

H O N O R A B L E M E N T I O N

Entrepreneurial Administration

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This Article explains that the conventional view of agency behavior—following the specific direction of the U.S. 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 U.S. Environmental Protection Agency (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. Entrepreneurial regulation refers to federal agency (a) development of programs that respond to important problems but are not explicitly required or authorized by Congress (e.g., EPA’s development of the Energy Star program) and (b) support for purely private initiatives that perform governmental functions (e.g., the Marine Stewardship Council). 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. [S]uch experimental strategies are not always preferable to traditional administrative rulemaking and adjudication, but considering experimental strategies and evaluat-

ing whether they would be more effective than traditional regulatory approaches is. This Article . . . first examines the traditional regulation model and emerging alternative models of agency action through coregulation, developing best practices through convening, and encouraging private regulation. It underscores that entrepreneurial leadership and a culture of experimentation and trial-and-error learning is essential to developing the best solution. Second, it discusses the relevant criteria for evaluating such experiments, including effectiveness, legitimacy, and accountability, and examines potential objections to the “earned regulatory authority” model, whereby entrepreneurial leadership is incentivized and maximized, because when innovations succeed, agencies and private actors are rewarded with more formal authority and budgetary support. Third, it discusses four case studies of experimental regulatory strategies. . . . Lastly, it examines the concept of policy entrepreneurship. The Article explains how considerable flexibility for a range of alternative options exists within current structures and is being used by agencies and private entities to great effect. The Article calls for a more self-conscious use of this model, and explains how agencies can implement this model successfully through entrepreneurial leadership and a culture of trial-and-error problem solving.

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