Lawbreaking as Lawmaking

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I. INTRODUCTION

Uber has been described by its most extreme critics as "the root of all evil" for its lawbreaking business tactics, among other things, in pursuit of becoming "too big to ban."[1] Uber, and its sharing economy colleagues such as Lyft and Airbnb, pioneered the use of the Internet and smartphones to broker exchanges between private individuals and break into previously closed service industries. Through its smartphone apps, Uber and Lyft developed the ridesharing industry in competition with professional drivers and taxi cabs, while Airbnb and its rivals generated the short-term home rental industry to compete with hotels and motels. These new businesses often advanced new business models that did not perfectly fit the government regulatory regimes that applied to industry incumbents. They exploited this regulatory uncertainty by beginning operations in defiance of the government and betting on their ability to win legal authorization later on, sometimes much later on. As a result of this lawbreaking posture, one commentator explained of Uber that "[i]t's hard to think of a company that has shown more disdain for governmental

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[1] Jon Evans, *Is Uber the Root of All Evil?*, TECH CRUNCH (Oct. 17, 2016), https://perma.cc/X2VG-CUF8.

authority, or for the safety and welfare of its drivers, riders, and employees."[2]

This negative view of companies like Uber and Lyft is well represented in the corporate law and business literature,[3] but I offer a public-law perspective on such companies' regulatory tactics with a different orientation. While corporate law commentators sometimes describe these aggressive regulatory tactics understandably as "corporate disobedience,"[4] I explore how these companies, precisely by pressing regulatory gray areas, can open democratic opportunity for public input to influence and update law. These "regulatory entrepreneurs," as Elizabeth Pollman and Jordan Barry name them, begin operating their businesses without advance government permission and invest in building up their popularity as a hedge against government later regulating them out of existence.[5] Regulatory entrepreneurs hope that they operate successfully enough that voters value their work and will protect them against government lawmakers who want to impose unwanted regulations. As one critic put it, "If [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."[6] Uber and other regulatory entrepreneurs actively cultivate a base of mass support among their providers and customers, in what some call "platform advocacy," to mobilize political pressure when necessary to influence government lawmakers against hostile regulation.[7]

Although regulatory entrepreneurs are commonly seen as disruptive outlaws, their strategic lawbreaking can be generative

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2 Lindsey Barrett, *The Evil List: Which Tech Companies Are Really Doing the Most Harm? Here Are the 30 Most Dangerous, Ranked by the People Who Know*, SLATE (Jan. 15, 2020), https://perma.cc/4WVZ-JDSH.

3 *See, e.g.*, Abbey Stemler, *The Myth of the Sharing Economy and Its Implications for Regulating Innovation*, 67 EMORY L.J. 197 (2017); Brian M. Sirman, *Loophole Entrepreneurship*, 29 FORDHAM J. CORP. & FIN. L. 33 (2023); Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709 (2019).

4 Pollman, *supra* note 3; Ben Wear, *Wear: Of Uber, Lyft and How 'Corporate Civil Disobedience' Works in Austin*, AUSTIN-AM. STATESMAN (Sept. 24, 2016), https://perma.cc/YJ6T-3L7N.

5 Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383 (2017).

6 Marcus Wohlsen, *Uber's Brilliant Strategy to Make Itself too Big to Ban*, WIRED (July 8, 2014), https://www.wired.com/2014/07/ubers-brilliant-strategy-to-make-itself-too-big-to-ban/#:~:text=By%20drastically%20lowering%20its%20prices,to%20take%20away%20their%20Uber.

7 *See e.g.*, Abbey Stemler, *Platform Advocacy and the Threat to Deliberative Democracy*, 78 MD. L. REV. 105 (2018).

from a public law perspective and present overlooked opportunities for democratic feedback and dynamism. "Lawbreaking" by regulatory entrepreneurs that arguably do not fit existing regulations can force the government to decide how and whether to apply longstanding, sometimes protectionist rules, and it often must do so with reference to public reaction to those companies and the tradeoff of services and costs they present. As a result, regulatory entrepreneurs can expose weaknesses in the existing regulatory regime and permit democratic feedback that the government must confront in deciding how to revise existing laws to these new businesses.

In this sense, I take direction from Eduardo Peñalver and Sonia Katyal in their inventive book *Property Outlaws*.[8] One academic observer explained "Silicon Valley believes you can still break the law and get away with it."[9] But Peñalver and Katyal argue that property outlaws like file-sharers and squatters may force updating and revision of property law, and just so, regulatory entrepreneurs force a kind of active referendum on the usefulness of certain regulations, and these companies that challenge them—in this sense "lawmaking by lawbreaking."

Lawmaking by lawbreaking can be particularly useful when it challenges longstanding regulation that benefits from updating and revision. The most salient examples of regulatory entrepreneurship, as described here, are new companies with pioneering business models that otherwise might have been blocked from industry entry if existing regulations had been applied straightforwardly to them as they had been to incumbent firms in the same business sector. Existing regulations of taxi cabs and hotels, for instance, arguably had served to insulate incumbent firms from new competition and were largely obscured from democratic review and oversight as a practical matter. Lawbreaking by regulatory entrepreneurs not only enabled entry by new upstarts, while empowering the public to weigh in, but it also tended to trigger a re-evaluation and modernizing revision of existing regulations even as they applied to incumbent companies.

The fact that the government is forced into a decision whether and how to regulate, based partially on public response, is critical to regulatory entrepreneurs' potential value from a

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8 EDUARDO M. PEÑALVER & SONIA KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP (Yale U. Press, 2010).

9 Elizabeth Dwoskin, *How a Former Clinton Aide is Rewriting Silicon Valley's Political Playbook*, WASH. POST (Jan. 27, 2017) https://perma.cc/945V-BX53 (quoting Ben Edelman).

public law perspective, as I develop here. Regulatory entrepreneurs reveal gray areas in existing regulatory schemes, some of which are protectionist and incumbent-friendly, and expose how new technology requires regulatory updating. Just as importantly, many regulatory entrepreneurs mobilize the mass public into the policymaking process, or at least make salient the public's attention and reaction to the government's decision. The regulatory entrepreneurs' putative lawbreaking spurs this new lawmaking.

Two important caveats: First, lawmaking by lawbreaking as I describe it applies only when government lawmakers are the regulating entity. Democratically elected government is sensitive to public reaction and thus responsive to the calibrated support that regulatory entrepreneurs try to generate among the public. However, other actors beside the government are, obviously, far less sensitive to public opinion and popular reaction to regulatory entrepreneurs. Private competitors who can bring lawsuits against regulatory entrepreneurs will care little about their public popularity and generally seek to enjoin regulatory entrepreneurs without respect to public sentiment or welfare.

Second, optimism about lawmaking by lawbreaking is not an absolute defense of regulatory entrepreneurs, nor does it express unidirectional skepticism about business regulation. Regulatory entrepreneurs typically force government evaluation of existing regulation and can empower a public voice on those questions, but they may be unsuccessful in winning public support for the regulatory treatment they want. Their effectiveness depends on their ability to generate public support and align with the public interest. As I discuss within, Uber and Lyft successfully won the right to operate in many jurisdictions with their popularity as effective service providers compared to incumbent taxi cab companies. However, they were not uniformly successful in all their efforts, nor were regulatory entrepreneurs successful in other industries, such as e-scooters for one example.

As I describe, voters may support application of certain regulations, and in other cases, voters may not, depending on the regulation, the behavior of the relevant companies, and how the public is affected. The ongoing public referendum on regulation sometimes changes over time as well. Rather than renegade behavior that reliably pressures government into accepting regulatory defiance, this strategy is effective insofar as it wins public support and can empower the public to have an important say in

deciding how laws get updated and enforced, in ways that the public usually would not.

II. REGULATORY ENTREPRENEURS AND LAWBREAKING

So-called sharing economy companies, such as Uber and Airbnb, pioneered a new business strategy in the 2010s.[10] They leveraged the pervasive Wi-Fi capability of smartphones, then becoming widely adopted, to create new opportunities in familiar industry sectors like taxi service and hotels where private individuals could connect to exchange excess capacity in things like car rides and apartments. The Internet enabled these companies to serve as intermediaries, among other things, connecting customers and private service providers in real time more conveniently than ever before. They therefore operated on the cutting edge of technology, business, and government regulation as well.

Defining the sharing economy and its companies is challenging but not the main focus here. Generally speaking, sharing economy companies tended to operate smartphone apps and websites that allowed private individuals to advertise themselves as available part-time service providers or to offer their property for short-term rental. Customers could use the app or website to find these individuals and contract with them on terms brokered by the company.

To take the most familiar example, Uber operated a smartphone app that enabled customers in need of a car ride to find nearby drivers to transport them to their desired destination, much like a taxi service, for a fee listed on the app. Of course, Uber provided a ride service largely similar to a taxi cab, except that the ride was provided by private individual driving their own vehicle, rather than a professional driver operating a duly licensed cab. This form of private ride-sharing enabled Uber to enter the market quickly, mobilize willing drivers on a part-time basis, and do so cheaply in bypassing costly government regulation applicable to the taxi cab industry.

Companies like Uber pressed ahead in defiance of government regulation that arguably applied to their operations. Elizabeth Pollman and Jordan Barry dubbed their strategy as "regulatory entrepreneurship." As they put it, these companies developed a "line of business that has a legal issue at its core—a significant

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[10] *See* Inara Scott & Elizabeth Brown, *Redefining and Regulating the New Sharing Economy*, 19 U. PA. J. BUS. L. 553, 553–56 (2017) (attempting to define the sharing economy).

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."[11] As another commentator described it, these companies were "betwixt and between" existing regulations, which did not contemplate their business model.[12] These companies thus placed a bet, in pushing ahead, on their ability to convince government regulators not to regulate them as traditional service providers in their related industry, or at least regulate them differently on more preferential terms.

Of course, these businesses could have elected for a different approach to their regulatory uncertainty. Instead of forging ahead without government permission, they could have first consulted with government regulators to resolve regulatory uncertainty and bargain in advance for regulatory permission to operate. Many of these companies in the so-called sharing economy used cellular and Wi-Fi technology to bring part-time workers into their industry and rent their private property—cars, apartments, etc.—in ways that would have been difficult to achieve previously. These companies therefore presented genuine policy questions for regulators in terms of how existing regulations might apply to this altogether different business model.

What was distinctive about these companies was not only their use of new technology and operations within a regulatory gray area, but their deliberate strategy to challenge government regulators by pressing ahead without advance permission. This calculation was also at the heart of the controversy surrounding these regulatory entrepreneurs. They assumed that it is, as the cliche goes, better to ask for forgiveness afterward than beg for permission in advance. This assumption underlies the strategy to begin business operations and arguably violates the legal requirements for their industry despite public criticism. In this sense, as one critic put it, their "business model is predicated on breaking the law."[13]

To be fair, in many cases, the legal applicability of existing regulation to regulatory entrepreneurs was unclear. The innovative use of new technology and the enlistment of private part-time

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11 Pollman & Barry, *supra* note 5 at 392.

12 Abbey Stemler, *Betwixt and Between: Regulating the Shared Economy*, 43 FORDHAM URB. L.J. 31, 33 (2016).

13 Benjamin Edelman, *Uber Can't Be Fixed—It's Time for Regulators to Shut It Down*, HARV. BUS. REV. (June 21, 2017), https://perma.cc/X87T-6ZG4.

workers in the sharing economy broke from the traditional operations of the industries these companies entered. Sharing economy companies, for instance, argued that they were essentially brokers between private parties who would not otherwise be governed by regulations intended to apply to professional business providers. The use of technology presented new formulations that regulations had never been intended to restrict. As Pollman and Barry summarized the argument, "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?"[14] Regulatory entrepreneurs exploited this regulatory ambiguity by beginning business and put the onus of the government to decide how to respond.

Ride-share companies Uber and Lyft are the clearest examples of regulatory entrepreneurs that were able to defy regulation and ultimately use these tactics to begin and protect their business. Ride-share companies, by beginning business without government authorization, were able to avoid costly and comprehensive regulation applicable to taxi companies. For example, taxi companies were licensed to operate within a municipality only, in most jurisdictions, if they were able to obtain an expensive medallion that effectively limited the number of cabs in a city. Uber and Lyft argued that they did not fall within these taxi regulations and simply operated without obtaining a medallion.[15] They similarly argued that did not need to comply with minimum insurance requirements for taxis, nor the security safeguards like mandatory fingerprinting to which taxi cab drivers need to submit. Uber and Lyft leapfrogged these costly, and in certain cases prohibitive, restrictions under the claim that they were not technically taxi cab companies, despite the fact that they sold basically the same services, because they were merely brokering rides between customers and independent contracting drivers.

The gamble with this strategy was that the government could respond with strict regulation, treating these new businesses exactly like incumbent firms and subjecting them to the same regulatory treatment. This outcome would potentially shut down their businesses by either prohibiting their business model

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14 Pollman & Barry, *supra* note 5, at 398.

15 Pollman, *supra* note 3, at 734 ("[Uber] was aware that many regulators viewed its operations as illegal, yet it characterized itself as a technology company to which taxi laws did not apply.").

altogether or raising costs sufficiently to make their business model infeasible. Of course, virtually all businesses are sensitive to government regulation, have preferences about whether and how they are regulated, and try to some degree to influence government regulation over them. But another distinguishing feature of regulatory entrepreneurs is the magnitude of uncertainty about regulation and the potentially existential threat that fairly straightforward regulation posed to their businesses. Regulatory entrepreneurs, in many cases, absolutely depended on the government not regulating them in the same way that the government regulated traditional incumbent firms in their industries. They made a huge bet, in beginning business without permission, that regulation would work out their way.

Finally, their strategy for influencing government regulation was to develop public support for their businesses that would be persuasive to government decision-makers. Although many companies care intensely about how they and their competitors are regulated, one traditional model for influencing government decision-makers is an inside lobbying strategy. Companies hire lobbyists, contribute to elected officials, and privately press government decision-makers with their case, typically outside of public awareness. Regulatory entrepreneurs employed lobbyists and privately made their case to government decision-makers as well, but a visible segment of them depended crucially on public opinion to help pressure government decision-makers to their side.

Companies like Uber counted on making their businesses so publicly popular that it would be costly for the government to regulate them too onerously for fear of public backlash. Uber, and a number of other prominent examples, pressed ahead with their business without permission or regulatory clarity precisely because they wanted to become as big and salient as possible as quickly as possible. By quickly becoming a business valued by the public, Uber hoped that government decision-makers would not be able to slam the door on their operations by treating it as a traditional taxi cab company and regulating it as such. One journalist described Uber's strategy as growing not just a customer base for profitability's sake, but consistent with their regulatory entrepreneurial mission, Uber was "cultivating constituents—the people who will complain when someone in power tries to take away their Uber."[16] Uber was thus betting that it could grow

[16] Wohlsen, *supra* note 6.

sufficiently in market share and public popularity to become "too big to ban"[17] before government regulators could decide what to do.

Just as controversially, these companies often engaged in aggressive advocacy, through their apps and other more traditional means, to rally political support from its workers and customers once the government contemplated their regulation. Companies like Uber had at the ready a cellphone app through which it communicated on a regular basis with both workers and customers, two constituencies that grew to have a major stake in the companies' continued operation. They were not shy about advertising their concerns through the app, as well as other channels, to encourage these citizens to express their concerns and press their elected officials toward preferential regulation. This "platform advocacy" could be criticized as deceptive but was an important element of many companies' strategy as a cutting-edge form of astroturfing that updated traditional lobbying tactics.[18]

It is important to underscore one critical condition for this strategy—it is effective only when the government is the initiator of regulation, rather than other parties through a private right of action. Industry competitors, aggrieved customers, and other private actors are likely to care very little about regulatory entrepreneurs' platform advocacy. They are largely unaffected by political pressures and care almost exclusively about their individual welfare. If they possess a private right of action to sue and enforce industry regulations, regulatory entrepreneurs' market share, popularity, and platform advocacy provide little help against private lawsuits in court. Taxi companies, for instance, sued where they could to pressure the government to regulate Uber and Lyft, even if courts largely dismissed these claims. However, democratically elected government has proved sensitive to entrepreneurial moves to become "too big to ban," generate public popularity, and then mobilize supporters to lobby government decision-makers. Government regulators are the audience for this approach. As a consequence, the regulatory entrepreneurial strategy is mainly an approach to fend off government regulatory treatment rather than any defense against individual private claims.

Regulatory entrepreneurs that engage in these tactics are not always sharing economy companies, though there is substantial overlap. As should be apparent, the most prominent company in

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17 *See, e.g.*, Pollman & Barry, *supra* note 5, at 401.

18 *See generally* Stemler, *supra* note 7, at 105.

both categories for my purposes has been Uber. Part IV discusses further some specifics about Uber's strategy, successes, and failures. Uber's ride-sharing competitor Lyft followed a similar model, as have other sharing economy companies such as Airbnb because of the mismatch between their sharing business model and existing regulations that never imagined it.

Other companies outside the sharing economy have used disruptive regulatory entrepreneurial strategies and tactics. Online gambling, and later fantasy sports, businesses have challenged state restrictions on gambling with a related approach of asking forgiveness rather than advance permission. Car manufacturer Tesla violated state laws prohibiting it from owning and operating stores to sell vehicles directly to customers, as well as selling cars with self-driving features that may violate certain laws.[19] Still newer firms such as scooter-rental companies Lime and Bird employed disruptive tactics, such as leaving scooters on sidewalks and streets, that forced government into regulatory responses.[20]

As a consequence, regulatory entrepreneurs have helped pioneer a successful way of challenging state laws with uncertain regulatory application to a new business model. Sharing economy companies were the most prominent examples and fit this approach well given their use of new technology, unforeseen by existing regulatory regimes, and an entrepreneurial ethos borne of the "Move Fast and Break Things" era. But their reasonable success in achieving their aims with state and local government paved the way for subsequent companies to follow their model. In other words, sharing economy companies were crucial in demonstrating the potential for regulatory entrepreneurship and now have established a mode of doing business in areas of regulatory uncertainty that promises to remain relevant going forward.

Much of the regulatory action in these cases occurred most relevantly at the municipal level, sometimes at the state level, but rarely at the national level. Regulatory entrepreneurs certainly were most salient at the local level, where detailed regulations of business operations typically resided. Regulation of taxi cabs and hotels, for instance, were most detailed and relevant at big city level. Occasionally, as with Tesla and online gambling

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19 *See, e.g.*, Daniel A. Crane, *Tesla, Dealer Franchise Laws, and the Politics of Crony Capitalism*, 101 IOWA L. REV. 573 (2016); Kirsten Korosec*, These Car Dealers Really, Really Hate Tesla*, YAHOO FINANCE (Nov. 28, 2016), https://perma.cc/8AZU-5DEM; Chris Bragg, *Inside the Albany Fight Over how Electric Vehicles Are Sold in New York State*, BUFFALO NEWS, Feb. 23, 2023.

20 *See infra*.

companies, regulatory entrepreneurs challenged state law and lobbied state lawmakers for clarifications and changes. Ride-share companies commonly appealed to state legislators, where their lobbying power was sometimes more effective, to pass state law preempting local regulation and allowing them to operate over the objections of local lawmakers.

III. THE DEMOCRATIC POTENTIAL OF LAWBREAKING

Regulatory entrepreneurs raise the hope of democratizing government regulation because a basic premise of their approach is to rally public support to their side over their regulation. A more traditional approach to influencing government regulation is a legislative lobbying model. Under this approach, a company hires lobbyists to meet with lawmakers, often outside public attention, and ply them with argument and bargaining to their side. There's nothing illegal or necessarily untoward about private negotiation with the government to influence industry regulation; it's basically assumed as part of interest group pluralism. But there's no assumption that the public will take an interest in the process, and indeed, it may be in the lawmakers' and industry's interest to exclude the public from the process. Regulatory entrepreneurs, on the other hand, contemplate bargaining with the government in public and rely on public support to give them leverage over lawmakers.

Regulatory entrepreneurs engage public support, not out of the goodness of their heart, but because they calculate that it's an effective political strategy. Regulatory entrepreneurs act as much out of economic self-interest as everyone else. They also engage in traditional lobbying tactics as well, hiring expensive lobbyists, trying to persuade lawmakers behind closed doors, and spending small fortunes on campaign advertising. That said, a key element of their approach, and what differentiates them in large part from other companies, is their public campaigning. As one academic observer put it, "[t]he more they sort of popularize themselves, the stronger their argument becomes" against regulatory crackdowns."[21] And this public strategy may have a healthy incidental effect of democratizing the policymaking process, whether or not the approach ultimately succeeds for the company in getting what it wants from government. A regulatory entrepreneurial bet on public support may lose out. The company may not be popular

[21] Wohlsen, *supra* note 6 (quoting NYU Stern School of Business professor Arun Sundararajan).

with the public or convince enough people of their usefulness. If so, the public may not help out the company's case with the government. Still, even then, it can be salutary, if only that public opinion is made salient and relevant to lawmakers in their process.

The point is that regulatory entrepreneurs are commonly understood as "lawbreakers," but the normative assessment of their lawbreaking is less straightforward than that pejorative suggests. Their lawbreaking can be a form of lawmaking, in spurring the government to consider a novel regulatory question at their prompting and then to take into account, by necessity, the public's reaction to the putative lawbreaking and its effect on public welfare. Not all lawbreaking is equally bad. Indeed, the argument here is that nominally lawbreaking of this sort can be disruptive but healthy and democratizing in the process.

This article takes inspiration from Eduardo Peñalver and Sonia Katyal's work on property lawbreaking, first in a *Pennsylvania Law Review* article[22] and then in their book, both titled *Property Outlaws*. Peñalver and Katyal depict certain forms of property lawbreaking as potentially generative and democratizing. Property rights guarantee stability and predictability to owners and those who transact with them, values that property rights scholars have emphasized in property scholarship. Property lawbreakers, in this view, are transgressive flouters who threaten these crucial values and are rightfully condemned as criminals, both legally and morally.

Peñalver and Katyal argue that property scholars have overlooked the role of property lawbreakers, or in their term property outlaws, in spurring the healthy evolution of lawmaking over time. They cite certain property outlaws such as sit-in protesters during the Civil Rights Movement and urban squatters as laying bare injustices in property entitlements and catalyzing revision of settled understandings of property law with their lawbreaking. Peñalver and Katyal therefore seek to "rehabilitate" property outlaws who, in their view, sometimes expose the need for law reform and change. They beautifully describe how lawbreaking, under the right circumstances, can disrupt stagnant, outdated regimes and move along the productive evolution of the law.

The argument here is that regulatory lawbreaking, by regulatory entrepreneurs, can be similarly generative and

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[22] Eduardo M. Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095 (2007).

democratizing as that by property outlaws. Government regulation, like property law, can be understood as stabilizing and therefore lawbreaking as de-stabilizing to orderly business and governmental conduct. But like property lawbreaking, regulatory entrepreneurs can reveal grey areas in regulatory schemes that demand value choices and modernization rather than simple rote extension to new business practices. Ridesharing companies appeared to be renegade lawbreakers at first, and simple extension of taxi regulations to them would have choked off their businesses before they began. By pressing ahead, these companies reorganized cartelized industries, forced government to accommodate public demand for their services, and it is hard to imagine urban transportation today without them.

It is worthwhile to note, however, that regulatory entrepreneurial companies described here, like Uber and Airbnb, are hardly societal underdogs. Peñalver and Katyal explain that, within their property context, "intentional lawbreaking is a tool of the little people—of the 'have nots.'"[23] Property outlaws resort to lawbreaking precisely because the law favors propertied interests and requires guerrilla tactics by little people to up-end the legal order. By contrast, lawbreakers among regulatory entrepreneurs are well-funded, profit-seeking companies in search of greater wealth and expansion. Although regulatory entrepreneurs were known to style themselves as scrappy underdogs fighting the entrenched order, regulatory entrepreneurs generally enjoyed the backing of wealthy capitalists, hired well-connected insiders as lobbyists, and flexed their financial and political muscle wherever necessary on top of their entrepreneurial tactics.[24] What's more, there are few, if any, expressive interests in play within the strategy of regulatory entrepreneurs described here. To be sure, regulatory entrepreneurs never act with the moral and expressive depth that sit-in protesters during the Civil Rights Movement, for instance, expressed through their lawbreaking. I make no claim that regulatory entrepreneurs in the business context act with that moral dimension in their lawbreaking, regardless of their own claims.[25]

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[23] *Id.* at 1100.

[24] *See, e.g.,* Rosalind S. Helderman, *Uber Pressures Regulators by Mobilizing Riders and Hiring Vast Lobbying Network*, WASH. POST (Dec. 13, 2014), https://perma.cc/8E59-TUMJ (outlining Uber's lobbying efforts in the early 2010s).

[25] *See id.* (describing David Plouffe's parallels between Uber and the 2008 Obama presidential campaign).

Still, lawbreaking by regulatory entrepreneurs, in exposing outdated assumptions and drawing public opinion into the policy-making process, can be quite socially useful. Peñalver and Katyal explain that property outlaws in their work provide both "redistributive" and "informational" value through their lawbreaking. Perhaps regulatory entrepreneurs offer less in terms of redistributive value, but their activity still provides informational value in identifying inefficiency in existing regulatory schemes that require critical revision in light of business innovation and the consumer welfare that it potentially unlocks.

Regulatory entrepreneurs usefully update public policy and regulation and differ from traditional companies because engaging and rallying public support is a critical component of their strategies. Unlike many traditional companies that might prefer to influence government behind the scenes, regulatory entrepreneurs deliberately cultivate public opinion to their side as an important boost to their regulatory battle with the government.

The common playbook for regulatory entrepreneurs, following Uber's model, has been to begin operation despite regulatory ambiguity about their lawfulness under existing government regulation. Then, regulatory entrepreneurs drive for rapid business growth and capture of market share precisely because they hope to establish the widespread attractiveness of their services and to build a large constituency that enjoys and depends upon their business. And finally, regulatory entrepreneurs mobilize this public support among customers and service-providers if and when government regulators attempt to crack down on their operations. Married with traditional lobbying and government influence, regulatory entrepreneurs have innovated in successfully bringing grass-roots mobilization to business lobbying and directly persuading the public of the need to accommodate their business in updating government regulation.

Uber, for instance, began as a car service called UberCab that did not directly challenge the taxi cab business. The original concept for Uber was enlisting limousine drivers to drive for Uber during their downtime, when not otherwise busy, and take ride orders through Uber's iPhone app. Uber at this point restricted itself to registered limo drivers and had not expanded yet into ridesharing. Indeed, when rivals Lyft and Sidecar led the way into ridesharing—paying unregistered, private drivers through an app to pick up peer-to-peer rides in their personal vehicles—

Uber actually lobbied local governments to prosecute them.[26] Uber CEO Travis Kalanick claimed at the time that every trip with Lyft was a "criminal misdemeanor."[27]

Of course, once Uber took the plunge into ridesharing in 2012, with a new service it called UberX, Kalanick changed his view of ridesharing's legality. Uber instead joined Lyft and their competitors in arguing that ridesharing fell into a category of regulatory ambiguity, neither limo service, nor taxi cab service, but simply the brokering of private exchanges between drivers as independent contractors and customers seeking to share a ride for a fee through a cellphone app. Ridesharing services, they contended, were simply not contemplated or covered by state and city regulations. Lyft argued "[w]e fit somewhere in between. These regulations simply do not address this model."[28] As a consequence, rideshare drivers typically, at least as an initial matter, did not comply with local registration, licensing, and insurance requirements, among other things.

For Uber's part, its strategy was to expand its ridesharing business as quickly as possible in the face of this regulatory ambiguity. Uber expanded from 60 cities in 21 countries to 250 cities in 50 countries from 2013 to 2014, but more importantly, Uber focused on supercharging growth in its market share within each particular city.[29] Uber actually dropped its ride rates effectively to nothing in many cases, using promotions to subsidize new ridership, and grow its market share as rapidly as it could.[30] Uber wanted customers to rely on their services and in the future be protective of Uber's continuing existence if and when government regulators decided to crack down. In the meantime, Uber instructed drivers to ignore government warnings to stop business, agreed to pay their fines, and devised means for avoiding detection of their continuing operations.[31] When government lawmakers considered extending existing regulations to restrict Uber, or contemplated new regulations to cover ridesharing, Uber

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26 *See* MIKE ISAAC, SUPER PUMPED: THE BATTLE FOR UBER 86 (2019).

27 Edelman, *supra* note 13 (quoting Kalanick).

28 Patricia Mazzei, *Miami-Dade Looks to Other Cities in Struggle to Deal with Lyft, Uber,* MIAMI HERALD (June 22, 2014), https://perma.cc/5G2N-VYWZ (quoting Veronica Juarez, Lyft director of government relations).

29 Yanelys Crespo, *Uber v. Regulation: "Rider-Sharing" Creates a Legal Gray Area*, 25 U. MIAMI BUS. L. REV. 79, 89 (2016).

30 *See generally* Wohlsen, *supra* note 6.

31 Most infamously, Uber created the Grayball system that identified government officials and made Uber cars undetectable, or grayed out, on their individual phone apps.

leveraged its popularity among customers and drivers to resist those efforts.

UberX's move into Miami, Florida, was a model for the effectiveness of Uber's approach. Miami presented some of the highest regulatory barriers for ridesharing with a well-organized taxi industry and a virtual prohibition on vehicles-for-hire outside medallioned taxi cabs. Miami-Dade County, for instance, at the time required passengers to request a vehicle-for-hire other than a taxi at least an hour in advance of pickup and pay minimum fares more than three times the hourly taxi rate, rendering infeasible any competition to taxi cabs in the county.[32] Uber, per its approach, began ridesharing operations in Miami anyway, operating more than 10,000 drivers in Miami-Dade, and simply paid fines and impound fees for drivers penalized by the county.[33]

Miami-Dade County, under pressure from the taxi cab industry, initially resisted Uber and Lyft. County Commission chair Jean Monestime, a former taxi cab driver, sponsored a bill that Uber claimed would be "one of the most hostile ridesharing laws in the country — and, if passed, would make it impossible for Uber to continue operating."[34] In response, Uber launched a public campaign of "platform advocacy." Uber threatened to withdraw from Miami-Dade County if Monestime's bill was adopted, as it had temporarily from neighboring Broward County under similar circumstances. Uber announced the threat to its huge customer base by email, leveraging its popularity and tech savvy, declaring "WE NEED YOUR VOICE" and urging customers to send emails to their respective commissioners to support Uber in the ridesharing regulatory fight.[35] The email asked customers to "[c]ontact Chairman Monestime to share what partnering with Uber means to you and your family, how your life would change without Uber, and what your service means to riders in Miami-Dade."[36] The *Miami Herald* reported that the hashtag #saveubermiami was first on Twitter's trending list for the city by the afternoon, and Monestime's office was receiving 5 to 10 calls an hour.[37]

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32 *See* Donna Tam, *Miami Officials Propose Law Changes to Allow Uber Service*, CNET (June 18, 2013), https://perma.cc/6ZZZ-TYU3.

33 *See* Crespo, *supra* note 29 at 97–98; Mazzei, *supra* note 28.

34 Douglas Hanks, *In Email Blitz Uber Threatens to Pull Out of Miami-Dade*, MIAMI HERALD (Jan. 14, 2016), https://perma.cc/K8GV-HBZ5.

35 *Id.*

36 *Id.*

37 *Id.*

Monestime and the Miami-Dade County Commission yielded to public pressure. Within days, Monestime withdrew his proposal that Uber opposed, and during a hearing crowded with dozens of Uber drivers in the audience, a pro-Uber ordinance promptly won a preliminary vote by a 10-2 margin.[38] Commissioner Esteban Bovo, an Uber supporter, crowed that "[t]he clientele base for Uber and Lyft have spoken loudly. They're here to stay."[39] Uber won endorsements from the Greater Miami Chamber of Commerce, University of Miami, and Greater Miami Convention and Visitors Bureau, as well as Miami Mayor Carlos Gimenez, among others. Uber won legal approval to operate when the County dismantled much of the regulations applicable to vehicles for hire, including both ridesharing and taxi cabs, as Uber had advocated.[40]

Uber and Lyft followed a similar gameplan across the country and around the globe. Specific tactics varied somewhat from city to city, as did relative success. Uber suspended services in San Antonio, as it did in Broward County, Florida, and threatened to boycott Chicago and New York City. In Austin, Texas, and New York City, Uber introduced a special setting on its app to illustrate the reduction in ride availability and price hikes that Uber claimed would result from threatened regulations in those cities.[41] The ridesharing companies concentrated more on the state legislative level in certain locations, and even introduced ballot measures to achieve their goals in some states. Across this intercity and interstate variation, Uber and Lyft predictably defied existing regulation and regulators to begin, built up customer and driver loyalty by growing their market share of ride-for-hire services without regulatory permission, and then exploited their public popularity in their fights against local regulation.

What was consistent across cities was the ridesharing companies exercised greater leverage where they had successfully entrenched customer reliance on their services such that lawmakers feared public backlash from new regulation. In Miami, as well as Chicago and New York, lawmakers largely backed down when

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38 *See* Douglas Hanks, *Pro-Uber Bill Wins Early Vote in Miami-Dade After Foe Stands Down*, MIAMI HERALD (Jan. 20, 2016), https://perma.cc/H9RY-AHKP.

39 *Id.* (quotation omitted).

40 *See* Douglas Hanks, *Uber and Lyft Are Now Legal in Miami-Dade, and Taxi Owners Vow to Fight Back*, MIAMI HERALD (May 4, 2016), https://perma.cc/7FSA-LM6Q.

41 *See, e.g.,* ISAAC, *supra* note 26, at 116 (describing Uber app setting); Matthew Zeitlin, *How Austin's Failed Attempt to Regulate Uber and Lyft Foreshadowed Today's Ride-Hailing Controversies*, VOX (Sept. 13, 2019), https://perma.cc/7C6L-UCN3 (describing the so-called "de Blasio view" in New York).

Uber threatened to withdraw and trigger a public backlash against the government. As one observer put it, "[a] consistent advantage for Uber is that having achieved a certain critical mass in terms of cars and drivers on the streets, restricting their growth becomes politically sensitive as it may be seen to be frustrating public demand."[42] Where Uber and Lyft successfully established their ridesharing services as a part of daily city life, public demand for accommodating them became a political necessity for lawmakers in formulating a government response to the new model of commercial transportation.

For all Uber's success in forcing cities to adapt to their business model, Uber depended on public support as an integral element of its strategy. Kalanick explained that when Uber began operating in a city, "[w]e are running a political campaign and the candidate is Uber."[43] Where Uber and Lyft were less successful in making themselves publicly popular and essential, lawmakers felt less pressure to accommodate them and were freer to regulate them without fear of electoral reprisal.

For instance, Uber and Lyft failed in Austin, Texas, where three-quarters of Austin residents commuted by car, and reliance on ride-sharing by locals was relatively low.[44] Uber and Lyft ran TV ads that pleaded "Don't take Uber away" and included an option on the app to request a horse-drawn carriage ostensibly inspired by city council member Ann Kitchen, whose "19th century regulations on 21st century technology" Uber claimed would force Uber to depart Austin.[45] The city council put ridesharing regulation to a public vote, which Uber and Lyft lost 56 to 44 percent and then withdrew from the city in 2016.[46] However, there was not public backlash from their disappearance. Surveys found that most Austin residents had little trouble without Uber and Lyft, and a few ridesharing companies willing to comply with Austin's rules filled any gap left by Uber and Lyft.[47] In other words, regulatory entrepreneurship by the ridesharing companies did not guarantee success in achieving their regulatory aims and hinged

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42 Geoffery Dudley, *The Rise of Uber and Regulating the Disruptive Innovator*, 88 POL. Q. 492, 494 (2017) (describing Uber's approach and its success in London).

43 Kara Swisher, *Man and Uber Man*, VANITY FAIR (Nov. 5, 2015), https://perma.cc/QK6A-A7DL (quotation omitted).

44 *See* Zeitlin, *supra* note 41.

45 *See* Nellie Bowles, *'We're Just Getting Started': Inside Austin's Contentious Clash with Uber and Lyft*, THE GUARDIAN (Mar. 10, 2016), https://perma.cc/EB3V-TRU3.

46 *See* Jon Herskovitz, *Uber, Lyft Spend Big, Lose Big in Texas Vote on Driver Fingerprinting*, REUTERS (May 7, 2016), https://perma.cc/HBK7-QFPE.

47 *See* Zeitlin, *supra* note 41.

in large measure on their public support. The lawmaking process appeared to measure and reflect Uber and Lyft's democratic support to some significant degree.[48]

It is important to acknowledge that the ridesharing companies' leveraging of public opinion bolstered a sophisticated, expensive lobbying effort that pitted those companies against the entrenched interests of local taxi cab operators. Ridesharing companies, as well as any regulatory entrepreneurs in other industries, could not achieve their regulatory aims on the strength of public popularity alone. They relied on their ability to rally public support as a way of reinforcing and multiplying their lobbying influence. They played the inside game as well as the outside game in influencing lawmaking. And they were opposed by entrenched, organized interests in the taxi cab industry. Existing taxi cab operators had enormous incentives to block ridesharing companies from entering their cities, where they exercised a practical monopoly on ride services by virtue of the cab medallion system that Uber and Lyft were fighting. When ride-sharing companies began operating in New York City, the price of a taxi medallion plummeted from a high of more than $1 million in 2013 to less than $200,000 by 2016.[49] Similarly, medallion prices dropped from $350,000 to less than $100,000 in Chicago over roughly the same stretch.[50] As a consequence, taxi cab companies fought the ridesharing companies to maintain existing regulations, or impose even more onerous ones, to restrict Uber and Lyft from entry.

In short, regulatory entrepreneurship by ridesharing companies in these examples didn't crowd out or relegate insider lobbying from influencing lawmaking, nor was public opinion necessarily determinative, but the ridesharing companies made public support relevant and salient to the regulatory process in ways that it would not have been. By beginning operations and "breaking the law," and then mobilizing public response, Uber and Lyft helped activate citizen opinion and brought the public into the lawmaking game.

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[48] Uber and Lyft managed to obtain their preferred regulatory treatment at the state legislative level, which later preempted Austin's rulemaking. *See id.*

[49] *See* Raul Hernandez, *A Mysterious Hedge Fund Just Scooped Up the Foreclosed Medallions from New York City's 'Taxi King,'* BUS. INSIDER (Sept. 19, 2017), https://perma.cc/R2XS-SZ84.

[50] *See* City of Chi. Bus. Affs. & Consumer Prot., Medallion Transfer Prices from 1/1/2013 to 12/31/2013; City of Chi. Bus. Affs. & Consumer Prot., 2016 Medallion Transfer Prices.

Other companies have been less successful in copying Uber and Lyft's model and rallying public opinion to their side. For instance, electric scooter companies have tried a similar pattern of becoming too big to ban in a number of American cities in freely distributing their rental scooters without local authorization. Like Uber and Lyft, e-scooter companies Bird, Lime, and others aimed for frictionless rental transportation where customers could find scooters available on city streets on their phone app and then pay to activate a scooter for a fee through the app as well. E-scooter companies hoped they could quickly build customer loyalty and reliance that would bolster them in inevitable conflict over their regulation. As one journalist observed, "Bird and Lime, employed a tried-and-true playbook, written a few years back by fast-growing ride-hail firms Uber and Lyft, as well as Airbnb."[51] Bird and Lime, like Uber and Lyft, achieved rapid early growth, expanding to 125 cities and reaching more than 10 million rental rides in a year after launch, and as a result, hit a $1 billion valuation as quickly as any Silicon Valley startup.[52]

However, despite their growth, the e-scooter companies failed to achieve the same level of public popularity as Uber and Lyft. Their scooters presented a nuisance to citygoers because, in the interest of easy accessibility, they were scattered haphazardly on street sidewalks where they obstructed pedestrian and bicycle traffic, among other things.[53] What's more, unlike ridesharing, e-scooter companies did not provide a welcome, improved alternative to unpopular incumbents. Nor did e-scooter companies newly employ a large group of drivers who became an important, invested constituency supporting ridesharing. Public opinion about the scooter companies was, as a result, far more mixed from the start than early public opinion about ridesharing.[54] The *Los Angeles Times*, after the introduction of Bird and Lime in its city,

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[51] Johana Bhuiyan, *The Bare-Knuckle Tactics Uber Used to Get Its Way with Regulators Are Not Going to Work for Scooter Startups*, VOX (Aug. 30, 2018) https://perma.cc/MU7R-L7VL.

[52] *See* Brandi Vincent, *Driverless Car Hype Gives Way to e-Scooter Mania Among Technorati*, NBC NEWS (Oct. 13, 2018), https://perma.cc/4WPZ-XHDB.

[53] *See, e.g.*, Laura Newberry, *Must Reads: Fed-up Locals Are Setting Electric Scooters on Fire and Burying Them at Sea*, L.A. TIMES (Aug. 10, 2018), https://perma.cc/QJ4G-LASV.

[54] *See generally* Bhuiyan, *supra* note 51; John Stehlin & Will Payne, *Disposable Infrastructures: 'Micromobility' Platforms and the Political Economy of Transport Disruption in Austin Texas*, 60 URB. STUD. 274 (2023).

declared "[t]he most controversial and divisive issue in Los Angeles these days may be scooters."[55]

As a consequence, e-scooter companies were less successful in influencing local regulation than their ridesharing predecessors were. Bird and Lime, for example, tried Uber's tactics in southern California, where they faced regulation from local authorities. In moves "straight from the Uber playbook,"[56] they shut down scooters in Santa Monica and implored their users to email city officials and rally outside City Hall.[57] Nevertheless, the e-scooter companies were not able to pressure lawmakers despite using the same tactics, at least in part because there was divided public opinion about scooters from the start. Even Uber itself, which eventually entered the scooter business, sensed the different politics at play and did not recycle its earlier tactics when it came to e-scooters.[58] Local lawmakers were able to limit e-scooter companies and impound scooters with less backlash from the public and forced e-scooter companies toward "image rehabilitation" and accommodation with lawmakers in place of the rideshare companies' pressure tactics.[59]

In short, regulatory entrepreneurs were able to leverage public support behind their efforts to influence lawmakers so long as they enjoyed tangible and salient public support. Furthermore, regulatory entrepreneurs can lose leverage over lawmakers when early public support falls off as the public learns more about their business. Airbnb, which brokers peer-to-peer housing rentals, used regulatory entrepreneurial strategies to grow quickly during the early 2010s. Airbnb organized "home sharing clubs" in more than 200 cities to coordinate home renters invested in the business and mobilize public support for Airbnb.[60] Airbnb grew quickly without fully complying with local hotel regulations under the theory, much like ridesharing companies and taxi cab

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55 Editorial, *How Much Responsibility Do Scooter Companies Have for the Bad Behavior of Their Users? A Lot*, L.A. TIMES (July 31, 2019), https://perma.cc/QJ4G-LASV.

56 Bhuiyan, *supra* note 48.

57 *See* Kate Cagle, *Scooter Protest Descends on Council Meeting that Has Nothing to Do with Scooters*, SANTA MONICA DAILY PRESS (Aug. 14, 2018), https://perma.cc/7HPK-YMLU.

58 See Andrew J. Hawkins, *Scooter Companies Are Trying to Rehabilitate Their Reputations as Cities Crack Down*, THE VERGE (Aug. 23, 2018) https://perma.cc/HUF2-4WVT.

59 *See, e.g., id.*; Christopher Mims, *Tech's Innovators Are Starting to Ask Permission, Rather than Forgiveness*, WALL ST. J. (July 19, 2018) https://www.wsj.com/articles/brash-tech-innovators-are-starting-to-ask-permission-rather-than-forgiveness-1532016963.

60 *See, e.g.,* Dwoskin, *supra* note 9; Katy Steinmetz, *Inside Airbnb's Plan to Build a Grassroots Political Movement*, TIME (July 21, 2016), https://time.com/4416136/airbnb-politics-sharing-economy-regulations-housing/.

regulations, that peer-to-peer rentals did not constitute hotel services under those regulations. However, public opinion turned against Airbnb over time as Airbnb renters bought up housing stock and drove up rent prices for locals, while conferring very little benefit for local residents.[61] Lawmakers were freer to regulate when Airbnb interests began losing public opinion.

The results from lawmaking by lawbreaking thus are contingent on the direction of public opinion. Regulatory entrepreneurs undertook a strategy that intentionally activated public opinion and made it salient to lawmakers in considering how to update law and regulation. It was hardly obvious that public opinion would have been conscious of these policy questions had regulatory entrepreneurs not pursued their lawbreaking strategy. But public opinion boosted regulatory entrepreneurs' interests with regulators only when the public found the regulatory entrepreneurs' services sufficiently valuable to the community.

When the public was ambivalent or hostile to a regulatory entrepreneur, it did not help the case against regulation, and indeed it may backfire and reinforce arguments for regulation. When Uber's less attractive business practices and other issues with safety and discrimination later publicly arose with their services,[62] even Uber faced much more aggressive regulation as the public became less supportive and more concerned. In other words, regulatory entrepreneurs brought the public into the process and lawmakers began referring to public opinion with respect to the balance of public interest as they continued to weigh how to regulate these evolving businesses.

Critically, lawbreaking by regulatory entrepreneurs, in the sense that they began operating without advance authorization in the face of regulatory uncertainty, gave the public an important

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61 *See, e.g.,* Rosie Bradbury, *Airbnb Is Running Riot in Small-Town America*, WIRED (Dec. 7, 2022, 7:09 AM), https://www.wired.com/story/airbnb-rentals-sedona-arizona/; Mihir Zaveri, *Airbnb Sues New York City Over Limits on Short-Term Rentals*, NEW YORK TIMES (June 1, 2023), https://perma.cc/8PAN-R58S; Katya Schwenk, *Scottsdale Wars Over Short-Term Rentals as Travel Demand Spikes*, PHOENIX NEW TIMES (July 15, 2021, 11:17PM), https://perma.cc/7QYP-LNC4; Chad Mills, *Fla. bill targeting short-term vacation rental rules advances but hears criticism*, ABC ACTION NEWS (Apr. 12, 2023), https://perma.cc/8Q9E-63F7.

62 *See, e.g.,* Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271 (2017). There are obviously many other issues implicated by regulatory entrepreneurs outside the scope of their regulatory strategy in beginning business. *See, e.g.,* Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623 (2017) (assessing data practices of sharing economy companies); Gregory M. Stein, *Inequality in the Sharing Economy*, 85 BROOK. L. REV. 787 (2020) (exploring distributional concerns regarding dynamic pricing by sharing economy companies).

opportunity to assess the value of the new business for itself. If regulatory entrepreneurs had waited for advance permission from the government before getting started, the public may not have been able to experience and evaluate for itself new businesses like ridesharing, Airbnb, and e-scooters. Regulators might have preempted them, as they often tried with ridesharing in the early days. Lawbreaking in this sense gave the public an expanded opportunity to judge for itself about how well these cutting-edge businesses served their community and weigh in on how they should be regulated by lawmakers. This sort of lawbreaking generated relevant public experience and introduced the regulatory question to voters in an accessible and salient way. It created a quasi-referendum on how to regulate new businesses in the face of genuine regulatory ambiguity and allowed the public a prominent voice in a dynamic regulatory lawmaking process.

IV. LAWBREAKING AS DEMOCRATIC REFERENDUM

Lawbreaking by regulatory entrepreneurs is more complex from a normative perspective than commonly received. "Lawbreaking" in the face of genuine regulatory uncertainty and technological change, is not straightforward. Regulatory entrepreneurs, at least in many well-known cases, present a case for regulatory adjustment, or perhaps clarification, when innovation brings new business models that lawmakers had not, and could not have originally contemplated. But what's distinctive for regulatory entrepreneurs like those discussed here is that they present their case for regulatory adjustment by risking lawmakers' ire in forging ahead with operations, without advance permission, and then invite the public to evaluate for itself the value and need for regulatory adjustment in light of its experience with their businesses. Lawbreaking in this sense is also lawmaking from a public law perspective and designed, at least to a salient degree, to invite a democratic judgment on the need for regulatory adjustment.

Previous scholarship on regulatory entrepreneurs tended to focus anxiously on their lawbreaking rather than this lawmaking potential. Like Peñalver and Katyal's property outlaws, regulatory entrepreneurs present some normative complexity. Their lawbreaking threatens disruption to the law abiding order and consciously violates expectations of lawful caution and obedience. Indeed, the entrepreneurial culture tends to glorify this disruption and a guerilla approach toward engaging the government. However, if one can look past their juvenile narcissism and

smugness (not always an easy thing to look past), regulatory entrepreneurs may introduce true technological and business innovation that government should determine how to, or how not to, accommodate. Developments such as ridesharing and Airbnb, among other things, provided new opportunities, with emerging benefits and costs, that regulators might well have stifled away from public scrutiny before they took flight, if not for lawbreaking by regulatory entrepreneurs.

First, lawbreaking as lawmaking empowers the public to participate in the regulatory process. Lawbreaking as lawmaking allows entrepreneurs to demonstrate the potential value, as well as the downside, of their new business model for public assessment. This opportunity is a large part of regulatory entrepreneurs' calculation in pushing ahead without government permission and indeed sometimes in defying government interdiction. At its early inception, Uber decided to ignore a cease-and-desist order from the City of San Francisco that would have shut down their business before a critical mass of the public even tried ordering a ride for hire on a cellphone app. Uber's lawbreaking in the moment allowed it to demonstrate proof of concept with the public in a way that enabled the public to understand the stakes in the regulatory battle to come over ridesharing. Without that experience, the public would have remained in the dark, indifferent and largely ignorant of ridesharing's potential one way or the other.

As a result, lawbreaking as lawmaking may align, to a degree, business companies' natural incentives toward profit-making with democratic participation. At a time when democratic governance seems paralyzed by hyperpartisanship,[63] all the way down to the local level, it needs all the help it can get. Of course, companies are interested in democratic participation only insofar as it materially benefits their interests, but on questions of regulatory authorization to operate, the public might be trusted to be able to judge well for itself on whether it benefits from their business or prefers tighter regulation. On matters such as ridesharing, Airbnb, and online gambling, among other things, the public appears to reason capably about its interests and respond to its experiences with those businesses. My claim is not that Uber and other regulatory entrepreneurs are public-spirited champions of participatory democracy, nor that the politics they cultivated were a model of participatory democracy. Critics raise important

[63] See, e.g., Michael S. Kang, Voting Rights From Judge Frank Johnson to Modern Hyperpolarization, 71 Ala. L. Rev. 793 (2020) (discussing the pathologies of hyperpartisanship).

concerns and qualifications along these lines.[64] But regulatory entrepreneurs helped show the public how it was potentially affected by local regulatory questions and nudged the public to have a voice in those matters, at least in some important subset of cases.

Second, updating regulation to keep pace with technological and societal change is not always automatic or inevitable, but regulatory entrepreneurs have spurred government to do so, and with public opinion as an important influence. Technological and societal change, as the academic literature on innovation considers, can quickly make outdated existing regulation and force rapid reassessment by the government. Pacing regulation with these changes can be challenging and not only fit changed circumstances quite differently from the original regulatory intent, but in fact, make the original regulatory intent entirely obsolete.[65] Tim Wu suggested that these cases of lawbreaking as lawmaking present "an adversarial process where we, the public, can reexamine whether the values and goals that motivated the law's enactment remain important or valuable today."[66] Indeed, with respect to ridesharing, many governments have thrown aside many longstanding regulations of the taxi cab industry as they reassess the original sensibility of those regulations under modern circumstances.

Democratic feedback from lawbreaking as lawmaking is not unidimensionally anti-regulation. As Airbnb founder Nathan Blecharczyk argued, "[W]e're not advocating that there shouldn't be rules. We're just saying that things have evolved and it's worth taking a fresh look from the ground up."[67] Regulation of each industry presents a complicated matrix of costs, benefits, and other considerations that varies from business to business over time. However, lawbreaking by regulatory entrepreneurs can spur the government to re-assess the case for existing and new regulation when there is sufficient public feedback that updating might be necessary and favored by consumers. When this occurs for industries where regulation is longstanding and has not been salient to the public, lawbreaking is all the more valuable as a catalyst. In

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64 *See generally* Stemler, *supra* note 7.

65 *See, e.g.,* Ryan Hagemann, et al., *Soft Law for Hard Problems: The Governance of Emerging Technologies in an Uncertain Future*, 17 COLO. TECH. L.J. 37 (2018) (discussing the pacing problem for regulation).

66 Tim Wu, *Strategic Law Avoidance Using the Internet: A Short History*, 90 SO. CAL. L. REV. POSTSCRIPT 7, 8 (2017).

67 Greg Rosalsky, *Regulate This! A New Freakonomics Radio Podcast*, FREAKONOMICS (Sept. 4, 2014).

those instances, regulatory entrepreneurship can help ensure, as Pollman and Barry argue, "[t]he law and its subsequent enforcement are often defined by the will of the people."[68] Like Peñalver and Katyal's property outlaws, regulatory entrepreneurs are most useful in raising policy questions, and generating relevant experience for public consideration of those questions, rather than dictating any particular regulatory result.

Airbnb's reversal in New York City provides an example of how the public's experience with a regulatory entrepreneur's business model educated the public to reject it. Airbnb likewise pursued a regulatory entrepreneurial strategy in its peer-to-peer short-term housing rental business. Airbnb allowed city residents to rent out their homes to short-term visitors for a designated fees over Airbnb's website. Airbnb charged ahead with operations in cities that restricted short-term rental housing without its members registering as a hotel or complying with a panoply of municipal regulations applicable to hotels. Airbnb organized "home sharing clubs" in more than 200 cities to mobilize its members for advocacy against regulations and banked, at least in part, on its popularity to fend off regulatory restriction.[69] Airbnb's members obtained a new source of income through their home rentals that Airbnb argued helped sustain middle-class home ownership in expensive housing markets. Airbnb won regulatory concessions in some cities while maintaining operations through a lobbying and litigation strategy even in cities that ostensibly restricted short-term home rentals.

Still, Airbnb and rivals like VRBO also gave the public experience with their business and turned public opinion against them in some important ways as well. In some markets, residents complained that landlords were able to make more money renting their units on Airbnb than renting to permanent residents, thereby reducing housing stock for city residents and driving up rents.[70] Neighbors also complained that unsupervised short-term renters were noisy and messy tourists who presented public nuisances for their communities. These concerns helped fortify resistance against Airbnb and, in certain cases such as New York

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68 Pollman & Barry, *supra* note 5, at 401 (quoting Yishan Wong, Comment to *Why Has Airbnb Not Been Sued or Regulated Out of Existence by the Agencies that Regulate the Hotel Industry?*, QUORA (Dec. 13, 2013)).

69 *See* Dwoskin, *supra* note 9; Steinmetz, *supra* note 60.

70 *See* Kyle Barron et al., *The Effect of Home-Sharing on House Prices and Rents: Evidence from Airbnb*, 40 MARKETING SCI. 23 (2020); Andrew Williams, *As Housing Crunch Intensifies Across the Country, Data Gives a Peek at Airbnb Impact*, NBC BOSTON (Aug. 30, 2022), https://perma.cc/7NHL-WB66.

City, led to strict enforcement of restrictions on short-term rentals. Similarly, rideshare companies Uber and Lyft generally acceded to municipal imposition of regulations regarding rider safety and worker conditions, which were more popular with the public and their workers, even while they battled governments over barriers to entry and regulations over terms of competition.[71]

Third, in revisiting existing regulation, regulatory entrepreneurs at times challenged protectionist regimes that served industry incumbents as much as, or more than they served the public. The extensive municipal regulation of taxi cabs and the medallion system originated in the need to raise fare prices and order a chaotic industry with excess supply of cabs in the 1930s.[72] Cities limited the number of taxi cabs operating within their boundaries, set fare rates, imposed driver qualifications, and required insurance minimums and maintenance standards. Over time, however, the medallion system artificially restricted the number of cabs in operation to the benefit of operators and arguably to the detriment of consumers. Restriction of entry into the taxi cab business benefitted incumbent operators by protecting them from competition, a classic example of a regulated industry with concentrated benefits for the operators and diffuse costs for the public.[73] In the view of critics, restriction of entry cartelized the business for incumbents who came to capture regulators, largely outside public scrutiny.

The regulatory entrepreneurship of the ridesharing companies blew open the taxi cab business and reduced the diffuse costs to the public of the longstanding regulatory regime. Lawbreaking by ridesharing companies allowed the public to try out and consider the counterfactual to the existing regime. The companies' ensuing lawmaking success turned on their success in demonstrating their value to consumers that, but for their lawbreaking, might have remained unrealized. For their part, the cab companies fought to protect the de-regulation of their industry and

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71 *See, e.g.,* Ruth Berins Collier et al., *Disrupting Regulation, Regulating Disruption: The Politics of Uber in the United States*, 16 PERSP. POL. 919, 924 (2018) (observing that Uber accepted certain consumer protection and safety regulations while successfully resisting competition regulation of market entry and price controls).

72 *See, e.g.,* Paul Stephen Dempsey, *Taxi Industry Regulation, Deregulation & Reregulation: The Paradox of Market Failure*, 24 TRANSPORTATION L.J. 73 (1996). *See also* Robert Hardaway, *Taxi and Limousines: The Last Bastion of Economic Regulation*, 21 HAMLINE J. PUB. L. & POL'Y 319, 331–32 (2000) (reporting that half of American cities with population more than 100,000 restricted entry into the taxi business by 1934).

73 *See, e.g.,* James B. Speta, *Southwest Airlines, MCI, and now Uber: Lessons for Managing Competitive Entry into Taxi Markets*, 43 TRANSPORTATION L.J. 101 (2016).

clung to their protection from outside competition. "The taxi industry has really locked itself into the mentality that what's worked for them the past 50 or 60 years needs to stay in place . . . I don't know of any business model in the history of mankind that doesn't adjust to realities."[74] After the ridesharing de-regulation of entry, by every account, the costs of rides decreased, the number of available drivers increased, and competition improved accessibility and cleanliness from the status quo ante. Regulatory entrepreneurs, in challenging the similar protection of regulated cartels with the restriction of entry in other businesses, can force re-evaluation of longstanding regulation that no longer serves the public consistent with the original intention and update the law very rapidly.

A similar re-evaluation took place in other regulatory entrepreneurial industries. Tesla challenged state-based requirements for carmakers to franchised onsite distribution to local dealerships. Tesla, following the rideshare model, simply began operating showrooms and selling cars locally in states that prohibited direct sales by carmakers at onsite facilities. These dealership requirements were longstanding but obscure to most people, while Tesla's direct sales through their facilities were reasonably popular and skirted these state laws.[75] Car dealer trade groups in the various states where Tesla operated onsite facilities battled to protect their state-mandated intermediary role in a legislative battle that brought new attention to these state restrictions and is still ongoing. Online fantasy sports businesses have similarly forced re-evaluating of state gambling prohibitions. FanDuel and DraftKings, two industry pioneers that subsequently merged, followed the ridesharing companies' lead by operating in defiance of state prohibitions and pursuing a growth strategy that would make them "too big to ban."[76] While they argued generally that their business should not be categorized legally as gambling, and thus not prohibited, their regulatory advocacy also forced government lawmakers to weigh public opinion, in light of the popularity of fantasy sports, and reconsider the government's longstanding restrictions on gambling as a general matter.

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[74] Douglas Hanks, *The Pros and Cons of Legalizing Uber in Miami-Dade County*, MIAMI HERALD (May 2, 2016), https://perma.cc/FX34-8EV6 (quoting Miami-Dade Commissioner Estaban "Steve" Bovo).

[75] *See generally* Cliff Weathers, *How Tesla and New Car Technologies Could Make Auto Dealers Obsolete*, SALON (Oct. 11, 2014, 12:00 PM), https://perma.cc/FV5P-WCZS.

[76] *See generally* Andrea MacIver, *Shoot Now, Ask Questions Later How Technology-Based Startups DraftKings and FanDuel Are Changing the Way We Do Business*, 35 QUINNIPIAC L. REV. 217 (2017); Pollman & Barry, *supra* note 5.

V. CONCLUSION

American democracy is under greater strain today than it has in many generations. Comparative political scientists Steven Levitsky and Daniel Ziblatt argue that American democracy is "under assault" and "that one of America's two major parties [] turn[ed] away from democracy in the twenty-first century."[77] They point out that Freedom House's Global Freedom Index now scores American democracy behind every established Western democracy and many others.[78] Election law scholar Nick Stephanopoulos asserts that "the dominant theme of contemporary American politics is misalignment" from people's policy views.[79] At this time when American politicians and democratic institutions are failing to faithfully represent public opinion, corporate America seems to be moving toward greater political engagement and active identification with majority opinion on a variety of salient policy questions.[80] As other contributors to this symposium explain, corporations seem eager to associate themselves with popular positions when the moment is right but sometimes suffer blowback when they strategize poorly and antagonize the wrong constituency in the process.

Lawbreaking as lawmaking is less about corporations seeking ingratiation by associating themselves with popular positions, but instead aggressively courting and shepherding public opinion to influence government policymakers their business advantage. Their regulatory entrepreneurial strategy requires them to democratize the regulatory process and win public support. This essay argues that there are democratic benefits when regulatory entrepreneurs try to mobilize the public and bring its voice back into what otherwise would be obscure government matters quietly settled through backroom negotiation. Regulatory entrepreneurs do not necessarily win their way as a result; their success depends on their ability to prove their particular case to the public, and they do not always succeed, as some of the cases discussed above demonstrate. Lawmaking by lawbreaking, despite its negative reputation, may therefore help align public policy with

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77 STEVEN LEVITSKY & DANIEL ZIBLATT, TYRANNY OF THE MINORITY 6 (Crown, 2023).

78 *Id.*

79 NICHOLAS O. STEPHANOPOULOS, ALIGNMENT: A THEORY OF THE LAW OF DEMOCRACY (forthcoming 2024).

80 Jill E. Fisch & Jeff Schwartz, *How Did Corporations Get Stuck in Politics and Can They Escape?*, 3 U. CHI. BUS. L. REV. 325 (2024); Anthony J. Casey & Tom Ginsburg, *Kalven For Corporations: Should For-Profit Corporations Adopt Public Statement Policies?*, 3 U. CHI. BUS. L. REV. 305 (2024).

public opinion, if only periodically, marginally, and imperfectly, at a time when American politics seem to be backsliding in terms of democratic responsiveness.