

# evasive entrepreneurs & the future of governance

how  
innovation  
improves  
economies  
and  
governments

—

Adam Thierer

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“The higher-ups have measures.  
Those lower down have countermeasures.”  
—old Chinese saying

“Exit has an essential role to play in restoring quality  
performance of government, just as in any organization.”  
—Albert O. Hirschman, *Exit, Voice, and Loyalty*



## INTRODUCTION

This book argues that the freedom to innovate is important not only because it expands opportunities for economic growth and human flourishing, but also because entrepreneurial acts and the technological innovations they generate can help improve the quality of government policies and institutions.

Increasingly today, *evasive entrepreneurs*—innovators who don't always conform to social or legal norms—are using new technological capabilities to circumvent traditional regulatory systems, or at least to put pressure on public policymakers to reform or selectively enforce laws and regulations that are outmoded, inefficient, or illogical. Evasive entrepreneurs rely on a strategy of permissionless innovation in both the business world and the political arena.<sup>1</sup> They push back against “the Permission Society,” or the convoluted labyrinth of permits and red tape that often encumber entrepreneurial activities.<sup>2</sup> In essence, evasive

entrepreneurs live out the adage that “it is easier to ask forgiveness than it is to get permission” by creating exciting new products and services without necessarily receiving the blessing of public officials before doing so.<sup>3</sup>

Evasive entrepreneurs are taking advantage of the growth of various technologies of freedom, or what might also be labeled “technologies of resistance.” These technologies are devices and platforms that let citizens circumvent (or perhaps just ignore) public policies that limit their liberty or their freedom to innovate or to enjoy the fruits of innovation.<sup>4</sup> We can think of this phenomenon as “technological civil disobedience.” This term represents the technologically enabled refusal of individuals, groups, or businesses to obey certain laws or regulations because they find those laws or regulations offensive, confusing, time-consuming, expensive, or perhaps just annoying and irrelevant.

The technologies of freedom or resistance that facilitate evasive entrepreneurialism and technological civil disobedience include common tools such as smartphones, ubiquitous computing, and various new media platforms, as well as more specialized technologies such as cryptocurrencies and blockchain-based services, private drones, immersive technologies such as virtual reality, 3D printers, the Internet of Things, and sharing economy platforms and services. That list just scratches the surface,<sup>5</sup> however, and “the list of potentially disruptive technologies keeps getting longer.”<sup>6</sup> “Inventions previously seen only in science fiction,” a 2015 report from the World Economic Forum argues, “will enable us to connect and invent in ways we never have before.”<sup>7</sup>

When innovators and consumers use tools and technological capabilities such as those to pursue a living, enjoy new experiences, or enhance the human experience, they often disrupt legal or social norms in the process. That disruption is not necessarily



a bad thing. In fact, evasive entrepreneurialism can transform our society for the better because it can do the following:

- Help expand the range of life-enriching innovations available to society.
- Help citizens pursue lives of their own choosing—both as creators looking for the freedom to earn a living and as consumers looking to discover and enjoy important new goods and services.
- Help provide a meaningful, ongoing check on government policies and programs that all too often have outlived their usefulness or simply defy common sense.

For those reasons, I will argue that we should tolerate—and often even embrace—a certain amount of evasive entrepreneurialism and even a fair amount of technological civil disobedience. Defending successful acts of disruptive entrepreneurialism is easy after they occur; I seek here to defend the process that leads to those acts in the first place, which often receives less support. I will do so by making the case that the freedom to innovate is essential to human betterment for each of us individually and for civilization as a whole. That freedom deserves to be taken more seriously today. Finally, we should better appreciate how creative acts and the innovations they give rise to can help us improve government by keeping public policies fresh, sensible, and in line with common sense and the consent of the governed.

### **Risk Taking and Innovation Drive Progress and Human Flourishing**

The normative case for evasive entrepreneurialism and the freedom to innovate begins with the fact that, throughout history, many innovations began as what were essentially illegal acts that

were opposed by various government authorities, powerful institutions, or private interests.<sup>8</sup> Economic historian Deirdre N. McCloskey reminds us that “‘betterment’ and ‘improvement’ and especially ‘innovation’ were long seen in Europe as violations of God’s will or as unsettling heresies.”<sup>9</sup> That same negative thinking about innovation later infected other continents and cultures. With the passage of time, however, new technological tools and capabilities quickly go from being considered controversial to being commonplace—and even essential—because citizens usually embrace the improvements to their lives that those tools and capabilities enable.<sup>10</sup>

It often took bold acts by daring dreamers to get us to the point of acceptance, however. “Only those who will risk going too far can possibly find out how far one can go,” the poet T. S. Eliot once noted. By their very nature, innovators and entrepreneurs break with tradition; they are “agents of change.” They refuse to settle for the status quo. They imagine a different and better world, and they take risks to achieve their goals. “What entrepreneurs do,” venture capitalist Vinod Khosla argues, “is they imagine what feels impossible to most people, and take it all the way from impossible, to improbable, to possible but unlikely, to plausible, to probable, to real!”<sup>11</sup> Sometimes that entails working at the margins of social norms and legal rules to change things. Other times it means striking at their very core.

We should be willing to tolerate a certain amount of such outside-the-box thinking because entrepreneurialism expands opportunities for human betterment by constantly replenishing the well of important, life-enhancing ideas and applications.<sup>12</sup> Entrepreneurialism and technological innovation are the fundamental drivers of economic growth and of the incredible advances in the everyday quality of life we have enjoyed over time.<sup>13</sup> They are the key to expanding economic opportunities, choice, and mobility.

This means that there is a *moral* dimension associated with innovation and entrepreneurialism, and with the economic growth and social improvement they help bring about. “Growth is valuable not only for our material improvement,” Benjamin M. Friedman of Harvard University argues, “but for how it affects our social attitudes and our political institutions—in other words, our society’s moral character, in the term favored by the Enlightenment thinkers from whom so many of our views on openness, tolerance, and democracy have sprung.”<sup>14</sup>

This story isn’t over—or at least it shouldn’t be. Innovation can usher in new and better ways of doing things to help us improve the human condition even more.<sup>15</sup> If we hope to achieve still more moonshots—“radical but feasible solutions to important problems”<sup>16</sup>—then we must give innovation and entrepreneurs a wide berth, because in daring to dream of a better future, we open up a world of new opportunities for progress and prosperity.<sup>17</sup> We should be willing to do so even when those innovative acts sometimes challenge existing norms, institutions, and laws.

### The Right to Earn a Living and to Innovate

The normative case for evasive entrepreneurialism also rests on the fact that it is often far too difficult for people to pursue an honest living today.<sup>18</sup> Citizens should have the right to freely pursue a living, not only to provide themselves and their families with income and sustenance but also to enjoy the freedom to engage in rewarding work.<sup>19</sup> Indeed, the freedom to pursue a living is simply an extension of the ideal of the pursuit of happiness that has long been a cherished American value.<sup>20</sup>

Our right to pursue happiness aligns with our corresponding rights to speak, to learn, and to move about the world we inhabit. In the United States, our constitutional heritage secured these rights and made it clear that we possess them simply by nature of

being human beings. So long as we do not bring harm to others, we are generally free to act as we wish. Our rights to pursue happiness and to speak, to learn, and to move freely serve as the basis of more specific freedoms: the freedom to tinker and try or to innovate more generally.

Although many self-described humanist scholars vociferously critique each new technological development, in reality there are few things more human than acts of invention. At its root, innovation involves efforts to discover new and better ways of solving practical human needs and wants. The resulting tools and methods we create to better our lives are called technologies.

Unfortunately, many barriers exist to expanding innovation opportunities and our entrepreneurial efforts to help ourselves, our loved ones, and others. Those barriers include occupational licensing rules,<sup>21</sup> cronyism-based industrial protectionist schemes, inefficient tax schemes, and many other layers of regulatory red tape at the federal, state, and local levels.<sup>22</sup> We should not be surprised, therefore, when citizens take advantage of new technological capabilities to evade some of those barriers in pursuit of their right to earn a living, to tinker with or try doing new things, or just to learn about the world and serve it better.

### Checking Government Power through Constant Innovation

Evasive entrepreneurialism and innovative activities can be valuable in another important way. In an age when many of the constitutional limitations on government power are being ignored or unenforced, innovation itself can act as a powerful check on the power of the state and can help serve as a protector of important human liberties.

Over the past century, both legislative and judicial checks and balances in the United States have been eroded to the point where they now exist mostly in name only. Although we should never

abandon efforts to use democratic and constitutional means of limiting state power—especially in the courts, where meaningful reforms are still most feasible—the ongoing evolution of technology can provide another way of keeping governments in line by forcing public officials to constrain their worst tendencies and undo past mistakes. If they fail to do so, public officials risk losing the allegiance of their more technologically empowered citizenry.

Evasive entrepreneurialism is not so much about evading law altogether as it is about trying to get interesting things done, demonstrating a social or an economic need for new innovations in the process, and then creating positive leverage for better results when politics inevitably becomes part of the story. By acting as entrepreneurs in the political arena, innovators expand opportunities for themselves and for the public more generally, which would not have been likely if they had done things by the book. Ironically, by pushing up against social and legal norms in that fashion, innovators also often increase their chances of getting a fair shake from policymakers, who are forced to acknowledge a clear public interest in the fruits of expanded innovation opportunities.

But evasive entrepreneurialism and the freedom to innovate have even more profoundly salubrious effects on the republic once we conceptualize innovation as an important form of dissent. Dissent plays a vital role in society and especially in politics. Dissent challenges the status quo and encourages fresh thinking about what certain majorities regard as consensus, which may actually be in need of serious rethinking.<sup>23</sup> Disruptive activities rooted in forms of evasive entrepreneurialism and technologically enabled civil disobedience can make dissent even more visible and effective.

The very threat of occasionally opting out of broken or outmoded government policies can help shake up the stodgy status

quo held by various individuals and bodies. We should not be afraid to speak up and challenge authority. Being entrepreneurial and innovative is another important way to make sure our voices are heard and our desires are respected.

Dissenting through innovation can help make public officials more responsive to the people by reining in the excesses of the administrative state, making government more transparent and accountable, and ensuring that our civil rights and economic liberties are respected. Political and judicial efforts aimed at checking government authority must continue, but innovation itself can also help ensure that government accountability and the consent of the governed retain some meaning in this country.

### Living with the Pace of Technological Change

Although a powerful defense of evasive entrepreneurialism and technological civil disobedience can be built on such grounds, it is equally true that we are going to have to learn to live with a certain amount of this disruptive activity. The expansion of modern technological capabilities is rapid relative to the glacial pace of political change. This gap between the ever-expanding frontier of technological possibilities and the ability of governments to keep up with the pace of change is referred to as the “pacing problem,” and it is a phenomenon explored throughout this book.<sup>24</sup>

The pacing problem is the great equalizer in debates over technological governance for two reasons.<sup>25</sup> First, with new technologies multiplying at such a rapid clip and building on top of one another in a symbiotic fashion, we live in an era of rapid-fire “combinatorial innovation.”<sup>26</sup> In this environment, policymakers no longer have the luxury of procrastinating about many important governance decisions. In some cases, governments will catch up or at least slow the tide of technological change.

But new innovators and technologies will arise just as quickly as policymakers are coming to grips with other developments, creating what is referred to as a “competency trap.”<sup>27</sup> In practice, this trap means that completely foreclosing innovative activities in most technological arenas is becoming increasingly challenging, costly, and unrealistic for governments.

The pacing problem manifests itself in another important way. As the public grows more familiar with, and reliant on, new technologies, individuals quickly assimilate those technologies into their lives and expect that more and better things will be around the corner. Once people have new devices and services and come to take them for granted, it becomes extremely hard to take them away. This relationship between technological change and societal expectations acts as an extraordinarily powerful check on the ability of regulators to roll back the clock on innovative activities. Once any particular technological innovation is out of the bottle, it will be increasingly difficult to stuff it back in.<sup>28</sup>

This book will examine the practical challenges that individuals, institutions, and governments will face as the pacing problem accelerates and technological civil disobedience becomes a more regular feature of modern life. Some suggestions will be offered for mitigating the downsides associated with these developments. But the primary focus here will be on providing a blueprint for progress that can help open the door to more opportunities for innovation and help significantly improve human welfare in both the short and long terms.

### Constructive Government Responses

Governments are not completely powerless in the face of challenges associated with technological change. Evasive entrepreneurs and crafty consumers will have their share of rebellious *Star Wars* moments, but we can also expect many *Empire Strikes*

*Back* responses from policymakers. That political pushback will sometimes be swift and occasionally even effective in foreclosing evasive acts. We should never underestimate the power of government to use force to harass and intimidate individuals—especially entrepreneurs who think and act outside the box.

Policymakers face resource and knowledge constraints, however, and they need to consider sensible responses. Cracking down on creative minds and fast-moving technologies is a costly, time-consuming affair. Moreover, enforcement challenges will increase over time, primarily because of the unrelenting nature of the pacing problem as well as the growth of innovation arbitrage, or the movement of innovations to the jurisdictions where they are treated most hospitably. The combined effect of these trends will force public officials to think harder about the hassles of enforcing many of their existing laws and regulations.

It may seem counterintuitive, but the easiest way for governments to discourage technological civil disobedience will not be with ominous threats or formal sanctions aimed at eradicating such practices altogether. If public officials respond to legal evasion by doubling down on illogical policies and prohibitions, the public will not necessarily be any more likely to obey them. In fact, the public might instead increase dissent and disobedience in response. This result is called the “compliance paradox,” which occurs when tighter rules simply lead to increased legal evasion and enforcement nightmares.<sup>29</sup> Thanks to the growth of technologies of resistance and increasing opportunities to engage in innovation arbitrage, the compliance paradox will become a more serious predicament for policymakers in coming decades.

Lawmakers and regulators need to consider a balanced response to evasive entrepreneurialism that is rooted in the realization that technology creators and users are less likely to seek to evade laws and regulations when public policies are more in line



with common sense. Sensible innovation policy means that rules need to be even-handed and leave the door open to new competition and forms of technological change. Lawmakers need to work harder to clean up the morass of confusing policies they have already concocted and bring some sense to the regulation of existing and emerging technologies. But for reasons I will itemize throughout the book, I do not place much faith in the willingness or ability of legislative bodies to undertake those efforts. Vested interests—both inside and outside government—will fight to preserve the status quo at all costs.

Nonetheless, if lawmakers are willing to get the process started, smart public policies should focus on the most serious potential harms associated with new innovations and not get obsessed with far-fetched hypothetical scenarios. Good policy should be reasonable about violations of law at the margin and should treat technological disobedience as a learning opportunity; that is, a chance to recalibrate policies and bring them in line with new societal demands and technological realities. Of course, not all technological risks are equal, and some will require a more sophisticated governance strategy.

Although traditional hard-law approaches will always have their place, policymakers must think more entrepreneurially themselves and create more flexible, adaptive policy approaches for the new challenges they will face.<sup>30</sup> For anticipatory efforts, soft-law mechanisms—multistakeholder processes, industry best practices and standards, agency workshops and guidance documents, educational efforts, and more—can help address both ethical and technical governance questions without completely foreclosing innovation opportunities. Many government officials and agencies are already moving in this direction, recognizing that the combination of the pacing problem and evasive entrepreneurialism is eroding many hard-law policies and

regulatory regimes.<sup>31</sup> Not everyone will be happy with this soft-law approach, but policymakers and other concerned parties need to realize that they have no choice but to undertake serious reform and adopt more flexible governance mechanisms if they hope to craft solutions that can keep pace with the technological changes we are witnessing today.

The common law will also continue to play an important role in addressing policy concerns in a reactive, remedial fashion. Common law mechanisms such as product liability, accident compensation, design defects law, failure to warn, breach of warranty, privacy torts, and trespass laws all have continuing importance. The common law evolves to meet new technological concerns and incentivizes innovators to make their products safer over time to avoid lawsuits and negative publicity.

### Against Utopianism, Toward Pragmatic Change

As I hope to make clear, the approach documented and defended here is not rooted in any sort of grandiose, utopian theory of social or political change. I am not a crypto-anarchist who advocates revolutionary change via technologically enabled upheaval.<sup>32</sup> Nor will there will be any salvation-through-technology<sup>33</sup> pronouncements about innovation leading to the death of politics, the end of all regulatory shenanigans, or the complete demise of special interest influence on government.<sup>34</sup>

Serious political reform aimed at limiting the power of government over our lives and liberties is an extremely difficult, slow-going affair that requires multiple strategies—and a great deal of patience. The bureaucratic state has grown for decades and will likely continue to do so because it is difficult to stop the institutional forces aligned to preserve and extend its reach. But that does not mean that the so-called fourth branch of our government cannot be managed in other ways.<sup>35</sup>

The case I seek to make here may seem radical at first blush, but it is actually rooted in a fairly pragmatic vision and goal: *Beyond boosting economic growth and our standard of living, evasive entrepreneurialism can play an important role in constraining inefficient, unaccountable governmental activities that often fail to reflect common sense and the consent of the governed.*

Writing a half century ago, the economist and political theorist Albert Hirschman observed that “exit has an essential role to play in restoring quality performance of government, just as in any organization.”<sup>36</sup> Innovative acts can be viewed as a type of exit, but ones that fall short of the more radical kind of exit the term conjures up in our minds. We need not call—as Thomas Jefferson once famously did—for repeated revolutionary acts to be undertaken every 20 years in an effort to “preserve the spirit of resistance” and keep government accountable to the people.<sup>37</sup> Along with other sensible governance methods and practical reforms, innovative acts can help us check governments’ worst tendencies, reconsider the wisdom of the status quo in various contexts, and improve the quality of our political institutions and public policies—all without resorting to radical action.

This is why the freedom to innovate is so important and deserves a strong defense. This book seeks to provide that defense.

## **Map of the Book**

The book opens with a simple, but often overlooked, question: Does innovation really matter? As Chapter 1 will show, innovation matters profoundly because it has been the primary driver of economic growth, human flourishing, and the long-term progress and prosperity of civilization. Innovation is fueled by continuous acts of entrepreneurialism and creative destruction, or what might more appropriately be labeled “innovative dynamism.”<sup>38</sup>

Moreover, innovation allows individuals to live lives of their own choosing by making it easier to satisfy basic human needs. Thus, innovative activities are also worthy of a strong defense, even when they may sometimes be “evasive” in character.

That topic sets the stage for a discussion of what evasive entrepreneurialism means and how it has played out in various contexts. Chapter 2 offers several case studies and discusses how innovation arbitrage and jurisdictional competition will make technologically enabled disobedience even more likely in the future. That chapter also considers the prospects for evasion in sectors where technologies are “born free” of existing technocratic regulatory regimes versus “born captive,” or likely to be burdened by existing regulations.

Chapter 3 steps back to consider how technological civil disobedience aligns with more traditional conceptions of civil disobedience. I will also seek to couch today’s examples of disobedience in the broader American tradition of dissent and freedom of association that has deep roots in this nation’s history. That chapter also explores the phenomenon of rule departure, or disobedient acts by government officials who sometimes choose not to enforce rules for various reasons.

Chapter 4 then explains why evasive entrepreneurialism and technologically enabled forms of dissent and disobedience are on the rise and likely to accelerate. Various factors and explanations will be explored, but the fundamental problem identified is that laws and regulations quite often defy common sense and typically fail to keep pace with new social and technological realities. This situation is caused by both the rapid pace of technological change (i.e., the pacing problem) and chronic failures within government itself. The result is less accountability and common sense in how government works today, which in turn encourages more evasion of broken or outmoded policies and processes.

That focus leads to a discussion in Chapter 5 of what may be my most controversial claim: With traditional legal and judicial checks and balances largely failing to keep policy up to date and protect important values and liberties, technological change itself may become the most important check on government power going forward. Critics on both the left and the right of the political spectrum may dispute this claim or be uneasy with it for various reasons. Nonetheless, I will argue that they should appreciate how these developments can have a positive effect on our government by helping make policymakers more accountable to the people and by bringing public policies more in line with common sense and modern realities.

Although evasive entrepreneurialism and technological change can have many positive benefits, they involve some undeniable tradeoffs. Innovation boosters cannot claim that the disruptive nature of creative destruction will be without challenges. Chapter 6 addresses some of the common objections raised by technology critics, who often rally under the banners of humanism and responsible innovation. Many of their concerns are valid and deserve a response—but not the innovation-limiting response that many of them desire. Slowing down or completely foreclosing entrepreneurial opportunities is almost never the wise approach. That idea leads in to the discussion in Chapter 7 about how more flexible and adaptive soft-law solutions are already being used to address these concerns. Soft law is not appropriate in every instance. Some technologies or technological processes give rise to more serious risks and deserve a more formal regulatory response. Chapter 8 grapples with those issues and begins sketching out a theory of technological harm that helps us decide when regulatory interventions are needed and which ones make the most sense.

Chapter 9 concludes by offering a variety of recommendations for how to both protect innovative acts going forward and improve government programs and procedures to encourage entrepreneurialism. Finally, other suggestions will be offered for how innovation advocates, universities, consumers, and entrepreneurs themselves can push for the freedom to both create and enjoy exciting, life-enriching innovations.

### Key Terms Used in This Book

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**Compliance paradox:** The situation in which heightened legal or regulatory efforts fail to reverse unwanted behavior and instead lead to increased legal evasion and additional enforcement problems.

**Demosclerosis:** Growing government dysfunction brought on by the inability of public institutions to adapt to change, especially technological change.

**Evasive entrepreneurs:** Innovators who do not always conform to social or legal norms.

**Free innovation:** Bottom-up, noncommercial forms of innovation that often take on an evasive character. Free innovation is sometimes called “grassroots” or “household” innovation or “social entrepreneurialism.” Even though it is typically noncommercial in character, free innovation often involves regulatory entrepreneurialism and technological civil disobedience.

**Innovation arbitrage:** The movement of ideas, innovations, or operations to jurisdictions that provide legal and regulatory environments most hospitable to entrepreneurial activity. It can also be thought of as a form of jurisdictional shopping and can be facilitated by competitive federalism.

**Innovation culture:** The various social and political attitudes and pronouncements toward innovation, technology, and entrepreneurial activities that, taken together, influence the innovative capacity of a culture or nation.

**Pacing problem:** A term that generally refers to the inability of legal or regulatory regimes to keep up with the intensifying pace of technological change.

**Permissionless innovation:** The general notion that “it’s easier to ask forgiveness than it is to get permission.” As a policy vision, it refers to the idea that experimentation with new technologies and innovations should generally be permitted by default.

**Precautionary principle:** The practice of crafting public policies to control or limit innovations until their creators can prove that they will not cause any harm or disruptions.

**Regulatory entrepreneurs:** Evasive entrepreneurs who set out to intentionally challenge and change the law through their innovative activities. In essence, policy change is part of their business model.

**Soft law:** Informal, collaborative, and constantly evolving governance mechanisms that differ from hard law in that they lack the same degree of enforceability.

**Technological civil disobedience:** The technologically enabled refusal of individuals, groups, or businesses to obey certain laws or regulations because they find them offensive, confusing, time-consuming, expensive, or perhaps just annoying and irrelevant.

**Technologies of freedom:** Devices and platforms that let citizens openly defy (or perhaps just ignore) public policies that limit their liberty or freedom to innovate. Another term with the same meaning is “technologies of resistance.”

## ABOUT THE AUTHOR

Adam Thierer is a senior research fellow at the Mercatus Center at George Mason University. He has spent more than 25 years covering the intersection of emerging technologies and public policy and has authored or edited eight books on topics ranging from media regulation and child safety issues to the role of federalism in high-technology markets. His previous book was *Permissionless Innovation: The Continuing Case for Comprehensive Technological Freedom*.

His writings have appeared in the *Wall Street Journal*, *The Economist*, the *Washington Post*, and *The Atlantic*, and he has testified numerous times on Capitol Hill, before regulatory agencies, and in state legislatures. Thierer has also served on several distinguished online safety task forces, including Harvard University's Internet Safety Technical Task Force and the Obama administration's Online Safety Technology Working Group.

Previously, Thierer was president of the Progress and Freedom Foundation, director of Telecommunications Studies at the Cato Institute, and a senior fellow at the Heritage Foundation. He received his MA in international business management and trade theory at the University of Maryland and his BA in journalism and political science from Indiana University.