</sup> See, e.g., Matthew Mitchell & Michael Farren, *A Common-Sense Solution to the Uber vs. Taxi Wars*, L.A. TIMES (Nov. 19, 2015), <http://www.latimes.com/opinion/op-ed/la-oe-1119-mitchell-farren-uber-taxis-deregulate-20151118-story.html> (noting that some Florida counties have created a single set of regulations that apply equally to taxis and ride-share companies).

<sup>287</sup> *Death of a Car Salesman*, *supra* note 45; Crane, *supra* note 13, at 12. Autozone also made a push against these rules, but similarly came up short.

<sup>288</sup> See, e.g., New Jersey Assembly Bill 3216, P.L. 2015 c.24; Eric D. Stolze, *A Billion Dollar Franchise Fee? Tesla Motors' Battle for Direct Sales: State Dealer Franchise Law and Politics*, 34 FRANCHISE L.J. 293, 305 (Winter 2015), available at [http://www.americanbar.org/content/dam/aba/publications/franchising\\_law\\_journal/Winter\\_2015/FLJ%2034-3\\_01Stolze.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/franchising_law_journal/Winter_2015/FLJ%2034-3_01Stolze.authcheckdam.pdf); Todd Bishop, *Tesla Wins Battle Against Auto Dealers in Washington State, But Future Rivals Are Screwed*, GEEKWIRE (Feb. 18, 2014), <http://www.geekwire.com/2014/tesla-wins-battle-auto-dealers-washington-state-future-rivals-screwed/>; Christopher DeMorro, *Tesla Wins Big in North Carolina and New Hampshire*, GAS2 (July 1, 2013), <http://gas2.org/2013/07/01/tesla-wins-big-in-north-carolina-and-new-hampshire/>; Brian Fung, *Tesla Just Won a Huge Victory in New Jersey*, WASHINGTON POST (Mar. 18, 2015), <https://www.washingtonpost.com/news/the-switch/wp/2015/03/18/tesla-just-won-a-huge-victory-in-new-jersey/>; Andrew Ganz, *New Hampshire to Allow Tesla, Others to Sell Cars Direct to Consumers*, LEFTLANENEWS (June 26, 2013), <http://www.leftlanenews.com/new-hampshire-to-allow-tesla-others-to-sell-cars-direct-to-consumers.html>.

optometric organizations, which favor in-person examinations in licensed optometrists' offices; the fight remains ongoing as of this writing.<sup>289</sup>

Restrictive zoning regulations provide another example of how asymmetric distribution of costs and benefits can produce questionable policy. Most people in the United States currently live in apartments or houses that they own or rent for relatively long periods of time; in the past, a broader range of housing options were common.<sup>290</sup> Many people were boarders, renting rooms in families' homes; others lived in rooming houses or residential hotels.<sup>291</sup> Over time, zoning rules made these increasingly scarce. A major driver of this process was that these restrictions, by reducing the supply of housing, created concentrated benefits for local homeowners by raising the value of their homes, while the costs were spread more diffusely. Over time, the restricted supply of housing has contributed to a dramatic increase in housing prices.<sup>292</sup>

The restrictive zoning described above extends to other types of land use as well. Hosting a dinner party for your friends is legal, but if you were to serve the same dinner to paying customers, you would run afoul of regulations in many cities.<sup>293</sup> Most cities require developments to set aside large amounts of space for parking.<sup>294</sup> And so on. Taken together, these kinds of restrictions can have a significant negative impact, producing massive demographic shifts, reducing economic growth, and damaging the environment.<sup>295</sup>

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<sup>289</sup> These groups have successfully secured legislation barring Opternative's business in five states and have filed a formal complaint with the FDA asking it to take Opternative's product off the market nationwide. Rishi Madhok, *Trouble for Opternative: The Establishment Fights Back*, TELEMEDICINE (Aug. 15, 2016), <http://www.telemedmag.com/features/2016/8/15/trouble-for-opternative-the-establishment-fights-back> (listing Georgia, Indiana, Michigan, Nebraska, Oklahoma, and South Carolina).

<sup>290</sup> ALAN DURNING, UNLOCKING HOME: THREE KEYS TO AFFORDABLE COMMUNITIES (2013); PAUL GROTH, LIVING DOWNTOWN: THE HISTORY OF RESIDENTIAL HOTELS IN THE UNITED STATES (1999); Alan Durning, *Bring Back Flophouses, Rooming Houses, and Microapartments*, SLATE (July 17, 2013, 1:27 PM) [http://www.slate.com/articles/business/moneybox/2013/07/sros\\_flophouses\\_microapartments\\_smart\\_cities\\_are\\_finally\\_allowing\\_the\\_right.html](http://www.slate.com/articles/business/moneybox/2013/07/sros_flophouses_microapartments_smart_cities_are_finally_allowing_the_right.html).

<sup>291</sup> *Id.*

<sup>292</sup> See, e.g., Edward Glaeser et al., *Why Have Housing Prices Gone Up?*, 95 AM. ECON. REV. 329 (2005).

<sup>293</sup> See Rachel Swan, *Airbnb's New Dinner Sharing Venture "Completely Illegal" (Update)*, S.F. WEEKLY (June 4, 2014, 1:27 PM), <http://www.sfweekly.com/thesnitch/2014/06/04/airbnbs-new-dinner-sharing-venture-completely-illegal-update>.

<sup>294</sup> DONALD SHOUP, THE HIGH COST OF FREE PARKING (2005).

<sup>295</sup> See, e.g., *id.*; David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1674-75 (2013); Edward Glaeser et al., *Urban Growth and Housing Supply*, 6 J. ECON. GEO. 71 (2006); Timothy B. Lee, *Zoning Laws Are Strangling Silicon Valley*, FORBES, (Sept. 19, 2011, 3:56 PM), <http://www.forbes.com/sites/timothylee/2011/09/19/zoning-laws-are-strangling-silicon-valley/#3c49212d568b>.

Regulatory entrepreneurship has the potential to partially ameliorate some of these problems. For example, it does not seem coincidental that one of Airbnb's toughest fights has been in San Francisco, a city with particularly restrictive zoning rules.<sup>296</sup> San Francisco is located on a peninsula, so the only obvious way for the city to add housing units and business space is to grow vertically.<sup>297</sup> Yet most of San Francisco's neighborhoods restrict maximum building height to forty feet, and severely restrict how those buildings can be used.<sup>298</sup> At the same time, local homeowners have strong incentives to resist development, and they have done so<sup>299</sup>—and the cost of residential and commercial real estate has soared.<sup>300</sup> Airbnb, by enabling rental transactions that would otherwise not be possible, allows greater utilization of existing space and structures, effectively expanding the supply of real estate.<sup>301</sup> Moreover, by allowing property owners and tenants to lease out unused residential space, Airbnb increases the range of uses to which property can be put. Similarly, Airbnb has launched a dinner sharing venture that allows users to host dinner parties for paying guests—effectively turning residential property into small restaurants.<sup>302</sup> Airbnb is hardly unique in this respect; many other regulatory entrepreneurs undermine and reduce the impact of restrictive zoning regimes.<sup>303</sup>

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<sup>296</sup> See, e.g., RYAN AVENT, *THE GATED CITY* (2011).

<sup>297</sup> Kyle Russell, *This One Intersection Explains Why Housing Is So Expensive in San Francisco*, BUSINESS INSIDER (Apr. 8, 2014), <http://www.businessinsider.com/why-housing-is-so-expensive-in-san-francisco-2014-4>.

<sup>298</sup> *Id.*

<sup>299</sup> Kim Mai-Cutler, *How Burrowing Owls Lead To Vomiting Anarchists (Or SF's Housing Crisis Explained)*, TECHCRUNCH (Apr. 14, 2014), <http://techcrunch.com/2014/04/14/sf-housing/>.

<sup>300</sup> Anna Marie Erwert, *San Francisco's Median Rent Hits a Ridiculous \$4,225*, SF GATE (June 2, 2015), <http://blog.sfgate.com/ontheblock/2015/06/02/san-franciscos-median-rent-hits-a-ridiculous-4225/>; Riley McDermid, *Soaring S.F. Rents Restrict Tech Companies Ability to Expand*, BIZ JOURNALS (Jan. 20, 2016), <http://www.bizjournals.com/sanfrancisco/blog/real-estate/2016/01/tech-office-rent.html>.

<sup>301</sup> Lobel, *supra* note 162.

<sup>302</sup> Swan, *supra* note 293; see also Sarah Schindler, *Regulating the Underground: Secret Supper Clubs, Pop-Up Restaurants, and the Role of Law*, 82 U. CHI. L. REV. DIALOGUE 16 (2015) (examining the regulation of “pop-up restaurants” and “underground dining”).

<sup>303</sup> Examples abound. A number of other companies, including Eat With, SupperKing, Feastly, and LeftOverSwap have taken similar approaches to Airbnb's dinner sharing business. Swan, *supra* note 293. Cherry sought to turn every parking spot in San Francisco into a de facto car wash. See note 255, *supra*. HonkMobile, Parking Panda, Rover Park, WhereiPark, and other startups are turning residential driveways into commercial parking lots. Vanessa Lu, *Parking Apps Will Allow Owners to Rent Out Parking Spots by the Hour*, TORONTO STAR (May 21, 2015), <http://www.thestar.com/business/2015/05/21/parking-apps-will-allow-owners-to-rent-out-parking-spots-by-the-hour.html>. Fild, WeFuel, Yoshi, Purple, and Booster Fuels gas up parked cars throughout their areas of operation, effectively turning every parking spot into a gas station while limiting their own real estate footprint in costly downtown areas. Eric Newcomer, *Gas Delivery Startups Want to Fill Up Your Car Anywhere. Is That Allowed?*, BLOOMBERG, May 2, 2016, <http://www.bloomberg.com/news/articles/2016-05-02/gas-delivery-startups-want-to-fill-up-your-car-anywhere-is-that-allowed>.

### 3. The Limits of Regulatory Entrepreneurship

While regulatory entrepreneurship can ameliorate some of the political economy problems described above, it is no panacea. The limits and potential downsides of regulatory entrepreneurship are considerable.

First, regulatory entrepreneurs' ability to change the law will vary significantly depending on the nature of the business and the law in question; this creates real limits on regulatory entrepreneurs' ability to effect legal change. As noted above, platform companies are especially well-suited for regulatory entrepreneurship, but the platform model is not always a good fit for a particular business. Moreover, some policy problems are not amenable to being solved by a business of any type; a successful business based around fundamental tax reform seems unlikely, for example.

Even when regulatory entrepreneurship is a viable business strategy, regulatory entrepreneurs are not saints or altruists; they are profit-seeking actors, and they will generally use their political power to further their profit-seeking goals. Simply put, regulatory entrepreneurs do not want to get the socially optimal result, they want the result that is best for them. This can lead to sub-optimal outcomes in a variety of ways.

To start, it is possible that the regulatory entrepreneur may push social policy away from the optimal outcome. The most direct way this can happen is when the regulatory entrepreneur's business is built on reversing an efficient regulatory regime.<sup>304</sup> When regulatory entrepreneurs change the law through quiet lobbying, without popular support, their behavior is consistent with a story of regulatory capture or rent-seeking, and can produce all of the same negative consequences.

When regulatory entrepreneurs succeed by building popular support for their desired legal changes, there is more cause for optimism that those changes are increasing general welfare. Yet, even in these instances, some caution is merited. Popular support is a good indicator that a change in the law is a positive one, but there are several circumstances in which popular support may give little confidence that a legal change is socially desirable.

For example, a majority of voters may support repealing a socially beneficial law if some of the law's benefits accrue to individuals who are not

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<sup>304</sup> For example, assume that cities' existing taxicab rules were efficient. Uber, by pushing to change those rules, would be moving society away from the optimal outcome. This is potentially consistent with Uber having popular support for its efforts: The efficient regime could involve small losses for many that are dwarfed by corresponding gains for others. Uber may merely have succeeded in organizing the former.

voters.<sup>305</sup> This can happen when a law imposes restrictions on residents to reduce pollution, and the benefits of that reduced pollution extend into other jurisdictions. It can also happen when laws benefit those who do not get to vote in the relevant elections.<sup>306</sup>

Another circumstance in which popular support may be entitled to less weight is when there is a strong paternalism argument. This can arise when there is a reason to believe people will fail to adequately look out for their own interests, such as laws restricting gambling out of concern for the social costs of gambling addictions and the impact on disadvantaged or vulnerable populations;<sup>307</sup> critics of marijuana legalization have raised similar arguments.<sup>308</sup> It can also arise when people have poor information that prevents them from understanding what they are getting or giving up by taking a certain action.<sup>309</sup> Naturally, views will vary on the merits of different laws rooted in morality or paternalism, the point is simply that some laws may be defended as socially important even if unpopular.

Regulatory entrepreneurship can also produce social costs in smaller ways; the regulatory entrepreneur may use its power to improve one policy outcome while worsening others. For example, many economists look favorably on Uber's efforts to increase competition in the taxi industry and to make prices more flexible.<sup>310</sup> At the same time, Uber has often pushed for lower levels of required insurance coverage and less rigorous background checks than regulators favored.<sup>311</sup> It is plausible that Uber's preferred outcomes on these issues are inefficient or socially undesirable, and that the regulators would forge a better rule

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<sup>305</sup> For a discussion of examples of this in the context of shareholder voting, see Jordan M. Barry et al., *On Derivatives Markets and Social Welfare: A Theory of Empty Voting and Hidden Ownership*, 99 VA. L. REV. 1103, 1124-26 (2013).

<sup>306</sup> This could apply to residents who rarely vote, or who are not allowed to vote, such as children, immigrants, or felons.

<sup>307</sup> See Bruce P. Keller, *The Game's the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 YALE L.J. 1569, 1569 (1999) ("For more than a century, Americans have believed that the social ills fostered by gambling outweigh its recreational value. As a result, gambling has been extensively regulated . . ."); see also Christopher Koopman & Jim Pagels, *The Doomed Crusade Against Daily Fantasy Sites*, NATIONAL REVIEW (Nov. 16, 2015, 4:00 AM), <http://www.nationalreview.com/article/427106/doomed-crusade-against-daily-fantasy-sports-christopher-koopman-jim-pagels> (criticizing the legal developments against fantasy sports company sites as paternalistic and not serving the interest of consumer protection).

<sup>308</sup> David Brooks, *Weed: Been There. Done That.*, N.Y. TIMES (Jan. 2, 2014), [nytimes.com/2014/01/03/opinion/brooks-weed-been-there-done-that.html?\\_r=0](http://nytimes.com/2014/01/03/opinion/brooks-weed-been-there-done-that.html?_r=0).

<sup>309</sup> See, e.g., Thomas Lee Hazen, *Filling a Regulatory Gap: It Is Time to Regulate Over-The-Counter Derivatives*, 13 N.C. BANKING INST. 123, 131 (2009) ("One of the longtime premises of securities regulation is that investors need protection not only against those who would take advantage of them, but also against themselves.").

<sup>310</sup> See, e.g., Fox, *supra* note 271.

<sup>311</sup> Weise, *supra* note 24.

without Uber’s influence.<sup>312</sup> Similar questions arise with respect to Uber’s attempts to have its drivers treated as independent contractors instead of employees.<sup>313</sup> Other examples abound.<sup>314</sup>

Even when regulatory entrepreneurs are fighting to change inefficient or otherwise flawed laws, they may produce limited reform measures that meet the company’s goals, but do not address larger social concerns.<sup>315</sup> For example, Tesla’s New Jersey law, considered a huge political victory for Tesla, is quite narrow. It only allows Tesla to operate up to four dealerships in the state.<sup>316</sup> More significantly, it only applies to companies that manufacture zero-emissions vehicles and that were licensed by New Jersey prior to 2014—essentially, only Tesla.<sup>317</sup> In Washington, the bill Tesla secured enables it to open as many dealerships as it likes, but the bill is similarly restricted to companies licensed in the state before 2014, which again means just Tesla.<sup>318</sup> Other innovators—for example, Elio Motors, which has announced plans to produce a car that retails for \$6,800 and gets 84 miles per gallon on the highway—would not qualify.<sup>319</sup> Similarly, when Elio has lobbied states for legislation permitting it to make direct

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<sup>312</sup> See, e.g., Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85 (2015) (discussing the social costs and benefits of Uber, including with regard to safety, privacy, discrimination, and labor standards).

<sup>313</sup> See, e.g., Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, \_ BOSTON U. L. REV. \_ (forthcoming 2016); Jeremias Prassi & Martin Risak, *Uber, Taskrabbit, & Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdfund*, \_ COMP. LABOR LAW & POL’Y J. \_ (forthcoming 2016); Christopher Mims, *How Everyone Gets the “Sharing” Economy Wrong*, WALL ST. J. (May 24, 2015), <http://www.wsj.com/articles/how-everyone-gets-the-sharing-economy-wrong-1432495921>.

<sup>314</sup> For instance, commentators and policymakers have similarly questioned whether Airbnb negatively impacts local housing markets. See, e.g., *San Francisco and New York Weigh Airbnb’s Effect on Rent*, N.Y. TIMES (June 16, 2015), <http://www.nytimes.com/roomfordebate/2015/06/16/san-francisco-and-new-york-weigh-airbnbs-effect-on-rent> (providing a variety of viewpoints on the social and economic impact of Airbnb); Ashlee Kieler, *Senators Call for Inquiry Into Impact of Airbnb And Other Short-Term Rentals on Affordable Housing*, CONSUMERIST (July 14, 2016), <https://consumerist.com/2016/07/14/senators-call-for-inquiry-into-impact-of-airbnb-other-short-term-rentals-on-affordable-housing/> (discussing letter from Senators Brian Schatz, Dianne Feinstein, and Elizabeth Warren to the Federal Trade Commission urging a study of the impact of Airbnb on communities with regard to issues of affordable housing, racial discrimination, and public health and safety).

<sup>315</sup> This may be due to the regulatory entrepreneur’s active desire to limit its competition, or simple apathy for others, but it can also stem from pressure by industry incumbents and regulators. Barry & Caron, *supra* note 61, at 75 (“Regulators worry that new benefits will be abused. Accordingly, they are inclined to write new benefits narrowly—and established-industry groups competing with new businesses may work to reinforce that inclination.”).

<sup>316</sup> N.J.P.L. 2015, Ch. 24, NJAB 3216 (2014-2015).

<sup>317</sup> *Id.*

<sup>318</sup> See, e.g., Todd Bishop, *Tesla Wins Battle Against Auto Dealers in Washington State, But Future Rivals Are Screwed*, GEEKWIRE (Feb. 18, 2014), <http://www.geekwire.com/2014/tesla-wins-battle-auto-dealers-washington-state-future-rivals-screwed/>.

<sup>319</sup> See Lao et al., *supra* note 52.



sales to consumers, the Elio-enabling bills are sufficiently narrow that they do not apply to Tesla.<sup>320</sup>

These types of grandfathering rules are quite common. For instance, the Air Cargo Deregulation Act enabled the growth of the modern air cargo industry and was heavily instigated by Federal Express.<sup>321</sup> The act gave special positive treatment to existing carriers—essentially, Federal Express and Flying Tiger Line—including a one-year window during which they could enter new markets without competition.<sup>322</sup> But perhaps the best example comes from ResponsibleOhio, which put forward a ballot measure to legalize marijuana in Ohio—but only if it was grown at one of ten predetermined sites, all of which were owned by members of ResponsibleOhio.<sup>323</sup> This would have given ResponsibleOhio a monopoly on legal marijuana sales in the state.<sup>324</sup>

More fundamentally, some people might worry about giving business interests additional political power.<sup>325</sup> Further, because much of law involves limiting and managing harms, politically empowering companies that intend to “move fast and break things,” as some startups famously implore their employees to do, could be problematic.<sup>326</sup> For instance, Uber has flouted not only taxi regulations, but also lobbying laws,<sup>327</sup> and the company’s aggressive tactics have bled into other parts of its business as well. In its early operations, Uber was dogged by persistent rumors that it had its employees order and then cancel thousands of rides from competing companies.<sup>328</sup> Perhaps most troubling, a top

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<sup>320</sup> See, e.g., *id.*; Michigan SB 268, available at <http://www.legislature.mi.gov/documents/2015-2016/billintroduced/Senate/htm/2015-SIB-0268.htm>.

<sup>321</sup> Fisch, *supra* note 209.

<sup>322</sup> *Id.*

<sup>323</sup> Graham, *supra* note 58.

<sup>324</sup> *Id.*

<sup>325</sup> Many Americans believe that big corporations and other business interests already wield too much political power. Lydia Saad, *Americans Decry Power of Lobbyists, Corporations, Banks, Feds*, GALLUP (Apr. 11, 2011), <http://www.gallup.com/poll/147026/americans-decry-power-lobbyists-corporations-banks-feds.aspx>.

<sup>326</sup> Ashlee Vance, *Facebook: The Making of 1 Billion Users*, BLOOMBERG BUSINESS (Oct. 4, 2012), <http://www.bloomberg.com/bw/articles/2012-10-04/facebook-the-making-of-1-billion-users>.

<sup>327</sup> Brad Schmidt, *Uber Fined \$2,000 for Violating Portland Lobbying Rules*, OREGON LIVE (Jan. 5, 2016), [http://www.oregonlive.com/portland/index.ssf/2016/01/uber\\_fined\\_2000\\_for\\_violating.html](http://www.oregonlive.com/portland/index.ssf/2016/01/uber_fined_2000_for_violating.html) (reporting that the auditor imposed “the maximum fine because she found that Uber showed a pattern of noncompliance, noncooperation and incomplete disclosures” that “undermine[d] the City’s decision-making process and contributed to the erosion of the public’s confidence in the legislative result”).

<sup>328</sup> Erica Fink, *Uber’s Dirty Tricks Quantified: Rival Counts 5,560 Canceled Rides*, CNN MONEY (Aug. 12, 2014), <http://money.cnn.com/2014/08/11/technology/uber-fake-ride-requests-lyft/>; Rip Empson, *Black Car Competitor Accuses Uber Of DDoS-Style Attack; Uber Admits Tactics Are “Too Aggressive”*, TECHCRUNCH (Jan. 24, 2014), <http://techcrunch.com/2014/01/24/black-car-competitor-accuses-uber-of-shady-conduct-ddos-style-attack-uber-expresses-regret/>. Uber’s competitors have also faced similar accusations. Ryan Lawler, *Uber Strikes Back, Claiming Lyft*

Uber executive suggested hiring private investigators to dig up dirt on the personal lives and families of specific journalists who were critical of Uber.<sup>329</sup> Uber quickly disavowed this plan in response to public outrage.<sup>330</sup>

The point here is not specific to Uber, however, or any particular company. The key takeaway is that, while regulatory entrepreneurship offers promise, there are also reasons to be concerned about some of the effects of empowering regulatory entrepreneurs. At core, regulatory entrepreneurs are motivated to pursue their own interests, which will not always align with the public good.

## CONCLUSION

Regulatory entrepreneurs abound, and include some of the world's most valuable companies, both public and private. Although companies such as Uber, Airbnb, DraftKings, Tesla, and Hyperloop are engaged in vastly different areas of business, they are all regulatory entrepreneurs: Each has built a business in an area fraught with legal issues, such as legal gray areas, unfavorable laws, and potential instability. Each of these companies has done so with the plan of remaking the legal landscape into one that supports its business. To do this, regulatory entrepreneurs blend political and economic actions in innovative ways and have changed the balance of power on many political fronts.

Further, we believe that companies will continue to engage in regulatory entrepreneurship in the future and perhaps will do so even more frequently. As information technology rapidly advances, it lowers the cost of political engagement. This may allow for a feedback loop in which the greater ease with which citizens can express their preferences creates new opportunities for companies to mobilize large groups of people to push for legal changes on their behalf. Companies' successes then make investors increasingly comfortable with regulatory entrepreneurship as a business strategy, which expands the already-significant infrastructure that supports regulatory entrepreneurship companies.

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*Drivers and Employees Canceled Nearly 13,000 Rides*, TECHCRUNCH (Aug. 12, 2014), <http://techcrunch.com/2014/08/12/uber-lyft-slap-fight/>.

<sup>329</sup> Ben Smith, *Uber Executive Suggests Digging Up Dirt on Journalists*, BUZZFEED (Nov. 17, 2014), <http://www.buzzfeed.com/bensmith/uber-executive-suggests-digging-up-dirt-on-journalists#.nklQ88XdP>; Susan Milligan, *A Ride Scare Tactic?*, U.S. NEWS (Nov. 19, 2014), <http://www.usnews.com/opinion/blogs/susan-milligan/2014/11/19/an-uber-executive-suggests-the-company-target-its-media-critics>; Sarah Lacy, *The Moment I Learned Just How Far Uber Will Go to Silence Journalists and Attack Women*, PANDO (Nov. 17, 2014), <https://pando.com/2014/11/17/the-moment-i-learned-just-how-far-uber-will-go-to-silence-journalists-and-attack-women/>.

<sup>330</sup> Mike Isaac, *Uber Executive's Comments Leave Company Scrambling*, N.Y. TIMES (Nov. 18, 2014), <http://bits.blogs.nytimes.com/2014/11/18/emil-michael-of-uber-proposes-digging-into-journalists-private-lives/>.

This raises the question of how regulatory entrepreneurship will ultimately affect the mix of laws and regulations that society enacts. The most successful regulatory entrepreneurs' chief source of political power is their army of activated users. Presumably, members of the public who support a regulatory entrepreneur's agenda are advancing their own self-interest, and thus stand to gain from policy change along with the entrepreneur. Thus, we are cautiously optimistic that the dynamics we describe could encourage more efficient legislative regimes, particularly at the state and local levels, at least in some instances, and could create an environment conducive to innovation more generally. Regulatory entrepreneurs are profit-seeking entities, however; there is strong reason to believe they will use their political power to pursue their own interests, with little regard to other stakeholders or society. Accordingly, regulatory entrepreneurship may have significant negative effects. How these positives and negatives weigh out will vary across different companies and circumstances.