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### Entrepreneurial Administration

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## ENTREPRENEURIAL ADMINISTRATION

PHILIP J. WEISER\*

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\* Hatfield Professor of Law and Dean Emeritus, University of Colorado Law School. I served as Senior Advisor for Technology and Innovation to the National Economic Council Director in the White House when some of the policy issues examined in this paper were being addressed, but this article only relies on and reflects the analysis of publicly available documents. For helpful conversations and comments that advanced this project, thanks go to Gabrielle Appleby, Jeff Blattner, William Boyd, John Braithwaite, Ming Chen, Aneesh Chopra, Dave Clark, Nestor Davidson, Ros Dixon, Jonathan Frankel, Ellen Goodman, Dale Hatfield, Sue Heilbronner, Alexia Brunet Marks, Randy Milch, Hiroshi Motomura, Helen Norton, Paul Ohm, Sam Rascoff, Blake Reid, Jonathan Sallet, and J. Pierre de Vries. I also acknowledge valuable feedback from Fordham University's Center on Law and Information Policy seminar series and the University of New South Wales Comparative Constitutional Law Workshop. Finally, I express my appreciation for Robert Bacaj's helpful research assistance, Heather Martin's terrific support, and Jane Thompson's amazing library assistance.

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#### INTRODUCTION

A core failing of today's administrative state and modern administrative law scholarship is the lack of imagination as to how agencies should operate. On the conventional telling, public agencies follow specific grants of regulatory authority, use the traditional tools of notice-and-comment rulemaking and adjudication, and are checked by judicial review. In reality, however, effective administration depends on entrepreneurial leadership that can spearhead policy experimentation and trial-and-error problem-solving, including the development of regulatory programs that use non-traditional tools.

Entrepreneurial administration takes place both at public agencies and private entities, each of which can address regulatory challenges and earn regulatory authority as a result. Consider, for example, that Energy Star, a successful program that has encouraged the manufacture and sale of energy efficient appliances, is developed and overseen by the Environmental Protection Agency ("EPA").<sup>1</sup> After the EPA established the program, Congress codified it and, eventually, other countries followed suit.<sup>2</sup> By contrast, the successful and complementary program encouraging the construction of energy efficient buildings, the well-respected Leadership in Energy and Environmental Design ("LEED") standard, was developed and is overseen by a private organization.<sup>3</sup> After it was developed, a number of governmental authorities endorsed it and

<sup>1</sup> *Energy Star, Origins & Missions*, ENERGY STAR, [https://www.energystar.gov/index.cfm?c=about.ab\\_index%20](https://www.energystar.gov/index.cfm?c=about.ab_index%20) [https://perma.cc/WJF7-ALKG] (last visited Nov. 17, 2017).

<sup>2</sup> The EPA developed the program without any specific congressional mandate to do so; in creating the program, it invoked a broad exhortation from the Clean Act Amendments of 1990. *Id.* ("Section 103(g) of the Clean Air Act directs the Administrator to 'conduct a basic engineering research and technology program to develop, evaluate, and demonstrate non-regulatory strategies and technologies for reducing air pollution.'"). Although the EPA initially developed this program, it later enlisted the Department of Energy ("DOE") as a partner to administer the program. *Id.* In the Energy Policy Act of 2005, Congress codified the program. *See* Energy Policy and Conservation Act, 42 U.S.C. § 6294a (2012) (establishing Energy Star as "a voluntary program to identify and promote energy-efficient products and buildings . . .").

<sup>3</sup> *See Join Our Community*, U.S. GREEN BLDG. COUNCIL, <https://new.usgbc.org/join> [https://perma.cc/9MAJ-G48P] (last visited Nov. 17, 2017).

have encouraged LEED-certified construction projects with both carrots<sup>4</sup> and sticks.<sup>5</sup> Significantly, although neither the Energy Star program nor the LEED standard were originally anticipated by any regulatory statute, both have had tremendous impacts.

The Energy Star and LEED case studies exemplify the sort of innovative regulatory strategies taking root in the modern administrative state.<sup>6</sup> Despite the importance of entrepreneurial administration in practice, scholars have failed to examine the role of entrepreneurial leadership in spurring policy innovation and earning regulatory authority for an agency (or private entity).<sup>7</sup> This oversight is most unfortunate in the case of technologically developing fields where experimental regulatory strategies—as opposed to traditional notice-and-comment rulemaking or adjudication—are often essential.<sup>8</sup> In short, administrative law needs an account of agency action that explains why entrepreneurial leadership matters in government and how agencies should operate.<sup>9</sup>

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<sup>4</sup> See, e.g., *Good to Know: Green Building Incentive Strategies*, U.S. GREEN BLDG. COUNCIL, <https://www.usgbc.org/articles/good-know-green-building-incentive-strategies-0> [<https://perma.cc/R59U-CTPE>] (last visited Nov. 17, 2017).

<sup>5</sup> See *infra* note 266 and accompanying text.

<sup>6</sup> In viewing programs like Energy Star as a form of “regulation,” I am using the term in its broader sense. See CARY COGLIANESE, THE ORG. FOR ECON. CO-OPERATION AND DEV., *MEASURING REGULATORY PERFORMANCE: EVALUATING THE IMPACT OF REGULATION AND REGULATORY POLICY* 9 (2012), [https://www.oecd.org/gov/regulatory-policy/1\\_coglianesse%20web.pdf](https://www.oecd.org/gov/regulatory-policy/1_coglianesse%20web.pdf) [<https://perma.cc/T54V-M28D>] (“[R]egulation seeks to change *behaviour* in order to produce desired *outcomes*.”).

<sup>7</sup> Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 903 (2009) (“Given legal scholars’ long-standing interest in and sensitivity to institutions, it is ironic that this set of questions about institutions is only now starting to penetrate the thinking of those of us in law who study agencies and their operation.”); Gillian E. Metzger, *Administrative Law, Public Administration, and the Administrative Conference of the United States*, 83 GEO. WASH. L. REV. 1517, 1518-19 (2015) (noting administrative law’s disconnect from actual government practices); Philip J. Weiser, *Institutional Design, FCC Reform, and the Hidden Side of Administrative Law*, 61 ADMIN. L. REV. 675, 676 (2009) (calling for more careful scrutiny as to how agencies operate in practice).

<sup>8</sup> Some scholars have noted the limits of notice-and-comment rulemaking and adjudication. E.g., Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1490 (2005) (“[N]otice-and-comment rulemaking is ossifying, and formal adjudication is burdensome.”). Similarly, a number of scholars have noted the rise of alternative models of regulation to adapt to accelerating technological change and globalization. See, e.g., Errol Meidinger, *Multi-Interest Self-Governance Through Global Product Certification Programs*, in RESPONSIBLE BUSINESS? SELF-GOVERNANCE AND LAW IN TRANSNATIONAL ECONOMIC TRANSACTIONS 261, 261 (Olaf Dilling, Martin Herberg & Gerd Winter eds., 2007); Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 448 (2003).

<sup>9</sup> For one recent alternative account, see Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L.

This Article explains that the conventional view of agency behavior—following the specific direction of Congress or the President and using notice-and-comment rulemaking or adjudication processes—does not capture how public agencies and private entities develop innovative regulatory strategies and earn regulatory authority as a result. In particular, this Article explains how governmental agencies like the EPA and private entities like the United States Green Building Council (“USGBC”) (which oversees the LEED standard) depend on entrepreneurial leadership to develop experimental regulatory strategies. It also explains how, in the wake of such experiments, legislative bodies have the opportunity to evaluate regulatory innovations in practice before deciding whether to embrace, revise, reject, or merely tolerate them. To be sure, such experimental strategies are not always preferable to traditional administrative rulemaking and adjudication, but considering experimental strategies and evaluating whether they would be more effective than traditional regulatory approaches is.

Legal scholarship on experimental regulation is well-developed in the context of states serving as laboratories of democracy.<sup>10</sup> Scholars have not, however, discussed the significant role that federal agencies and private bodies can play in experimenting with regulatory strategies in advance of congressional action.<sup>11</sup> Scholars have also failed to examine the role of entrepreneurial leadership in developing successful experiments. This Article does just that, highlighting the importance of entrepreneurial leadership in government, discussing a number of

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REV. 227, 232-34, 243, 266 (2016) (challenging conventional narrative and explaining interactive dynamic of how agencies, the President, Congress, and civil society check one another’s authority and collaborate with one another).

<sup>10</sup> The phrase, of course, comes from Justice Louis Brandeis’s dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”). For a discussion of the use of state agencies to experiment within federal regulatory regimes, see Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 668-73 (2001). Indeed, as Robert Ahdieh points out, a core value of “intersystem[] regulation” (which can include international entities) is the encouragement of regulatory innovation. Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 892 (2006).

<sup>11</sup> To be sure, some commentators have called for changes to the administrative state to allow for experimental regulations. *E.g.*, Sofia Ranchordas, *Innovation Experimentalism in the Age of the Sharing Economy*, 19 LEWIS & CLARK L. REV. 871, 875 (2015) (proposing new model for experimental regulations); Matthew T. Wansley, *Regulation of Emerging Risks*, 69 VAND. L. REV. 401, 430 (2016) (calling for new approach to enabling experiments using traditional administrative law tools); *see also* Nathan Cortez, *Regulating Disruptive Innovation*, 29 BERKELEY TECH. L.J. 175, 182 (2014) (suggesting how timing rules and alternative enforcement mechanisms can be used to manage experimental regulatory strategies).

emerging regulatory experiments, and suggesting how Congress should evaluate such experiments.

This Article proceeds in four parts. Part I examines the traditional model of regulation and the emerging alternative models of agency action through co-regulation, developing best practices through convening, and encouraging private regulation. In so doing, it underscores that entrepreneurial leadership and a culture of experimentation and trial-and-error learning is essential to developing the best solution. Part II discusses the relevant criteria for evaluating such experiments and examines potential objections to the earned regulatory authority model. Part III discusses four case studies of experimental regulatory strategies: (1) the USGBC's development of the LEED standard; (2) the Federal Trade Commission's ("FTC") oversight of information privacy and data security practices; (3) the National Institute of Standards and Technology's ("NIST") development of a strategy for cybersecurity readiness; and (4) the Department of Health and Human Services' ("HHS") oversight of electronic health records. In all of these cases, the private body or federal agency acted to oversee an emerging technology or issue (often in advance of explicit congressional direction and guidance), allowing Congress to observe the strategy in action and evaluate it after the fact. Part IV examines the concept of policy entrepreneurship, explaining both the barriers and opportunities it faces in the modern administrative state.

#### I. THE TRADITIONAL MODEL AND EMERGING REALITIES

The traditional model of regulation relies on notice-and-comment rulemaking and agency adjudication.<sup>12</sup> Under this model, the output—the starting point for traditional administrative law analysis—is generally a form of positive law developed and enforced by a government agency through traditional tools (rulemaking or adjudication).<sup>13</sup> As Professors Charles Sabel and William Simon have observed, this model, “pejoratively called command and control, is identified with rule-bound bureaucracy and deference to ineffable expertise.”<sup>14</sup>

The traditional model can be depicted neatly as a hierarchy.<sup>15</sup> Congress sets a specific policy direction and empowers an administrative agency to implement that policy. The agency, in turn, uses either its rulemaking or adjudication authority to implement that direction. Finally, owing to the agency's expertise and congressional authorization, courts review the agency's action with deference.

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<sup>12</sup> See Jason Solomon, Book Review Essay, *Law and Governance in the 21st Century Regulatory State*, 86 TEX. L. REV. 819, 821-22 (2008).

<sup>13</sup> See *id.*

<sup>14</sup> Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 54 (2011).

<sup>15</sup> See, e.g., Solomon, *supra* note 12, at 820.

Driven by technological changes and globalization, regulatory agencies increasingly are looking to alternative regulatory strategies, many of which fit under the “[N]ew [G]overnance” label.<sup>16</sup> In some cases, innovative regulators experiment with new approaches to address emerging issues and fill gaps in the existing regulatory regime. In other cases, an agency might experiment with a co-regulatory strategy (where the agency integrates its authority with private sector efforts); exercise its authority in creative ways, such as developing best practices through convenings; or rely on private regulation. In that last category, as is the case with Energy Star, the government agency (or private entity, for that matter) can certify compliance with best practices, thereby sharing valuable information with the public and shaping norms of behavior.<sup>17</sup> In each of the above examples, the regulatory agency acts not within a hierarchy, but within a network.<sup>18</sup>

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<sup>16</sup> Bradley C. Karkkainen, “New Governance” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471, 496 (2004) (“New Governance is not a single model, but a loosely related family of alternative approaches to governance, each advanced as a corrective to the perceived pathologies of conventional forms of regulation.”); Solomon, *supra* note 12, at 823 (categorizing New Governance strategies as ones where “public and private actors interact in increasingly complex and collaborative ways to address problems of public policy”); *see also* Charles F. Sabel & Jonathan Zeitlin, *Experimental Governance*, in THE OXFORD HANDBOOK OF GOVERNANCE 169, 169 (David Levi-Faur ed., 2012) (“[E]xperimentalist governance is a recursive process of provisional goal-setting and revision based on learning from the comparison of alternative approaches to advancing them in different contexts.”). Both New Governance and experimental governance follow in the intellectual tradition of Professors Ian Ayres and John Braithwaite’s landmark work in the field. *See* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 4 (Donald R. Harris et al. eds., 1992) (“[B]y working more creatively with the interplay between private and public regulation, government and citizens can design better policy solutions.”).

<sup>17</sup> Professor Michael Livermore, invoking the Energy Star model, calls the combination of information sharing and norm entrepreneurship “preference-directed regulation.” Michael A. Livermore, *Reviving Environmental Protection: Preference-Directed Regulation and Regulatory Ossification*, 25 VA. ENVTL. L.J. 311, 326-32 (2007) (describing way that information provided and norms established by EPA’s Energy Star program have altered consumer preferences).

<sup>18</sup> Sabel & Zeitlin use the concept of “network governance” to describe an experimentalist approach, explaining that it captures the approach of a “reciprocal redefinition of ends and means through an iterated, multi-level cycle of provisional goal-setting and revision.” Sabel & Zeitlin, *supra* note 16, at 175. In a different piece with Simon, Sabel suggested that this model of governance is “‘networked’ and ‘multilevel,’” explaining that it uses “decisionmaking processes that are neither hierarchical nor closed and that permit persons of different ranks, units, and even organizations to collaborate as circumstances demand.” Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1019 (2004).

The traditional, hierarchical model follows a familiar, step-wise approach to regulation.<sup>19</sup> The first step is establishing a standard of conduct.<sup>20</sup> The second step is implementing that standard of conduct, generally through a monitoring regime.<sup>21</sup> The final step is enforcement, in which parties are sanctioned for any failures to comply with the rules.<sup>22</sup> This model of regulatory action still holds strong in some areas, but it is no longer—and should not be—the exclusive strategy for addressing emerging policy issues.

In the emerging, networked environment, regulatory agencies find themselves with a range of options and tools for developing standards of conduct, monitoring behavior in the marketplace, and enforcing or encouraging compliance. The conversation around such emerging solutions has taken a number of forms, sometimes under the headings of “responsive regulation,” “experimentalism,” or “New Governance.” However framed, there is a pressing need for more adaptable approaches that can operate effectively in technologically changing environments or in fields where the circumstances differ across geographic (or other) contexts.<sup>23</sup> To address emerging challenges, regulatory agencies will increasingly be called upon to experiment with non-traditional regulatory strategies, requiring legislatures to monitor and evaluate the effectiveness of innovative regulatory initiatives after the fact.

#### A. *The Limits of the Traditional Regulatory Approach*

The traditional model of regulation is coming under strain in the face of increasing globalization and technological change.<sup>24</sup> Consider, for example, the traditional model of drug and medical device approval used by the Food and Drug Administration (“FDA”). The legacy model of regulation envisioned the FDA reviewing a drug and making an up-or-down decision on whether to approve the marketing of the drug.<sup>25</sup> By putting all of the pressure on the front

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<sup>19</sup> For a discussion of these steps, see Lesley K. McAllister, *Harnessing Private Regulation*, 3 MICH. J. ENVTL. & ADMIN. L. 291, 299-300 (2014) (explaining that there are three aspects of regulation: rule creation, rule implementation, and enforcement).

<sup>20</sup> See *id.* at 299.

<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

<sup>23</sup> See J.B. Ruhl, *Managing Systemic Risk in Legal Systems*, 89 IND. L.J. 559, 600 (2014) (“[T]he conventional regulatory state is not designed for agencies to move quickly and adaptively.”).

<sup>24</sup> FTC Chairwoman Maureen Ohlhausen made the point colorfully, stating that, for rapidly evolving, unregulated industries, “yesterday’s comfortable regulatory bed can quickly become a torture rack for tomorrow’s technologies.” Maureen K. Ohlhausen, *The Procrustean Problem with Prescriptive Regulation*, 23 COMMLAW CONSPECTUS 1, 2 (2014); see also Roger G. Noll, *Impediments to Innovation in Legal Infrastructure*, 8 I/S 62, 62 (2012) (“[A]ccelerated technological progress and globalization of economic relationships have made standard-form solutions to legal problems increasingly inefficient . . .”).

<sup>25</sup> See Sabel & Simon, *supra* note 14, at 86.



end (ex ante), the legacy model creates two sets of challenges: (1) the pre-approval process takes a long time, costs a lot of money, and, in some cases, unnecessarily delays access to potentially beneficial drugs; and (2) the lack of a post-approval review process allows drugs to “be marketed despite evidence that they were doing unanticipated harm.”<sup>26</sup> Unfortunately, the second type of error—a lack of responsiveness to on-the-ground realities—reinforces the first type of error, creating more pressure on the FDA to withhold approval until it satisfies itself that the relevant drug or device will not cause harm.<sup>27</sup>

Congress is well aware of the limits of traditional ex ante regulation. In the food and drug arena, it has worked to update the FDA’s model of regulation. In the Food and Drug Administration Amendments of 2007, for example, Congress gave the FDA increased flexibility to approve drugs and require ongoing research as to how the drugs work, called for an improved Adverse Event Report System at the agency, and mandated a framework for monitoring drug efficacy in practice.<sup>28</sup> More recently, the FDA established fast-tracks for approving drugs and medical devices that promise life-saving breakthroughs.<sup>29</sup> As the FDA explained with respect to the medical device review process, “[r]educing premarket data requirements while increasing postmarket requirements for devices subject to a [Pre-Market Approval], when appropriate, can assist the FDA in making medical devices available to patients sooner than if following the traditional premarket review pathway.”<sup>30</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> For another example of the limits of the traditional model and its principal focus on ex ante regulation, consider the case of wireless spectrum regulation. *See, e.g.*, J. PIERRE DE VRIES & PHILIP J. WEISER, UNLOCKING SPECTRUM VALUE THROUGH IMPROVED ALLOCATION, ASSIGNMENT, AND ADJUDICATION OF SPECTRUM RIGHTS 5-6 (2013), [https://www.brookings.edu/wp-content/uploads/2016/06/THP\\_DeVriesWeiserDiscPaper.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/THP_DeVriesWeiserDiscPaper.pdf) [<https://perma.cc/SY49-4MGA>] (advocating for implementation of specific reforms in spectrum regulation to reduce time-consuming regulatory processes); Philip J. Weiser & Dale Hatfield, *Spectrum Policy Reform and the Next Frontier of Property Rights*, 15 GEO. MASON L. REV. 549, 551-52 (2008) (arguing that, by continuing to use “command and control” model of spectrum regulation, FCC has ignored need for regulatory reform).

<sup>28</sup> Sabel & Simon, *supra* note 14, at 87. In so doing, Congress opted to adhere to the traditional model, rather than take a fundamental reform along the lines urged by Richard Epstein. *See* Richard A. Epstein, *Against Permittitis: Why Voluntary Organizations Should Regulate the Use of Cancer Drugs*, 94 MINN. L. REV. 1, 3-4 (2009) (advocating model where FDA acted only to certify drugs as safe, allowing for more experimentation in market with novel cures).

<sup>29</sup> U.S. FOOD & DRUG ADMIN., EXPEDITED ACCESS FOR PREMARKET APPROVAL AND *DE NOVO* MEDICAL DEVICES INTENDED FOR UNMET MEDICAL NEED FOR LIFE THREATENING OR IRREVERSIBLY DEBILITATING DISEASES OR CONDITIONS 4 (2015), <http://www.fda.gov/ucm/groups/fdagov-public/@fdagov-meddev-gen/documents/document/ucm393978.pdf> [<https://perma.cc/A87Z-CV3D>].

<sup>30</sup> *Id.* at 5.

This Article, while sympathetic to the need to reform existing regulatory structures, does not focus on this issue.<sup>31</sup> Rather, it explains how considerable flexibility for a range of alternative options exists within current structures and is already being used by agencies and private entities to great effect. As such, this Article describes the underappreciated model of earned regulatory authority, calls for a more self-conscious use of this model, and explains how agencies can spearhead and implement this model successfully through entrepreneurial leadership and a culture of trial-and-error problem solving.<sup>32</sup>

The role of a more imaginative approach to regulation relates back to the “responsive regulation” movement led by Ayres and Braithwaite. On their account, regulatory strategies can be conceptualized as an “enforcement pyramid,” with “persuasion” on the bottom and “license revocation” at the top (as the regulatory equivalent of the death penalty for a regulated firm).<sup>33</sup> In all cases, a responsive regulation approach emphasizes dialogue and engagement around the impact of regulatory efforts in practice.<sup>34</sup> In so doing, it underscores that regulators need not always use their traditional tools (notice-and-comment rulemaking and adjudication). Rather than reflexively adopting traditional approaches, regulatory agencies can (1) embrace and oversee self-regulation (enforced self-regulation or co-regulation), (2) convene stakeholders to develop best practices, or (3) persuade parties to develop private regulatory initiatives. The next three Sections discuss each strategy in turn.

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<sup>31</sup> For one thoughtful such discussion, see J.B. Ruhl, *Regulation by Adaptive Management—Is It Possible?*, 7 MINN. J. SCI. & TECH. 21, 25 (2005) (“There is almost universal agreement that problems of this sort demand new approaches to regulation.”). See also Robin Kundis Craig & J.B. Ruhl, *Designing Administrative Law for Adaptive Management*, 67 VAND. L. REV. 1, 14 (2014) (proposing changes to traditional structure of administrative law to allow for agencies to use adaptive management model); David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187, 193 (2010) (explaining how Treasury Department operates free of traditional administrative law constraints in practice, enabling it to use its authority more nimbly and flexibly than other agencies).

<sup>32</sup> In the European Union, for example, there is an effort underway to promote experimental strategies of governance. See EUROPEAN COMM’N, REPORT FROM THE COMMISSION ON EUROPEAN GOVERNANCE 36 (2003), [http://ec.europa.eu/governance/docs/comm\\_rapport\\_en.pdf](http://ec.europa.eu/governance/docs/comm_rapport_en.pdf) [<https://perma.cc/6KLM-FAA4>].

<sup>33</sup> Ayres & Braithwaite, *supra* note 16, at 35. Later, Braithwaite developed the complementary concept of the “strengths-based pyramid” ranging from providing education and persuasion around a valued concept to a singular award for excellent achievement, with certification for best practice somewhere in the middle. See JOHN BRAITHWAITE ET AL., REGULATING AGED CARE: RITUALISM AND THE NEW PYRAMID 319 (2007). For an overall discussion of Braithwaite’s thinking, see generally John Braithwaite, Fasken Lecture, *The Essence of Responsive Regulation*, 44 U.B.C. L. REV. 475 (2011).

<sup>34</sup> See Braithwaite, *supra* note 33, at 476.

B. *The Promise of Co-Regulation*

Even when using its traditional authority, an agency can operate more nimbly and effectively by integrating its efforts with private bodies who have expertise in the field. Where that integration involves the explicit embrace, oversight, and enforcement of actions by private bodies, the model of regulation is aptly described as “co-regulation.”<sup>35</sup> For a successful use of co-regulation, consider the FCC’s use of frequency coordinators to assign rights to use the wireless spectrum. As I have explained previously:

One notable self-regulatory program that the FCC has overseen is the use of frequency coordinators, which manage voluntary cooperation in the use of point-to-point microwave links and private land mobile radio systems. In that context, the coordinator evaluates requests for new licenses and certifies that such new licenses will not cause undue interference to established users. Consequently, while the FCC is the authority that grants or denies licenses as a formal matter, it routinely relies on and defers to the judgment of the frequency coordinator. This deference to the frequency coordinator facilitates cooperation around the use of the relevant licenses.<sup>36</sup>

The importance of this co-regulation model is that the FCC’s delegation of authority enables practical problem-solving on the ground by the frequency coordinator. As Dale Hatfield, a former Chief Engineer at the FCC, explained, this system works because it encourages the local engineers to “sit down together, solve these problems, and say let’s figure out how to do it,” limiting the need for the FCC to use its backstop authority.<sup>37</sup>

The FTC’s partnership with the Better Business Bureau’s National Advertising Division (“NAD”) operates in a functionally similar fashion to the FCC’s use of frequency coordinators.<sup>38</sup> Notably, the NAD has developed an

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<sup>35</sup> For discussions about co-regulation, see Philip J. Weiser, *The Future of Internet Regulation*, 43 U.C. DAVIS L. REV. 529, 553 (2009) (“[T]he concept of co-regulation involves industry self-policing through an independent and credible body subject to government accountability and oversight.”); OFFICE OF COMM’N, IDENTIFYING APPROPRIATE REGULATORY SOLUTIONS: PRINCIPLES FOR ANALYSING SELF- AND CO-REGULATION 4 (2008) (U.K.), <http://stakeholders.ofcom.org.uk/binaries/consultations/coregulation/statement/state ment.pdf> [<https://perma.cc/4VVZ-9W5H>] (summarizing Office of Communication’s method for determining whether co-regulation is appropriate to achieve specific regulatory objectives).

<sup>36</sup> Weiser, *supra* note 35, at 555-56.

<sup>37</sup> *Id.* at 555.

<sup>38</sup> Formally, the FTC does not empower the NAD in the identical fashion as the FCC does for frequency coordinators in that it does not specifically call for participation in this body before bringing a matter to the FTC. As a practical matter, however, the FTC encourages the use of the NAD. *See, e.g.*, Robert Pitofsky, *Self-Regulation and Antitrust*, FED. TRADE COMM’N (Feb. 18, 1998), <https://www.ftc.gov/public-statements/1998/02/self-regulation-and-antitrust> [<https://perma.cc/FK7-237M>] (praising NAD as effective model of self-regulation).

effective model of dispute resolution around misleading advertising issues, deciding an array of issues and referring cases, where necessary and appropriate, to the FTC.<sup>39</sup> Because the NAD has developed such a trusted program, FTC leaders have praised its work and relied on it to carry the laboring oar in this area,<sup>40</sup> leaving the FTC's residual authority as a backstop. In particular, the NAD refers cases to the FTC where a party refuses to participate in its process or comply with a decision.<sup>41</sup>

Learning from the NAD model, the European Union is working with the European Advertising Standards Alliance to develop a similar approach to overseeing false advertising claims.<sup>42</sup> In this case, however, the governmental authority is actively involved in developing and supporting this body rather than integrating its work after the body developed on its own.<sup>43</sup> In short, government can either embrace existing bodies as part of a co-regulation strategy or stimulate and steer the development of new ones.

### C. *The Role of Best Practices and Agency Convened Efforts*

For many regulatory agencies, the opportunity to act as a “convenor,” to develop best practices, and to create “soft law” or norms is an important part of their mission. As former FTC Chair Bill Kovacic explained with regard to the FTC, “Congress gave the FTC capacity to serve as a *convenor*—to engage in a diverse array of activities that facilitate norms development,” including “what we now call ‘soft law’ measures (e.g., self-regulatory standards, proposed guidelines).”<sup>44</sup> In particular, Congress specifically authorized the FTC to collect information and develop reports on topics not immediately related to cases or regulatory matters before the Commission.<sup>45</sup> In Kovacic's view, the FTC has used its convening authority effectively, “improv[ing] understanding, build[ing] consensus, and supply[ing] focal points for norms development” through thoughtful reports that distill key issues.<sup>46</sup>

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<sup>39</sup> Weiser, *supra* note 35, at 553.

<sup>40</sup> John E. Villafranco & Katherine E. Riley, *So You Want to Self-Regulate? The National Advertising Division as Standard Bearer*, 27 ANTITRUST 79, 79 (2013).

<sup>41</sup> *Id.*

<sup>42</sup> Colin Scott, Fabrizio Cafaggi & Linda Senden, *The Conceptual and Constitutional Challenge of Transnational Private Regulation*, 38 J.L. & SOC'Y 1, 8-9 (2011).

<sup>43</sup> *See id.*

<sup>44</sup> William E. Kovacic, *The Federal Trade Commission as Convenor: Developing Regulatory Policy Norms Without Litigation or Rulemaking*, 13 COLO. TECH. L.J. 17, 19-20 (2015).

<sup>45</sup> 15 U.S.C. §§ 46, 49 (2012); *see* Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. CHI. L. REV. 165, 176 (2005) (“A farsighted feature of Congress's institutional design is that it gave the FTC flexible tools to perform the necessary research and development.”).

<sup>46</sup> Kovacic, *supra* note 44, at 28.

For a range of agencies, the role of developing and championing best practices is on the rise,<sup>47</sup> reflecting a number of trends. First, many agencies find themselves without sufficient authority to promulgate binding rules as new technologies emerge. Second, even where an agency may have formal authority, it might be reluctant to use it in the face of an emerging technology where it needs to act more quickly than formal notice-and-comment rulemaking allows. Third, the agency may lack sufficient confidence that a prescriptive rule is warranted and thus leaves open a range of options, merely narrowing the field of possibilities and pointing entities in the right direction.<sup>48</sup>

To develop best practices effectively, an agency must invest significant resources in the enterprise. Stated generally, this effort involves “horizontal modeling rather than hierarchical direction” and is “a method of regulation in which central administrators provide advice and disseminate information, instead of mandating a one-size-fits-all regulatory scheme.”<sup>49</sup> In an increasing number of cases, best practices focus not only on U.S. firms, but also those across the world, requiring that the regulatory agency coordinate its international counterparts.<sup>50</sup> Moreover, to develop emerging best practices, it is important that agency staff take the time to learn the details of “the regulated entities first-hand, develop a strong sense of emerging processes, and . . . [share] knowledge of these processes with staff at other locations.”<sup>51</sup>

Where an agency (or a private entity) identifies and disseminates a best practice, it acts as a “norm entrepreneur.”<sup>52</sup> As discussed in Part III, the FTC has performed this role in the online privacy and data security contexts, articulating and recommending a set of best practices.<sup>53</sup> One virtue of this role—like soft law more generally—is that it may well make the adoption of more formal regulation less necessary.<sup>54</sup> To the extent that the articulation of the relevant

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<sup>47</sup> David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 295 (2006) (“Although best-practice rulemaking has been largely ignored by the legal literature, regulation through best practices has increased seven-fold in the past ten years . . .”).

<sup>48</sup> *Id.* at 324 (citing BARRY SCHWARTZ, *THE PARADOX OF CHOICE: WHY MORE IS LESS 2* (2004)) (noting value of providing a limited set of options).

<sup>49</sup> *Id.* at 297.

<sup>50</sup> See Zaring, *supra* note 47, at 299.

<sup>51</sup> Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 354 (1998).

<sup>52</sup> See, e.g., Steven Hetcher, *The FTC as Internet Privacy Norm Entrepreneur*, 53 VAND. L. REV. 2041, 2046 (2000).

<sup>53</sup> *Id.* at 2046-52.

<sup>54</sup> See Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 586 (2008) (arguing that soft law may prompt people to adjust their behavior, therefore obviating need for hard law). Commenting in the European Union context, where the use of soft law is more prevalent, one observer defined soft law as “rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may

norm itself does not overcome the collective action problem and catalyze compliance with a norm, a certification regime (like Energy Star) for those who are compliant (along with naming and shaming) might do so.

One path for catalyzing compliance, which can be labeled as “jawboning” or “threats,” involves the use of apparent legal authority—say, opening up an investigation—to achieve a desired result. In a provocative article, Professor Tim Wu defends the use of “threats,” calling for norm entrepreneurship by agency leaders and the development of limiting principles for the practice.<sup>55</sup> In criticizing Wu’s argument, some commentators have characterized it as condoning lawless conduct.<sup>56</sup> In that spirit, I previously criticized the FCC’s use of its merger review authority to secure outcomes in other contexts that were not specifically related to the merger.<sup>57</sup> I also called the FCC’s use of “arm twisting” controversial when done without full transparency and a willingness to take formal action.<sup>58</sup> Finally, I noted that the tactic is “dangerous” if the agency is not willing and able to follow through with formal regulation if the called-for behavior does not take place, as the meaningless nature of the threat will become plain and the agency will lose credibility.<sup>59</sup>

Any agency that develops best practices should be aware of the potential risks of such an effort. For starters, if an agency’s identified best practices are allowed to become stale, some private actors might stick with them and fail to improve their practice. Second, given that there is no judicial oversight of best practices development,<sup>60</sup> it is important that agencies pre-commit to a level of procedural regularity and fairness in how they develop them. Third, without either carrots or sticks related to best practices, an agency may find it difficult to generate attention or catalyze compliance.<sup>61</sup>

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produce practical effects.” Linda A.J. Senden, *Soft Law and Its Implications for Institutional Balance in the EC*, 1 UTRECHT L. REV. 79, 81 (2005).

<sup>55</sup> See Tim Wu, *Essay, Agency Threats*, 60 DUKE L.J. 1841, 1842-43 (2011) (arguing that the use of threats is useful and justified where regulated industry undergoes rapid change).

<sup>56</sup> See Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51, 65 (2015) (criticizing “informal enforcement” where formal actions are proscribed by First Amendment or other legal constraints); Jerry Brito, “*Agency Threats and the Rule of Law: An Offer You Can’t Refuse*,” 37 HARV. J.L. & PUB. POL’Y 553, 553 (2014) (criticizing “policymaking through the issuance of completely unenforceable threats”).

<sup>57</sup> See Weiser, *supra* note 7, at 708-11.

<sup>58</sup> Weiser, *supra* note 35, at 559.

<sup>59</sup> See *id.* at 559-60.

<sup>60</sup> See Zaring, *supra* note 47, at 310 (noting lack of judicial review or requirement to use open notice-and-comment process); *infra* Section III.C.

<sup>61</sup> Where the best practices developed by an agency might arguably provide a safe harbor from potential tort liability, that can be a powerful incentive. Similarly, where a governmental authority supports a best practice—either by requirement (say, a zoning code) or subsidy—it can encourage compliance. See, e.g., Zaring, *supra* note 47, at 326-38 (discussing Clean Water Act’s Section 319 approach to reducing nonpoint source pollution).

#### D. *Private Regulation*

As exemplified by the LEED building standard, a private regulatory initiative can drive behavior toward a social goal. Given the need to respond to emerging issues more adaptably than traditional regulatory processes allow, public agencies may be tempted to rely on private bodies.<sup>62</sup> In the internet environment, for example, a range of issues are managed by multi-stakeholder organizations, which use “dialogue to develop voluntary norms and best practices.”<sup>63</sup> Similarly, in the environmental field, a range of “private activity generates pressure on environmental behavior without resulting in a statute, regulation, agency enforcement action, or court decision for review by scholars and policymakers.”<sup>64</sup>

The role of private, multi-stakeholder efforts in internet governance is the U.S. government’s official policy.<sup>65</sup> Since the development of the internet’s basic technical standards in the 1980s and 1990s by groups like the Internet Engineering Task Force (“IETF”) and the World Wide Web Consortium (“W3C”), “these entities have largely established the norms and standards for the global internet, but they are little known to the general public.”<sup>66</sup> The U.S. government recently fully embraced this model, recognizing the need for internet policy and governance issues to be developed in an adaptable and global fashion.<sup>67</sup> This embrace includes supporting the Internet Corporation for Assigned Names and Numbers (“ICANN”) as an independent, international body to oversee the internet’s numbering system.<sup>68</sup>

In the internet context, two private regulatory efforts bear notice, as both exist in tandem with legal and regulatory oversight. First, the Copyright Alert System (overseen by the Center for Copyright Information) was a cooperative effort between broadband providers and content providers focused on addressing

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<sup>62</sup> See Pitofsky, *supra* note 38 (explaining reasons why governmental agencies might encourage private regulation).

<sup>63</sup> Joe Waz & Phil Weiser, *Internet Governance: The Role of Multistakeholder Organizations*, 10 J. ON TELECOM. & HIGH TECH. L. 331, 336 (2012).

<sup>64</sup> Michael P. Vandenberg, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 138 (2013).

<sup>65</sup> See Waz & Weiser, *supra* note 63, at 344 n.29.

<sup>66</sup> *Id.* at 332.

<sup>67</sup> See Lawrence E. Strickling, *Moving Together Beyond Dubai*, NAT’L TELECOMM. & INFO. ADMIN. (Apr. 2, 2013), <https://www.ntia.doc.gov/blog/2013/moving-together-beyond-dubai> [<https://perma.cc/93UD-MQGC>].

<sup>68</sup> Olivier Sylvain, *Legitimacy and Expertise in Global Internet Governance*, 13 COLO. TECH. L.J. 31, 31-41 (2015).

piracy in peer-to-peer networks.<sup>69</sup> This initiative, which existed for four years,<sup>70</sup> provided some measure of guidance to the broadband industry on what sort of “repeat infringer” policy was reasonable.<sup>71</sup> In light of recent court decisions holding a broadband provider liable for failing to develop an appropriate repeat infringer policy, the guidance from this organization could be considered best practice and protect a provider from liability,<sup>72</sup> although its cessation of operations may limit its impact. Second, the Broadband Internet Technical Advisory Group (“BITAG”) is a multi-stakeholder organization that seeks to define best practices and broadband network management ahead of any FCC action under its network neutrality regime.<sup>73</sup> In its most recent regulatory decision on network neutrality, the FCC highlighted its openness to “obtain[ing] objective advice from industry standard-setting bodies or similar organizations,” specifically citing BITAG as an example.<sup>74</sup>

Both the Center for Copyright Information and BITAG relied on a mix of industry representatives and public interest advocates and operated in an open, transparent, and consensus-based manner.<sup>75</sup> Like frequency coordinators and the

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<sup>69</sup> See *What Is a Copyright Alert?*, CTR. FOR COPYRIGHT INFO., <http://www.copyrightinformation.org/the-copyright-alert-system/what-is-a-copyright-alert> [https://perma.cc/BXE9-ATP5] (last visited Nov. 17, 2017) (explaining how Copyright Alert worked).

<sup>70</sup> See *Statement on the Copyright Alert System*, CTR. FOR COPYRIGHT INFO. (Jan. 27, 2017), <http://www.copyrightinformation.org/statement/statement-on-the-copyright-alert-system/> [https://perma.cc/H8MV-6XRT] (discussing how the Copyright Alert System closed down in early 2017).

<sup>71</sup> In the Memorandum of Understanding for the Copyright Alert System the parties stated that the practices adopted did not speak to the standard of liability imposed by the Digital Millennium Copyright Act (“DMCA”), but the framework still provided a plausible basis for establishing the reasonableness of the participating ISP’s attitude toward repeat infringers. Memorandum of Understanding 8-9 (2011), <https://www.copyrightinformation.org/wp-content/uploads/2013/02/Memorandum-of-Understanding.pdf> [https://perma.cc/T4SM-6WZK]; see 17 U.S.C. § 512(i)(1)(A) (2012) (conditioning DMCA immunity on proof that defendant “adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers”).

<sup>72</sup> *BMG Rights Mgmt. (US), LLC v. Cox Commc’ns, Inc.*, 149 F. Supp. 3d 634, 661 (E.D. Va. 2015) (faulting Cox for failing to implement adequate repeat-infringer policy).

<sup>73</sup> See *BITAG History*, BROADBAND INTERNET TECH. ADVISORY GRP., [https://www.bitag.org/bitag\\_organization.php?action=history#](https://www.bitag.org/bitag_organization.php?action=history#) [https://perma.cc/A5S8-QZV4] (last visited Nov. 17, 2017).

<sup>74</sup> *In re Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601, 5612, 5720 n.697 (2015).

<sup>75</sup> BITAG’s membership is outlined at *BITAG Membership*, BROADBAND INTERNET TECH. ADVISORY GRP., [http://members.bitag.org/kwspub/BITAG\\_Membership](http://members.bitag.org/kwspub/BITAG_Membership) [https://perma.cc/6WUV-UANV] (last visited Nov. 17, 2017). The membership of the Center for Copyright Information is outlined at *About CCI*, CTR. FOR COPYRIGHT INFO., <http://www.copyright>



NAD, the bodies confronted the challenge of earning their legitimacy and claim to regulatory authority. If such efforts succeeded, the FCC and copyright courts would regard their guidance as meaningful, just as the FTC and courts do with respect to the actions of the NAD.<sup>76</sup>

In the environmental realm, the Marine Stewardship Council (“MSC”) is an instructive case study on how a multi-stakeholder private regulatory initiative can have a major impact. The MSC, founded by the World Wildlife Fund and Unilever, was launched to address the concern about fisheries operating in a sustainable fashion.<sup>77</sup> As one commentator explained, “[t]he MSC administers standards for sustainable fisheries, updates the standards periodically with input from a stakeholder advisory group, evaluates fisheries, and allows those fisheries that meet certain criteria to label their fish as MSC-certified.”<sup>78</sup> The MSC standard focuses on three core concerns: (1) maintaining sustainable fish stocks; (2) minimizing any adverse environmental impact; and (3) managing the fishery effectively, including compliance with relevant legal requirements.<sup>79</sup> Under the MSC-administered regime, independent private auditors must assess compliance with the relevant standards and compliant products can be labeled as such.<sup>80</sup> Indeed, the MSC regime allows any organization with concerns related to certification to make a formal objection during the certification process.<sup>81</sup>

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information.org/about-cci [https://perma.cc/U6NH-2NFU] (last visited Nov. 17, 2017). See Waz & Weiser, *supra* note 63, at 342-43 (discussing best practices for such organizations generally).

<sup>76</sup> Villafranco & Riley, *supra* note 40, at 80.

<sup>77</sup> *MSC Fisheries Standard*, MARINE STEWARDSHIP COUNCIL, <https://www.msc.org/about-us/standards/fisheries-standard> [https://perma.cc/D3D4-Y6E9] (last visited Nov. 17, 2017); *Sustainable Seafood: The First 20 Years*, MARINE STEWARDSHIP COUNCIL, <http://20-years.msc.org/> [https://perma.cc/E96R-Z8EZ] (last visited Nov. 17, 2017). It was based on a similar model, the Forest Stewardship Council (“FSC”) program, also founded by the World Wildlife Fund. See *Our History*, FOREST STEWARDSHIP COUNCIL, <https://us.fsc.org/en-us/who-we-are/our-history> [https://perma.cc/28X4-Q23N] (last visited Nov. 17, 2017); *What’s Behind the FSC Logo?*, FOREST STEWARDSHIP COUNCIL, <https://www.worldwildlife.org/stories/what-s-behind-the-fsc-logo> [https://perma.cc/6ZC9-WJL3] (last visited Nov. 17, 2017) (discussing connection between World Wildlife Fund and FSC).

<sup>78</sup> Vandenbergh, *supra* note 64, at 149 (citing *About Us*, MARINE STEWARDSHIP COUNCIL, <http://www.msc.org/about-us> [https://perma.cc/7DW4-5MT5] (last visited Nov. 17, 2017)).

<sup>79</sup> *MSC Fisheries Standard*, *supra* note 77.

<sup>80</sup> See *Get Certified*, MARINE STEWARDSHIP COUNCIL, <https://www.msc.org/get-certified/fisheries/msc-fisheries-standard-explained> [https://perma.cc/W2SM-LCWF] (last visited Nov. 17, 2017).

<sup>81</sup> Patricia A. Moye, *Private Certification Versus Public Certification in the International Environmental Arena: The Marine Stewardship Council and Marine Eco-Label Japan Fisheries Certification Schemes as Case Studies*, 43 VAND. J. TRANSNAT’LL. 533, 544 (2010).

The MSC provides a powerful example of how private regulation can work even when not reinforced by public regulation.<sup>82</sup> By 2012, sixty percent of the fish caught in U.S. fisheries for human consumption were MSC-certified and major corporations, such as Wal-Mart and McDonald's, had committed to selling only MSC-certified, wild-caught fish.<sup>83</sup> Moreover, the MSC's private regime drove compliance with the nonbinding Code of Conduct, developed by the United Nations Food and Agriculture Organization, by making it part of its requirements.<sup>84</sup> After surveying this regime and formal regulatory efforts to address the issue, one commentator concluded that the MSC model was more successful than traditional regulatory efforts in this area and that "private regulation is best situated to address the complex problem of fisheries depletion."<sup>85</sup>

In short, private regulatory efforts, such as those led by multi-stakeholder organizations, can influence private behavior whether they operate in tandem with public regulatory oversight or in a vacuum created by a lack of regulatory oversight. Whether they operate in the backdrop of public oversight or as a standalone effort, private bodies need to establish their legitimacy to influence behavior on the ground. To do so, they must have sufficient independence from those they oversee, enabling both regulators and consumers to trust their judgments (including determinations of compliance).<sup>86</sup>

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<sup>82</sup> To be sure, the FTC serves as an important public backstop, overseeing unfair and deceptive marketing practices. In particular, the FTC has developed "Green Guides," which govern the MSC's actions. Jason J. Czarnecki, Andrew Homan & Meghan Jeans, *Greenwashing and Self-Declared Seafood Ecolabels*, 28 TUL. ENVTL. L.J. 37, 48 (2014). In the past, the FTC has taken action against third party certification efforts, sanctioning TRUSTe for its failure to conduct annual recertification. Press Release, Fed. Trade Comm'n, TRUSTe Settles FTC Charges It Deceived Consumers Through Its Privacy Seal Program: Company Failed to Conduct Annual Recertifications, Facilitated Misrepresentation as Non-Profit (Nov. 17, 2014), <https://www.ftc.gov/news-events/press-releases/2014/11/truste-settles-ftc-charges-it-deceived-consumers-through-its> [<https://perma.cc/RCM5-2JSU>].

<sup>83</sup> Vandenberg, *supra* note 64, at 150. Part of what drives such behavior is that outside groups monitor compliance (or lack thereof). Errol Meidinger, *The Administrative Law of Global Private-Public Regulation: The Case of Forestry*, 17 EUR. J. INT'L L. 47, 75 (2006).

<sup>84</sup> Vandenberg, *supra* note 64, at 150.

<sup>85</sup> Moye, *supra* note 81, at 564. Other commentators offer more qualified praise. *See, e.g.*, Lars H. Gulbrandsen, *Accountability Arrangements in Non-State Standards Organizations: Instrumental Design and Imitation*, 15 ORG. 563, 570 (2008) (praising MSC model as complement to and catalyst for public regulatory oversight in this area); Zdravka Tzankova, *Interactions Between Private and Public Resource Governance: Key Insights from the Fisheries Case*, 6 WM. & MARY POL'Y REV. 1, 4 n.13, 6, 25 (2014) (same); *see also* ARCHON FUNG ET AL., *THE POLITICAL ECONOMY OF TRANSPARENCY: WHAT MAKES DISCLOSURE POLICIES EFFECTIVE?* 29 (2004), [http://ash.harvard.edu/files/political\\_econ\\_transparency.pdf](http://ash.harvard.edu/files/political_econ_transparency.pdf) [<https://perma.cc/8H6X-WRBU>].

<sup>86</sup> Deborah Platt Majoras, FED. TRADE COMM'N, *SELF REGULATORY ORGANIZATIONS AND THE FTC* 4-5 (2005), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/](https://www.ftc.gov/sites/default/files/documents/public_statements/)

E. *Hacking the Bureaucracy*

In most situations, Congress and agencies think along traditional lines and agency leaders continue on the established path of agency regulation, underutilizing the alternative models discussed above.<sup>87</sup> There are a number of reasons for this dynamic, including the power of “path dependency and bureaucratic entrenchment.”<sup>88</sup> Even more powerfully, the incentives for policymakers are often to avoid Type 1 errors—those visible errors of commission—that arise when trying a new strategy that might fail. By contrast, the hidden Type 2 errors—ones of omission—are permissible and a regular feature of bureaucratic inertia.<sup>89</sup>

On one account, the challenge of leading a bureaucracy is captured by the reality that governmental employees, who enjoy civil service protection, can tell their politically-selected leaders, “I was here long before you arrived and will be here long after you are gone.” In practice, such explicit defiance is the exception. Regardless of whether bureaucratic inertia is willful or based on an entrenched tradition governmental agencies are built to continue the same course. Consequently, any course corrections require energetic leadership.<sup>90</sup> And governmental employees are generally conditioned “to be quiet, take orders, and do their jobs in a repetitive way.”<sup>91</sup> On the positive side, governmental employees tend to have a service orientation and are mission driven, meaning

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self-regulatory-organizations-and-ftc/050411selfregorgs.pdf [https://perma.cc/53ZF-Q4Y3] (underscoring this issue and invoking Better Business Bureau as case in point).

<sup>87</sup> Reeve T. Bull, *Building a Framework for Governance: Retrospective Review and Rulemaking Petitions*, 67 ADMIN. L. REV. 265, 306-07 (2015) (“[O]ne can reasonably expect underutilization of such alternatives to agency-driven regulation merely because they are novel and command-and-control programs are well entrenched.”).

<sup>88</sup> Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1144 (2012).

<sup>89</sup> See DANIEL C. ESTY, REGULATORY EXCELLENCE: LESSONS FROM THEORY AND PRACTICE 5 (2015), <https://www.law.upenn.edu/live/files/4714-esty-ppr-bicregulordiscussionpaper-062015pdf> [https://perma.cc/XNU6-D7MQ] (“Inertia is a powerful force in every organization, but especially in government where there is often little incentive to innovate.”). This dynamic is further reinforced by cognitive biases, notably, the “endowment effect.” Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 605 (2012).

<sup>90</sup> On a critical account, “[o]pportunism, conflict of interest, and asymmetric information—the bases of willful noncompliance—are rampant at the lower level.” Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 L. & CONTEMP. PROBS. 1, 17 (1994). On a more generous take, “the career incentives and training of civil servants usually orient them towards perpetuating the stability of their institutions, rather than embracing administrative innovations.” Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 473 (2015).

<sup>91</sup> JOHN P. KOTTER, ACCELERATE: BUILDING STRATEGIC AGILITY FOR A FASTER-MOVING WORLD 15 (2014).

that effective engagement around the mission and purpose of the agenda can catalyze innovation and collaboration.<sup>92</sup>

Bureaucratic inertia and autopilot administration not only prevent innovative programs from being developed, but also can lead existing programs to be administered badly. Take, for example, the development of the healthcare.gov website. After Congress passed the Affordable Care Act, a health care economist, David Cutler, encouraged the White House to treat the administration of the law more like “launching a start-up than passing a law.”<sup>93</sup> In particular, Cutler made clear that the default strategy—using the existing personnel at the Center for Medicare and Medicaid Services (“CMS”)—for administering the law was a recipe for failure.<sup>94</sup> In an assessment ignored by the White House, he explained that CMS “is demoralized, the best people have left, IT services are antiquated, and there are fewer employees than in 1981, despite a much larger burden.”<sup>95</sup>

Cutler’s call for an entrepreneurial approach to implementing the Affordable Care Act was rejected by President Obama.<sup>96</sup> Perhaps fearing the need to manage political warfare with House Republicans or responding to the HHS’ interest in protecting its turf, President Obama agreed to, in Cutler’s words, pile “new responsibilities onto a broken system.”<sup>97</sup> As this episode underscores, even when the current system is flawed, the pressure to use it is powerful. As a result, the healthcare.gov website cost \$800 million to develop, whereas Twitter, which serves a similar number of users and is of comparable complexity, cost only \$60 million.<sup>98</sup>

The redeeming part of the healthcare.gov story is that it demonstrates that treating a government project like a startup can work. After the failed rollout of healthcare.gov (which only enabled six people to sign up for insurance on its first day), President Obama essentially embraced Cutler’s recommendation,

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<sup>92</sup> Robert Lavigna, *Why Government Workers Are Harder to Motivate*, HARV. BUS. REV. (Nov. 28, 2014), <https://hbr.org/2014/11/why-government-workers-are-harder-to-motivate> [<https://perma.cc/RR92-YSUD>] (“Research has shown that public servants find meaning in their work by making a positive difference in the lives of the citizens they serve. This is an advantage in building engagement.”).

<sup>93</sup> Ezra Klein, *The Memo that Could Have Saved Obamacare*, WASH. POST (Nov. 4, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/11/04/the-memo-that-could-have-saved-obamacare/> [<https://perma.cc/XPL4-QRF3>].

<sup>94</sup> *See id.*

<sup>95</sup> Memorandum from David Cutler to Larry Summers (May 11, 2010), [https://www.washingtonpost.com/blogs/wonkblog/files/2013/11/Cutler-implementation-memo-1.pdf?tid=a\\_inl](https://www.washingtonpost.com/blogs/wonkblog/files/2013/11/Cutler-implementation-memo-1.pdf?tid=a_inl) [<https://perma.cc/VJ82-HTQP>].

<sup>96</sup> *See* Amy Goldstein & Juliet Eilperin, *HealthCare.gov: How a Start-Up Failed to Launch*, WASH. POST, Nov. 3, 2013, at A01.

<sup>97</sup> Memorandum from David Cutler to Larry Summers, *supra* note 95, at 3; Goldstein & Eilperin, *supra* note 96, at A01. (“[T]he project was hampered by the White House’s political sensitivity to Republican hatred of the law . . .”).

<sup>98</sup> Jon Gertner, *Obama and His Geeks*, FAST COMPANY, July-Aug. 2015, at 56, 64-65.

authorizing Todd Park, Mikey Dickerson, and a team of entrepreneurs to operate in a new structure that was called “tech surge.”<sup>99</sup> This project, like a good startup, approached the challenge of building an effective website from first principles. Rather than ask how the government had done IT projects before, the team innovated (for government) in a number of important ways, including using Amazon Web Services to support the site.<sup>100</sup> In developing the new website, it broke from the traditional bureaucratic process of “waterfall” development (where every step is prescribed and locked-in) and used “agile” development (where the process is iterative and evolves along the way).<sup>101</sup> Finally, the team built a login system for \$4 million (with annual maintenance costs of \$1 million) to replace the initial version that did not work well and cost \$250 million to build (with \$70 million annual maintenance costs).<sup>102</sup>

In an important legacy of this effort, Park and Dickerson continued to work in government after fixing healthcare.gov, developing the new U.S. Digital Service (“USDS”).<sup>103</sup> The goal of the USDS is to lure a range of talented technology professionals to the federal government, including data scientists, product managers, and product designers.<sup>104</sup> The USDS, in turn, provides guidance to government agencies on questions like how they can use Amazon Web Services.<sup>105</sup> In short, the USDS supports entrepreneurial leadership in government; and as Park said, it develops “people who can hack the technology, as well as people who can hack the bureaucracy.”<sup>106</sup>

The healthcare.gov story now has two parts. The first is the cautionary tale about government’s traditional inertial default setting—that is, to do things as they were done before. The second underscores that entrepreneurial leadership

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<sup>99</sup> See Steven Levy, *America’s Tech Guru Steps down—but He’s Not Done Rebooting the Government*, WIRED (Aug. 28, 2014, 2:15 PM), <https://www.wired.com/2014/08/healthcare-gov/> [<https://perma.cc/43JY-3XKB>].

<sup>100</sup> See Robinson Meyer, *The Secret Startup that Saved the Worst Website in America*, ATLANTIC (July 9, 2015), <http://www.theatlantic.com/technology/archive/2015/07/the-secret-startup-saved-healthcare-gov-the-worst-website-in-america/397784/> [<https://perma.cc/P9LL-J689>].

<sup>101</sup> See *id.*

<sup>102</sup> *Id.*

<sup>103</sup> Gertner, *supra* note 98, at 62.

<sup>104</sup> See *id.*

<sup>105</sup> For one example of its impact, and another encouraging post-healthcare.gov tale of entrepreneurial leadership, consider the Veterans’ Administration’s recent progress in improving its service delivery. See Nick Sinai, *The Untold Story of VA Leadership*, MEDIUM (Dec. 8, 2016), <https://medium.com/@NickSinai/the-untold-story-of-va-leadership-f6d763ec6c51#.otd5qig33> [<https://perma.cc/F2C9-3VVJ>].

<sup>106</sup> Gertner, *supra* note 98, at 64.

in government is both possible and important, and can lead to transformative results.<sup>107</sup>

The positive legacy of the healthcare.gov story is that entrepreneurial leaders in government can free their agencies from “the mental grip of conventional structures on the capacity to consider alternatives.”<sup>108</sup> In so doing, such leaders can facilitate the development of alternative regulatory strategies. Similarly, governmental agencies face the challenge of overcoming the institutional bias that “experts may myopically focus on issues within their area of expertise and thereby fail to recognize that a decision would benefit from accessing other bodies of knowledge or ways of thinking.”<sup>109</sup> In short, an important role of entrepreneurial leadership in government is to examine issues through the lens of first principles.<sup>110</sup>

The concept of policy entrepreneurship recognizes that an entrepreneurial mindset and skillset can be applied to governance to foster innovative results. Professor Adam Sheingate, for example, defines the concept as the “skillful manipulation of politics [that] somehow results in the creation of a new policy or a new bureaucratic agency, creates a new institution, or transforms an existing one.”<sup>111</sup> This type of leadership can also be seen in the development of, for example, the MSC program, the FTC’s oversight of online privacy, and the Energy Star program. In a world where the best solutions may well require new models of regulation, it is critical that agency leaders experiment with new solutions.<sup>112</sup>

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<sup>107</sup> A complementary initiative to USDS is the White House Office of Social and Behavioral Sciences, which encourages a range of experiments to improve government performance and policy outcomes. See Justin Wolfers, *Making Government Work More Like Google*, N.Y. TIMES, Sept. 27, 2015, § BU (Economic View), at 6. As one commentator put it, the office seeks to “[e]xperiment relentlessly, keep what works, and discard what doesn’t” and has already developed a number of successes. *Id.*

<sup>108</sup> Sabel & Simon, *supra* note 18, at 1075.

<sup>109</sup> Rachlinski & Farina, *supra* note 89, at 560; see *id.* at 599-600 (suggesting strategies for improving governmental decisionmaking).

<sup>110</sup> The goal of this mindset is to frame a problem in general terms and evaluate whether there are innovative strategies for solving it by getting people to look past the obvious and traditional approaches. See Tony McCaffrey & Jim Pearson, *Find Innovation Where You Least Expect It*, HARV. BUS. REV., Dec. 2015, at 82, 88-89.

<sup>111</sup> Adam Sheingate, *Political Entrepreneurship, Institutional Change, and American Political Development*, 17 STUD. AM. POL. DEV. 185, 188 (2003); see also MARK SCHNEIDER, PAUL TESKE & MICHAEL MINTROM, PUBLIC ENTREPRENEURS: AGENTS FOR CHANGE IN AMERICAN GOVERNMENT 8 (1995) (defining public entrepreneurs as those who identify opportunities, take risks, and work with others to pursue goals); Peter G. Klein et al., *Toward a Theory of Public Entrepreneurship*, 7 EUR. MGMT. REV. 1, 5 (2010) (“[P]ublic entrepreneurs are alert to opportunities for gain, exercise judgment over the use of private and public resources, and may pursue innovative products and processes.”).

<sup>112</sup> To that end, in her Nobel Prize talk, Elinor Ostrom highlighted the importance of institutional innovation. See Elinor Ostrom, *Beyond Markets and States: Polycentric*

A significant hurdle for entrepreneurial leadership in government—and a foundation of the inertial default setting—is the lack of acceptance of failure as an outcome. In practice, this means that governmental agencies often reflexively turn to traditional regulatory models and do not consider untested alternatives (often out of fear of failure).<sup>113</sup> This instinct mirrors the old private sector saw that “nobody got fired for buying IBM.”<sup>114</sup> Citing the fear of failure and risk aversion, former Massachusetts Governor Deval Patrick explained, “there may be no industry less susceptible to innovation than government.”<sup>115</sup> There are, however, exceptions, including the Defense Advanced Research Projects Agency (“DARPA”), which makes a conscious effort to promote a “risk-taking and failure-tolerant culture.”<sup>116</sup>

In the entrepreneurship environment, failure is a normal state, providing data, an opportunity to iterate, and a spur to refine a product offering.<sup>117</sup> Consequently, entrepreneurs celebrate the need to “fail fast” on new experiments by trying them on a small scale and determining as quickly as possible whether they can work.<sup>118</sup> As two advocates of innovation in government put it, “[a]

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*Governance of Complex Economic Systems*, 100 AM. ECON. REV. 641, 665 (2010) (“We need to ask how diverse polycentric institutions help or hinder the innovativeness, learning, adapting, trustworthiness, levels of cooperation of participants, and the achievement of more effective, equitable, and sustainable outcomes at multiple scales.”).

<sup>113</sup> Glen Hepburn, ORG. FOR ECON. CO-OPERATION & DEV., ALTERNATIVES TO TRADITIONAL REGULATION 10 (2006), <http://www.oecd.org/gov/regulatory-policy/42245468.pdf> [<https://perma.cc/8GQT-HJ6C>] (“The ‘regulate first’ approach may mean that more effective and efficient policy instruments are being overlooked.”).

<sup>114</sup> *See id.* at 11-12 (noting that non-traditional strategies are generally eschewed by risk-averse regulators).

<sup>115</sup> *Deval Patrick on Government Innovation and the Massachusetts “Edge,”* MASS. INST. TECH. (May 12, 2015), <http://mitsloan.mit.edu/newsroom/articles/deval-patrick-on-government-innovation-and-the-massachusetts-edge> [<https://perma.cc/PLZ3-PDTJ>].

<sup>116</sup> Stephen Overly, *This Agency Loses a Quarter of Its Workers Each Year—and That’s a Good Thing*, WASH. POST (July 14, 2016), <https://www.washingtonpost.com/news/innovations/wp/2016/07/14/why-high-employee-turnover-keeps-one-agency-innovative/> [<https://perma.cc/MC9W-H56Q>]; *see* DEF. ADVANCED RES. PROJECTS AGENCY, INNOVATION AT DARPA 2 (2016), [http://www.darpa.mil/attachments/DARPA\\_Innovation\\_2016.pdf](http://www.darpa.mil/attachments/DARPA_Innovation_2016.pdf) [<https://perma.cc/8XRK-KNYA>].

<sup>117</sup> As one writer described entrepreneurs, “[t]hey’ve been conditioned to see failure as a learning experience—that, rather than being the end of something, a big flop is merely a very useful (though painful) data point along the way to success.” Jason Feifer, *This Exclusive Study Reveals Entrepreneurs Really Do Have Thicker Skins*, ENTREPRENEUR (Nov. 14, 2016), <https://www.entrepreneur.com/article/284075> [<https://perma.cc/VM3F-23RN>].

<sup>118</sup> As one commentator explained: “Fail fast isn’t about the big issues, it’s about the little ones. It’s an approach to running a company or developing a product that embraces lots of little experiments with the idea that some will work and grow and others will fail and die.” David Brown, *Here’s What ‘Fail Fast’ Really Means*, VENTURE BEAT (Mar. 15, 2015, 7:00 AM), <http://venturebeat.com/2015/03/15/heres-what-fail-fast-really-means> [<https://perma.cc/2S3G-4HV8>].

culture of innovation means continuously exploring and adopting new processes in an ecosystem where risk is incentivized, not precluded.”<sup>119</sup> Similarly, entrepreneurial leadership in government authorizes calculated risk-taking and, more importantly, provides cover for trial-and-error learning when the trials do not produce the envisioned results.<sup>120</sup> Unfortunately, leaders who support experimentation and are willing to accept the inevitable failures, are the exception, not the rule.<sup>121</sup>

The basic entrepreneurial methodology of experiment-measure-iterate is captured in Eric Ries’s classic book, *The Lean Startup*.<sup>122</sup> A core thesis of the book, widely accepted in the entrepreneurial community (and ignored by most legal scholars),<sup>123</sup> is that companies should develop and market a “minimum viable product,” solicit feedback from actual customers, and improve it based on that data.<sup>124</sup> At Facebook, this philosophy was adopted and embodied in its mantra, “[d]one is better than perfect.” Citing that mantra, one commentator explained that “had Facebook waited so much as a year to perfect its model, the company might very well be where MySpace is today.”<sup>125</sup>

The Ries philosophy is famously captured in a feedback loop representing the cycle of innovation.<sup>126</sup> The core idea is to embrace experimentation, gather data

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<sup>119</sup> GEORGETOWN UNIV., THE ARCHITECTURE OF INNOVATION: INSTITUTIONALIZING INNOVATION IN FEDERAL POLICYMAKING 7 (2016), <https://georgetown.app.box.com/s/z0vlobeoycdlo54g4wxby87kk71c3aua> [<https://perma.cc/GC32-BRQZ>].

<sup>120</sup> See Quentin Hardy, *G.A.O. Tech Chief Says Washington Should Start Small on Big Projects*, N.Y. TIMES (June 18, 2014, 7:00 AM), <http://bits.blogs.nytimes.com/2014/06/18/g-a-o-tech-director-says-washington-needs-to-think-smaller/> (noting failure to develop pilot projects and to candidly assess failing efforts).

<sup>121</sup> Philadelphia Mayor Mike Nutter is one of those exceptions, stating: “If you don’t fail, you’re not trying hard enough.” Li Zhou, *City Governments Are Collaborating with Startups, and Acting Like Ones Themselves*, SMITHSONIAN (June 10, 2015), <http://www.smithsonianmag.com/innovation/citie-governments-are-collaborating-startups-and-acting-ones-themselv-es-180955483/> [<https://perma.cc/2ZWN-NLAZ>].

<sup>122</sup> See generally ERIC RIES, THE LEAN STARTUP: HOW TODAY’S ENTREPRENEURS USE CONTINUOUS INNOVATION TO CREATE RADICALLY SUCCESSFUL BUSINESSES (2011).

<sup>123</sup> One exception is Richard S. Gruner, *Lean Law Compliance: Confronting and Overcoming Legal Uncertainty in Business Enterprises and Other Complex Organizations*, 11 N.Y.U. J.L. & BUS. 247, 292-93 (2014).

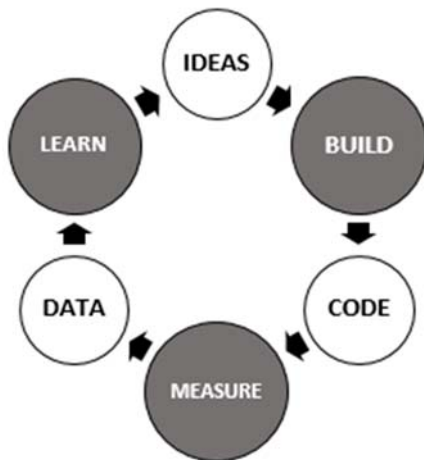
<sup>124</sup> RIES, *supra* note 122, at 3-5. This methodology is very close to the approach espoused by “design-centered thinking,” which also emphasizes the importance of prototyping. On this approach, the goal of developing, testing, and even marketing a prototype is “to learn about the strengths and weaknesses of the idea and to identify new directions that further prototyping might take.” Tim Brown, *Design Thinking*, HARV. BUS. REV., June 2008, at 84, 87.

<sup>125</sup> Martin Lindstrom, *The Truth About Being “Done” Versus Being “Perfect,”* FAST COMPANY (Sept. 25, 2012), <https://www.fastcompany.com/3001533/truth-about-being-done-versus-being-perfect> [<https://perma.cc/JJ6M-MNX2>].

<sup>126</sup> RIES, *supra* note 122, at 9-11.



(whether it signals success or failure), and iterate.<sup>127</sup> The lean startup model, represented by the following diagram, focuses on taking ideas from prototype to feedback to improvement:<sup>128</sup>



This lean startup model echoes the style of software development championed by open source software, which calls for releasing code that can be viewed and improved by a community of users and developers. In what Eric Raymond dubbed “Linus’s Law,” in honor of the founder and coordinator of Linux, the open source maxim is “given enough eyeballs, all bugs are shallow.”<sup>129</sup> This approach has spread far beyond open source, enabling “business webs where focused companies partner others to innovate and create value.”<sup>130</sup> Although this

<sup>127</sup> *See id.*

<sup>128</sup> *The Lean Startup Methodology*, THE LEAN STARTUP, <http://theleanstartup.com/principles> [<https://perma.cc/7WVV-VNQ8>] (last visited Nov. 17, 2017).

<sup>129</sup> Scott Merrill, *With Many Eyeballs, All Bugs Are Shallow*, TECHCRUNCH (Feb. 23, 2012), <https://techcrunch.com/2012/02/23/with-many-eyeballs-all-bugs-are-shallow/> [<https://perma.cc/W2AT-H78N>].

<sup>130</sup> Don Tapscott, *The World in 2036*, ECONOMIST (Nov. 22, 2010), <http://www.economist.com/node/17509361> [<https://perma.cc/HS2S-F59Z>]. In referencing this concept, and Linus’s Law, I do not mean to suggest that the open source model is perfect or even necessarily always better than proprietary software, which has some advantages as managed by a single firm. Consider, for example, the shortcomings of the open source program Heartbleed, which led to a major security vulnerability in OpenSSL. *See* Robert McMillan, *How Heartbleed Broke the Internet—and Why It Can Happen Again*, WIRED (Apr. 14, 2014), <https://www.wired.com/2014/04/heartbleedslesson> [<http://perma.cc/EF6Z-E6L7>]. In that case, the mostly-volunteer labor force was too short-handed to keep the software bug-free, demonstrating that “we must add more oversight to the internet’s underlying infrastructure.” *Id.*

approach and a commitment to prototyping and testing solutions is novel in government, it is starting to take root, with promising results.<sup>131</sup>

With respect to the fear of failure, government operates quite differently than the entrepreneurial world. In government, the perceived costs of failure are sufficiently high that many governmental leaders decline to introduce a new initiative for fear it will fail or refuse to admit that an existing program is failing, even though that admission is a necessary predicate for improvement. To be sure, there are cases like the initial healthcare.gov rollout where the failure is readily apparent and must be fixed. In other cases, however, governmental leaders stand by programs where the data backing up its effectiveness is either uncertain or doubtful.

For an instructive case of governmental leaders refusing to acknowledge the limitations of a program, consider the case of the EPA's Performance Track program. When created, the program was supposed to highlight those companies with stellar environmental records.<sup>132</sup> In practice, however, it ultimately became, as EPA Administrator Lisa Jackson put it, "just one of those window-dressing programs that has little value."<sup>133</sup> Similarly, the EPA Inspector General criticized the program as ineffective, noting that it did not provide "a new model for achieving" its stated goals and very few companies met their stated goals.<sup>134</sup> Nonetheless, the Bush Administration did not make any real changes to the program before the Obama Administration cancelled it.<sup>135</sup>

The Performance Track program story, like the failure to acknowledge the failings of the healthcare.gov website earlier, underscores that the hesitancy to acknowledge failure is a major challenge in governmental administration. If governmental leaders refuse to acknowledge failures, they undermine the ability to learn—and iterate—from mistakes and instead allow failed programs to

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<sup>131</sup> For a criticism of government's lack of investment in experiments, see Peter Orzag & John Bridgeland, *Can Government Play Moneyball?*, ATLANTIC, July/Aug. 2013, at 62 (concluding that "federal government—where spending decisions are largely based on good intentions, inertia, hunches, partisan politics, and personal relationships—has missed this wave"). For a discussion of the use of this approach, see Russell Shorto, *Water Works*, N.Y. TIMES, Apr. 13, 2014, at MM20 (discussing use of public design challenge).

<sup>132</sup> John Sullivan and John Shiffman, *Green Club an EPA Charade*, PHILA. INQUIRER, Dec. 12, 2008, A01.

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

<sup>134</sup> U.S. ENVTL. PROT. AGENCY, Report No. 2007-P-00013, PERFORMANCE TRACK COULD IMPROVE PROGRAM DESIGN AND MANAGEMENT TO ENSURE VALUE 4, 15, 18 (2007), <https://www.epa.gov/sites/production/files/2015-11/documents/20070329-2007-p-00013.pdf> [<https://perma.cc/P8HX-Q33L>]; see generally Cary Coglianese & Jennifer Nash, *Performance Track's Postmortem: Lessons from the Rise and Fall of EPA's "Flagship" Voluntary Program*, 38 HARV. ENVTL. L. REV. 1 (2014) (criticizing Performance Track program).

<sup>135</sup> Coglianese & Nash, *supra* note 134, at 8.

continue during a period of denial.<sup>136</sup> Or, as Lawrence Summers put it while reflecting on the healthcare.gov debacle, it is crucial to resist the “overwhelming temptation for everyone involved [in a project] to circle the wagons and promise rapid repair so as to hold critics at bay.”<sup>137</sup>

Another challenging dynamic for governmental leaders to address is the impact of unconscious bias. It is normal for those involved in a project to believe that it is working, following what Nobel Laureate Daniel Kahneman calls “confirmation bias.”<sup>138</sup> As one commentator put it, a challenge for those evaluating regulatory experiments is that those “deeply involved in the implementation of a particular regulation are likely to see the benefits of such a project far more clearly than the costs.”<sup>139</sup> As commentators have explained, there are a number of strategies for overcoming this bias, including using red team-blue team exercises, appointing a Devil’s Advocate, and creating a process for deliberate decisionmaking.<sup>140</sup> Of course, as happened in the Performance Track situation, new leadership is able to bring a fresh perspective. Ideally, however, existing leaders can step back and ask, “if a new leader came in and took a fresh look, what would she do?”<sup>141</sup>

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<sup>136</sup> *Id.* at 86 (“To achieve the true learning potential from these programs, government officials must be prepared to accept that innovations can sometimes fail.”).

<sup>137</sup> Lawrence Summers, *Lawrence Summers: Immediate Lessons from Health-Care Reform*, WASH. POST (Nov. 10, 2013), [https://www.washingtonpost.com/opinions/lawrence-summers-immediate-lessons-from-health-care-reform/2013/11/10/5b5be00e-48c8-11e3-a196-3544a03c2351\\_story.html?utm\\_term=.245c9ac1e9e0](https://www.washingtonpost.com/opinions/lawrence-summers-immediate-lessons-from-health-care-reform/2013/11/10/5b5be00e-48c8-11e3-a196-3544a03c2351_story.html?utm_term=.245c9ac1e9e0) [https://perma.cc/WR7W-ZS2E].

<sup>138</sup> DANIEL KAHNEMAN, *THINKING FAST & SLOW* 80-81 (2011).

<sup>139</sup> Michael Greenstone, *Toward a Culture of Persistent Regulatory Experimentation and Evaluation*, in *NEW PERSPECTIVES ON REGULATION* 111, 119 (David Moss & John Cisternino eds., 2009).

<sup>140</sup> In their book, *Decisive*, the Heath brothers examine such strategies for improving evaluation and decisionmaking. See CHIP HEATH & DAN HEATH, *DECISIVE: HOW TO MAKE BETTER CHOICES IN LIFE AND WORK* 22-23 (2013); Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. REV. 962, 1015-16 (2005) (advocating use of “devil’s advocates” to improve decision making).

<sup>141</sup> Andy Grove, in his classic, *Only the Paranoid Survive*, tells a story just along these lines on how Intel decided to get out of the memory chip business and focus on microprocessors:

I was in my office with Intel’s chairman and CEO, Gordon Moore, and we were discussing our quandary. Our mood was downbeat. I looked out the window at the Ferris Wheel of the Great America amusement park revolving in the distance, then I turned back to Gordon and asked, “If we got kicked out and the board brought in a new CEO, what do you think he would do?” Gordon answered without hesitation, “He would get us out of memories.” I stared at him, numb, then said, “Why don’t you and I walk out the door, come back and do it ourselves?”

ANDREW S. GROVE, *ONLY THE PARANOID SURVIVE: HOW TO EXPLOIT THE CRISIS POINTS THAT CHALLENGE EVERY COMPANY AND CAREER* 89 (1996). For another telling of this story and its impact, see HEATH & HEATH, *supra* note 140, at 13-16.

The role of entrepreneurial leadership in encouraging candid reflection and criticism is essential. As former FTC Chair Bill Kovacic and David Hyman explain, agencies develop an institutional culture and a reputation (or a brand, as they put it).<sup>142</sup> In some cases, that brand can be one of reliability and commitment to data-driven decisionmaking. An important role of an entrepreneurial leader is to develop and maintain that commitment. In the case of Underwriters Laboratory (“UL”), for example, its early leadership did just that, building up “UL’s reputation for reliability by creating organizational structures, administrative routines, and oversight systems designed to prevent mistakes and misconduct.”<sup>143</sup> To get past the natural status quo bias, an entrepreneurial leader should welcome diverse ideas, criticism, different options, and experimentation.<sup>144</sup> In Part II, to explain how policy entrepreneurship can earn regulatory authority, I discuss how experimental initiatives need to establish their effectiveness, legitimacy, and accountability to be embraced as lasting regulatory regimes.

## II. CRITERIA FOR SOUND INSTITUTIONAL DESIGN AND REGULATORY EXPERIMENTATION

Whether by design or default, Congress often sits back, allowing regulatory authorities and private entities to experiment with innovative regulatory strategies. Under the traditional model of regulation, this phenomenon is viewed as a bug—or an aberration. In practice, however, this alternative model is emerging as a feature of our regulatory system and is a strategy that Congress should use more self-consciously going forward.

This Part discusses the three principal criteria for regulatory innovation. First, regulatory experiments should establish their effectiveness through after-the-fact assessment. Second, regulatory experiments should be legitimate, both in terms of their legal status and how they operate in practice. Third, regulatory experiments should be accountable—that is, they need to operate transparently and as promised. After explaining these criteria, this Part evaluates the potential objections to policy experimentation through entrepreneurial leadership.

### A. *Effectiveness*

The value of a regulatory experiment will depend on whether it advances its envisioned purposes effectively. Historically, however, governments “have paid remarkably little attention to analyzing regulations after adoption or to evaluating the impacts of the procedures and practices that govern the regulatory

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<sup>142</sup> David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 GEO. WASH. L. REV. 1446, 1472-74.

<sup>143</sup> Timothy D. Lytton, *Competitive Third-Party Regulation: How Private Certification Can Overcome Constraints that Frustrate Government Regulation*, 15 THEORETICAL INQUIRIES L. 539, 545 (2014).

<sup>144</sup> HEATH & HEATH, *supra* note 140, at 95-97, 146, 168.

process itself.”<sup>145</sup> By explicitly encouraging an experimentalist approach to regulation, Congress can change this dynamic and evaluate innovative regulatory experiments before codifying, refining, tolerating, or rejecting them.

A core failing of our current regulatory system is its inability to generate and evaluate regulatory experiments. To make this point, Professor Michael Greenstone contrasts the process for evaluating prospective drugs—experiments through randomized trials—with regulation (including those used to oversee drug safety).<sup>146</sup> Unlike drug evaluation trials, the process for evaluating regulations is currently all at the front end. Put differently, our regulatory system is unduly wedded to the traditional model of regulation (often an exclusively front end, before-the-fact, process) and, insofar as we evaluate regulatory effectiveness at all, the process for doing so is similarly front-loaded (as opposed to after-the-fact).<sup>147</sup>

In encouraging experimentation in the public sector, it is important that Congress recognize the impact of private regulatory efforts. Consider, for example, that the Energy Star program could have been developed by a private entity and the LEED standard could have been developed by the EPA. And even where a private (or public) effort initially succeeds, continued success can only be assured by a culture of continuous improvement through entrepreneurial leadership.<sup>148</sup>

The Australian Office of Best Practices (“AOBP”) is a model of constant commitment to experimentation and evaluation. Whereas the United States’ Office of Management and Budget’s Office of Information and Regulatory Affairs (“OIRA”) is focused on the analysis of regulatory strategies before they are adopted (notably, whether they are justified on cost-benefit analysis

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<sup>145</sup> COGLIANESE, *supra* note 6, at 7.

<sup>146</sup> See Greenstone, *supra* note 139, at 114-18; Wansley, *supra* note 11, at 430-36 (suggesting model of randomized trials for evaluating experimental regulatory initiatives).

<sup>147</sup> The limited, after-the-fact analysis of new initiatives is particularly problematic because of the limits of notice-and-comment rulemaking as a means of gathering effective and reliable data. See Yoon-Ho Alex Lee, Essay, *An Options Approach to Agency Rulemaking*, 65 ADMIN. L. REV. 881, 892 (2013) (“[T]he agency seldom has all the necessary information to understand the intricacies of any industry.”); see generally Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321 (2010) (examining flaws and biases of traditional notice-and-comment rulemaking).

<sup>148</sup> For private sector efforts, there is always the threat that “[t]o the extent that standards are not maintained, the value of a label is undermined and consumer demand declines.” Tracey M. Roberts, *The Rise of Rule Four Institutions: Voluntary Standards, Certification and Labeling Systems*, 40 ECOLOGY L.Q. 107, 154 (2013); see Sally Eden, *The Work of Environmental Governance Networks*, 40 GEOFORUM 383, 392 (2009) (“[G]overnance networks are not given nor guaranteed power, but remain precarious and must be continually (re)produced, standardised, and normalised through complex networking, often against competing networks.” (citations omitted)).

grounds),<sup>149</sup> the AOBP investigates the impact of regulatory initiatives in practice.<sup>150</sup> In another model, the U.K. Behavioral Insights team is an impressive case study of continuous improvement applied to government.<sup>151</sup> In the private regulatory arena, the International Social and Environmental Accreditation and Labeling (“ISEAL”) Alliance has a similar mission, spearheading an effort to enable its members to improve their programs and learn from one another.<sup>152</sup> In particular, this initiative calls for the “establishment of monitoring and evaluation programs; the definition of the intended change; establishment of appropriate indicators; data collection and evaluation; evaluation reports; and learning and improvement.”<sup>153</sup>

The hardest cultural challenge for government is to develop the ability to admit that an experiment did not work.<sup>154</sup> The incentives are not only against experimentation,<sup>155</sup> but they also weigh against acknowledging that an experiment failed. Indeed, cognitive bias itself can influence whether evaluators

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<sup>149</sup> Greenstone, *supra* note 139, at 111-12, 121 (“[O]ur regulatory system all too frequently takes shots in the dark and we all too infrequently fail to find out if we have hit anything—or even worse, we only find out when things have gone horribly wrong.”); Michael A. Livermore, *A Brief Comment on “Humanizing Cost-Benefit Analysis,”* 2 EUR. J. RISK REG. 13, 16 (2011) (“[R]etrospective reviews have never been a priority, despite calls from a range of commentators across the political spectrum.”).

<sup>150</sup> *Best Practice Regulation*, DEP’T PRIME MINISTER AND CABINET, <https://www.pmc.gov.au/regulation/best-practice-regulation> [<https://perma.cc/X3VD-9SJM>] (last visited Nov. 17, 2017).

<sup>151</sup> *Who We Are*, BEHAV. INSIGHTS TEAM, <http://www.behaviouralinsights.co.uk/about-us/> [<https://perma.cc/TN4T-Q2MQ>] (last visited Nov. 17, 2017).

<sup>152</sup> *Our Mission*, ISEAL ALLIANCE, <https://www.isealalliance.org/about-us/our-mission> [<https://perma.cc/9HSF-7RUK>] (last visited Nov. 17, 2017). “The ISEAL Alliance was founded in 2002 by a pioneering group of sustainability standard-setters,” including the FSC and the MSC. *Our History*, ISEAL ALLIANCE, <https://www.isealalliance.org/about-us/our-history> [<https://perma.cc/9GAJ-D3ZH>] (last visited Nov. 17, 2017). ISEAL initially stood for International Social and Environmental Accreditation and Labelling Alliance, but now it is ISEAL alone. *Id.*

<sup>153</sup> Colin Scott, *Evaluating the Performance and Accountability of Regulators*, 37 SEATTLE U. L. REV. 353, 370-71 (2014).

<sup>154</sup> MICHAEL MANDEL & DIANA G. CAREW, PROGRESSIVE POLICY INST., REGULATORY IMPROVEMENT COMMISSION: A POLITICALLY-VIABLE APPROACH TO U.S. REGULATORY REFORM 13 (2013), [http://www.progressivepolicy.org/wp-content/uploads/2013/05/05.2013-Mandel-Carew\\_Regulatory-Improvement-Commission\\_A-Politically-Viable-Approach-to-US-Regulatory-Reform.pdf](http://www.progressivepolicy.org/wp-content/uploads/2013/05/05.2013-Mandel-Carew_Regulatory-Improvement-Commission_A-Politically-Viable-Approach-to-US-Regulatory-Reform.pdf) [<https://perma.cc/2WVG-UZPE>] (noting challenge of critically evaluating past efforts as calling “unwanted attention to all of their regulations and programs, and potentially rais[ing] embarrassing questions”).

<sup>155</sup> See J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757, 787 (“Agency heads and politicians rarely brag about the number of rules they have cut or amended so as to reduce regulation. It is the new initiatives that get people’s attention.” (footnote omitted)).

judge regulatory initiatives successful or not.<sup>156</sup> To build a culture of retrospection is thus not enough; that culture must also—perhaps aided by outside perspectives—embrace harsh feedback and accept failure (at least when resulting from competent administration) as a normal and valuable data point.

A culture of retrospection requires leadership that embraces critical thinking.<sup>157</sup> This mindset embraces both the trial and the error parts of “trial-and-error,” allowing new ideas to be tried and errors to be accepted as an inevitable part of the process.<sup>158</sup> It also calls for rigorous evaluation of what is working—and what is not working—about a regime in practice.<sup>159</sup>

Legislators and regulators around the world continue to look for models to spur more effective and honest evaluation of regulatory programs in practice. To drive a culture of honest re-examination in a particular agency takes considerable vigilance and a willingness to re-examine the impact of past programs. To aid such efforts, the European Union has developed a set of “Impact Assessment” guidelines.<sup>160</sup> In a recent attempt to spur such behavior across the government, President Obama signed an executive order calling for retrospectively evaluating the effectiveness of regulations.<sup>161</sup> Reflecting the skepticism about this and similar efforts,<sup>162</sup> some commentators have called for

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<sup>156</sup> Rachlinski & Farina, *supra* note 89, at 591 (“Cognitive biases can operate as insidiously in the *evaluation* of regulatory policy as in its *design*.”); see DAN ARIELY, *THE UPSIDE OF IRRATIONALITY: THE UNEXPECTED BENEFITS OF DEFYING LOGIC AT WORK AND AT HOME* 109-22 (2010) (explaining how, once we create something, “we feel an increased sense of ownership—and we begin to overvalue the usefulness and the importance of ‘our’ ideas”).

<sup>157</sup> Cass R. Sunstein & Reid Hastie, *Making Dumb Groups Smarter*, HARV. BUS. REV., Dec. 2014, at 90, 98 (“So if the leader of a group encourages information disclosure from the beginning, even if it goes against the grain, members will probably do less self-silencing.”).

<sup>158</sup> Until certain experiments are tried, it will be far from clear how they will turn out. See Vernon L. Smith, *Constructivist and Ecological Rationality in Economics*, 93 AM. ECON. REV. 465, 472 (2003) (explaining how some breakthroughs “had to be discovered through market experimentation”).

<sup>159</sup> See Michael Lewis, *Bond of Brilliance*, VANITY FAIR, Dec. 2016, at 132, 177 (discussing Danny Kahnemans’s insights generated for Israeli Army by examining what food soldiers ate and did not eat). A close cousin of this approach is to observe how a regime operates in parallel contexts. See STEVEN KELLMAN, *UNLEASHING CHANGE: A STUDY OF ORGANIZATIONAL RENEWAL IN GOVERNMENT* 19 (2005) (noting that government procurement reform can be guided by how successful private firms manage procurement).

<sup>160</sup> See *European Commission, Impact Assessment Guidelines*, at 3, SEC (2009) 92 final (Jan. 15, 2009), [http://ec.europa.eu/smart-regulation/impact/commission\\_guidelines/docs/iag\\_2009\\_en.pdf](http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iag_2009_en.pdf) [<https://perma.cc/EN9G-ZYJ4>].

<sup>161</sup> See Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011); Memorandum from Cass R. Sunstein, Adm’r, Exec. Office of the President, to the Heads of Exec. Dep’ts & Agencies 1 (Apr. 25, 2011), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2011/m11-19.pdf> [<https://perma.cc/5ZE7-XCMF>].

<sup>162</sup> Ruhl & Salzman, *supra* note 155, at 778 (commenting that past state initiatives have had “decidedly mixed” results); see JOSEPH E. ALDY, NAT’L BUREAU OF ECON. RESEARCH,

other structural innovations to facilitate more effective reexaminations of regulatory effectiveness.<sup>163</sup>

This Article calls for entrepreneurial leadership and the development of an agency culture that advances such retrospectives with a level of seriousness and rigor.<sup>164</sup> In most cases, agencies engage in an auto-pilot, check-the-box approach to such matters.<sup>165</sup> By contrast, agencies that create a learning culture are able to continuously evaluate the impact of policy experiments, improve them, and learn from the experience.<sup>166</sup> To drive such cultures, Congress can choose to acknowledge and defer to those agencies that take this process seriously;

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LEARNING FROM EXPERIENCE: AN ASSESSMENT OF THE RETROSPECTIVE REVIEWS OF AGENCY RULES AND THE EVIDENCE FOR IMPROVING THE DESIGN AND IMPLEMENTATION OF REGULATORY POLICY 4 (2014), <https://www.acus.gov/sites/default/files/documents/Aldy%2520Retro%2520Review%2520Draft%252011-17-2014.pdf> [<https://perma.cc/UYT3-X2UH>] (“[T]he federal government has a mixed track record on retrospective review of existing rules.”); Cary Coglianese, *Moving Forward with Regulatory Lookback*, 30 YALE J. ON REG. 57, 60 (2013) (expressing skepticism about likely effectiveness of Obama Administration’s retrospective effort).

<sup>163</sup> E.g., Reeve T. Bull, *Building a Framework for Governance: Retrospective Review and Rulemaking Petitions*, 67 ADMIN. L. REV. 101, 113 (2015) (calling for “collaborative alternatives”); Mandel & Carew, *supra* note 154, at 2 (calling for regulatory improvement commission).

<sup>164</sup> This is the approach for which Professor Cass Sunstein has advocated. See CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT 150, 172, 215 (2013) (explaining power of cost-benefit analysis as way to unearth errors and enable their correction); Cass Sunstein, Adm’r, Office of Info. & Regulatory Affairs, Regulation: Looking Backward, Looking Forward 2 (May 10, 2012) (transcript available at <https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/speeches/regulation-looking-backward-looking-forward-05102012.pdf> [<https://perma.cc/Q28L-3GCW>]) (“Regulatory systems need their own Billy Beanes and Paul DePodestas[, the heroes of the book, *Moneyball*], avoiding anecdotes and intuitions, and instead carefully assessing what rules will do before the fact and testing them after the fact.”). In a sign of the importance of building such a mindset, agencies reported to the Government Accountability Office (“GAO”) that retrospectives were more successful when they followed from their own discretionary reviews rather than from mandates to perform them. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-791, REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS 6 (2007), <http://www.gao.gov/new.items/d07791.pdf> [<https://perma.cc/8BDR-A6XK>].

<sup>165</sup> See Braithwaite, *supra* note 33, at 512 (“Regulatory practice tends to accept far too readily presumptions that extant regulatory frameworks already have the right answers. The law is often taken as self-evidently right; rational choice presumptions about how actors respond to deterrence are ingrained in the face of the evidence we have that defiance often exceeds deterrence effects.”).

<sup>166</sup> See *id.* at 513-14 (examining concept of triple-loop learning, “where lessons about how to revise regulatory goals and strategies are looped across all such organizations throughout the economy,” and claiming that “more systematic approach to tripling loops of learning could be one of the more cost-effective investments regulators can make in improvement”).



recognize failed experiments, displaying more skepticism to those agencies that fail to evaluate their work carefully; or refuse to recognize failed experiments.

B. *Legitimacy and Adherence to Public Norms*

The legitimacy of agency actions (or private sector ones) depends on their legal authority to act and their compliance with traditional administrative law norms (even when not formally required). For both public agencies and private entities, it is thus important that they establish their legitimacy, develop standards of conduct, and enforce them by following fair and acceptable processes.<sup>167</sup> This Section first discusses public agencies' legal authority to act and then explains how both public agencies and private entities must follow traditional law norms to establish and maintain legitimacy.

1. Legal Authority to Act

For public agencies, it is essential that any experimentation fits within their legal authority to act. Where agencies act contrary to their enabling legislation, they can be properly accused of going rogue.<sup>168</sup> In a classic scholarly treatment of this point, McCubbins, Noll and Weingast (known collectively as "McNollgast") have argued that congressionally-imposed structures and procedures ensure that agencies stick to the path envisioned by Congress.<sup>169</sup> On this view, these restrictions address the "principal-agent" problem that occurs when Congress legislates with one purpose in mind and agencies take another course.<sup>170</sup>

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<sup>167</sup> See Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 706 (1988) ("[I]n a community organized around rules, compliance is secured—to whatever degree it is—at least in part by perception of a rule as legitimate by those to whom it is addressed."); see also Meidinger, *supra* note 8, at 287 ("Ultimately multi-interest self-governance systems must prove themselves legitimate—that is, socially accepted and expected—if they are to persist.").

<sup>168</sup> It is axiomatic that "an agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

<sup>169</sup> More particularly, the McNollgast argument is that legislation reflects a victory by a winning coalition and Congress needs to impose structures on agency administration—including notice-and-comment requirements—to protect the interests of that coalition. See Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 481-82 (1989) (arguing that procedural requirements and structure "can provide effective control over agency decisions").

<sup>170</sup> Terry M. Moe, *Delegation, Control, and the Study of Public Bureaucracy*, in THE HANDBOOK OF ORGANIZATIONAL ECONOMICS 1148, 1154-55 (Robert Gibbons & John Roberts eds., 2013) ("The problem arises because the typical agency has its own policy preferences, often different from those of Congress, and because it may be able to use the information asymmetry built into their relationship—owing to its greater expertise—to go its own way in policy.").

First, it is important to appreciate that the range of cases and the use of experimental regulations envisioned in this Article will mostly arise in cases where agencies possess broad authority without specific authorizations to act.<sup>171</sup> In cases where regulatory agencies are specifically barred from proceeding in a particular area, they cannot take action, experimental or otherwise. In cases where they are specifically authorized to act, there is no cause for concern. The most interesting cases are ones where the agency possesses broad authority, but Congress has not specifically called on the agency to act.

The value of allowing administrative agencies some degree of “common-law-like” authority is that they can address emerging issues as they arise rather than await specific congressional authorization.<sup>172</sup> In the Energy Star initiative, for example, the EPA lacked authority to enact formal regulations, but possessed broad authority to encourage energy efficiency.<sup>173</sup> In that case, Congress monitored the agency’s actions, providing budgetary authority for its efforts, and ultimately endorsed the initiative by specifically authorizing it.<sup>174</sup>

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<sup>171</sup> As Jerry Mashaw has explained, the tradition of conferring broad authority to agencies goes back to the early days of the Republic. See JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 290-91 (2012) (noting that like many statutes today, early statutes, such as those establishing Departments of War and State in first Congress, provided “broad delegations” of discretionary authority to administrative officers). The cynical take on this practice is that Congress adopts general policies so that it can take credit for acting, but avoid taking responsibility for specific results. See Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 *PUB. CHOICE* 33, 46-52 (1982). A more generous view is that Congress may not know specifically what it wants to do, but agrees that the ability to act is important. See Glen O. Robinson, *Commentary on “Administrative Arrangements and the Political Control of Agencies”*: *Political Uses of Structure and Process*, 75 *VA. L. REV.* 483, 485 (1989) (asserting that congressional delegation of broad discretion to agencies can often “reflect the fact that coalition members cannot agree on pertinent policy outcomes but can agree that delegating policymaking power to an agency is preferable to legislative stymie”).

<sup>172</sup> Sunstein interprets the canonical *Chevron* case in just this fashion, explaining that “[o]perating as common law courts, agencies have, as they should, considerable power to adapt statutory language to changing understandings and circumstances.” Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 *DUKE L.J.* 1013, 1019 (1998).

<sup>173</sup> Another challenge, not explored in this Article, is how to address the situation where multiple agencies possess plausible claims to address an issue and seek to do so at the same time. In the case of Energy Star, where the DOE had a claim to authority as well, the EPA ultimately brought that agency into the program and the two agencies have collaborated on it ever since. See Energy Star, *supra* note 1.

<sup>174</sup> See 42 U.S.C. § 6294(a)(1) (2012). There is considerable debate and uncertainty on the effectiveness of congressional oversight. See Christopher Carrigan & Cary Coglianese, *The Politics of Regulation: From New Institutionalism to New Governance*, 14 *ANN. REV. POL. SCI.* 107, 110 (2011) (“In fact, even today the extent to which Congress effectively oversees agency activities remains unclear.”); *id.* at 111-12 (finding varying impact of congressional

The McNollgast theory focuses on the concern that an agency will depart from its envisioned direction by going rogue, but the theory ignores the risk that the agency will depart from congressional intent by failing to act effectively.<sup>175</sup> Recent scholarship suggests that these two goals—cabining agency discretion and encouraging agency effectiveness—are in tension with one another.<sup>176</sup> With respect to the focus on structural safeguards to prevent unwanted agency action, Professor Terry Moe suggested that “bureaucracies should tend to be less burdened with structures that, in the American system, make it difficult for agencies to do their jobs.”<sup>177</sup> To that end, Moe criticizes the assumption—made by McNollgast and others—that bureaucratic expertise and capacity can be assumed. In contrast, invoking an article by Gailmard and Patty, Moe argues that providing for a degree of agency discretion will lead to superior performance.<sup>178</sup>

Relying on after-the-fact review by Congress is far from perfect. In most cases, the budget authorization process provides an important check on agency action and can ensure the legitimacy of agency experiments. Nonetheless, there may well be cases where information asymmetries between Congress and administrative agencies allow some programs to remain under the radar.<sup>179</sup> This

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oversight, but noting that “congressional oversight and appropriations decisions have been found to be important predictors of activity levels at the EPA and other agencies through the late 1980s”).

<sup>175</sup> Steve Croley offers this criticism of the McNollgast theory. Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7, 34 (2000) (“Another difficulty with the McNollgast view is its implicit suggestion that agencies defy Congress—upset proper legislative coalitions—only through action, not inaction.”).

<sup>176</sup> Moe, *supra* note 170, at 1158 (“The McNollgast theory is about what Congress can do to prevent runaway bureaucracy, which is an important issue. . . . The presumption seems to be that, as long as agencies are under control and prevented from drifting, they will perform effectively and constituents will get their benefits.”).

<sup>177</sup> *Id.* at 1159.

<sup>178</sup> *Id.* at 1170-71 (discussing Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873, 882-84 (2007)). Stated simply, Gailmard & Patty explain that “only those with a stake in policy can be induced (by the limited instruments available) to become experts.” Gailmard & Patty, *supra*, at 886. The same analysis can also apply to the case of how much discretion the White House should allow to agencies to develop and implement regulatory initiatives. Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 434 (2009) (“Presidents may well be willing to forego politicization or centralization and opt for a form of administration they can less easily control if they believe that doing so will yield more effective performance.”).

<sup>179</sup> On the McNollgast view, it was not necessarily information asymmetries that raised this concern, but that a winning coalition that pushed the original legislation might fracture in the face of a different outcome at the administrative agency, thereby undermining Congress’s ability to push for its original policy preference after-the-fact. See McCubbins et al., *supra* note 169, at 435-40. To the extent that this dynamic could take hold, however, it would apply only in situations where the policy outcome was clearly zero-sum, with concrete winners and losers. In many cases, including the case studies discussed in Part III, this premise does not

concern should not be overstated, however, as like in the Energy Star case, Congress plainly engages in after-the-fact oversight.<sup>180</sup> Moreover, to the extent that agencies believe that such oversight is possible, they may well internalize congressional concerns and avoid controversy by declining to act outside of their mandates.<sup>181</sup>

## 2. Compliance with Traditional Administrative Law Norms

For regulatory initiatives managed by private bodies (or even for public agencies acting outside formal processes), there is a basic question as to whether they comply with traditional administrative law norms. With respect to standard setting, the federal government has long required that “official” standard setting bodies—that is, those developing voluntary consensus standards used or supported by the government—must operate based on a set of norms related to openness and transparency. In particular, the Office of Management and Budget (“OMB”) has explained that such bodies should adhere to the following: (1) openness, (2) balance of interest, (3) due process, (4) a review/appeals process, and (5) a commitment to developing consensus.<sup>182</sup> By following these principles, the OMB suggests, such bodies can develop legitimacy.<sup>183</sup> Similarly, when governments rely on third party certification regimes, the best practice is to ensure that they operate openly and transparently.<sup>184</sup>

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hold. A more powerful reason to doubt the ability of Congress to engage in after-the-fact review is that its practice of establishing multiple agencies with oversight jurisdiction—thereby creating a “multiplicity of legislative principals”—can undermine “the control they have collectively over a bureaucratic agent.” Sean Gailmard, *Multiple Principals and Oversight of Bureaucratic Policy-Making*, 21 J. THEORETICAL POL. 161, 181 (2009).

<sup>180</sup> Ryan Bubb & Patrick L. Warren, *Optimal Agency Bias and Regulatory Review*, 43 J. LEGAL STUD. 95, 125-27 (2014) (contending oversight of FTC in early- and late-1970s influenced agency behavior).

<sup>181</sup> Jacob E. Gersen, *Designing Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 335 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010) (“A rational agency might prefer to maintain rigid control over existing jurisdiction or avoid entering into regulatory domains that will prove especially controversial . . .”); *id.* at 336 (explaining “under-reaching” by agencies on ground that they might well prefer to “maximize autonomy instead of regulatory authority”).

<sup>182</sup> OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-119, FEDERAL PARTICIPATION IN THE DEVELOPMENT AND USE OF VOLUNTARY CONSENSUS STANDARDS AND IN CONFORMITY ASSESSMENT ACTIVITIES 16 (2014), [https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A119/revised\\_circular\\_a-119\\_as\\_of\\_1\\_22.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A119/revised_circular_a-119_as_of_1_22.pdf) [<https://perma.cc/92RE-UE2H>].

<sup>183</sup> *Id.* at 14-16.

<sup>184</sup> LESLEY K. MCCALLISTER, THIRD-PARTY PROGRAMS TO ASSESS REGULATORY COMPLIANCE (PRELIMINARY DRAFT) 47 (2012) <https://www.acus.gov/sites/default/files/documents/Draft-Report-on-Third-Party-Programs-to-Assess-Regulatory-Compliance.pdf> [<https://perma.cc/2AS4-ELKG>] (highlighting importance of transparency and accountability to protect public confidence in such third-party programs); see Daniel C. Esty, *Good*

As a foundational matter, the values of due process—namely, notice and the opportunity to be heard—are fundamental to the administrative state. To be successful, experimental regulatory programs must take these values seriously.<sup>185</sup> Similarly, the administrative law tradition of providing reasoned justifications for decisions—even if not subject to judicial review—is a healthy practice for public agencies and private entities developing new regulatory initiatives.<sup>186</sup> By adhering to such norms, both public agencies and private entities can earn legitimacy.

For private entities, membership structure is a critical step to building legitimacy.<sup>187</sup> Initially, when the World Wildlife Fund and Unilever founded the MSC program, it was criticized as tilted toward industry and insufficiently transparent and participatory.<sup>188</sup> Responding to these criticisms, the MSC became an independent non-profit organization in 1998 and took governance issues very seriously, instituting requirements that “enhance[d] participation, representation, and transparency.”<sup>189</sup> Moreover, in 2001, after further governance review, the MSC instituted a series of measures to facilitate its responsiveness to a range of stakeholders, including the addition of a technical advisory board, a stakeholder council, and national and regional working groups.<sup>190</sup>

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*Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1527-37 (2006) (setting out best practices for governance and asserting that “a procedurally sophisticated rulemaking process promotes political debate and decisionmaking based on reasoned analysis and, thus, enhances deliberative legitimacy”).

<sup>185</sup> For discussions of this point, see McAllister, *supra* note 19, at 404 (“The development of program rules and guidance [of a private regulatory regime] should include public notice and participation.”); Weiser, *supra* note 35, at 577 (calling for such experimental regulatory programs to adopt “commitment to transparency, open participation (at least on specified terms), [and] periodic exit rights for members”).

<sup>186</sup> The classic administrative law case on point is *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) (requiring agency to “examine the relevant data and articulate a satisfactory explanation for its action”).

<sup>187</sup> To develop that credibility, as explained by Ofcom, the organization must include the right mix of membership. See OFFICE OF COMM’CNS, INITIAL ASSESSMENTS OF WHEN TO ADOPT SELF- OR CO-REGULATION § 4.3(h), 12 (2008) (U.K.), [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0019/41806/condoc.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0019/41806/condoc.pdf) [<https://perma.cc/VMN8-67CE>] (considering “a system involving a mixture of independent lay and industry members [to] be appropriate in both the [self-regulatory] scheme’s governing body and further operating committees” and necessary to garner respect of stakeholder groups).

<sup>188</sup> Martijn W. Scheltema, *Assessing Effectiveness of International Private Regulation in the CSR Arena*, 13 RICH. J. GLOBAL L. & BUS. 263, 310-11 (2014).

<sup>189</sup> *Id.*

<sup>190</sup> Lars H. Gulbrandsen, *Accountability Arrangements in Non-State Standards Organizations: Instrumental Design and Imitation*, 15 ORG. 563, 572 (2008). The MSC is still led by a self-perpetuating board of trustees. *Id.*

The Forest Stewardship Council (“FSC”),<sup>191</sup> which provided the basic model for the MSC, uses a very sophisticated governance structure and enjoys a competitive advantage on that account.<sup>192</sup> Under the FSC’s charter, social, economic, and environmental concerns have equal weight.<sup>193</sup> In the face of adopting stricter standards than some industry participants believed appropriate, industry interests sought to establish rival certification programs.<sup>194</sup> Those programs, however, were forced to adjust their governance models “to accept some degree of scrutiny from and answerability to outside stakeholders” in order to compete with “FSC for legitimacy and rule-making authority.”<sup>195</sup> This development suggests that governance norms around transparency, participation, and accountability are becoming *de rigueur* for trusted multi-stakeholder organizations.<sup>196</sup> Ideally, such safeguards can limit the risk of public choice pressures and industry capture in multi-stakeholder organizations.<sup>197</sup>

Even with diverse membership, multi-stakeholder organizations must take affirmative steps to address the “[c]oncerns about the uneven capacity of

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<sup>191</sup> Like the MSC, the FSC focuses on sustainability, articulating its mission as providing principles and criteria for “environmentally appropriate, socially beneficial, and economically viable forest management.” *The 10 FSC Principles*, FOREST STEWARDSHIP COUNCIL <https://ic.fsc.org/en/what-is-fsc-certification/principles-criteria/fscs-10-principles> [<https://perma.cc/W79D-S4PY>] (last visited Nov. 17, 2017).

<sup>192</sup> Scheltema, *supra* note 188, at 311.

<sup>193</sup> *Id.* (“[The FSC] established a tripartite governance structure composed of social, environmental, and economic chambers which have equal voting rights. In each chamber there are north and south sub chambers with equal voting rights regardless of the number of members.”); see Meidinger, *supra* note 83, at 53 (“The FSC’s international governing body, the General Assembly, is constituted of three chambers—economic, social and environmental—with equal voting power. These chambers are further divided into Northern (developed country) and Southern (developing country) sub-chambers, each also holding equal decisional power . . .”).

<sup>194</sup> Gulbrandsen, *supra* note 190, at 572.

<sup>195</sup> *Id.* at 572; see Meidinger, *supra* note 83, at 55 (noting that FSC rival, Sustainable Forestry Initiative, “has since gone through numerous other iterations, gradually getting stronger and more detailed, and eventually being placed under the control of a nominally independent multi-stakeholder board”).

<sup>196</sup> See Gulbrandsen, *supra* note 190, at 575 (making this argument and concluding that “accountability structures are most developed in FSC and MSC, whereas certification proceedings in industry-dominated schemes tend to be less demanding, transparent and open to outside stakeholders”); Errol Meidinger, *Competitive Supragovernmental Regulation: How Could It Be Democratic?*, 8 CHI. J. INT’L L. 513, 517 (2008) (“Most programs now provide for multi-stakeholder participation, notice-and-comment processes for rulemaking and adjudication, public responses to comments and explanation of decisions, . . . and similar practices characterizing modern administrative regulation.”); see also Lytton, *supra* note 143, at 547 (explaining how UL built up “its reputation for trustworthiness through transparency”).

<sup>197</sup> In praising such structures, one commentator went so far as to suggest that they are resistant to such practices and “more directly democratic” than traditional regulatory institutions. Roberts, *supra* note 148, at 140.

different stakeholders to participate.”<sup>198</sup> To be sure, this concern is equally applicable to traditional administrative processes conducted by public agencies.<sup>199</sup> With respect to providing voices to different groups, the leaders of multi-stakeholder processes should be aware that not all groups are equally well positioned to participate and there are measures—such as the ones taken by the FSC<sup>200</sup>—that can ensure all perspectives are heard before important decisions are made. Given that such measures may well require funding those who cannot otherwise participate, this challenge threatens to become an Achilles heel for any multi-stakeholder organization.

### C. *Accountability*

To ensure that a regulatory regime is successful, it must hold regulated firms accountable. For agencies or entities that lack the tools to punish non-compliance with a regulatory standard, the risk is that opportunistic behavior, whether cheating on the rule or free-riding by not making the investments necessary for full compliance, will become the norm. As sociological studies show, where firms believe that compliance is the norm, they are far more likely to comply; by contrast, the belief that others are cheating encourages non-

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<sup>198</sup> Nick Doty & Deidre K. Mulligan, *Internet Multistakeholder Processes and Techno-Policy Standards*, 11 J. TELECOMM. & HIGH TECH. L. 135, 163, 181 (2013) (examining multi-stakeholder effort on internet privacy and noting need for “additional measures to ensure effective participation by diverse stakeholders”); see Waz & Weiser, *supra* note 63, at 344 (“With greater openness to members, [multistakeholder] bodies must . . . minimize the risk of forum-packing, which can become a challenge when an organization’s ground rules permit disproportionate representation that may introduce dimensions of politics into its process.”).

<sup>199</sup> Lytton, *supra* note 143, at 569 (noting private entity certification efforts that “compare favorably in terms of participation, transparency, and accountability with notice-and-comment rulemaking”); Sidney Shapiro, Elizabeth Fisher & Wendy Wagner, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 464 (2012) (“Empirical evidence indicates that industry interests dominate the rulemaking process in a number of important areas of social regulation, with no public interest representation at all in many rulemakings.”); Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 119, 152 (2011) (examining “interest group participation and influence during three stages of the rulemaking process for one set of highly technical rules promulgated by EPA” and concluding that “imbalanced participation” from industry and public interest groups is prevalent).

<sup>200</sup> Meidinger, *supra* note 196, at 527 (noting that FSC tried to “provide resources and venues” to allow less-endowed interests to join in discussions).

compliance.<sup>201</sup> Consequently, a common response to potential cheating is to require auditing or certification of the regulated standard of conduct.<sup>202</sup>

As this Section discusses, there are a range of different auditing, certification, and oversight regimes to encourage compliance. For self-regulatory initiatives, it is often the case that “the presence or absence of public monitoring is critical.”<sup>203</sup> And the design of such regimes matters. In the best of cases, effective oversight can ensure vigilant compliance, leveraging public disclosure as a tool and incentive.<sup>204</sup> In the worst cases, the compliance regime encourages check-the-box thinking and conduct that misleads the public as to whether a firm is meaningfully compliant.<sup>205</sup>

A fundamental challenge for private regimes that rely on outside oversight is the potential conflict of interest facing auditors and certification bodies. As one commentator explained, the goal of such programs is for the “certifier” to operate as a “trustworthy expert who can verify for outsiders that a firm is performing to [a] standard” of conduct and be analogous to a hearing officer or government inspector.<sup>206</sup> The big difference and challenge is that auditors and certification bodies are selected and paid for by the regulated firm. When structured well, such as the MSC,<sup>207</sup> a successful program can operate effectively and manage the potential conflicts of interest, ensure sufficient transparency, and promote accountability.<sup>208</sup> In other cases, however, the

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<sup>201</sup> See Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333, 341-43 (2001) (“In sum, individuals behave like amoral calculators posited by the conventional theory *only* when they believe that others are cheaters; if they believe that others are morally motivated to comply, they reciprocate by complying in turn, whether or not they believe that they could profitably evade.”).

<sup>202</sup> *But see id.* at 343 (“But because stepped up enforcement efforts supply no assurance that citizens can *trust* others to pay their taxes, they are unlikely to promote the reciprocal cooperation necessary to sustain high compliance levels.”).

<sup>203</sup> Weiser, *supra* note 35, at 552; see AYRES & BRAITHWAITE, *supra* note 16, at 33 (noting salutary effect of oversight and “claim[ing] that business actors are likely to put forward a self that they, the regulator and the researcher observing them, are all likely to view as their socially responsible self”); Jodi L. Short & Michael W. Toffel, *Making Self-Regulation More Than Merely Symbolic: The Critical Role of the Legal Environment*, 55 ADMIN. SCI. Q. 361, 387 (2010) (concluding that self-regulation without oversight can be abused by poor compliers “as window dressing” and that threat of punishment in background is healthy).

<sup>204</sup> McAllister, *supra* note 19, at 314.

<sup>205</sup> Friederike Albersmeier et al., *The Reliability of Third-Party Certification in the Food Chain: From Checklists to Risk-Oriented Auditing*, 20 FOOD CONTROL 927, 928-30 (2009) (explaining risk-assessment-based auditing versus checklist-based auditing); see Alexia Brunet Marks, *A New Governance Recipe for Food Safety Regulation*, 47 LOYOLA U. CHI. L.J. 907, 960-61 (2016) (discussing this concern in context of food safety regulation).

<sup>206</sup> *E.g.*, Meidinger, *supra* note 8, at 267.

<sup>207</sup> See *supra* note 189 and accompanying text.

<sup>208</sup> In statutory regimes that call for third-party audits, Congress generally institutes requirements for managing conflict of interest concerns, including oversight of those charged



potential for conflicts of interest and the need to develop safeguards against them is neglected.<sup>209</sup> In short, it is crucial that programs ensure effective oversight lest participants begin to see compliance as optional and non-compliance as the norm.<sup>210</sup>

The risks to initiatives without strong safeguards against cheating underscores the importance of a robust accreditation regime. As for the MSC case discussed above, formally accredited bodies oversee and certify the results of purportedly independent auditors.<sup>211</sup> To guide such oversight, the International Organization for Standardization (“ISO”) has developed a standardized approach to “conformity assessment,”<sup>212</sup> explaining the two key elements of this model: (1) certification and (2) accreditation.<sup>213</sup> Notably, the ultimate authority (say, a governmental agency like the EPA) selects the accreditation body (or bodies) to accredit responsible auditors and to certify audits as a means of ensuring compliance with the regulatory regime.<sup>214</sup> With an independent accreditation

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with accrediting the auditors. *See, e.g.*, Marks, *supra* note 205, at 936-40 (discussing Food Safety Modernization Act’s third party auditing regime); McAllister, *supra* note 19, at 335-38 (same).

<sup>209</sup> Notably, in some programs, there is “little transparency in the inspection activities of the auditors hired by commercial buyers to check on their suppliers.” Lesley K. McAllister, *Regulation by Third-Party Verification*, 53 B.C. L. REV. 1, 34 (2012). In such cases, where third-party auditors are arranged for and paid for by the regulated firm with little oversight, the relationship is “rife with potential for abuse.” Margaret Blair, Cynthia A. Williams & Li-Wen Lin, *The New Role for Assurance Services in Global Commerce*, 33 J. CORP. L. 325, 334 (2008).

<sup>210</sup> *See* OFFICE OF COMMC’N, *supra* note 35, at 22 (emphasizing importance of “openness and transparency in operation, and a degree of public accountability in relation to the scheme’s performance”); Julien Etienne, *Compliance Theory: A Goal Framing Approach*, 33 LAW & POL’Y 305, 316 (2011) (explaining how perceptions of institutional environment shape attitudes toward compliance).

<sup>211</sup> *See* McAllister, *supra* note 209, at 2 (“With third-party verification, regulated entities are required to contract with a ‘verifier’ or ‘verification body’ to make a regulatory compliance determination.”).

<sup>212</sup> The American National Standards Institute (“ANSI”) is recognized by ISO as the “official U.S. representative.” *About ANSI*, AM. NAT’L STANDARDS INST., [https://www.ansi.org/about\\_ansi/overview/overview?menuid=1](https://www.ansi.org/about_ansi/overview/overview?menuid=1) [<https://perma.cc/WWA5-NC6P>] (last visited Nov. 17, 2017). ANSI defines “conformity assessment” as the “demonstration that specified requirements relating to a product, process, system, person, or body are fulfilled.” AM. NAT’L STANDARDS INST., UNITED STATES CONFORMITY ASSESSMENT PRINCIPLES 3, 5 (3d ed. 2007), <https://share.ansi.org/shared%20documents/News%20and%20Publications/Brochures/USCAP%202011.pdf> [<https://perma.cc/2GYR-6XY9>].

<sup>213</sup> For a discussion of conformity assessment, see McAllister, *supra* note 19, at 310-12 (explaining development of standardized conformity assessment and detailing different forms of assessment, including testing, inspection, certification, and accreditation).

<sup>214</sup> *See id.* at 312 (“Accreditation bodies may be public or private entities, and some countries have one or more private accreditation bodies in addition to or instead of a national accreditation body. Accreditation bodies, in turn, are often members of either the International

body in place, auditors cannot take for granted that pleasing the regulated firm is their only obligation (other than professional norms); rather, they must consider whether their work will be accepted and whether they can maintain their accreditation.<sup>215</sup> Moreover, making the certification decision and firm performance data public provides both an incentive for firm improvement as well as a basis for other outside parties to scrutinize the certification decision.<sup>216</sup>

The value of an effective accreditation system is underscored by the experience of the Energy Star program. In the early 1990s, the EPA, in an innovative regulatory experiment, developed a voluntary program for electronics manufacturers to label their programs with a “certification mark” (Energy Star) that signaled that the products were energy efficient.<sup>217</sup> On a number of levels, the program has succeeded, “sav[ing] American families and businesses 503 billion kWh of energy and \$34 billion on their energy bills in 2015 alone” and catalyzing the “purchase [of] more than 300 million Energy Star certified products in 2015.”<sup>218</sup> For consumers, the brand is both familiar (“seventy-six percent of households reported a high understanding of the ENERGY STAR label in 2015”)<sup>219</sup> and powerful (fifty-two percent of consumers in non-high-publicity areas in 2015 reported that they were “‘very much’ influenced by the label after recognizing it and purchasing an ENERGY STAR-labeled product”).<sup>220</sup> Finally, building on this model and working with

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Accreditation Forum (IAF) or the International Laboratory Accreditation Cooperation (ILAC), which require adherence to international standards for accreditation bodies and use a system of peer evaluation to assess accreditation bodies for membership.” (footnote omitted)).

<sup>215</sup> See *id.* (explaining that objective of independent accreditation “is that conformity assessment bodies accredited by member accreditation bodies will be recognized as competent in multiple jurisdictions and markets”).

<sup>216</sup> See Meidinger, *supra* note 83, at 71-73 (noting that FSC reviews “accreditation decisions of certifiers, with the option of suspending or revoking their status as certifiers if problems occur,” and uses transparency of certification proceedings as check on certifiers).

<sup>217</sup> See Fla. Citrus Comm’n, 160 U.S.P.Q. (BNA) 495, 499 (T.T.A.B. 1968) (“A certification mark is a special creature created for a purpose uniquely different from that of an ordinary service mark or trademark.”); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 11 cmt. a (AM. LAW INST. 1995).

<sup>218</sup> About ENERGY STAR, ENERGY STAR, (footnote omitted) <https://www.energystar.gov/about> [<https://perma.cc/SYG6-3C8W>] (last visited Nov. 17, 2017).

<sup>219</sup> EPA OFFICE OF AIR AND RADIATION, CLIMATE PROTECTION P’SHIPS DIV., NATIONAL AWARENESS OF ENERGY STAR FOR 2015: ANALYSIS OF 2015 CEE HOUSEHOLD SURVEY ES-1 (2015) [https://www.energystar.gov/index.cfm?fuseaction=home.downloadfile&file=F84267790DF5B5F22EB9D715BC7BEC4F2E6F21C078AD0D8DB716916D20CB04C3778CC40ABE8B9DBF508BE77DAD9A753D5EAA2CFC510D5530702AC176F23ACA67F51939211384A8256F097182F6234B80CC51C3BB639D51552DAB56D4A545B4EC28CA75636445B36DBC1EBCFB00613B4901FD9F2DFC20B85E0A8A1CF8C266ED6C552155DB4A2FA9F326381FE0D89F4D1F&app\\_code=publications&env\\_name=other](https://www.energystar.gov/index.cfm?fuseaction=home.downloadfile&file=F84267790DF5B5F22EB9D715BC7BEC4F2E6F21C078AD0D8DB716916D20CB04C3778CC40ABE8B9DBF508BE77DAD9A753D5EAA2CFC510D5530702AC176F23ACA67F51939211384A8256F097182F6234B80CC51C3BB639D51552DAB56D4A545B4EC28CA75636445B36DBC1EBCFB00613B4901FD9F2DFC20B85E0A8A1CF8C266ED6C552155DB4A2FA9F326381FE0D89F4D1F&app_code=publications&env_name=other) [<https://perma.cc/6KUD-2ERF>].

<sup>220</sup> *Id.* at 21.

the EPA, other countries, including Canada, New Zealand, and Taiwan, as well as the European Union, adopted the Energy Star program for certain products.<sup>221</sup>

For most of its history, the Energy Star program relied on manufacturers to self-declare compliance, with no requirement for independent third-party certification and very limited oversight to guard against false reporting.<sup>222</sup> After a *Consumer Reports* analysis<sup>223</sup> and a Government Accountability Office (“GAO”) investigation highlighted the flaws of this approach, including a GAO audit that reported that fifteen out of twenty non-qualifying products submitted for review were accepted by the EPA,<sup>224</sup> the EPA agreed to change the structure of the program.<sup>225</sup> Energy Star labeling now requires testing in an accredited laboratory and certified results (by an accredited certification body) that are sent to the EPA.<sup>226</sup> Moreover, Energy Star audits product certifications to ensure that they are being managed properly and the accreditation system now requires the accreditation bodies to conduct periodic assessments of the certification bodies they oversee.<sup>227</sup> Applications for the Energy Star label have not fallen off despite the rising compliance costs, signaling the program’s value.<sup>228</sup>

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<sup>221</sup> *ENERGY STAR International Partners*, ENERGY STAR, [https://www.energystar.gov/index.cfm?c=partners.intl\\_implementation](https://www.energystar.gov/index.cfm?c=partners.intl_implementation) [<https://perma.cc/2BLT-DJHW>] (last visited Nov. 18, 2017).

<sup>222</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-470, *ENERGY STAR PROGRAM: COVERT TESTING SHOWS THE ENERGY STAR PROGRAM CERTIFICATION PROCESS IS VULNERABLE TO FRAUD AND ABUSE* 6 (2010), <http://www.gao.gov/new.items/d10470.pdf> [<https://perma.cc/DX9B-H6ZR>].

<sup>223</sup> *See id.* at 7 (“[A]n October 2008 issue of *Consumer Reports* detailed further problems [with the Energy Star certification program], including lax qualifying standards, federal testing procedures that were outpaced by current technology, and reliance on industry self-policing . . . without evidence of the effectiveness of that approach.”); Ryan Davis, *‘Energy Star’ Claims May Be Misleading: Study*, LAW360 (Sept. 19, 2008), <https://www.law360.com/articles/69886> (“Consumer Reports also faulted the program for allowing companies to self-certify that their products comply with the standards, since the EPA does not test any products itself. As a result, there is no independent verification of what the manufacturers report.”).

<sup>224</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 222, at 8; *see id.* at 17 (“Our ability to obtain product certifications with unverified test results illustrates the need for, at a minimum, some level of third-party testing for the program to be one of certification versus self-certification.”).

<sup>225</sup> Memorandum from Cathy Zoi, Assistant Sec’y, U.S. Dep’t of Energy, & Gina McCarthy, Assistant Adm’r, U.S. Env’tl. Prot. Agency, to Steven Chu, Sec’y, U.S. Dep’t of Energy, & Lisa P. Jackson, Adm’r, U.S. Env’tl. Prot. Agency, on Building a Stronger Energy Star Program para. 2 (Apr. 2, 2010), [https://www.energystar.gov/ia/news/downloads/Joint\\_Letter\\_with\\_DOE\\_EPA\\_Building\\_a\\_Stronger\\_Energy\\_Star\\_Program.pdf](https://www.energystar.gov/ia/news/downloads/Joint_Letter_with_DOE_EPA_Building_a_Stronger_Energy_Star_Program.pdf) [<https://perma.cc/ES7Y-GB6C>].

<sup>226</sup> *Id.* paras. 3-9 (explaining changes in program away from self-certification towards independent testing); *see* McCallister, *supra* note 209, at 19.

<sup>227</sup> MCCALLISTER, *supra* note 184, at 49.

<sup>228</sup> *Id.* at 53.

The Administrative Conference of the United States has studied the use of third-party certification regimes and recommends that agencies carefully “evaluate whether sufficient incentives exist or can be created to attract the participation of regulated entities in the third-party program.”<sup>229</sup> As examples of such incentives, it mentions an “exemption from a governmental fee” and the ability to satisfy multi-jurisdictional regulatory requirements “through a single third-party conformity assessment.”<sup>230</sup> The Administrative Conference concluded, moreover, that when an agency relies on third-party evaluators, it “has a duty to exercise oversight to ensure that the third-party is fulfilling its regulatory purpose.”<sup>231</sup> Similarly, with respect to private regulatory initiatives, the ISEAL Alliance works with “multi-stakeholder sustainability standards and accreditation bodies that demonstrate their ability to meet the ISEAL Codes of Good Practice and accompanying requirements, and commit to learning and improving,” enabling efforts like the MSC to increase their effectiveness.<sup>232</sup>

In general, private regulation efforts are unlikely to succeed without the backing of effective public oversight to address the threat of opportunist behavior by companies claiming compliance, but disregarding relevant requirements.<sup>233</sup> This general rule, however, gives way to important

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<sup>229</sup> ACUS Recommendation 2012-7, Agency Use of Third-Party Programs to Assess Regulatory Compliance, 78 Fed. Reg. 2941, 2942 (Jan. 15, 2013).

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 2943.

<sup>232</sup> *About Us*, ISEAL ALLIANCE, <http://www.isealalliance.org/about-us> [https://perma.cc/9PQE-HPM8] (last visited Nov. 17, 2017); see Tracey M. Roberts, *Innovations in Governance: A Functional Typology of Private Governance Institutions*, 22 DUKE ENVTL. L. & POL’Y F. 67, 95-96 (2011) (praising role of ISEAL Alliance).

<sup>233</sup> See Joel Seligman, *Cautious Evolution or Perennial Irresolution: Stock Market Self-Regulation During the First Seventy Years of the Securities and Exchange Commission*, 59 BUS. LAW. 1347, 1347 (2004) (“[I]ndustry self-regulation subject to SEC supervision generally has been effective in its major applications when the Commission has been willing to threaten or actually use its regulatory authority to create incentives for securities industry self-regulation.”); Jodi L. Short, *Self-Regulation in the Regulatory Void: “Blue Moon” or “Bad Moon,”* 649 ANNALS AM. ACAD. POL. & SOC. SCI. 22, 23 (2013) (finding that “self-regulation works best when it is not really self-regulation at all, but when it constitutes regulated organizations as more governable institutions within a robust regulatory regime”). As one study of the chemical industry’s Responsible Care program found:

Our research exposes the difficulty in establishing and maintaining industry self-regulation. Responsible Care has operated up to now without explicit sanctions for malfeasance. As a result, our data suggest, it has fallen victim to enough opportunism that it includes a disproportionate number of poor performers, and its members do not improve faster than nonmembers.

Andrew A. King & Michael J. Lenox, *Industry Self-Regulation Without Sanctions: The Chemical Industry’s Responsible Care Program*, 43 ACAD. MGMT. J. 698, 713 (2000). For an economic modeling of this concept, see Peter M. DeMarzo, Michael J. Fishman & Kathleen M. Hagerty, *Self-Regulation and Government Oversight*, 72 REV. ECON. STUD. 687, 700 (2005) (concluding that “[o]versight allows the government to threaten enforcement without

exceptions.<sup>234</sup> First off, as in the MSC case, a purely private regulatory regime that is viewed as credible and develops a successful brand in the marketplace can influence industry behavior by using a meaningful certification regime.<sup>235</sup> Second, either a private or a public sector effort can be successful if industry participants believe that compliance is valuable and may well sway regulatory or legal authorities by operating as a safe harbor in practice (such as with BITAG and the Copyright Alliance).<sup>236</sup> Finally, as in the FTC's oversight of online privacy, the adoption of either a private regulatory standard or compliance with best practices developed by a governmental agency may take hold as ways to avoid more stringent governmental regulation.<sup>237</sup> Indeed, some commentators have argued that some private certification efforts outperform government ones by effectively resisting public choice pressures—with the aid of empowered members (such as the role of insurance companies in UL who insist on vigilance)—that would undermine their reliability.<sup>238</sup>

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actually undertaking any” and that threat raises level of compliance by self-regulatory bodies).

<sup>234</sup> Elinor Ostrom has identified the core conditions necessary for such exceptions. *See* Elinor Ostrom, *A Long Polycentric Journey*, 13 ANN. REV. POL. SCI. 1, 6 (2010) (noting importance of level of trust, reliable data, effective decision-monitoring, and ability to adapt, and concluding that “individuals facing [collective action problems] do not always need an external authority” to solve them).

<sup>235</sup> *See* King & Lenox, *supra* note 233, at 713 (noting that “explicit sanctions administered by informed outsiders may be needed to avoid opportunism within an industry self-regulatory scheme” and suggesting that third-party certifiers and publicizing firm performance information can discipline industry behavior); Vandenberg, *supra* note 64, at 166 (“Private certification and labeling systems directed at consumers are a form of large-scale private ordering that may be able to overcome . . . collective action problems . . .”). There are cases where public regulation can serve to develop a self-enforcing norm—such as banning smoking—even where there is no formal enforcement of the rule. *See* Michael J. Licari, *Bureaucratic Discretion and Regulatory Success Without Enforcement*, in *POLITICS, POLICY, AND ORGANIZATIONS: FRONTIERS IN THE SCIENTIFIC STUDY OF BUREAUCRACY* 276, 289 (George A. Krause & Kenneth J. Meier eds., 2005). This dynamic could conceivably take hold in certain private initiatives as well. *See id.* (finding that using signaled information, rather than coercion, may yield successful policies and noting that this “suggests that other, nonregulatory agencies can play an important role in implementation of regulation”).

<sup>236</sup> *See supra* notes 61, 69-76.

<sup>237</sup> Meidinger, *supra* note 83, at 59 (“[T]he threat of increased governmental regulation in the absence of effective non-governmental regulation has sometimes been a background factor in the acceptance of certification.”); Marc Schneiberg & Tim Bartley, *Organizations, Regulation, and Economic Behavior: Regulatory Dynamics and Forms from the Nineteenth to Twenty-First Century*, 4 ANN. REV. L. & SOC. SCI. 31, 48 (2008) (explaining nuclear power industry’s creation of successful self-regulatory initiative); Vandenberg, *supra* note 64, at 137 (“Corporations have incentives to use private governance to mollify stakeholder concerns and to displace more stringent government regulation, and it would be surprising if some private efforts do not have these effects.”).

<sup>238</sup> Lytton, *supra* note 143, at 560-61.

D. *Evaluating the Challenges of Experimentation and Policy Entrepreneurship*

As highlighted above and developed further in Part IV, a prerequisite to experimentation and departing from traditional models is overcoming bureaucratic inertia. As explained in this Section, it is possible that experimentation spurred by entrepreneurial leadership could make things worse—if applied to programs and processes that are working reasonably well. In this Section, I discuss five types of risks of departing from a traditional model: (1) taking policy in a lawless (or even dangerous) direction, (2) undermining a good (even if imperfect) program, (3) evading public input and transparency, (4) discouraging better practice by promoting best practice, and (5) enabling industry capture.

A bureaucratic system is designed to ensure regularity and consistency in decisionmaking. Max Weber, who evaluated the emerging bureaucratic state in the early 1900s, identified this basic characteristic and described how it operated.<sup>239</sup> As Professor Gillian Metzger explained, Weberian bureaucracy exists in today's federal government as "major federal agencies are generally hierarchically organized and staffed substantially by career public servants with removal protection."<sup>240</sup> Consequently, once a program is designed and once processes are instituted, bureaucratic inertia serves the purpose of protecting the basics of the program.

A basic objection to the idea that agencies can earn regulatory authority through entrepreneurial initiatives is that this model will undermine effective public administration. In the strongest version of this concern, entrepreneurial leaders in government and experimentation in regulatory programs provide flexibility to governmental leaders that is abused.<sup>241</sup> Viewed against this concern, bureaucratic inertia and regular processes provide bulwarks against abuse and corruption.<sup>242</sup> In the case of President Trump, for example, some have

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<sup>239</sup> 3 MAX WEBER, *ECONOMY & SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 956-59 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1968). In line with Weber's analysis, Nobel Laureate Oliver Williamson explained that bureaucracy serves the purpose of "promot[ing] probity in mission, responsiveness, and [consistent] communication." Oliver E. Williamson, *Public and Private Bureaucracies: A Transaction Cost Economics Perspective*, 15 J.L. ECON. & ORG. 306, 325 (1999).

<sup>240</sup> Gillian B. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1848 (2015).

<sup>241</sup> On this view, for example, J. Edgar Hoover's entrepreneurial leadership takes the form of abusing his position. See JOHN BRAITHWAITE, *RESPONSIVE EXCELLENCE* 1 (2015), [https://www.anu.edu.au/fellows/jbraithwaite/\\_documents/Articles/2015\\_Responsive-Excellence.pdf](https://www.anu.edu.au/fellows/jbraithwaite/_documents/Articles/2015_Responsive-Excellence.pdf) [<https://perma.cc/3Z87-W5J3>] ("J. Edgar Hoover is the archetypal evil regulator because he sought to be transformative by abusing arbitrary power.").

<sup>242</sup> See Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 540-41 (2015) (explaining how civil servants "are well positioned to push back on any tendency agency leaders might have to skirt laws and promote hyperpartisan interests").

suggested that bureaucratic inertia is a powerful force that will minimize the impact of dangerous policies.<sup>243</sup>

The concern about making changes for the sake of change or making misguided changes is well taken. As a foundational principle, those evaluating changes to existing programs should remember that “the best is the enemy of the good.”<sup>244</sup> For a regulatory program that works well enough, but could be improved, experimentation and innovation might make matters worse. Emphasizing this point, commentators like Professor Jill Lepore have reacted to Professor Clayton Christensen’s high praise for innovation with strong criticism; as Lepore puts it, the core weakness of Christensen’s praise of innovation is that “[t]ransfixed by change, it’s blind to continuity.”<sup>245</sup>

Skeptics of innovation highlight the risk that governmental leaders will pursue change and innovation for its own sake, fail to know what they do not know, and undermine well-functioning programs in the process.<sup>246</sup> Such concerns are particularly poignant where the risks of failure—which can arise when departing from traditional processes, such as those involved in ensuring nuclear safety regulation—are greatest. In such contexts, my critique of government’s undervaluing the impact of false negatives on account of the inertial bias against experimentation and innovation does not apply with the same force.<sup>247</sup> Indeed, some regulatory reforms later connected to the financial crisis were criticized on this very ground,<sup>248</sup> in line with the conventional defense of bureaucratic inertia “as a brake on ill-considered adaptations.”<sup>249</sup>

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<sup>243</sup> See, e.g., Leon Neyfakh, *Can the “Secret Government” Save Us?*, SLATE (Nov. 14, 2016), [http://www.slate.com/articles/news\\_and\\_politics/politics/2016/11/can\\_the\\_secret\\_government\\_save\\_us\\_from\\_donald\\_trump.html](http://www.slate.com/articles/news_and_politics/politics/2016/11/can_the_secret_government_save_us_from_donald_trump.html) [<https://perma.cc/Z8YQ-UU9K>].

<sup>244</sup> THE OXFORD DICTIONARY OF QUOTATIONS 716 (Angela Partington ed., rev. 4th ed. 1996) (translating “[l]e mieux est l’ennemi du bien” to mean “[t]he best is the enemy of the good”).

<sup>245</sup> Jill Lepore, *The Disruption Machine*, NEW YORKER, June 23, 2014, at 30, 36. *But see* Drake Bennett, *Clayton Christensen Responds to New Yorker Takedown of ‘Disruptive Innovation,’* BLOOMBERG BUS. (June 21, 2014, 1:09 PM), <http://www.bloomberg.com/news/articles/2014-06-20/clayton-christensen-responds-to-new-yorker-takedown-of-disruptive-innovation> (interviewing Clayton Christensen and discussing Jillian Lepore’s critique of Christensen’s work).

<sup>246</sup> This concern, about elected or appointed officials vis-à-vis the professional bureaucracy, goes back to Weber. See Thomas H. Hammond, *Veto Points, Policy Preferences, and Bureaucracy in Democratic Systems*, in POLITICS, POLICY, AND ORGANIZATIONS: FRONTIERS IN THE SCIENTIFIC STUDY OF BUREAUCRACY, *supra* note 235, at 73, 74 (noting advantages of bureaucracy over political leaders).

<sup>247</sup> See Derek E. Bambauer, *Ghost in the Network*, 162 U. PA. L. REV. 1011, 1029 (2014) (stating that “high reliability theory forbids trial-and-error learning because it is simply too risky that errors will arise”).

<sup>248</sup> See Weiser, *supra* note 35, at 573 (discussing SEC decision to change capital requirements for investment banks).

<sup>249</sup> Klein, *supra* note 111, at 9.

As explained above, we are moving into an age where networks, more than hierarchies, can better coordinate and influence behavior and adapt to changing circumstances.<sup>250</sup> As such, it is important to take neither a “blind obedience to disruption [nor] blind obedience to continuity.”<sup>251</sup> Skeptics of innovation may be inclined to defend status-quo approaches and doubt calls for experimentation, but as discussed above with respect to the development of the healthcare.gov website,<sup>252</sup> the use of traditional approaches in the midst of changing circumstances can have disastrous results.

Second, some criticize experimental regulatory strategies as operating outside of traditional administrative law norms. Professor Jody Freeman highlighted this concern, recommending that “standard-setting groups should adhere to at least some internal procedural rules designed to promote information disclosure, reasoned decision making, and fairness.”<sup>253</sup> Building on this suggestion, Freeman argues that “privatization can be a means of ‘publicization,’ through which private actors increasingly commit themselves to traditionally public goals.”<sup>254</sup> When following the recommendations above, this vision can be realized. Where, however, private regulatory models (or agencies developing best practices outside of rulemaking or adjudication) fail to do so, Freeman’s cautionary concern is well taken.

Third, the promotion of best practices, where an agency decides to do so, raises notable risks. Most significantly, government-promoted best practices can lead to a “ritual of comfort,” where companies become complacent by following guidelines that are not updated appropriately.<sup>255</sup> As Professor Michael Power describes, such rituals exist when companies follow outdated or useless procedures to give the appearance of accountability or order without advancing any useful purpose.<sup>256</sup> In the cybersecurity context, the risk of a check-the-box compliance mentality is substantial, as “enhancing the cybersecurity posture of a system—and by extension the organization in which it is embedded—must be understood as an ongoing process rather than something that can be done once

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<sup>250</sup> See JOHN HAGEL III & JOHN SEELY BROWN, INSTITUTIONAL INNOVATION: CREATING SMARTER ORGANIZATIONS TO SCALE LEARNING 2 (2013), <http://dupress.deloitte.com/dup-us-en/topics/innovation/institutional-innovation.html> [<https://perma.cc/W3JG-R5P3>] (download report from side-menu) (calling for “‘scalable learning’ with the goal of creating smarter institutions that can thrive in a world of exponential change”).

<sup>251</sup> Greg Satell, *Let’s Stop Arguing About Whether Disruption Is Good or Bad*, HARV. BUS. REV. (May 21, 2015), <https://hbr.org/2015/05/lets-stop-arguing-about-whether-disruption-is-good-or-bad> [<https://perma.cc/YY8V-AXT6>].

<sup>252</sup> See *supra* notes 93-110 and accompanying text.

<sup>253</sup> Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 643 (2000).

<sup>254</sup> Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1285 (2003).

<sup>255</sup> See MICHAEL POWER, *THE AUDIT SOCIETY: RITUALS OF VERIFICATION* 96 (1997).

<sup>256</sup> *Id.*



and then forgotten.”<sup>257</sup> Citing such concerns, some commentators are critical of the National Institute of Standards and Technology’s (“NIST”) Cybersecurity Framework.<sup>258</sup> Viewed more generally, this concern is why government-convened efforts should not settle for a traditional “best practices” model; rather, they should insist on building a framework and capability to drive continuously developing “better practice.”

Finally, experimental regulatory programs could enable the evasion of stricter requirements and provide an ineffective form of oversight. The success of the LEED standard and the MSC certification model over industry opposition suggests otherwise, underscoring that “public choice” concerns do not always lurk behind such models.<sup>259</sup> Nonetheless, there is a risk that such initiatives could provide the appearance, but not the reality, of regulatory oversight. The critical question, however, is whether the public choice risks in experimental contexts are necessarily greater than those in traditional programs. If experimental programs are designed to engage a wide range of stakeholders, they may well be less susceptible to such risks.

### III. CASE STUDIES OF EXPERIMENTAL REGULATION AND EARNED REGULATORY AUTHORITY

Governmental oversight of emerging technologies can take different forms. One theme that runs through each of the case studies discussed in this Part is that there are potentially significant benefits from building cooperation, facilitating coordination, and elevating the level of trust in an entire sector that comes from a shared commitment to a defined level of responsible behavior.<sup>260</sup> Catalyzing those benefits, however, requires entrepreneurial leadership and appropriate incentives to overcome the collective action problem. In the first three case

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<sup>257</sup> COMM. ON DEVELOPING A CYBERSECURITY PRIMER ET AL., AT THE NEXUS OF CYBERSECURITY AND PUBLIC POLICY: SOME BASIC CONCEPTS AND ISSUES 2-3 (David Clark, Thomas Berson & Herbert S. Lin eds., 2014).

<sup>258</sup> See, e.g., Robert Gyenes, *A Voluntary Cybersecurity Framework Is Unworkable—Government Must Crack the Whip*, 14 J. TECH. L. & POL’Y 293, 307-10 (2014) (stating that the Framework fails to establish (1) sufficiently clear compliance obligations, (2) adequate incentives for systems improvement, (3) novel practices that market could not otherwise achieve on its own, and (4) appropriate cost analysis).

<sup>259</sup> See Rachlinski & Farina, *supra* note 89, at 568 (providing example of public choice behavior as when “[p]rivate interest groups lobby for regulatory policies that advance the material well-being of their members—at best without regard to whether these policies serve the larger public interest, and often with the precise object of profiting at the expense of the public or some competing group”).

<sup>260</sup> See Robert B. Ahdieh, *The Visible Hand: Coordination Functions of the Regulatory State*, 95 MINN. L. REV. 578, 580-81 (2010) (commenting that “[m]uch of the vaunted ‘New Economy’ turns out to be a coordination economy” and calling for examination of how regulatory agencies can facilitate coordination).

studies, entrepreneurial leaders successfully developed such efforts; in the fourth study, HHS has, thus far, largely failed to do so.

A. *The LEED Building Standard*

For a case study of private regulation influencing industry behavior, consider the impact of the LEED building standards.<sup>261</sup> To appreciate its impact (and in a “perverse sign of its expanding influence”), some industry groups are concerned about its demanding requirements and are resorting to the political process to ban any reference to the standard, with Mississippi having already enacted such a law.<sup>262</sup> Despite such efforts, the LEED standard is now the leading one for green buildings and has helped grow that sector to forty-five percent of new institutional construction.<sup>263</sup>

The now-familiar LEED certification is administered by the USGBC and allows builders to certify compliance at different levels of stringency (Platinum, Gold, Silver, and Bronze), with 2.2 million square feet certified daily.<sup>264</sup> LEED’s significance is such that, as one commentator put it, “[i]ndustry groups now lobby the USGBC regarding the content of LEED standards in ways that might have been directed at Congress or the [EPA] two decades ago.”<sup>265</sup> Initially, the Council’s only mandate was its moral authority to encourage better practice. Today, there are both sticks (a number of municipalities have adopted rules for

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<sup>261</sup> See generally LEED, U.S. GREEN BLDG. COUNCIL, <https://new.usgbc.org/leed> [<https://perma.cc/XGP5-KXGH>] (last visited Nov. 17, 2017).

<sup>262</sup> Emily Badger, *Why Are Some States Trying to Ban LEED Green Building Standards?*, CITY LAB (Aug. 28, 2013), <http://www.citylab.com/design/2013/08/why-are-some-states-trying-ban-leed-green-building-standards/6691> [<https://perma.cc/7AB9-F436>]. The efforts to ban LEED, pushed by some industry groups, stem from the concern that the USGBC has shut “out many stakeholders, [is] unbalanced in its committee representation and lack[s] transparency.” Craig Silvertooth, *Commentary: More Voices Need to Be Heard When Setting Green Standards*, WASH. POST (July 21, 2013), [https://www.washingtonpost.com/business/capitalbusiness/commentary-more-voices-need-to-be-heard-when-setting-green-standards/2013/07/19/4fd8200a-ed63-11e2-9008-61e94a7ea20d\\_story.html](https://www.washingtonpost.com/business/capitalbusiness/commentary-more-voices-need-to-be-heard-when-setting-green-standards/2013/07/19/4fd8200a-ed63-11e2-9008-61e94a7ea20d_story.html) [<https://perma.cc/7R8J-HP3Z>]. Supporters of the LEED standard counter that the real issue is the timber industry’s opposition to stricter standards of conduct, notably, the FSC. See *supra* notes 191-200 and accompanying text; see also Badger, *supra* (claiming that FSC “demands costlier and more sustainable practices” in order to “pass off fundamentally status quo, barely legal forestry practices as green and sustainable”).

<sup>263</sup> See *The Business Case for Green Building*, U.S. GREEN BLDG. COUNCIL (Feb. 10, 2015), <https://www.usgbc.org/articles/business-case-green-building> [<https://perma.cc/DX4L-VTNP>]. For a favorable assessment of the LEED standard, see NAT’L RESEARCH COUNCIL, CERTIFIABLY SUSTAINABLE? THE ROLE OF THIRD-PARTY CERTIFICATION SYSTEMS 47-65 (2010).

<sup>264</sup> LEED, *supra* note 261.

<sup>265</sup> Vandenbergh, *supra* note 64, at 154.

requiring LEED certification)<sup>266</sup> and carrots (a number of state governments, as well as the federal government, have adopted incentive programs in this area)<sup>267</sup> to encourage compliance.

The LEED standard provides an overall structure for evaluating energy and environmental impact. It is structured around a 110-point scale, across eight credit categories: Energy and Atmosphere, Indoor Environmental Quality, Innovation in Design, Location and Transportation, Materials and Resources, Regional Priority, Sustainable Sites, and Water Efficiency.<sup>268</sup> The USGBC continues to refine this system through regular notice-and-comment opportunities, thereby ensuring that new technologies are captured and encouraged.<sup>269</sup> With respect to oversight, the Council has delegated the certification process to the Green Building Council Institute (“GBCI”), which accredits green building professionals.<sup>270</sup> Those professionals can work with builders to submit an application for LEED certification.<sup>271</sup> For applications that do not meet the minimum program requirements, the GBCI rejects the application. If the GBCI later learns of any inaccurate information that supported

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<sup>266</sup> See Michael T. Durham, *Counsel’s Role in Sustainable Solutions: Pay Now or Pay Later*, 31 STRATEGIC PLAN. FOR ENERGY & ENV’T 19, 31 (2012).

<sup>267</sup> Rob Freeman, *5 Green Building Tax Incentives for 2016*, POPLAR NETWORK (Jan. 26, 2016), <https://www.poplarnetwork.com/news/5-green-building-tax-incentives-2015> [<https://perma.cc/QJY2-RB9K>] (“Financial incentives include long term, low interest rate energy efficiency financing and grants tied to renewable energy investment.”).

<sup>268</sup> U.S. GREEN BLDG. COUNCIL, LEED FOR NEW CONSTRUCTION AND MAJOR RENOVATIONS (v4) 1, <https://www.usgbc.org/credits/new-construction/v4/indoor-environmental-quality> [<https://perma.cc/BH69-7CUR>] (last visited Nov. 17, 2017) (score card can be downloaded from side menu).

<sup>269</sup> Mary Jane Angelo & Joanna Reilly-Brown, *Whole-System Agricultural Certification: Using Lessons Learned from LEED to Build a Resilient Agricultural System to Adapt to Climate Change*, 85 U. COLO. L. REV. 689, 745 (2014) (“Strengths of the LEED program include its flexible credit system, the transparent nature of the standards-setting process, and the program’s whole-building life-cycle approach to certification.”); *About LEED*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/articles/about-leed> [<https://perma.cc/MPS3-5SU8>] (last updated Oct. 2017) (“LEED credits . . . are developed through several rounds of public comments and in collaboration with the [USGBC’s] board, broader membership and staff.”).

<sup>270</sup> *New Credentialing Organization Launched for Green Building Professionals*, BUILDINGS (Nov. 20, 2007), <http://www.buildings.com/news/industry-news/articleid/5451/title/new-credentialing-organization-launched-for-green-building-professionals.aspx> [<https://perma.cc/U78E-CA5X>].

<sup>271</sup> See *What Is the Green Business Certification Inc. (GBCI)*, U.S. GREEN BLDG. COUNCIL, <https://www.usgbc.org/help/what-green-building-certification-institute-gbci> [<https://perma.cc/4275-WAWH>] (last visited Nov. 17, 2017).

a successful application, it can revoke the certification, subject to the GBCI Challenge Policy.<sup>272</sup>

B. *The FTC's Approach on Privacy and Data Security*

The FTC has established itself as the de facto privacy enforcer in the United States. In other countries, national data protection authorities are formally empowered by enabling legislation.<sup>273</sup> In the United States, however, the FTC has used its legacy and broad Section 5 authority, designed to address “unfair or deceptive” trade practices,<sup>274</sup> to oversee privacy issues. More recently, the FTC broadened its use of that authority to oversee data security matters.<sup>275</sup> This authority enables the FTC to address matters where the act or practice at issue “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”<sup>276</sup> For cases of deception, the relevant harm can be presumed; for cases of “unfair practices,” the burden is on the FTC to identify the harmful impact of the relevant conduct.<sup>277</sup>

Modern privacy law and policy in the United States emerged from an act of policy entrepreneurship by the Department of Health, Education, and Welfare in

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<sup>272</sup> See generally GREEN BUS. CERTIFICATION, INC., *GBCI Certification Challenge Policy*, <https://www.usgbc.org/sites/default/files/GBCI-Cert-Challenge-Policy.pdf> [https://perma.cc/8FMP-Z2LF]. It appears that very few, if any, LEED certifications are later revoked under this policy. See, e.g., Stuart Kaplow, *Revocation of LEED Certification*, GREEN BUILDING L. UPDATE (June 2, 2014), <http://www.greenbuildinglawupdate.com/2014/06/articles/leed/revocation-of-leed-certification> [https://perma.cc/HXC6-Q523] (“We know with certainty that GBCI has never revoked a certification, but GBCI does not make public complaints that initiate the Challenge Policy. It is apparent challenges are infrequent.”).

<sup>273</sup> See ORG. FOR ECON. CO-OPERATION & DEV., THIRTY YEARS AFTER: THE OECD PRIVACY GUIDELINES 26 (2011), <http://www.oecd.org/sti/ieconomy/49710223.pdf> [https://perma.cc/FRD6-GYLX] (“Nearly all OECD countries have established authorities for enforcing data protection laws.”).

<sup>274</sup> 15 U.S.C. § 45(a)(1) (2012). Originally, the FTC Act only addressed “unfair competition.” See Wheeler-Lea Act, ch. 49, sec. 3, § 5, 52 Stat. 111, 111 (1938) (codified as amended at 15 U.S.C. § 45). In 1938, in the Wheeler-Lea Amendment, Congress expanded the Commission’s authority to enable it to address “unfair or deceptive acts of practices in commerce.” *Id.*

<sup>275</sup> See, e.g., *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 248-49 (3d Cir. 2015).

<sup>276</sup> 15 U.S.C. § 45(n).

<sup>277</sup> J. Howard Beales, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, FED. TRADE COMM'N (May 30, 2003), <https://www.ftc.gov/public-state-ments/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection> [https://perma.cc/3FHD-SQZK] (stating that Commission must analyze each case by balancing costs and benefits of challenged behavior, which “allows the Commission to provide strong consumer protection against marketplace abuses without prohibiting related conduct that is beneficial to consumers”).

1973. A Department report introduced the concept of Fair Information Practice Principles (“FIPPs”).<sup>278</sup> These principles not only shaped the U.S. Privacy Act, but also became influential around the world, providing the framework for the Organization for Economic Co-Operation and Development’s (“OECD”) 1980 Privacy Guidelines.<sup>279</sup> The first and fundamental principle of FIPPs is that individuals have the right to know what data is gathered about them and how that data will be used.<sup>280</sup> The second principle is that individuals have the right to consent—or withhold their consent—as to how that data can be used.<sup>281</sup> Taken together, these two principles represent the concept of “notice and choice,” which the FTC has used as the foundation of modern information privacy policy.

When the FTC took up the challenge of developing a U.S. regime on privacy protection in the online environment, the concept of “notice and choice” was followed only in the breach. Notably, in 1998, only two percent of all websites had privacy policies.<sup>282</sup> To spur the industry into action, the FTC encouraged online companies to post privacy policies that specified what data was collected, how it was used, and how customers could protect their data (at a minimum, by choosing whether to use the service).<sup>283</sup> Within two years, the number of websites with posted privacy policies rose from fourteen percent to eighty-eight percent.<sup>284</sup> To be sure, the mere fact that websites adopted policies does not mean that they were protective or they were necessarily adhered to; but the mere publication of policies can create liability under the FTC’s Section 5 authority if companies fail to live up to their promises.

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<sup>278</sup> U.S. DEP’T OF HEALTH, EDUC., & WELFARE, RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS: REPORT OF THE SECRETARY’S ADVISORY COMMITTEE ON AUTOMATED PERSONAL DATA SYSTEMS 41-42 (1973), <https://www.justice.gov/opcl/docs/rec-com-rights.pdf> [<https://perma.cc/M6C2-QQAJ>].

<sup>279</sup> See generally Org. for Econ. Co-Operation & Dev., *Recommendation of the Council Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data*, C(80)58/FINAL (Sept. 23, 1980), <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?%20InstrumentID=114&InstrumentPID=312> [<https://perma.cc/L2XL-7DGS>]; Bartosz M. Marcinkowski, *Privacy Paradox(es): In Search of a Transatlantic Data Protection Standard*, 74 OHIO ST. L.J. 1167, 1175-83 (2013) (discussing impact of HEW report and OECD guidelines).

<sup>280</sup> U.S. DEP’T OF HEALTH, EDUC., & WELFARE, *supra* note 278, at 41 (“There must be a way for an individual to find out what information about him is in a record and how it is used.”).

<sup>281</sup> *Id.*

<sup>282</sup> FED. TRADE COMM’N, PRIVACY ONLINE: A REPORT TO CONGRESS iii (1998), <https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-report-congress/priv-23a.pdf> [<https://perma.cc/3V8H-A3GQ>].

<sup>283</sup> *Id.* at ii-iii.

<sup>284</sup> FED. TRADE COMM’N, PRIVACY ONLINE: FAIR INFORMATION PRACTICES IN THE ELECTRONIC MARKETPLACE: A REPORT TO CONGRESS 10-11 (2000), <https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-fair-information-practices-electronic-marketplace-federal-trade-commission-report/privacy2000.pdf> [<https://perma.cc/J7GW-97YG>].

The success of the FTC's online privacy initiative reflected, among other factors, the entrepreneurial leadership of its Chairman, Bob Pitofsky.<sup>285</sup> Under Pitofsky, the agency engaged in a sustained campaign to encourage the online industry to adopt privacy policies, provide guidance on best practice, measure compliance, encourage advertisers not to work with companies without privacy policies, and emphasize that legislative action loomed if the industry failed to act on its own.<sup>286</sup> As noted above, once firms put privacy policies in place, the FTC could enforce them under its Section 5 authority because breaching promises to consumers constitutes an "unfair or deceptive" act.<sup>287</sup>

In light of the FTC's emerging leadership in the field, its authority was enhanced by three statutory developments in the late 1990s. First, Congress passed a special law—designed around the notice and choice architecture—to protect children online, the Children's Online Privacy Protection Act ("COPPA"), and give the FTC rulemaking authority under that law.<sup>288</sup> Second, Congress passed a law governing financial privacy, the Graham-Leach-Bliley Act (also built around notice and choice and a data security standard), thereby granting the FTC, among other agencies, enforcement authority under the law.<sup>289</sup> Finally, the Department of Commerce negotiated a role for the FTC to enforce compliance with the European Union Data Protection Initiative's safe harbor

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<sup>285</sup> See, e.g., Robert Pitofsky, Chairman, Fed. Trade Comm'n, Prepared Statement of the Federal Trade Commission on "Self-Regulation and Privacy Online" 4 (July 13, 1999), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/prepared-statement-federal-trade-commission-self-regulation-and-privacy-online/privacyonlinetestimony.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-self-regulation-and-privacy-online/privacyonlinetestimony.pdf) [<https://perma.cc/UX2P-HYDZ>] (describing self-regulation as "least intrusive and most efficient means to ensure fair information practices online").

<sup>286</sup> See FED. TRADE COMM'N, SELF-REGULATION AND PRIVACY ONLINE: A REPORT TO CONGRESS 12-14 (1999), <https://www.ftc.gov/system/files/documents/reports/self-regulation-privacy-online-federal-trade-commission-report-congress/1999self-regulationreport.pdf> [<https://perma.cc/V8SE-7AHQ>] ("[T]he Commission believes that legislation to address online privacy is not appropriate at this time."); Hetcher, *supra* note 52, at 2047.

<sup>287</sup> See Kovacic, *supra* note 44, at 25 (defining "essential" as "availability of the broad, flexible policy mandate of Section 5"). The FTC has pursued a similar course with respect to green marketing claims. See Jason J. Czarnezki, *Greenwashing and Self-Declared Seafood Ecolabels*, 28 TUL. ENVTL. L.J. 37, 42-48 (2014) ("The FTC published the Green Guides 'to enlighten marketers and explain how [the] FTC will enforce section five of [the] FTCA in the environmental marketing and advertising context.'" (alterations in original)).

<sup>288</sup> Children's Online Privacy Protection Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (codified at 15 U.S.C. §§ 6501-6506 (2012)).

<sup>289</sup> Gramm-Leach-Bliley Act, Pub. L. No. 106-02, § 503, 113 Stat. 1338, 1439 (codified as amended at 15 U.S.C. § 6804(a)(1)(C)) ("[T]he [FTC] shall . . . prescribe . . . such regulations as may be necessary to carry out the purposes of this subtitle with respect to the financial institutions subject to [its] jurisdiction under section 505.").

regime.<sup>290</sup> In short, over a period of about five years, the FTC “leveraged its very limited powers and fragmented authority to hoist itself into the position of being the dominant regulatory force for data privacy,”<sup>291</sup> with Congress responding to its effectiveness by providing it with additional authorities.

From 2000 to 2010, the FTC’s “privacy jurisprudence [became] the broadest and most influential regulating force on information privacy in the United States—more so than nearly any privacy statute or common law tort.”<sup>292</sup> As Professors Daniel Solove and Woody Hartzog capture in their study on the topic, FTC enforcement activity in this area, which is relatively robust, has developed a series of principles that are carefully followed and implemented by companies who collect information from consumers.<sup>293</sup> To supplement this enforcement record (and set of principles), the FTC has used its “soft law” capability of developing best practices through convenings and reports, with practitioners paying close attention to them as well.<sup>294</sup> Finally, the FTC has sought to supplement its efforts by encouraging complementary self-regulation.<sup>295</sup>

The FTC’s development of data security standards reflects an even more ambitious and imaginative use of its authority. Breaking promises with respect to a firm’s privacy policies constitutes a fairly straightforward deceptive act. By contrast, when it came to data security matters, the FTC relied on the theory that a failure to follow reasonable data security practices—say, for example, using

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<sup>290</sup> MARTIN A. WEISS & KRISTIN ARCHICK, CONG. RESEARCH SERV., *U.S.-EU Data Privacy: From Safe Harbor to Privacy Shield* 5-6 (2016), <https://www.fas.org/sgp/crs/misc/R44257.pdf> [<https://perma.cc/E5QV-ANSV>].

<sup>291</sup> Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 605 (2014). Solove and Hartzog praise this effort. *Id.* at 676. By contrast, Gus Hurwitz critiques it. *See generally* Justin (Gus) Hurwitz, *Data Security and the FTC’s UnCommon Law*, 101 IOWA L. REV. 955 (2016).

<sup>292</sup> Solove & Hartzog, *supra* note 291, at 587.

<sup>293</sup> *Id.* at 614-22 (noting substantive principles developed by FTC over time and explaining how lawyers pay careful attention to them to advise their clients); *see* Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy on the Books and on the Ground*, 63 STAN. L. REV. 247, 273-75 (2011) (examining role of Chief Privacy Officers in evaluating “state-of-the-art privacy practices,” including FTC actions and guidance, to develop company policies and procedures).

<sup>294</sup> Bamberger & Mulligan, *supra* note 293, at 313 (explaining how FTC used “soft-law techniques” to develop its substantive principles); Solove and Hartzog, *supra* note 291, at 625-27 (analogizing FTC’s soft law to dicta in judicial opinions).

<sup>295</sup> Maureen K. Ohlhausen, Comm’r, Fed. Trade Comm’n, *Success in Self-Regulation: Strategies to Bring to the Mobile and Global Era* 10 (June 24, 2014), [https://www.ftc.gov/system/files/documents/public\\_statements/410391/140624bbbsself-regulation.pdf](https://www.ftc.gov/system/files/documents/public_statements/410391/140624bbbsself-regulation.pdf) [<https://perma.cc/VH6T-3LLB>] (“Over the last decade, the FTC has encouraged the development of a strong self-regulatory framework in the realm of online behavioral advertising so that consumers’ potentially sensitive personal information is protected.”).

insecure open wireless networks (without password protection)—constituted an “unfair act or practice.”<sup>296</sup>

In the sole judicial opinion on this topic, the Third Circuit upheld the FTC’s theory on the grounds that a company’s privacy policy that leads a consumer to believe her data will be safeguarded is misleading and unfair when that company fails to adhere to reasonable practices to protect her data.<sup>297</sup> In particular, the court analogized the series of data security failings that led to earlier FTC enforcement actions and the hacking of information from 619,000 consumers and \$10.6 million in fraud to a “supermarket[] leaving so many banana peels all over the place that 619,000 customers fall.”<sup>298</sup> In so doing, the court arguably ratified the FTC’s effort to place companies on notice that a failure to follow principles highlighted by past enforcement actions can give rise to liability.<sup>299</sup>

### C. *NIST and Cybersecurity*

The Obama Administration’s approach to cybersecurity regulation followed from its commitment to a multi-stakeholder model of internet regulation. Originally, the Obama Administration proposed legislation to address cybersecurity issues, even suggesting model legislative language.<sup>300</sup> After Congress declined to act, President Obama issued Executive Order 13636, “Improving Critical Infrastructure Cybersecurity,” on February 12, 2013, which established that “[i]t is the Policy of the United States to enhance the security and resilience of the Nation’s critical infrastructure and to maintain a cyber environment that encourages efficiency, innovation, and economic prosperity while promoting safety, security, business confidentiality, privacy, and civil liberties.”<sup>301</sup> In particular, the Executive Order called on NIST for the development of a voluntary risk-based Cybersecurity Framework, working “collaboratively with industry to develop the framework, relying on existing

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<sup>296</sup> *In re* BJ Wholesale Club, Inc., 140 F.T.C. 465, 468 (2005).

<sup>297</sup> *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 246-47 (3d Cir. 2015).

<sup>298</sup> *Id.* at 247.

<sup>299</sup> *See* Solove & Hartzog, *supra* note 291, at 651-56. This point is arguable because the court’s opinion can be read more narrowly, *see* Hurwitz, *supra* note 291, at 975, and because ongoing litigation challenges the FTC’s approach in this area. *See* J. Howard Beales, III & Timothy J. Muris, *Choice of Consequences: Protecting Privacy in Commercial Information*, 75 U. CHI. L. REV. 109, 132 (2008) (terming use of unfairness authority in data security cases “appropriate,” but noting that it is “potentially far-reaching and subject to abuse”); *id.* (“An unfairness theory is sound when security deficiencies are clear, have resulted in intentional breaches that are highly likely to lead to fraudulent use of the information, and low-cost steps that would significantly reduce the risk are readily apparent.”).

<sup>300</sup> *FACT SHEET: Cybersecurity Legislative Proposal*, WHITE HOUSE (May 12, 2011), <https://www.whitehouse.gov/the-press-office/2011/05/12/fact-sheet-cybersecurity-legislative-proposal> [<https://perma.cc/V3SF-SHHU>].

<sup>301</sup> Exec. Order No. 13,636, 3 C.F.R. 217 (2014).



international standards, practices, and procedures that have proven to be effective.”<sup>302</sup>

In 2014, NIST introduced its “Framework for Improving Cybersecurity Infrastructure.”<sup>303</sup> The goal of the framework is to use “business drivers to guide cybersecurity activities and considering cybersecurity risks as part of the organization’s risk management processes.”<sup>304</sup> The framework focuses on five core functional categories—identify, protect, detect, respond, and recover—with guidance in each area on how to manage cybersecurity risk.<sup>305</sup> In establishing the framework, NIST made clear that this framework is not a checklist, but an evolving set of best practices.<sup>306</sup> It has emphasized that the framework is not “one-size-fits-all,” meaning that it must be adapted by each organization using it and be utilized with constant vigilance.<sup>307</sup> As in the case of the Energy Star program, Congress—having observed the NIST Framework in practice—later embraced the model, codifying NIST’s approach in the Cybersecurity Enhancement Act of 2014 and calling on the GAO to regularly review the effectiveness of the framework.<sup>308</sup>

The NIST Cybersecurity Framework won praise both for its process and its substance. In terms of process, the 2015 GAO report celebrated NIST’s effectiveness, noting that an overwhelming share of respondents (170 out of 187) praised NIST’s engagement with industry in developing the framework.<sup>309</sup> On

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<sup>302</sup> Press Release, White House, Office of the Press Sec’y, *Executive Order on Improving Critical Infrastructure Cybersecurity* (Feb. 12, 2013), <https://obamawhitehouse.archives.gov/realitycheck/the-press-office/2013/02/12/executive-order-improving-critical-infrastructure-cybersecurity-0> [<https://perma.cc/48D9-PYZN>]; see Doty & Mulligan, *supra* note 198, at 155 (describing process as “seek[ing] to facilitate collaborative processes that support and raise the influence of the relevant parties, foster experimentation, and promote accountability to substantive aims”).

<sup>303</sup> See generally NAT’L INST. OF STANDARDS & TECH., *FRAMEWORK FOR IMPROVING CRITICAL INFRASTRUCTURE SECURITY* (2014), <https://www.nist.gov/sites/default/files/documents/cyberframework/cybersecurity-framework-021214.pdf> [<https://perma.cc/NE56-ZKAB>].

<sup>304</sup> *Id.* at 1.

<sup>305</sup> *Id.* at 7-9.

<sup>306</sup> See *id.* at 4 (“[T]he Framework outcomes will scale across borders, acknowledge the global nature of cybersecurity risks, and evolve with technological advances and business requirements.”).

<sup>307</sup> *Id.* at 2 (“The Framework is a living document and will continue to be updated and improved as industry provides feedback on implementation.”); see COMM. ON DEVELOPING A CYBERSECURITY PRIMER ET AL., *supra* note 257, at 2 (“[C]ybersecurity is a never-ending battle, and a permanently decisive solution to the problem will not be found in the foreseeable future.”).

<sup>308</sup> Cybersecurity Enhancement Act of 2014, Pub. L. No. 113-274, 128 Stat. 2971 (codified at 15 U.S.C. § 7421 et seq.).

<sup>309</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-152, *CRITICAL INFRASTRUCTURE PROTECTION: MEASURES NEEDED TO ASSESS AGENCIES’ PROMOTION OF THE CYBERSECURITY*

substance, the framework is gaining followers, with the Gartner Group, for example, predicting that “[b]y 2020, more than 50% of organizations will use the NIST Cybersecurity Framework, up from the current 30% in 2015.”<sup>310</sup> As for the incentives for adopting the framework, businesses reported a number of motivations (including business partner requirements (twenty-nine percent) and federal contract requirements (twenty-eight percent)), but principally cited the goal of adhering to cybersecurity best practices (seventy percent).<sup>311</sup> Commentators also noted that adopting the framework can reduce legal risk, whether from consumer lawsuits or government enforcement actions.<sup>312</sup> By contrast, other agencies with congressionally provided authority in this area—HHS, as discussed below<sup>313</sup>—have struggled to catalyze compliance with cybersecurity best practices, even when they have more formal authority to do so.<sup>314</sup>

In what should drive adoption, the FTC embraced the NIST Cybersecurity Framework as a valuable guide to sound data security practices. As to its oversight of specific statutory areas like the Graham-Leach-Bliley Act (in financial services) and the COPPA, as well as in policing “unfair or deceptive acts or practices,” the FTC has stated that it will take account of whether firms adopted the framework in determining whether they have acted reasonably.<sup>315</sup> In making this point clear, the FTC underscored that the NIST Framework focuses on process, and that neither the Framework nor the FTC provide any

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FRAMEWORK 15 (2015), <http://www.gao.gov/assets/680/674300.pdf> [<https://perma.cc/T94U-MP4M>]. By contrast, around half (59 out of 112) of those surveyed concluded that the Department of Homeland Security (“DHS”) was serving an effective role in providing cybersecurity assistance. *Id.* at 19-20. The GAO also criticized DHS for its failure to establish metrics or monitoring programs related to the Framework. *Id.* at 22.

<sup>310</sup> Ted Gary, *Tenable Automates NIST Cybersecurity Framework Technical Controls*, TENABLE (Mar. 1, 2016), <https://www.tenable.com/blog/tenable-automates-nist-cybersecurity-framework-technical-controls> [<https://perma.cc/B2FA-UAWZ>].

<sup>311</sup> Mark Francis, *The Future of the NIST Cybersecurity Framework*, INT’L ASS’N PRIVACY PROFS. (Apr. 25, 2016), <https://iapp.org/news/a/the-future-of-the-nist-cybersecurity-framework/> [<https://perma.cc/ZV3M-X42L>].

<sup>312</sup> *Id.*

<sup>313</sup> See *infra* notes 321-49 and accompanying text.

<sup>314</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-771, ELECTRONIC HEALTH INFORMATION: HHS NEEDS TO STRENGTHEN SECURITY AND PRIVACY GUIDANCE AND OVERSIGHT 29 (2016), <http://www.gao.gov/assets/680/679260.pdf> [<https://perma.cc/PXL7-3LG3>].

<sup>315</sup> Andrea Arias, *The NIST Cybersecurity Framework and the FTC*, FED. TRADE COMM’N (Aug. 31, 2016), [www.ftc.gov/news-events/blogs/business-blog/2016/08/nist-cybersecurity-framework-ftc](http://www.ftc.gov/news-events/blogs/business-blog/2016/08/nist-cybersecurity-framework-ftc) [<https://perma.cc/GMN3-EDQR>] (“Applying the risk management approach presented in the Framework with a reasonable level of rigor—as companies should do—and applying the FTC’s Start with Security guidance will raise the cybersecurity bar of the nation as a whole and lead to more robust protection of consumers’ data.”).

hard-and-fast rules; thus, emphasizing that reasonable and responsible data security practices require constant vigilance.<sup>316</sup>

Finally, NIST has left open the question of whether it should continue to superintend the Framework or partner with a multi-stakeholder body to manage that Framework. In a recent request for information, NIST asked a series of questions, including how to best manage this initiative.<sup>317</sup> For now, NIST believes it is too early to make any changes, but it is clearly thinking about this possibility.<sup>318</sup> As captured from the request for information responses, it is clear that if NIST were to make this change, “the desired characteristics of any potential successor” should be “a neutral non-profit organization with international reach, respected for technical proficiency, and willing to keep the Framework free, with participation open to all interested parties.”<sup>319</sup> Such a model of the government’s incubating a successful initiative and spinning it off is not unprecedented. The FCC, for example, once managed its own equipment certification program, but now relies on the private sector to do so.<sup>320</sup>

#### D. HHS, *Electronic Health Records, and Data Security*

The discussion of how the FTC and NIST successfully developed regulatory initiatives to catalyze better cybersecurity practices provides a useful contrast to the efforts of HHS to do so. As noted above, the GAO specifically faulted HHS for its performance in this area.<sup>321</sup> Under the Health Insurance Portability and Accountability Act (“HIPAA”)<sup>322</sup> and the Health Information Technology for Economic and Clinical Health Act (“HITECH Act”),<sup>323</sup> HHS enjoys more formal regulatory authority than either the FTC or NIST do to ensure data security and to provide customers access to that data. In particular, the goal of

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<sup>316</sup> *Id.* (“[T]he FTC [recognizes] that there is no such thing as perfect security, and that security is a continuing process of detecting risks and adjusting one’s security program and defenses. For that reason, the touchstone of the FTC’s approach to data security has been reasonableness . . .”).

<sup>317</sup> NAT’L INST. OF STANDARDS & TECH., ANALYSIS OF CYBERSECURITY FRAMEWORK RFI RESPONSES 8, 11 (Mar. 24, 2016), [https://www.nist.gov/sites/default/files/documents/cyberframework/RFI3\\_Response\\_Analysis\\_final.pdf](https://www.nist.gov/sites/default/files/documents/cyberframework/RFI3_Response_Analysis_final.pdf) [<https://perma.cc/4T4Z-J33S>].

<sup>318</sup> *See id.* at 2.

<sup>319</sup> Francis, *supra* note 311.

<sup>320</sup> Warren G. Lavey, *Telecom Globalization and Deregulation Encounter U.S. National Security and Labor Concerns*, 6 J. TELECOMM. & HIGH TECH. L. 121, 143-46 (2007).

<sup>321</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 314, at 29.

<sup>322</sup> 29 U.S.C. § 1181 (2012) (“The Secretary shall establish rules to prevent an entity’s failure to provide information . . . with respect to previous coverage of an individual from adversely affecting any subsequent coverage of the individual under another group health plan or health insurance coverage.”).

<sup>323</sup> 42 U.S.C. § 1320d-5(a)(1) (2012). Notably, under the HITECH Act, HHS was authorized to assess penalties based on HIPAA violations due to “willful neglect.” *Id.* § 1320d-5(a)(1)(C).

the HITECH Act is to drive the use of electronic health records (“EHRs”), prevent duplicative health care (estimated to cost between \$148 billion and \$226 billion per year), and facilitate patients’ access to their own health care information.<sup>324</sup> As both the HITECH Act and HIPAA recognize, however, putting health care information in electronic form raises significant cybersecurity risks.<sup>325</sup>

Under HIPAA and the HITECH Act, HHS is authorized to drive better cybersecurity practices in health care records.<sup>326</sup> To date, however, HHS has failed to do so, with unfortunate consequences. “[M]ore than half the U.S. population—168.3 million individuals— . . . have had their medical records breached,”<sup>327</sup> reflecting the great value of health data on the black market.<sup>328</sup> According to the GAO, HHS is partially responsible for this state of affairs by failing to provide adequate guidance and failing to enforce HIPAA effectively.<sup>329</sup> As the GAO explained, the HHS’s Security Rule is not clearly defined, has failed to incorporate relevant NIST guidance, and is poorly enforced.<sup>330</sup> Consequently, the requirements for cybersecurity preparedness in healthcare are behind other sectors (e.g., financial services).<sup>331</sup>

In its report, the GAO concluded that HHS has failed to develop a fully operational and effective auditing program, has not “follow[ed] up to ensure that agreed-upon corrective actions were taken once investigative cases were closed,” and has not established benchmarks to assess the effectiveness of its program, “result[ing] in less assurance that loss or misuse of health information is being adequately addressed.”<sup>332</sup> The GAO identified one case, for example, where HHS received a complaint of a covered entity using easily guessed

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<sup>324</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 314, at 5, 7-9.

<sup>325</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 222, at 1.

<sup>326</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 314, at 1.

<sup>327</sup> Joseph Conn, *GAO Slams HHS in Health IT Cybersecurity Report*, MOD. HEALTHCARE (Sept. 26, 2016), <http://www.modernhealthcare.com/article/20160926/NEWS/160929925> [<https://perma.cc/X9XN-KU7J>].

<sup>328</sup> Caroline Humer & Jim Finkle, *Your Medical Record Is Worth More to Hackers than Your Credit Card*, REUTERS (Sept. 24, 2014), <http://www.reuters.com/article/us-cybersecurity-hospitals-idUSKCN0HJ21I20140924> [<https://perma.cc/8D7R-Y3C8>] (“Stolen health credentials can go for \$10 each, about 10 or 20 times the value of a U.S. credit card number . . .”).

<sup>329</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 314, at GAO Highlights (“Without more comprehensive guidance, covered entities may not be adequately protecting electronic health information from compromise. HHS has established an oversight program for compliance with privacy and security regulations, but actions did not always fully verify that the regulations were implemented.”).

<sup>330</sup> *Id.* at 5, 16, 19, 27.

<sup>331</sup> Bambauer, *supra* note 247, at 1050 (“The financial sector is more secure than other industries and operates under specific cybersecurity mandates embedded in law. This correlation is no coincidence.”).

<sup>332</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 314, at GAO Highlights.

passwords to access health information and responded by sending the offending company a guidance document. In several other cases, HHS responded to health information being available on a website by sending a document discussing appropriate password protections for workstations.<sup>333</sup> To fill in the gap of HHS's oversight, the FTC has acted in this area, bringing a case against LabMD for failing to adhere to basic data security practices, sharing sensitive patient information, and failing to disclose the breach to its patients once it was discovered.<sup>334</sup> LabMD is now appealing the FTC's action, including on the ground that health care providers' data security practices are subject to HHS oversight.<sup>335</sup>

HHS is also required (under the HITECH Act) to enable individuals to gain access to their health care records in electronic form. Here, too, HHS's efforts are open to criticism. HHS finally developed such a rule in 2015,<sup>336</sup> after the White House called for "empower[ing] individuals and families to invest in and manage their health" by giving them access "to the applications and services that can safely and accurately analyze" their health information.<sup>337</sup> The implementation of this effort is slow going, and, ironically, "some providers may be unwilling to share this information due to liability concerns with sharing HIPAA-protected information."<sup>338</sup> Indeed, in some cases, providers actively block access to this information—despite the statutory requirement to share

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<sup>333</sup> *Id.* at 24.

<sup>334</sup> See generally Opinion of the Commission, LabMD, Inc., No. 9357, 2016 WL 4128215 (F.T.C. July 28, 2016), [www.ftc.gov/system/files/documents/cases/160729labmd-opinion.pdf](http://www.ftc.gov/system/files/documents/cases/160729labmd-opinion.pdf) [<https://perma.cc/5A2G-B7Y7>]; Final Order, LabMD, Inc., No. 9357, 2016 WL 4128215 (F.T.C. July 28, 2016), [www.ftc.gov/system/files/documents/cases/160729labmdorder.pdf](http://www.ftc.gov/system/files/documents/cases/160729labmdorder.pdf) [<https://perma.cc/S87K-9CF3>].

<sup>335</sup> Respondent LabMD, Inc.'s Application for Stay of Final Order Pending Review By a United States Court of Appeals at 11, LabMD, Inc., No. 9357, 2016 WL 4923403, at \*11 (F.T.C. Aug. 30, 2016), [www.ftc.gov/system/files/documents/cases/160830labmdstayapplication.pdf](http://www.ftc.gov/system/files/documents/cases/160830labmdstayapplication.pdf).

<sup>336</sup> See generally Medicare and Medicaid Programs; Electronic Health Record Incentive Program—Stage 3 and Modifications to Meaningful Use in 2015 through 2017; Final Rule, 80 Fed. Reg. 62,762 (Oct. 16, 2015) (to be codified at 42 C.F.R. pts. 412, 495).

<sup>337</sup> Press Release, White House, Office of the Press Sec'y, Fact Sheet: President Obama's Precision Medicine Initiative (Jan. 30, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/01/30/fact-sheet-president-obama-s-precision-medicine-initiative> [<https://perma.cc/QL2L-3QD8>].

<sup>338</sup> CHRIS LAUGHLIN, POLICY SOLUTIONS TO FULFILL THE PROMISE OF THE HEALTH INFORMATION TRANSFORMATION 6 (2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2731863](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2731863) [<https://perma.cc/F8VP-B5CX>] (paper may be downloaded by selecting download button at top of screen).

access.<sup>339</sup> In other cases, even when they do share this information, they do so in a cost-prohibitive manner.<sup>340</sup>

Not only has HHS failed to exercise its core mandates on security and access effectively, it has also failed to take action in a complementary area, that of personal health records (“PHRs”). Under HIPAA, HHS oversees electronic health records (“EHRs”) managed by health care providers.<sup>341</sup> But in today’s world, a range of other providers—from Microsoft to startup app companies—capture, store, and manage health information that can constitute a personal health record.<sup>342</sup> Indeed, if EHRs were accessible, health care intermediaries could combine different sources of data (EHRs and PHRs) to support better health care outcomes. To facilitate such a result, however, HHS (or another entity) would need to lead an experimental regulatory initiative like those outlined above, catalyzing patient access to and control over such information and encouraging better cybersecurity practices. As the GAO noted in a different report, there is a compelling need to develop a model of “governance and trust among [health care] entities . . . to facilitate the sharing of information among all participants in an initiative.”<sup>343</sup> To date, however, HHS has not taken any notable steps to spur such an effort.<sup>344</sup> As such, the opportunities to take advantage of electronic health information (including enabling artificial intelligence and data analytics to improve health care) remain underdeveloped.<sup>345</sup>

As the earned regulatory model advanced in this Article would predict, other agencies in comparable positions to HHS can and do take action to drive multi-stakeholder processes to enable sharing of information on a secure basis. Consider, for example, the case of “Green Button,” a program led by the Department of Energy and NIST to enable consumers to gain access to their electric usage information based on the Energy Services Provider Interface

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<sup>339</sup> HEALTH INFO. TECH. POLICY COMM., REPORT TO CONGRESS: CHALLENGES AND BARRIERS TO INTEROPERABILITY 12-14 (Dec. 2015), [https://www.healthit.gov/facas/sites/faca/files/HITPC\\_Final\\_ITF\\_Report\\_2015-12-16%20v3.pdf](https://www.healthit.gov/facas/sites/faca/files/HITPC_Final_ITF_Report_2015-12-16%20v3.pdf) [https://perma.cc/PHU3-RFTD].

<sup>340</sup> Laughlin, *supra* note 338, at 7.

<sup>341</sup> In particular, HIPAA focuses on “covered entities,” which include health plans and health providers who store and transmit health information in electronic form. *See* 45 C.F.R. § 160.101-03 (2000).

<sup>342</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-817, ELECTRONIC HEALTH RECORDS: NONFEDERAL EFFORTS TO HELP ACHIEVE HEALTH INFORMATION INTEROPERABILITY 7-10 (2015), <http://www.gao.gov/assets/680/672585.pdf> [https://perma.cc/Y93Y-MFKN].

<sup>343</sup> *Id.* at GAO Highlights.

<sup>344</sup> For thoughts on how such a model could operate, see generally Laughlin, *supra* note 338.

<sup>345</sup> *See, e.g.*, STANFORD UNIV., ARTIFICIAL INTELLIGENCE AND LIFE IN 2030, at 26-27 (2016), [https://ai100.stanford.edu/sites/default/files/ai\\_100\\_report\\_0831fnl.pdf](https://ai100.stanford.edu/sites/default/files/ai_100_report_0831fnl.pdf) [https://perma.cc/DWU4-B3AG].

(“ESPI”) data standard developed by the North American Energy Standards Board (“NAESB”) in early 2012.<sup>346</sup> Like in the health care context, such a standard must ensure customer privacy and security in their energy usage data. Moreover, to be successful, Green Button must drive adoption among a range of providers. Over the last several years, it has done so successfully, sponsoring “Apps for Energy Challenges” and using the agency’s power to convene, all without any specific legislative direction to undertake this initiative.<sup>347</sup>

Finally, and consistent with the earned regulatory authority model, Congress has noticed HHS’s relative failings and has taken actions to address them. In enacting the 21st Century Cures Act, Congress authorized new institutional actors to make progress in this area. First, the bill empowers the HHS’s Office of the Inspector General “to investigate and establish deterrents to information blocking practices that interfere with appropriate sharing of electronic health information.”<sup>348</sup> Second, it calls for the “[c]onvening [of] existing data sharing networks to develop a voluntary model framework and common agreement for the secure exchange of health information across existing networks.”<sup>349</sup> In short, this law shows that where Congress is frustrated by the lack of progress, it can and does empower alternative institutional actors to step in.

#### IV. TOWARD A THEORY OF AND APPRECIATION FOR POLICY ENTREPRENEURSHIP

The conventional account of regulatory authority is one where Congress grants authority to agencies based on presumed expertise. By contrast, the reality of regulatory authority—in a range of contexts, but particularly as to emerging technologies—is that it can be earned through experimentation and effective administration. This depends on, as Section I.E explained, entrepreneurial leadership and a commitment to trial-and-error learning.

Democratic experimentalism, New Governance, and responsive regulation are powerful theories for conceptualizing the modern administrative state and how it should operate. Such theories, however, generally assume the presence of effective leadership and agency capacity for driving and evaluating experiments that happen organically. What these theories miss is that without

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<sup>346</sup> *The Green Button*, DEP’T OF ENERGY, <http://energy.gov/data/green-button> [<https://perma.cc/N8LH-Q7QD>] (last visited Nov. 17, 2017).

<sup>347</sup> *Id.*; *Secretary Chu Launches First-Ever “Apps for Energy” Challenge*, DEP’T OF ENERGY (Mar. 23, 2012), <https://energy.gov/articles/secretary-chu-launches-first-ever-apps-energy-challenge> [<https://perma.cc/BPP2-CU9N>].

<sup>348</sup> Heather Landi, *Senate HELP Committee Passes Health IT Bill*, HEALTHCARE INFORMATICS (Feb. 9, 2016), <http://www.healthcare-informatics.com/news-item/senate-help-committee-passes-health-it-bill> [<https://perma.cc/U6TC-V62Q>].

<sup>349</sup> *Id.*

the space, incentives, and mandate for such leadership, experimentation will not necessarily emerge.<sup>350</sup>

Under the earned regulatory authority model, an entrepreneurial approach to public policy problem-solving by administrative agencies (or private bodies, for that matter) is placed front-and-center and is encouraged by a congressional feedback loop.<sup>351</sup> Unlike many theories of the administrative state, this model does not take the “optimal legal-institutional design . . . as given” or assume “the expertise of various possible decisionmakers.”<sup>352</sup> Rather, it underscores that the incentive for entrepreneurial leadership in government is that agency leaders and agencies can maximize their impact by both a willingness to revisit their own existing legacy and experiment with innovative regulatory strategies. If those strategies succeed, the agencies (and their leaders) are rewarded with more formal authority and budgetary support. In this Part, I review the traditional skepticism of entrepreneurial leadership and explain why it should become a central part of scholarship around the administrative state.

#### A. *Traditional Public Choice Theory and Critics of the Administrative State*

The Weberian portrait of expert bureaucratic administration and the James-Landis-New-Deal-era theory of ideal administration faced a withering critique in the 1960s and 1970s from the public choice theory of regulation.<sup>353</sup> Informed

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<sup>350</sup> Professor Neal Katyal recognized one aspect of this point in *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2325 (2006) (“Without bureaucratic overlaps, agencies are not pushed to develop innovative ways of dealing with problems and may ossify.”).

<sup>351</sup> The importance of such an approach is greatly underappreciated in the public law literature. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2252, 2263-64 (2001) (calling this point “routinely neglected” in legal literature). A number of legal scholars have recognized the role of policy entrepreneurship, but that concept tends to be applied to elected officials rather than leaders in regulatory agencies. See, e.g., William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 54 (2003).

<sup>352</sup> Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1425-26 (2012). An important exception is Hyman & Kovacic, *supra* note 142, at 1473 (2014) (discussing criteria for effective agencies and how they can build strong brands). A different kind of exception is the argument of then-Professor Kagan, who looked at the challenge from the standpoint of the President and focused on the need to bring energy and direction to overcome bureaucratic inertia. Kagan, *supra* note 351, at 2264. Kagan’s argument is controversial insofar as it rejects the focus on the agency, which is the entity to which Congress has delegated authority. See Peter L. Strauss, *Overseer or “the Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 704-05 (2007) (“[W]here Congress has assigned a function to a named agency subject to its oversight and the discipline of judicial review, the President’s role—like that of Congress and the courts—is that of overseer and not decider.”).

<sup>353</sup> See Louis L. Jaffe, *The Illusion of Ideal Administration*, 86 HARV. L. REV. 1183, 1187 (1975) (criticizing Landis and acknowledging influence of public choice theory); Richard B.



by public choice theory, Professor Louis Jaffe challenged Professor James Landis's defense of the administrative state and concluded that "[o]ne cannot expect very much from" the Civil Aeronautics Board ("CAB").<sup>354</sup> In so doing, he overlooked the importance of policy entrepreneurship.

Jaffe's prediction about the CAB did not foresee the entrepreneurial leadership of former Chair of the Civil Aeronautics Board Alfred Kahn and the emergence of a political environment that welcomed reform. In 1977, Kahn took over the CAB and demonstrated plainly what entrepreneurial leadership looks like.<sup>355</sup> Notably, Kahn championed the benefits of his proposed reform program, began experimenting with a new model, and effectively built a coalition of those willing to reform the regulatory regime.<sup>356</sup> Kahn's reform program started from first principles, examined valuable experiments (in particular, the introduction of airline competition in California and Texas), and experimented at the federal level in a manner that hurt the incumbents and invited entry and innovation into the field.<sup>357</sup> Kahn's leadership was, in short, a demonstration of the limits of public choice theory.<sup>358</sup>

Jaffe also invoked the FTC to support his criticisms of the regulatory state.<sup>359</sup> That agency provides an instructive case study on the importance of entrepreneurial leadership. For Jaffe, the FTC was an easy target and a perfect case study to demonstrate that Landis—who praised the agency—was off the mark.<sup>360</sup> By the early 1970s, former FTC Commissioner Phil Elman deemed the agency hopeless and concluded that the "best thing to do would be to start all

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Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1713-15 (1975) (same).

<sup>354</sup> Jaffe, *supra* note 353, at 1196-97. Landis's defense hinged on the value of expertise. See JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* 23 (1938).

<sup>355</sup> Philip J. Weiser, *Alfred Kahn as a Case Study of a Political Entrepreneur: An Essay in Honour of His 90th Birthday*, 7 REV. NETWORK ECON. 603, 605 (noting that Kahn went against wishes of established firms and pursued deregulatory initiative).

<sup>356</sup> *Id.* at 607-08. Sheingate offers a similar typology, focusing on the need to (1) define problems and shape the agenda for reform, (2) invest resources in generating new ideas and institutional strategies, and (3) consolidate innovations into lasting change. Sheingate, *supra* note 111, at 188.

<sup>357</sup> Weiser, *supra* note 355, at 606-07 ("[Kahn] sought to undermine the traditional premises of airline regulation that competition was destructive and should be avoided through command and control regulation.").

<sup>358</sup> There is a painful irony in this story, as Landis had earlier chaired the CAB and had failed—on account of public choice pressures—to spur the entry of competition engineered by Kahn. See DONALD A. RITCHIE, JAMES M. LANDIS: DEAN OF THE REGULATORS 153-54 (1980).

<sup>359</sup> Jaffe, *supra* note 353, at 1196 ("The FTC's uncertain, some-times conflicting, and heterogeneous jurisdiction made it an easy target for judicial sabotage.").

<sup>360</sup> *Id.* at 1187 ("It is ironic that two of the agencies so much relied on by Landis, the Federal Trade Commission and the Interstate Commerce Commission, were even when he wrote proving to be ineffective . . .").

over again, abolish the commission and set up a new agency.”<sup>361</sup> By the early 1980s, matters got worse, with one Congressman capturing the negative sentiment toward the agency in calling it “a rogue agency gone insane.”<sup>362</sup> Based on its antipathy to the FTC, Congress passed a special law in 1980 to make it harder for the agency to adopt regulations, responding to its earlier, overreaching efforts.<sup>363</sup>

If one judged Jaffe’s skeptical view of the FTC in the 1970s, one might well side with his case against the agency.<sup>364</sup> Over the last thirty-five years, however, the agency has emerged as a powerful case study for how entrepreneurial leadership, flexible experimentation, and capacity-building can pay great dividends. Following Bob Pitofsky (who led the development of the online privacy framework discussed above), Professor Tim Muris exhibited similar entrepreneurial leadership in developing the “Do Not Call List.”<sup>365</sup> Through such leadership, the agency earned valuable credibility and, in Kovacic’s terminology, built its “brand.”<sup>366</sup>

A particularly heartening feature of the FTC’s resurgence is that the agency is no “one-hit wonder.” Over the last thirty-five years, it has developed the sort

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<sup>361</sup> NORMAN I. SILBER, *WITH ALL DELIBERATE SPEED* 368 (2004).

<sup>362</sup> William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 590 (1982) (quoting Representative William Frenzel).

<sup>363</sup> Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (codified as amended at 15 U.S.C. § 57a (2012)); *Financial Services and Products: The Role of the Fed. Trade Commission in Protecting Customers: Hearing on S. 3217 Before the Subcomm. on Consumer Protection, Product Safety, and Insurance of the S. Comm. on Commerce, Science, and Transportation*, 111th Cong. 2 (2010) (statement of Timothy J. Muris) (noting that the law followed criticism that FTC sought to be “the second most powerful legislature in Washington”).

<sup>364</sup> David A. Hyman & William E. Kovacic, *Can’t Anyone Here Play This Game? Judging the FTC’s Critics*, 83 GEO. WASH. L. REV. 1948, 1952 (2015) (“The conventional wisdom—which is not entirely mistaken—is that the FTC was the governmental equivalent of a leper colony prior to 1969.”).

<sup>365</sup> See *The Do Not Call List Authorization: Hearing on H.R. 395 Before the H. Comm. on Energy & Commerce*, 108th Cong. 12-32 (2003) (testimony of Timothy J. Muris, Chairman, Federal Trade Commission); Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. CHI. L. REV. 165, 168, 177 (2005).

<sup>366</sup> See Hyman & Kovacic, *supra* note 142, at 1472-74. To be sure, once such a culture is developed, it drives a virtuous cycle. JENNIFER HOWARD-GRENVILLE, STEPHANIE BERTELS & BROOKE BOREN, *WHAT REGULATORS NEED TO KNOW ABOUT OUR ORGANIZATIONAL CULTURE* ii (2015), <https://www.law.upenn.edu/live/files/4708-howard-grenvillebertelsboren-ppr-researchpaper0620> [<https://perma.cc/9EGY-2PKJ>] (“Cultures that are mindfully managed can set organizations apart from their peers in their ability to attract and retain talent, and enable organizational adaptation.”).

of norm around continuous improvement and reflection discussed above.<sup>367</sup> It also has shown a willingness to experiment, adhering to FTC Chairwoman Maureen Ohlhausen's maxim that "a leading competition agency like the FTC must have the courage to fail from time to time."<sup>368</sup> These results are not an accident, but reflect both culture and leadership that encourages consideration of alternative ideas.<sup>369</sup> As such, the FTC—like the CAB—provides an instructive case study of how entrepreneurial leadership can transform an administrative agency.<sup>370</sup>

B. *The Entrepreneurial Leadership and Agency Capacity Research Agenda*

The successes of the CAB and FTC underscore that agencies often enjoy the opportunity to make a policy impact through experimentation *if* they are willing to take risks, develop new experiments, and have the capacity to pull them off. From Congress's perspective, it is important that agencies take up this opportunity because there is a substantial risk that agencies will stick with traditional models when circumstances change and experimentation is called for.<sup>371</sup> Consequently, when Congress embraces an experiment by specifically codifying it, it provides important support and momentum, rewarding the agency's risk in acting and raising the likelihood that the initiative will continue to succeed.<sup>372</sup>

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<sup>367</sup> See Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, How to Measure Success: Agency Design and the FTC at 100, at 11 (Nov. 6, 2014) [https://www.ftc.gov/system/files/documents/public\\_statements/597191/141106ftcat100fallforum.pdf](https://www.ftc.gov/system/files/documents/public_statements/597191/141106ftcat100fallforum.pdf) [<https://perma.cc/K2LU-2EDA>] ("[The FTC's design] has afforded the agency . . . the capacity and capability to invest in resolving novel competition issues with long-range plans relying on outreach, research, advocacy, and enforcement."); see also Hyman & Kovacic, *supra* note 142, at 1476 (noting that "agency's attainment of greater capability requires acceptance of a norm that encourages agency personnel to self-critically assess both means and ends").

<sup>368</sup> Ohlhausen, *supra* note 367, at 11.

<sup>369</sup> HEPBURN, *supra* note 113, at 17 ("If alternative instruments are to be actively considered and used when they are the best option to deal with a policy issue, there needs to be a good policy making process in place, supported by information about alternatives approaches and their advantages and disadvantages.").

<sup>370</sup> For another such example, see generally Justin Crowe, *The Forging of Judicial Autonomy: Political Entrepreneurship and the Reforms of William Howard Taft*, 69 J. POL. 73 (2007).

<sup>371</sup> For Congress, this approach is sensible because it creates incentives for agencies to invest in developing the necessary expertise to continue improving the relevant regulatory regimes to accomplish their core mission and purposes. See Matthew C. Stephenson, *Bureaucratic Decision Cost and Endogenous Agency Expertise*, 23 J.L. ECON. & ORG. 469, 470 (2007) (explaining once agency expertise is viewed as endogenous to whether Congress authorizes agencies to act more broadly, Congress would rationally vest more discretion with agencies).

<sup>372</sup> STEVEN KELMAN, UNLEASHING CHANGE: A STUDY OF ORGANIZATIONAL RENEWAL IN GOVERNMENT 137 (2005) ("Legislation thus encouraged the front lines to conclude that

A fundamental challenge to an entrepreneurial vision of regulatory innovation is that institutional reform does not generally bear immediate results and, to the extent it does, it builds on prior leadership that invested in institutional capacity. On the legal and bureaucratic front, it is important that agencies are allowed some leeway to invest in, and experiment with, institutional reforms.<sup>373</sup> On the cultural front, the challenge is to select agency leaders willing to build the capacity and mindset to experiment and evaluate different policy solutions over a time horizon that may well be longer than their term. As former FTC Chairman Bill Kovacic and Professor David Hyman explain, the incentives are against making such investments and in favor of bringing big regulatory initiatives or filing headline-garnering cases.<sup>374</sup> Nonetheless, in some cases (like at the FTC), agencies have developed a tradition of investing in institutional capacity and innovation.<sup>375</sup>

For most agency leaders, the challenge of being an entrepreneurial leader and creating a culture of innovation is a formidable one.<sup>376</sup> At its core, bureaucracy is designed to perform in a consistent and reliable manner. In many cases, new leaders of administrative agencies are “captured” by the bureaucracy, encouraged to accept the traditional modes of operation as a given, and discouraged from exercising entrepreneurial leadership and developing innovative strategies.<sup>377</sup>

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supporting the reform was safe and that change was ‘for real.’”).

<sup>373</sup> From a positive political theory perspective, agencies have room to experiment because, as a practical matter, Congress is unlikely to act to overrule its decisions. See John Ferejohn & Barry Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT’L REV. L. & ECON. 263, 267 (1992) (discussing this point in context of freedom that courts have in interpreting statutes, noting “range of choices they can make without fear of legislative reaction”).

<sup>374</sup> William E. Kovacic & David A. Hyman, *Consume or Invest: What Do/Should Agency Leaders Maximize?*, 91 WASH. L. REV. 295, 296-99 (2016); Muris, *supra* note 365, at 166 (“An agency head garners great attention by beginning ‘bold’ initiatives and suing big companies. When the bill comes due for the hard work of turning initiatives into successful regulation and proving big cases in court, these agency heads are often gone from the public stage. Their successors are left either to trim excessive proposals or even to default, with possible damage to agency reputation.”).

<sup>375</sup> Kovacic & Hyman, *supra* note 374, at 318-20 (noting that “[a]s the custom continues and becomes deeply ingrained in the agency’s culture over time, it becomes more difficult and costly for future leaders to abandon it”).

<sup>376</sup> As Professor Daniel Esty explained:

Regulatory excellence thus requires that a regulator’s leadership team encourage fresh thinking and risk taking at all levels so as to ensure that new approaches will be put forward, experimentation undertaken, and better ways of doing business identified. Given the prevailing “CYA” attitude of most government workers (who have decades of *not* being rewarded for creativity), innovation will not come easily.

ESTY, *supra* note 89, at 7.

<sup>377</sup> Robert Behn tells the story of how a new Commissioner of the Massachusetts Department of Revenue, Ira Jackson, upon his appointment, was asked to accept a range of

The drive towards predictability is a valuable feature of bureaucracy, as it ensures that administration of the law is fair and equal. It is, however, a powerful impediment to experimentation and innovation. After all, powerful political forces and pressures reinforce bureaucratic inertia, notably because bureaucracy and rules provide a ready justification for actions, even if they lead to suboptimal results. At the same time, entrepreneurial leaders—who know how and are willing to “‘hack’ the system”—can provide guidance, encouragement, and political cover for risk-taking and experimentation.<sup>378</sup>

The challenge of hacking the system includes the ability to engage front-line employees and empower them in efforts directed at experimentation, reinvention, and performance improvement.<sup>379</sup> In a powerful study of entrepreneurial leadership, Steven Kelman, building off his personal experience overseeing procurement reform in the 1990s, explains that many agency leaders fail to even attempt to introduce real change, do not persist in developing new experiments, or are defeated by the perception (or reality) of bureaucratic and legal constraints.<sup>380</sup> In Kelman’s case, he found that there were a number of employees ready to challenge the traditional model and test new models (the “change vanguard,” he called them) and that they were waiting for top-line leadership to authorize such experiments and engage them.<sup>381</sup> In so doing, he implemented a version of lean startup, putting into practice “some part of a change quickly, rather than studying the idea to death until perfected, and mak[ing] corrections along the way.”<sup>382</sup> Kelman, in other words, created an entrepreneurial network within the overall bureaucratic hierarchy.<sup>383</sup>

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operating procedures and to delegate authority to a set of officials. Robert D. Behn, *Management by Groping Along*, 7 J. POL’Y ANALYSIS & MGMT. 643, 643-44 (1988). Rather than succumb to this tradition, Jackson resisted such delegations and held long, “exhausting” interviews with the relevant officials, seeking to understand how and why they operate the way they do. *Id.* at 644. When appointed agency leaders accede to the legal culture (particularly in ways that might run counter to their political charge), that is sometimes called “going native.” See Michaels, *supra* note 9, at 247 (defining “going native” as when agency heads are “co-opted by civil servants”).

<sup>378</sup> GEORGETOWN UNIV., *supra* note 119, at 47 (“Leaders must create the structural conditions under which new modes of thinking and creative problem solving are cultivated, encouraged, and rewarded.”).

<sup>379</sup> For a discussion of this argument, see Joseph Landau, *Bureaucratic Administration: Experimentation and Immigration Law*, 65 DUKE L.J. 1173, 1192 (2016) (“[D]iffering institutional responses of frontline officers within distinct agencies and subagencies, and the conflicts they create, can generate fruitful arenas for experimentation and policy innovation.”).

<sup>380</sup> KELMAN, *supra* note 372, at 7-16.

<sup>381</sup> *Id.* at 39.

<sup>382</sup> *Id.* at 83 (citing Behn, *supra* note 377).

<sup>383</sup> John Kotter developed a framework for how this can happen in his book, *Accelerate*, explaining that front-line employees rise to the opportunity because “[t]hey appreciate the chance to collaborate with a broader array of people than they ever could have worked with

For successful experiments to stick, and indeed to provide an environment where agencies can experiment, agencies must develop the capacity to learn from trial-and-error. For agencies to be proactive, they need to foster a learning culture. It may well be the relevant culture of the agencies that explain why the FTC and NIST were able to successfully develop new initiatives—which Congress embraced after the fact—and why HHS has struggled to implement a clear mandate. The culture of an agency defines (whether consciously or not) how it does things, which can involve an adherence to traditional approaches or an openness to trying new things.<sup>384</sup>

For leaders to be effective, they must understand and engage effectively with the culture of their particular agencies. After all, “if they do not become conscious of the cultures in which they are embedded, those cultures will manage them.”<sup>385</sup> In all cases (and particularly for agencies with an underdeveloped learning culture), it is crucial that leaders set the right tone and example, “portray[ing] confidence that active problem solving leads to learning.”<sup>386</sup> Moreover, leaders should be willing to test different “hunches,” allowing front-line employees to offer ideas, experiment, and develop innovative strategies, and learn from what works as well as what does not.<sup>387</sup>

A final related area that has not received the attention it deserves is the development of regulatory capacity. It is not an accident, for example, that the environmental leadership in California flows from an agency that has built up capacity, expertise, and confidence based on successful experimentation.<sup>388</sup> As Professor Ann Carlson explains, the California Air Resources Board is a case study in regulatory capacity building.<sup>389</sup> Similarly, over the last thirty-five years at the FTC, the effort to build administrative capacity is also an important part

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in their regular jobs within the hierarchy.” KOTTER, *supra* note 91, at 36.

<sup>384</sup> For a classic treatment of organizational culture, see EDGAR H. SCHEIN, *ORGANIZATIONAL CULTURE AND LEADERSHIP* 18 (4th ed. 2010).

<sup>385</sup> *Id.* at 22.

<sup>386</sup> *Id.* at 366.

<sup>387</sup> Behn, *supra* note 377, at 644; see KOTTER, *supra* note 91, at 97 (noting need for such leadership to elicit ideas from people taught not to speak up).

<sup>388</sup> The importance of regulatory experimentation through entrepreneurial leadership applies equally to state and local levels. See, e.g., Danielle Keats Citron, *Privacy Policymaking of State Attorneys General*, 92 NOTRE DAME L. REV. 747, 760 (2017) (discussing impact of state attorneys’ general leadership, using range of tools, in privacy fields such as mobile apps). The role of experimentation at those levels is justly celebrated, but the importance of the entrepreneurial mindset and methods that can make experimental regulatory initiatives successful is generally ignored.

<sup>389</sup> See Ann E. Carlson, *Regulatory Capacity and State Environmental Leadership: California’s Climate Policy*, 24 FORDHAM ENVTL. L. REV. 63, 63 (2012) (“The state is not simply regulating a single product . . . or a particular sector of the economy . . . . Nor is it tackling a problem of particular importance to the state . . . . Instead, the effort to regulate climate change is truly an economy-wide one.”).

of its successes. But past success is no guarantee of continued effectiveness, meaning that no agency or initiative can afford to be complacent.<sup>390</sup>

#### CONCLUSION

As governmental agencies continue to confront new challenges (including emerging technologies), it is important to encourage policy innovation and the evaluation of experiments on how to address issues ranging from the regulation of drones to how to oversee the sharing economy.<sup>391</sup> With respect to emerging technologies, the pace of technological change and the realities of a global marketplace will cut against using traditional command-and-control approaches.<sup>392</sup> To have the courage to experiment and embrace alternative approaches will take entrepreneurial leadership like that displayed by Kahn at the CAB and Pitofsky and Muris at the FTC.

The traditional administrative law model calls on Congress to enact a clearly defined, hierarchical regime that empowers a single agency to act, generally by rulemaking and adjudication. In reality, agencies and private sector bodies are positioned to experiment using a range of approaches other than rulemaking and adjudication. When they do so, they develop experience and expertise and build (or lose) credibility. In some cases, as with the FTC's oversight of online privacy and data security, the EPA's development of the Energy Star program, NIST's development of the Cybersecurity Framework, and the MSC's oversight of sustainable fishing, these experimental initiatives are successful and provide Congress with a basis for legislation (or obviate the need for legislation). In all of these cases, the willingness to experiment, solicit feedback, and adapt is critical to public policy problem solving.

Going forward, Congress is institutionally well-positioned to encourage and learn from experiments undertaken by agencies, to recognize where agencies can adapt to meet new challenges, and to address the situation where they

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<sup>390</sup> KELMAN, *supra* note 372, at 213 (observing that 1990s procurement reform efforts suffered setbacks in 2000s, as “the spirit of frontline empowerment and innovation had dissipated”).

<sup>391</sup> For a discussion of the regulation of drones, see generally Henry H. Perritt, Jr. & Eliot O. Sprague, *Drones*, 17 VAND. J. ENT. & TECH. L. 673 (2015). For a development of a private regulatory effort to spur best practice in artificial intelligence, see generally Press Release, P'ship on AI, Industry Leaders Establish Partnership on AI Best Practices (Sept. 28, 2016), <http://www.partnershiponai.org/2016/09/industry-leaders-establish-partnership-on-ai-best-practices/> [<https://perma.cc/Q9JW-SNBR>].

<sup>392</sup> See Kenneth W. Abbott & Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State*, in THE POLITICS OF GLOBAL REGULATION 44, 87 (Walter Mattli & Ngaire Woods eds., 2009) (“[W]hen it comes to regulating the externalities of transnational production, the state is far from the only game in town, and may no longer be the most important game in town.”).

cannot.<sup>393</sup> Similarly, scholars should no longer ignore why, in some cases, initiatives are successful and benefit from entrepreneurial leadership while in other cases, they flounder. In so doing, they should evaluate whether, when, and why entrepreneurial leadership emerges to drive experiments and how that leadership engages with front-line employees and develops agency capacity to drive results. With the recent institutional turn in administrative law scholarship, there is an increasing receptivity to such inquiries, suggesting that we may well be at the dawn of a new era that more seriously considers how agencies operate in practice than how judges review their actions.<sup>394</sup>

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<sup>393</sup> See Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES L. 369, 414 (2016) (“[S]cholars and policymakers must be willing to entertain the prospect of paradigm shifts in both the design of regulatory institutions and the formulation of regulatory mandates.”); Weiser, *supra* note 7, at 720 (“[A]n agency’s institutional process is not a black box; rather it is shaped by a series of practices that can be examined, evaluated, and potentially changed.”).

<sup>394</sup> If this proves to be the case, it will no longer be true that studies of institutional design are “the Rodney Dangerfield of administrative law: [they] get[] no respect.” Hyman & Kovacic, *supra* note 142, at 1516.