

Corporate Political Activism 5.0

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Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 **S. Cal. L. Rev.** 383 (2017), available at [SSRN](#).

Regulatory Entrepreneurship by Elizabeth Pollman and Jordan Barry provides a must-read thought provoking descriptive account of how certain companies influence and shape regulation in the modern economy. In short, “regulatory entrepreneurship” describes companies’ attempts to dismantle, weaken, and exploit gray areas in the preexisting regulatory architecture that impede a particular line of business. With clear illustrations the article sheds new light on the tactics employed by some of today’s fastest growing companies such as Uber and Airbnb to surmount regulatory obstacles.

Article’s Findings

The article distinguishes regulatory entrepreneurship (“RE”) from more reactive traditional modes of corporate political activism and lobbying where companies insulate themselves from competition and protect existing profit centers. In the traditional context, the article asserts that changing the law is not necessarily material to a company’s overarching business plan and usually constitutes a relatively small part of their overall operations and focus. By contrast “regulatory entrepreneurship” is more proactive and central to a company’s overarching business strategy and viability.

RE is best thought of as one of multiple forms of political advocacy companies utilize. Generally, companies shape and are shaped by their regulatory environments: they mobilize to alter the regulatory environment or they simply adapt to the preexisting regulatory and political context. RE reflects the former approach. It is distinct from the discussion of “regulatory arbitrage” in the corporate law literature where corporate actors merely adjust taking the “law as given, then try[ing] to take advantage of the law as best they can by making minor alterations to their behavior.” (P. 397.) RE is a process where companies proactively “seek to shape the legal environment to suit their needs instead.” (P. 397.) In practice such distinctions —RE versus regulatory arbitrage— may become blurry. Nevertheless, it is helpful to identify different methods of corporate political advocacy and possibly predict under what circumstances these different methods are likely to be successful and what types of companies are likely to use them. The article helps answer these important questions, and builds upon the literature in this area providing a more textured and contextual narrative.

Certain conditions foster RE: high profit potential; a company’s financial resources; and specific business features such as scalability, connectedness, and mass appeal. Law-related factors also contribute to the success of RE strategies. For example, certain types of regulation are more conducive to RE: regulations characterized by civil fines as opposed to criminal penalties, local and state regulations as opposed to national regulations, and unpopular regulations as opposed to popular ones. Although RE involves companies’ attempts to dismantle or weaken the existing regulatory architecture, actual repeal of regulation is not necessary for success if lax enforcement will suffice. Courts are not the most effective fora for RE; the legislative and executive branches, especially at the local and state level, are the preferred venues for regulatory entrepreneurs to exert influence.

RE is particularly popular among, but not limited to, startups and technology companies such as Uber (taxi regulations) and Airbnb (zoning regulations). Regulatory entrepreneurs tend to be well-financed-platform-oriented-start-ups, prioritizing rapid user growth over immediate profits, made possible by a large well-connected user base and an ecosystem of investors willing to support high risk growth strategies. (Pp. 430-431.) The article further suggests how an aggressive libertarian Silicon Valley start-up culture might contribute to the more aggressive tactics regulatory entrepreneurs use to bring legal change such as: breaking the law (i.e., asking for forgiveness rather than seeking permission from regulators); taking advantage of legal gray areas; mobilizing their users and stakeholders to thwart government action; and rapidly “growing too big to ban.” Pp. 398-406.)

Ultimately, the article predicts that RE will continue to grow along with the influence of regulatory entrepreneurs, due in part to regulatory entrepreneurs’ ability to mobilize large previously unorganized groups toward political action on their behalf. These developments have the potential to impact the balance of power among companies that shape local, state, and national policies in the future.

Article’s Implications

Is regulatory entrepreneurship good or bad?

The authors are noncommittal concerning whether RE results in optimal regulatory outcomes. They acknowledge that the goal of RE is profit, and there is no particular reason to expect companies engaged in RE to act in the public interest. They acknowledge RE’s benefit to the extent that existing laws or regulations may be antiquated, impede innovation, unduly restrict competition, and impose unnecessary costs on entrepreneurs, consumers, and the public. Taking a balanced approach, however, the article recognizes RE’s potential limitations. Regulations targeted by regulatory entrepreneurs, although a bit inefficient, could serve beneficial public welfare purposes that could be undermined and displaced or ignored by a regulatory entrepreneur’s narrow focus. Another important question is whether a regulatory entrepreneur’s top-down mobilization and manufacture of opposition to existing regulations reflects socially desirable outcomes or is simply another chapter in the regulatory capture story where users and consumers are manipulated as part of a broader scheme to influence the regulatory environment.

Another potential downside to RE involves expertise asymmetries between private sector companies and regulators. Regulators may not adequately study or understand the impact of new technological advances leading to suboptimal outcomes and unintended consequences. A standard critique of government bureaucracy is its slow pace responding to technological innovations. Yet delays resulting from prudent due diligence are preferable to hasty uninformed decision-making. RE is not simply a story of regulatory capture at the local, state, and national level, it may also reflect an expertise gap between government and private actors.

Is there a connection between the aggressive tactics employed by regulatory entrepreneurs, company culture, and internal controls?

The article mentions some of the criticisms and earlier scandals surrounding Uber. More recently, a high-profile scandal related to Uber's handling of workplace sexual harassment contributed to the dismissal of Uber's founder and CEO Travis Kalanick. Developments such as these raise questions whether companies engaging in RE are more prone to engage in overly aggressive competitive practices, dismiss widely accepted workplace norms, and have weak internal controls.

In conclusion, the article is an informative balanced assessment of a newer method of corporate political activism that will impact the shape of the regulatory environment and the balance of power among today's companies.

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