

INNOVATION AND INEQUALITY: CONSERVATIVE AND LIBERTARIAN PERSPECTIVES

BETH KREGOR*

Advances in technology have changed the way we work and the jobs that are available. This presents a challenge for us all to consider—a challenge that is not new. It is one that was encountered during the Industrial Revolution and every major economic transformation since then.¹ But the challenge is particularly acute today.

Many occupations have become obsolete quite recently. Others will inevitably be left behind. But, notably, entrepreneurship is not obsolete. In fact, the founders and initial financiers of innovative new companies continue soaring to astronomical wealth, while many workers in other industries are out of jobs.²

Perhaps part of the financial success of innovators is due to the availability of machines to fill the roles previously held by laborers.³ Entrepreneurs do not have to distribute their revenue among so many people. Perhaps part of their success is a reward for their rarity. There is only a limited supply of such creative entrepreneurs.⁴ Entrepreneurs' uncanny ability to identify and fill previously unimagined needs is worth rewarding because of its scarcity. Whatever the explanation for entrepreneurs' wealth, entrepreneurship can be valued and well com-

* Director, Institute for Justice Clinic on Entrepreneurship and Lecturer, University of Chicago Law School; J.D., University of Michigan Law School; B.A., Yale University. This Essay was adapted from remarks given at the 2015 Federalist Society National Student Symposium held at the University of Chicago.

1. See ERIK BRYNJOLFSSON & ANDREW MCAFEE, RACE AGAINST THE MACHINE 36–38 (2011).

2. See David Rotman, *Who Will Own The Robots?*, MIT TECH. REV. (July/Aug. 2015), <http://www.technologyreview.com/featuredstory/538401/who-will-own-the-robots> [<http://perma.cc/DA4L-P5PG>]; Kerry A. Dolan & Luisa Kroll, *Inside the 2014 Forbes 400: Facts and Figures about America's Wealthiest*, FORBES (Sep. 29, 2014), <http://www.forbes.com/sites/kerryadolan/2014/09/29/inside-the-2014-forbes-400-facts-and-figures-about-americas-wealthiest/> [<http://perma.cc/88LW-SAL4>].

3. See BRYNJOLFSSON & MCAFEE, *supra* note 1, at 50–52.

4. See ISRAEL M. KIRZNER, DISCOVERY, CAPITALISM, AND DISTRIBUTIVE JUSTICE 15 (1989).

pensated when it works, even while certain other kinds of work—assembly-line labor, for example—are facing extinction.

The comparison between wealthy entrepreneurs and the endangered species of laborers raises real concerns about inequality, especially because these high-flying entrepreneurs come from a narrow slice of society. If society and the economy allow only certain individuals who are deemed “tech geeks” to succeed, then we are cutting many people out. There is some evidence of that kind of discrimination built into the entrepreneurial ecosystem. Inventors in the technology sector are often free to experiment and grow huge because the law has not regulated cyberspace,⁵ while innovators in traditional service sectors—who may be more likely to come from less educated or less wealthy sectors—are regularly handicapped by legal restrictions.⁶ Venture capital firms are much more likely to fund ventures started by people who fit a certain mold and are missing out on people who may have great ideas but do not look the way that entrepreneurs are expected to look or sound the way that they are expected to sound.⁷ As a result, people with equally excellent ideas have wildly unequal chances at achieving economic success.

Putting aside concerns about inequality per se, a society does not maximize innovation if it allows only a small slice of its population to execute their ideas and insights. Failing to take full advantage of the entire population’s creativity and insight is simply foolish, as every individual is differently situated and

5. See David Kirkpatrick, *Why Government Doesn't Get Tech*, FISCAL TIMES (Nov. 20, 2014), <http://www.thefiscaltimes.com/2014/11/20/Why-Government-Doesnt-Get-Tech> [<http://perma.cc/B863-9F9X>].

6. See, e.g., Larry Downes, *Lessons from Uber: Why Innovation and Regulation Don't Mix*, FORBES (Feb. 6, 2013), <http://www.forbes.com/sites/larrydownes/2013/02/06/lessons-from-uber-why-innovation-and-regulation-dont-mix> [<http://perma.cc/UW33-AD2U>].

7. See, e.g., Candida G. Brush et al., *Women Entrepreneurs 2014: Bridging the Gender Gap in Venture Capital*, BABSON COLL. (Sep. 2014), <http://www.babson.edu/Academics/centers/blank-center/global-research/diana/Documents/diana-project-executive-summary-2014.pdf> [<http://perma.cc/VG23-4FGP>]; Mark Milian, *Do Black Tech Entrepreneurs Face Institutional Bias?*, CNN (Nov. 14, 2011), <http://www.cnn.com/2011/11/11/tech/innovation/black-tech-entrepreneurs/index.html> [<http://perma.cc/X5UJ-Y8TX>]; Vivek Wadhwa, *The Glaring Gender Dilemma Silicon Valley Venture Capitalists Are Hiding From*, WASH. POST (Oct. 7, 2014), <https://www.washingtonpost.com/news/innovations/wp/2014/10/07/the-glaring-gender-dilemma-silicon-valley-venture-capitalists-are-hiding-from> [<http://perma.cc/WBR4-TLYN>].

has a unique view of the world. Not drawing on these diverse perspectives denies society of an untold number of innovations that could benefit everyone.

Each individual, shaped by his own experience and perspective of the world, can see opportunities and solutions in a way that others cannot. No one—constrained as each one is by his own limited worldview—can predict in advance who will be inspired with a winning idea or which idea will in fact win.⁸ The more people who are ideating and tinkering with the world, the better the chances are of benefiting from a great idea and a great execution of that idea.

For these reasons, Americans should not want a single regulatory agency or single venture capital firm to run the world. Rather, Americans should fight for individual liberty, not only because it is good for individuals but also because it benefits society by, among other things, breeding more innovation.

Based on this theoretical groundwork, it is concerning that society is not benefitting from the innovation and creativity of as many people as possible. Too few entrepreneurs are being generated—not because everyone should be an entrepreneur, but because almost everyone should have a job, and it is entrepreneurs, after all, who create jobs.⁹ So if there are to be more employment opportunities and more exciting new innovations, society needs more entrepreneurs who will create jobs and even create new kinds of jobs that are unimaginable today.¹⁰

What should the *government* do, if anything, about the shift in the job market created by new technology replacing humans in various lines of work? One answer to this question might be to make sure displaced workers can become entrepreneurs, too. In fact, all people should be free to imagine new businesses and

8. See FRIEDRICH HAYEK, *THE CONSTITUTION OF LIBERTY* 79–81 (Ronald Hamowy ed., U. Chi. Press 2011).

9. John C. Haltiwanger et al., *Who Creates Jobs? Small vs. Large vs. Young* 27–30 (Nat'l Bureau of Econ. Research, Working Paper No. 16300, 2010), <http://www.nber.org/papers/w16300> [<http://perma.cc/99J9-3R2W>]; Zach Cutler, *Entrepreneurs Are Job Creators*, HUFFINGTON POST (Sep. 6, 2012), http://www.huffingtonpost.com/zach-cutler/entrepreneurs-are-job-creators_b_1861665.html [<http://perma.cc/BH4F-2SN5>].

10. See ERIK BRYNJOLFSSON & ANDREW MCAFEE, *THE SECOND MACHINE AGE* 214 (2014).

pursue them. Is the government doing a good job at ensuring this freedom? No, not at all.

Some of the difficulties faced by Americans, especially poor Americans, in pursuing innovative, entrepreneurial ideas are actually created by the government.¹¹ Regardless of the fast pace of technological development, many industries are stymied by over-regulation.¹² Some of these burdened industries are actually the kinds of industries that poorer Americans might naturally enter into.¹³ For example, the service occupations that have been familiar and historically accessible to poorer individuals are very heavily regulated.

As a result, entrepreneurship and innovation—and even simply work—are placed out of reach for poor Americans. For example, barbershops, transportation businesses, and street vending are very heavily regulated.¹⁴ Conversely, anyone is free to start an “app” business.¹⁵ No government officials check credentials or certifications in the tech sector.¹⁶ Meanwhile, a hair

11. See, e.g., *Building an Opportunity Economy: The State of Small Business and Entrepreneurship: Hearing Before the H. Comm. on Small Bus.*, 114th Cong. (2015) (written testimony of David R. Burton, Senior Fellow in Econ. Policy, Heritage Found., at 3), available at <http://smallbusiness.house.gov/calendar/eventsingle.aspx?EventID=397859> [<http://perma.cc/2TL4-6GQ8>].

12. See, e.g., *Over-Regulated America*, THE ECONOMIST (Feb. 18, 2012), <http://www.economist.com/node/21547789/print> [<http://perma.cc/V4RF-X3BV>].

13. See, e.g., DICK M. CARPENTER II ET AL., LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING 4, (Inst. for Just., 2012), <https://www.ij.org/licensetowork> [<http://perma.cc/R89T-VWLL>]; Mark Adams, *Raising the Minimum Wage Hurts the Poor*, U.S. NEWS (Mar. 11, 2013), <http://www.usnews.com/opinion/blogs/economic-intelligence/2013/03/11/raising-the-minimum-wage-wont-help-the-poor> [<http://perma.cc/6HV3-MBCV>].

14. Gary L. Wolfram, *Barber Shops and the Extravagant Over-Regulation of America*, CAL. POLITICAL REV. (Apr. 29, 2012) <http://www.capoliticalreview.com/top-stories/barber-shops-and-the-extravagant-over-regulation-of-america> [<http://perma.cc/SK99-PP9P>]; Downes, *supra* note 6; N.Y.C. INDEP. BUDGET OFFICE FISCAL BRIEF, *Sidewalk Standoff: Street Vendor Regulations Are Costly, Confusing, and Leave Many Disgruntled* 1 (Nov. 2010), available at <http://www.ibo.nyc.ny.us/iboreports/peddlingnovember2010.pdf> [<http://perma.cc/2HFS-KW8P>].

15. Brian X. Chen, *What It Takes To Be An App Developer*, N.Y. TIMES (Nov. 17, 2012), http://www.nytimes.com/2012/11/18/business/what-it-takes-to-be-an-app-developer.html?_r=0 [<http://perma.cc/64TE-NO83>].

16. See, e.g., U.S. DEP'T OF LABOR, HOW TO BECOME A COMPUTER PROGRAMMER, (Jan. 8, 2014), <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm> [<http://perma.cc/23J5-V3GM>] (showing

braider needs to earn a degree, pass tests, and take continuing education courses to braid hair.¹⁷ This is a strange inequality. It is a burden on Americans with fewer educational opportunities and jeopardizes their ability to work and start businesses.

Nearly one in three occupations in this country now require obtaining some kind of permission from the government.¹⁸ And the need to obtain permission is growing more burdensome year after year, especially in traditional service businesses like hair braiding. It is curious that the law keeps changing in those industries that do not seem to change at all. Should not the law be racing to catch up with technology? Why is the government instead racing to impose yet more requirements on traditional services industries?

One answer—perhaps *the* answer—is that there are many people in these traditional occupations who band together and lobby the government to put these rules in place.¹⁹ Perhaps they do this because they want to protect the public interest. Perhaps they know how to do their jobs safely and properly and want to codify their standards in law. Or perhaps they are just motivated by a protectionist desire to keep new competitors out of industries. Protectionists have little incentive to allow innovators to challenge the status quo and steal their customers. Regardless of the motivation, these popular occupations end up being heavily regulated.

that there is no federal government certification required to become a computer programmer).

17. *Challenging Barriers To Economic Opportunity: Untangling African Hairbraiders from Arizona's Cosmetology Regime*, INST. FOR JUST. LITIG. BACKGROUNDER, <https://www.ij.org/arizona-hairbraiding-background> [http://perma.cc/X96X-8GLL] (last visited Sep. 20, 2015).

18. Morris Kleiner & Alan Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT. J. INDUS. REL. 676, 677 (2010).

19. See generally ELIZABETH KREGOR, SPACE TO WORK: OPENING JOB OPPORTUNITIES BY REDUCING REGULATION, (Inst. for Just., 2013), http://www.bigideasforjobs.org/wp-content/uploads/2013/07/Kregor_Institute-of-Justice_Entrepreneurship_REPORT.pdf [http://perma.cc/V2VT-FXXB]; ADAM B. SUMMERS, OCCUPATIONAL LICENSING: RANKING THE STATES AND EXPLORING ALTERNATIVES 18–19 (Reason Found., 2007), available at <http://reason.org/news/show/occupational-licensing-ranking> [http://perma.cc/8TVY-RD57].

Traditional kinds of service businesses are often “non-routine manual labor.”²⁰ This is the kind of labor that machines are simply not good at performing (at least not yet).²¹ For example, machines are not good at cutting hair, creating new recipes, taking care of the elderly or disabled, or babysitting children. These are all the kinds of occupations in which low-income entrepreneurs who seek help from the Institute for Justice Clinic at the University of Chicago Law School are starting their businesses. These people are not replaceable by machines because these lines of work require art, craft, or subtle human interaction.

One might think that, because these are old-fashioned businesses, they are all the same or that there is no real room for innovation. Why, critics ask, does hair braiding or babysitting or making burgers matter in the context of discussing innovation?

The reason these may look like cookie-cutter businesses is because the government has created the cookie cutter and imposed it on these occupations.²² Take the funeral home business, for example. The government dictates precisely what constitutes a funeral home.²³ So if entrepreneurs try to do something different than what is prescribed—like trying to sell only caskets but not the whole funeral “package”—they will be shut down.²⁴ It is very difficult for entrepreneurs in these kinds of fields to innovate and then receive the rewards for their creativity and productivity.

Thus far, this Essay has dealt mainly with innovations in technology. But not all innovation is technological. Too often, the terms “innovation” and “entrepreneurship” are used to refer to technology or Silicon Valley. This association is not always appropriate. Starbucks took a basic, non-technological business and

20. David H. Autor, Frank Levy & Richard J. Murnane, *The Skill Content of Recent Technological Change: An Empirical Exploration*, Q.J. ECON. 1279, 1283 (2003).

21. See *id.* at 1280–81.

22. See, e.g., *Regulatory Burdens: The Impact of Dodd-Frank on Community Banking: Hearing before the Subcomm. on Econ. Growth, Job Creation, and Reg. Affairs of the H. Comm. on Oversight and Gov't Reform*, 113th Cong. 25 (2013) (statement of Hester Peirce, Senior Research Fellow, Mercatus Center, George Mason University).

23. See, e.g., TENN. CODE ANN. §§ 62-5-305, 62-5-306 (defining the requirements to become a licensed funeral director).

24. See, e.g., *Institute for Justice Breaks Up Tennessee Casket Cartel*, INST. FOR JUST., <http://www.ij.org/craigmiles-v-giles> [<http://perma.cc/9WSR-WBPL>] (last visited Aug. 2, 2015).

reinvented it.²⁵ Dyson took an everyday household appliance and reinvented it.²⁶ There is room to reinvent outside of cyberspace.

What can we do about all of these problems that stamp out the entrepreneurial spark in important segments of our population? First, look at the companies that have infiltrated these old-fashioned service businesses in spite of high regulatory barriers to entry. Uber is battling taxi-company laws.²⁷ Airbnb is battling hotel regulations.²⁸ These are exciting conflicts that are bringing national attention to the problems caused by stifling regulations. We should hope that the focus on these issues will weaken these regulatory schemes and the presumptions that support them. This, in turn, would free other people to innovate and start their own entrepreneurial ventures.

Uber and Airbnb are forces of the democratization of technology.²⁹ They have had the gall and the financing to fight the regulatory status quo in their respective industries. It is important to remember these two factors: Uber and Airbnb have had (1) the gall and (2) the financing to fight back. Entrepreneurs and founders of venture-backed dot-com startups can afford to be cheeky and overlook the law.³⁰ Many have an act-first-see-permission-later mentality. Their approach to many legal obstacles is to just ignore them. But not everybody is in a position to cavalierly disregard the law. Not everyone in society is in the same privileged position to take this sort of risk.

One cannot help but think about what has been happening in the world without concluding that different people have different relationships with the law depending on their position in socie-

25. TAYLOR CLARK, *STARBUCKED: A DOUBLE TALL TALE OF CAFFEINE, COMMERCE, AND CULTURE* 51–56 (2007).

26. ANJA FOERSTER & PETER KREUZ, *DIFFERENT THINKING: CREATIVE STRATEGIES FOR DEVELOPING THE INNOVATIVE BUSINESS* 97–98 (2007).

27. Luz Lazo, *Cab companies unite against Uber and other ride-share services*, WASH. POST (Aug. 10, 2014), http://www.washingtonpost.com/local/trafficandcommuting/cab-companies-unite-against-uber-and-other-ride-share-services/2014/08/10/11b23d52-1e3f-11e4-82f9-2cd6fa8da5c4_story.html [<http://perma.cc/P72N-SPZK>].

28. Roberta A. Kaplan & Michael L. Nadler, *Airbnb: A Case Study in Occupancy Regulation and Taxation*, 82 U. CHI. L. REV. DIALOGUE 103, 108–12 (2015).

29. Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J.L. SCI. & TECH. 413, 473 (2015).

30. Richard Sudek, *Why Working With Entrepreneurs Is Different*, 38 LITIG. NEWS 26, 26 (2013).

ty.³¹ The poor entrepreneurs that I work with at the Institute for Justice Clinic are not going to have the same trailblazing attitude as Uber. Neither will they have the money to hire lobbyists. They lack a safety net to fall back on if their venture fails.

For example, the Clinic had a client, Ken Coats, who wanted to start a dot-com business for expungement. Many people in this country have criminal records that are misleading.³² The law provides a way to clear these records, but the process is very complicated. Ken wanted to create an online service that would allow people to fill out complicated paperwork in a simplified way and, if eligible, expunge their records—just like TurboTax simplifies a complex process by enabling people to complete their tax forms in a simple way.

The Illinois Attorney General ordered Ken to stop pursuing his business because he was not licensed to practice law. Ken had neither the nerve nor the financing to disregard the law or lobby to change the laws that license lawyers. The many people who would have benefitted from Ken's software are now without a solution, and society is worse off for that reason.

The law needs to be cleaned up for all entrepreneurs to flourish. It is too limiting to wait for the next Uber or Airbnb to do the hard work of lobbying. What can the government do to help? It can scour its codes, practices, and policies to make sure that the laws are not creating cookie-cutters for businesses, so that everyone enjoys the freedom to pursue a dream; change an industry; and create value, wealth, and jobs.

31. See ROGER COTTERRELL, *LAW, CULTURE AND SOCIETY: LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY* 41 (2006).

32. See Michelle N. Rodriguez & Maurice Emsellem, *65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks*, NAT'L EMP'T L. PROJECT (2011), <http://www.nelp.org/publication/65-million-need-not-apply-the-case-for-reforming-criminal-background-checks-for-employment> [<http://perma.cc/6L3V-JAPF>].