PRIVATE ORDERING

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I. INTRODUCTION

The sharing of regulatory authority with private actors (i.e., private ordering) can occur in many ways.1 For example, government often delegates the authority to make specific regulatory determinations to private actors, or sanctions and enforces privately made rules.2 Private ordering has lengthy historical precedent3 and, in recent years, has been rapidly expanding in scope, both domestically and abroad.4 Nowhere is its expansion as preva-

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1 In its largest sense, regulation can be divided into the administrative system of direct public control and the judicially enforced system of private rights. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 13.1, at 367 (4th ed. 1992). I focus on the former.

2 See infra Part II (classifying types of private ordering). This Essay will focus on delegation of regulatory authority to private actors. In this context, the Essay will assume, consistent with the illustrative examples used in this Essay and the aspirations of private ordering, that such private actors are disinterested and have no conflicts of interest.

3 See, e.g., Gillian K. Hadfield, Privatizing Commercial Law, REGULATION, Spring 2001, at 40, 41 (observing that “[from the Middle Ages to the infant digital age, there are examples of law developed and administered by private entities with varying degrees of state involvement”). The term “privatizing law” is sometimes used as a synonym for private ordering.

4 See, e.g., Saskia Sassen, De-Nationalized State Agendas and Privatized Norm-Making 9, 11 (2000) (unpublished manuscript, on file with author) (arguing that credit rating agencies are members of the “new set of [largely, though not exclusively, private] intermediary strategic agents [that] have absorbed some of the international functions carried out by states in the recent past”); Gillian Hadfield, Privatizing Commercial Law: Lessons from the Middle and the Digital Ages 28–32 (Mar. 2000) (unpublished manuscript) (discussing government reliance on private companies, such as TRUSTe and VeriSign, Inc., to maintain guidelines, checkpoints and a responsive system to handle disputes surrounding Internet privacy and confidentiality issues and also arguing that because private firms can develop new practices and adjust to changing environments more quickly than governmental bureaucracies, utilizing the private sector arguably both lowers public sector costs and increases the pace of industry expansion), available at http://papers.ssrn.com/sol3/delivery.cfm/000323600.pdf?abstractid=220252; Gillian
lent as in the commercial, financial, and business sectors.\(^5\) Examples include the United States government’s recent entrusting of the Internet domain system and the assignment of Internet protocol numbers with the Internet Corporation for Assigned Names and Numbers (ICANN), a private nonprofit corporation,\(^6\) or the delegation by the Securities and Exchange Commission of the power to promulgate public accounting standards to the privately organized, but independent,\(^7\) Financial Accounting Standards Board (FASB).\(^8\)

The motivation behind commercial private ordering is different than that behind traditional private ordering; more significantly, it is deemed legitimate for reasons different than those that legitimize its traditional counterpart. Traditional private ordering, such as that performed by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) and Underwriters Laboratories, is primarily motivated by the desire to “foster pluralism in the regulatory state,”\(^9\) as well as to reduce costs and delegate

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\(^5\) Hereinafter, “commercial private ordering” in notes and text. Indeed, much of the recent literature on private ordering addresses commercial ordering. See supra note 4 and sources cited therein.

\(^6\) See James Boyle, Governance of the Internet: A Nondelegation Doctrine for the Digital Age?, 50 DUKE L.J. 5, 6 (2000); see also infra Part IV (analyzing ICANN’s private ordering).

\(^7\) See FINANCIAL ACCOUNTING STANDARDS BOARD, FACTS ABOUT FASB (2002) (stating that “FASB is part of a structure that is independent of all other business and professional organizations”), available at http://www.fasb.org/facts/facts_about_fasb.pdf.

\(^8\) Id. at 1.

Since 1973, the Financial Accounting Standards Board (FASB) has been the designated organization in the private sector for establishing standards of financial accounting and reporting. Those standards govern the preparation of financial reports. They are officially recognized as authoritative by the Securities and Exchange Commission (Financial Reporting Release No. 1, Section 101) and the American Institute of Certified Public Accountants (Rule 203, Rules of Professional Conduct, as amended May 1973 and May 1979). The Securities and Exchange Commission (SEC) has statutory authority to establish financial accounting and reporting standards for publicly held companies under the Securities Exchange Act of 1934. Throughout its history, however, the Commission’s policy has been to rely on the private sector for this function to the extent that the private sector demonstrates ability to fulfill the responsibility in the public interest.

Id.; see infra Part IV (discussing FASB’s private ordering).

policymaking responsibilities to private interests.\textsuperscript{10} In contrast, the sole motivation for commercial private ordering is to reduce the cost of regulation.\textsuperscript{11} Traditional private ordering derives legitimacy from costly procedural safeguards—essentially the same as those protecting the legitimacy of administrative agency rulemaking—designed to ensure fair process and reasoned decisionmaking by the private actor.\textsuperscript{12} The purported legitimacy of commercial private ordering comes from other premises: private institutions can operate more efficiently than government by using market incentives to allocate public resources without having to take account of such extraneous matters as the state’s legitimacy\textsuperscript{13} and the interests of the politicians, legislatures, and special interest groups.\textsuperscript{14} If the goal of commercial regulation is economic efficiency,\textsuperscript{15} private institutions can achieve

\textsuperscript{10} Havighurst, supra note 9, at 7–9; Lawrence, supra note 9, at 653–57. For example, the delegation of healthcare policymaking responsibilities under Medicare to private interests, including JCAHO, is politically motivated. Because the Medicare legislation was vigorously opposed by organized medicine, its implementation (once enacted) “faced almost certain failure” unless government “could rapidly bring health care providers, including physicians, to embrace it.” Timothy Stoltzfus Jost, Medicare and the Joint Commission on Accreditation of Healthcare Organizations: A Healthy Relationship?, 57 LAW & CONTEMP. PROBS. Autumn 1994, at 15, 23. But healthcare providers would not embrace Medicare unless government control was minimized. Id. at 24. Because “health care professionals and providers controlled [JCAHO], providers viewed oversight by [JCAHO] as more acceptable than direct federal regulation.” Id. at 25. Delegating healthcare policymaking responsibilities to JCAHO therefore was the politically wise solution, cost being a distinctly secondary factor. Id. at 23. In other areas of traditional private ordering, cost is likewise only a secondary factor. For example, educational accreditation by private actors is prevalent “because the first amendment tradition has long discouraged government from engaging in direct regulation of educational institutions.” Havighurst, supra note 9, at 7.

\textsuperscript{11} Hadfield, supra note 3, at 38.

The instrumental rationale for privatizing commercial law is based on the distortions that result from the state’s exercise of monopoly over the production and distribution of commercial law. As with any monopoly, the absence of competition implies that the costs of commercial law are higher than they would be if private regimes were able to compete.

\textsuperscript{12} Id. The foregoing discussion of motivations is viewed from the government’s perspective. From the standpoint of the private actor, the motivation for engaging in traditional private ordering often is “the political one of preventing or assuaging public concerns that might lead government to regulate the field or to regulate it more aggressively.” Havighurst, supra note 9, at 3. In contrast, the motivation of the private actor in commercial private ordering is more likely to be profits. See, e.g., Schwarz, supra note 4, at 12 (discussing fees charged by credit rating agencies).

\textsuperscript{13} See infra Part III.B.

\textsuperscript{14} See, e.g., Hadfield, supra note 3, at 40 (“The economic sphere of law regularly deals with relationships that involve only corporate entities. Private legal regimes could provide this law without raising legitimacy concerns.”); see also Hadfield, supra note 4, at 41 (arguing that, in a commercial context, the state’s legitimacy is not at issue and the rights at stake need not be treated as absolute).

\textsuperscript{15} Jonathan R. Macey, Public and Private Ordering and the Production of Legitimate and Illegitimate Legal Rules, 82 CORNELL L. REV. 1123, 1124 (1997). But cf. infra note 17 (questioning whether at least some forms of private ordering may be even more susceptible to pressure from special interest groups). For an argument that, in an international context, private ordering can increase efficiency by reducing transaction costs, see A. Claire Cutler et al., The Contours and Significance of Private Authority in International Affairs, in PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS 333, 338–44 (A. Claire Cutler et al. eds., 1999).

\textsuperscript{16} Hadfield, supra note 4, at 58 (arguing that the “public value at stake in relationships between
that goal more easily than public actors. Thus, commercial private ordering is rarely restricted by the procedural safeguards that bind traditional private ordering.\textsuperscript{16}

I question, however, the premise that the only goal of commercial regulation is efficiency.\textsuperscript{17} Even in a commercial context, society sometimes has other regulatory goals.\textsuperscript{18} There may, for example, be distributional goals such as fairness.\textsuperscript{19} Unrestricted private ordering should not attain legitimacy without safeguarding those goals.\textsuperscript{20} I also believe, however, that the safeguards by which traditional private ordering derives legitimacy may not be feasible for commercial private ordering. The cost of instituting those safeguards would likely offset any cost savings that motivate commercial private ordering in the first place, thereby undermining its \textit{raison commercial entities . . . is economic efficiency}); see also W. Kip Viscusi et al., ECONOMICS OF REGULATION AND ANTITRUST 9 (3d ed. 2000) (arguing that, where health and safety are not at issue, the rationale for regulatory policy is “foster[ing] improvements judged in efficiency terms”). References hereinafter to efficiency refer to economic efficiency.

\textsuperscript{16} See, e.g., Schwarz, supra note 4, at 3–5 (discussing the unrestricted private ordering by credit rating agencies); see also infra Part IV (discussing the unrestricted private ordering by ICANN and FASB and finding that, even though such private ordering purports to be subject to traditional procedural safeguards, those safeguards are superficially applied).

Commercial private ordering that lacks the procedural protections from which traditional private ordering derives legitimacy shall be referred to hereinafter, in notes and text, as “unrestricted private ordering.”

The failure of this Essay to question the latter premise—that private institutions can operate more efficiently than government in commercial matters—does not necessarily signify agreement with that premise in all cases. For example, the type of private ordering discussed in Part II.A, \textit{infra}, (i.e., rules originated by private actors but put into force by sovereign governments) has been criticized as being particularly subject to pressure from cohesive special interest groups. See, e.g., Robert E. Scott, \textit{The Politics of Article 9}, 80 VA. L. REV. 1783, 1816–21 (1994); Kathleen Patchel, \textit{Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code}, 78 MINN. L. REV. 83 (1983) (exploring impact of interest groups on uniform laws process). However, the general question of whether private institutions can operate more efficiently than government is beyond the scope of my Essay.

\textsuperscript{17} Cf. Edith Stoney & Richard Zeckhauser, \textit{A Primer for Policy Analysis} 297 (1978) (arguing that “[t]he rationale for government intervention must be either that in particular areas the market is performing poorly or not at all, or that the society has objectives in addition to economic efficiency”) (emphasis added).

\textsuperscript{18} \textit{Id.} (arguing that “concern for the distribution of welfare is the principal additional objective”). For example, scholars have shown that permitting unrestricted commercial adhesion contracts will ultimately reduce costs for consumers, thereby benefiting them economically as a class. See, e.g., Posner, supra note 1, § 4.7, at 127 (arguing that unrestricted adhesion contracts save the consumer the cost of drafting a contract for each transaction entered into, and that competition between merchants ensures that such contracts do not take undue advantage of the weak bargaining position of the consumer). Nonetheless, society chooses to impose restrictions on such contracts in order to assure fairness in individual cases. See Restatement (Second) of Contracts § 211 cmt. c (1981) (“[S]tandard terms are subject to the overriding obligation of good faith (§205) and to the power of the court to refuse to enforce an unconscionable contract or term (§208).”).

\textsuperscript{19} Cf. Hadfield, supra note 3, at 44 (“[P]rivatization is justifiable only for those areas of law [which Hadfield assumes includes commercial law] in which efficiency is the only value at stake.”).

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I propose that distributional and other nonefficiency regulatory goals be safeguarded directly by imposing constraints on the private actors—requiring them to demonstrate how actual regulatory goals are being protected—as a less costly way to promote legitimacy.

Before beginning the analysis, it should be cautioned that most of the literature concerning private ordering—commercial or otherwise—either discusses the subject using amorphous generalities or else focuses on specific examples of private ordering without considering their place within the subject’s overall framework. This approach deters rigorous analysis, while the focus on specific examples does not easily allow a reader to apply the analysis to other examples of private ordering. I therefore attempt in Part II below to classify the types of private ordering in order to provide a framework for the subsequent analysis in Part III. The classification shows that private ordering is a label applied to a broad range of activities, and that any analysis of private ordering is a function of, and therefore should focus on specific types of, those activities. In Part IV, I will demonstrate how the constraints I argue for can be implemented, using examples of existing commercial private ordering.

It also should be cautioned that the term “legitimacy” can have different shades of meaning. It can mean, for example, whatever is added to convert power into authority. It also can refer to perceptions: whether there is a belief that something is okay. I do not dwell on whether private ordering is duly authorized; indeed, I will assume that it is authorized in accordance with applicable law. I focus, rather, on perceptions, the uneasiness and perceived illegitimacy associated with private ordering. The meaning of legitimacy also depends on the audience. For example, an “honor” killing may well have legitimacy within organized crime, though not within the society generally. I focus on general societal perceptions: Is private order-

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21 There is no inconsistency between my claim that commercial regulation has goals other than efficiency and the fact that the sole motivation for commercial private ordering is to reduce regulatory costs. Regulation, I argue, also has distributive goals, such as fairness. In contrast, the only rationale for instituting a commercial private ordering regime, irrespective of the goals such regime is to safeguard, is to reduce regulatory costs.

22 Collectively, these will be referred to as “non-efficiency goals” in notes and text.

23 See infra Part III.C.

24 See, e.g., Jonathan Weinberg, ICANN and the Problem of Legitimacy, 50 DUKE L.J. 187, 191, 257 (2000) (observing that “ICANN’s legitimacy issues are highly controversial” and further observing that “[i]f ICANN is to establish its legitimacy, it must be able to answer the charge that [its] exercise of authority is inconsistent with our ordinary understandings about public power and public policymaking”). Indeed, the recent Enron meltdown has exacerbated these perceptions. See, e.g., Steven Liesman et al., Accounting Debacles Spark Calls for Change: Here’s the Rundown, WALL ST. J., Feb. 6, 2002, at A1, A8 (questioning, in light of Enron, FASB’s private ordering of public accounting standards); Rating the Raters: Enron and the Credit Rating Agencies: Hearing Before the Senate Comm. on Gov. Affairs, 107th Cong. (2002) (quoting members of the Senate Committee on Government Affairs criticizing the rating agencies for failing to predict Enron’s demise), available at http://www.senate.gov/~gov_affairs/032002witness.htm.
ing perceived as legitimate *by the public*? A perception problem arises because, historically, most public functions have been carried out by public bodies. Private ordering forces us all to step back and ask: What justifies a deviation from that norm and why should the state be able to give its imprimatur to private ordering?  

I do not, however, attempt to fully answer this question. Nor do I argue that private ordering is, or ever can be made, legitimate. Rather, my approach is pragmatic: Private ordering exists for good (often economic) reasons, but perceptions of illegitimacy plague it; thus, it is important to inquire how to design cost-effective controls to reduce these perceptions, even though the controls may be second best.

II. CLASSIFICATION

Private ordering can be viewed as part of a broad spectrum within which rulemaking is classified by the amount of governmental participation involved. At one end of the spectrum are rules of law originated and put into force by sovereign governments. At the other end are rules that are adopted entirely by private actors. Between these extremes, private ordering involves a continuum of government participation. To clarify the nature of the private ordering addressed by this Essay, I will roughly divide the spectrum into four classes: first, rules originated and put into force by sovereign governments; second, rules originated by private actors but put into force by sovereign governments; third, rules originated and put into force by private actors pursuant to governmental delegation; and fourth, rules adopted by private actors without government sanction or enforcement. Only the last three classes involve private ordering. For the reasons discussed below, this Essay will focus in Parts III and IV on the third group, rules originated and put into force by private actors pursuant to governmental delegation.

A. Rules Originated by Private Actors But Put into Force by Sovereign Governments

Governments sometimes adopt rules proposed by private groups. In a domestic context, the National Conference of Commissioners on Uniform State Laws (NCCUSL), sometimes in association with The American Law Institute (ALI), has produced numerous model uniform laws that serve as

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25 I only claim here that private ordering *is perceived* to be a deviation from the norm, and thus do not need to get into the dispute raised by the Critical Legal Studies movement of whether the public-private distinction is meaningful.

26 *Cf. infra* note 124 and accompanying text (observing that this Essay does not purport to provide a basis for deciding whether to permit private ordering with second-best safeguards because society already has made that choice by permitting widespread private ordering; but nonetheless arguing that second-best safeguards are preferable to the current paucity of safeguards).
templates for adoption by state governments.\textsuperscript{27} Although NCCUSL and ALI superficially appear to be quasi-governmental institutions, they are in fact composed of private individuals and have no governmental authority.\textsuperscript{28} This type of private ordering has been accepted because it brings experts together from around the country to share their expertise on a pro bono basis. An individual state legislature could not assemble such expertise except at great cost.\textsuperscript{29}

In the international context, this type of private ordering is especially useful because it can transcend a lack of formal collaboration among nations. To some extent this can be illustrated by the Basel Committee on Banking Supervision,\textsuperscript{30} an international organization that addresses cross-border banking activities.\textsuperscript{31} The rules produced by the Basel Committee have been referred to as "soft law"\textsuperscript{32} because the Committee lacks the authority to actually make law; nations must separately enact those rules into law.\textsuperscript{33}

This type of private ordering, whether domestic or international, should not raise significant legitimacy problems. Enactment of a privately originated rule into law at least implies that the rule has been scrutinized within, and sanctioned by, the enacting government's lawmaking process. This is not to say that there are no legitimacy concerns. For example, private ordering by the Basel Committee has been criticized for representing only certain national interests.\textsuperscript{34} Recent scholarship likewise questions the le-

\textsuperscript{28} Id. at 915 n.11.
\textsuperscript{29} Id. at 921.
\textsuperscript{30} The Basel Committee consists of "senior representatives of bank supervisory authorities and central banks of Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Sweden, Switzerland, the United Kingdom and the United States." Press Release, Bank for International Settlements, Consultative Paper on a New Capital Adequacy Framework, ¶ 16 (June 3, 1999), available at http://www.bis.org/press/p990603.htm. Because the Committee's members are government representatives, its work is not strictly private ordering. The analysis below, however, is nonetheless representative of private ordering.
\textsuperscript{32} Soft law "includes statements of principles, guidelines, understandings, model laws and codes, and declarations that...are 'neither strictly binding norms of law, nor completely irrelevant political maxims, and operate in a grey zone between law and politics.'" Cutler et al., supra note 14, at 367–68.
\textsuperscript{33} Tarbert, supra note 31, at 1787. Soft law is the term generally used to refer to "a set of legal terms or informal duties adopted under formal or informal treaties or multilateral agreements. The emergence of soft law resulted from the inadequacy of hard law, which cannot overcome the deadlocks in international relations that result from economic or political differences."
\textsuperscript{34} Tarbert, supra note 31, at 1787 (noting that "[a]lthough the Basle Committee has sought to extend its influence on a near global basis, it has also 'made the conscious decision not to expand its membership beyond its original limited group'") (internal quotations omitted).
gitimacy of rules promulgated by the World Trade Organization,\textsuperscript{35} even where such rules are intended for separate adoption by each national government.\textsuperscript{36} In a domestic context, the legitimacy of this type of private ordering is also not assured to the extent states enact uniform laws without independent scrutiny.\textsuperscript{37} Nonetheless, these concerns ultimately could be addressed by greater legislative scrutiny of the rules being proposed and, as appropriate, more representative composition of the private rulemaking body.\textsuperscript{38} This type of private ordering therefore will not be the focus of this Essay.

B. Rules Originated and Put into Force by Private Actors Pursuant to Governmental Delegation

Governments often choose to delegate all or part of a regulatory scheme to private actors, especially in a commercial context. This extends beyond mere reliance on contractors to conduct ministerial activities such as building prisons to situations in which the private actors exercise substantive power. For example, governments in the United States and other nations\textsuperscript{39} have delegated to private companies, such as Standard & Poor's Ratings Services and Moody's Investors Service,\textsuperscript{40} the power to issue credit ratings\textsuperscript{41} that determine whether or not issuers of securities need to comply with various provisions of national securities law.\textsuperscript{42} Similarly, as discussed, the United States government has entrusted ICANN with the task of con-


\textsuperscript{36} See id. at 19 (observing that "in a formal sense [the WTO's] negotiations meet democratic principles [because] the final agreements have to be ratified through domestic procedures").

\textsuperscript{37} Schwarz, supra note 27, at 977 (arguing that "subsequent legislative ratification, through enactment, of uniform state laws is ultimately unsatisfying because state legislatures do not always exercise, and indeed the goal of uniformity discourages, independent scrutiny"); id. at 981 n.253 (discussing actual legislative enactment of a uniform state law without scrutiny).

\textsuperscript{38} Keohane & Nye, supra note 35, at 8 (observing that "[i]n principle, representative working groups with transparent processes, might help to alleviate . . . concerns about legitimacy if such processes could be worked out").

\textsuperscript{39} Including, for example, Japan, France, and Hong Kong. See Schwarz, supra note 4, at 3–5.

\textsuperscript{40} Standard & Poor's, Moody's, and similar companies are commonly referred to as "rating agencies." They are, however, private entities with no government involvement. See Steven L. Schwarz, The Universal Language of Cross-Border Finance, 8 DUKE J. COMP. & INT'L L. 235, 251–52 (1998). Reputational costs assure the independence and objectivity of their ratings determinations. Schwarz, supra note 4, at 16.

\textsuperscript{41} A credit rating is merely an opinion on the creditworthiness of particular debt securities. Schwarz, supra note 4, at 6.

\textsuperscript{42} See id. at 4–5. For example, under U.S. law, "Rule 3a-7 of the Investment Company Act of 1940 exempts certain financings from registration and compliance with that Act if, among other requirements, the securities are rated 'investment grade'" by at least one credit rating agency that is designated as a nationally recognized statistical rating organization by the Securities and Exchange Commission. Id.
trolling the Internet domain name system and the assignment of Internet protocol numbers.\textsuperscript{43}

In this type of private ordering, the government sanctions only the private actor, not the resulting rule. The legitimacy of the rulemaking is therefore central. This type of private ordering will be the focus of this Essay.

C. Rules Adopted by Private Actors Without Government Sanction

This type of private ordering arises both domestically and internationally, and any analysis must be tied to the jurisdictional context. Domestically, private actors sometimes adopt systems of rules by opting out of government regulation or by adopting rules in areas where the government has not itself regulated.\textsuperscript{44} The seminal work on this type of private ordering is Robert Ellickson's study of the interaction of cattlemen in Shasta County, California.\textsuperscript{45} He observes that this community of cattlemen had generated a set of private norms that, he argues, maximizes the general welfare of the group, without government intervention.\textsuperscript{46}

Domestic private ordering of this type does not, however, purport to create "law" in the traditional sense.\textsuperscript{47} Because the community generates its own rules, unenforced by government,\textsuperscript{48} legitimacy derives from consensus agreement on the rules themselves. This type of private ordering is increasingly prevalent in an international context,\textsuperscript{49} especially where activities transcend national boundaries and are beyond the regulatory reach of any

\textsuperscript{43} See supra note 6 and accompanying text; see also infra Part IV (analyzing ICANN's private ordering).

\textsuperscript{44} For a comprehensive examination of private actors opting out of government regulation, see Lisa Bernstein, Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions, 99 Mich. L. Rev. 1724 (2001) (examining the cotton industry, which has almost entirely opted out of the public legal system; thus, most contracts for the purchase and sale of U.S. cotton are neither consummated under the Uniform Commercial Code nor interpreted and enforced in U.S. courts but, instead, are concluded under one of several privately drafted sets of contract default rules and subject to arbitration in one of several merchant tribunals; similarly, most international sales of cotton are governed neither by State-supplied legal rules nor the Convention on the International Sale of Goods, but rather by the rules of the Liverpool Cotton Association).

\textsuperscript{45} ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

\textsuperscript{46} Id. at 267. Whether this type of private ordering maximizes general welfare is disputed, however. See, e.g., Eric A. Posner, Law, Economics & Inefficient Norms, 144 U. Pa. L. Rev. 1697, 1711–25 (1996) (cataloging reasons why norms may be inefficient, and concluding that "norms are likely to be 'inefficient,' in the sense that while they enable people to cooperate for the purpose of producing a collective good, they do not enable them to exploit the full cooperative surplus that would exist if cooperation were costless").

\textsuperscript{47} Hadfield, supra note 4, at 5 (observing that "[r]ules developed by purely private entities obtain the status of law when they are enforced by the state").

\textsuperscript{48} This type of private ordering is enforced through other means, such as reputational consequences. See Bernstein, supra note 44, at 24–25, 72.

\textsuperscript{49} Cutler et al., supra note 14, at 370 (observing that private actors, such as corporations, "increasingly...establish institutions that 'govern' in the absence of or in coordination with governance arrangements involving states at the international level").
single nation. It is common, for example, for rules to be adopted privately in legal areas that traditionally have been the prerogative of sovereign states, such as the voluntary industry guidelines on the prevention of money laundering. Generally, the actors in this type of private ordering have credibility “because of [their] perceived expertise . . . ; [or because of] historical practice that renders such exercise of authority acceptable and appropriate.”

To differentiate this type of private ordering from the types discussed above, consider credit-rating agencies. As noted above, government has delegated the authority to issue credit ratings that determine whether or not issuers of securities need to comply with national securities laws. In contrast, the type of private ordering discussed in this subpart is exemplified, in an international context, by rating agency development—completely independent of any governmental delegation of authority—of “strong standards for the financial industry as a whole, affecting the decisions and options available to those they rate [in a manner that the] rest of the financial community accepts.” This type of private ordering can even morph into the type of private ordering discussed above where international rules adopted by private actors are enacted into law by sovereign governments.

Although international rulemaking by private actors without government sanction has significant historical precedent, it still raises serious le-


51 A. Claire Cutler et al., Private Authority and International Affairs, in PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS, supra note 14, at 3, 16.

52 The original guidelines were proposed by the Financial Action Task Force on Money Laundering (FATF), a private organization devoted to developing and promoting policies to combat money laundering, in a report entitled “The Forty Recommendations” that outlines measures for countries to adopt in order to frustrate and prosecute money launderers. See FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, THE FORTY RECOMMENDATIONS, available at http://www1.oecd.org/fatf/40Recc_en.htm (last visited Nov. 13, 2002). These guidelines became “the principal standard in this field.” Id. In light of the September 11th attacks and the requirements of United Nations Security Council Resolution 1373, the FATF recently issued even stricter guidelines aimed at eliminating money laundering by terrorist organizations, such as by freezing assets and other economic resources of individuals committing terrorist acts. See Press Release, Financial Action Task Force on Money Laundering, FATF Cracks Down on Terrorist Financing (Oct. 31, 2001), at http://www1.oecd.org/fatf/pdf/PFR-20011031_en.pdf. Because these new guidelines commit the FATF to “intensify its cooperation with . . . international organizations and bodies, such as the United Nations,” id., there is at least some question of the extent to which money laundering guidelines will continue to be privately formulated and voluntarily implemented.

53 Cutler et al., supra note 51, at 5.

54 See supra text accompanying note 40.

55 Id. at 21.

56 See supra Part II.A.

57 Cutler et al., supra note 14, at 351 (contending that this type of private ordering “has existed in
gitimacy issues. As a result, this has been an important subject of study by political scientists and it deserves increased scrutiny by legal scholars. I nonetheless exclude it from this Essay because any analysis of this type of private ordering is inherently bound up with the “more general problem of theorizing about international governance and [does] not derive from the concept of private authority as such.”

In summary, then, this Essay focuses primarily on the type of private ordering that results when private actors originate and put rules into force pursuant to governmental delegation. My intention also is to make the following analysis germane to private ordering that occurs in foreign as well as domestic legal systems. I therefore refrain from focusing on country-specific limitations on private ordering except insofar as those limitations may provide normative insight.

III. ANALYSIS

Where efficiency is the sole goal of regulation, unrestricted private ordering can be legitimate. Gillian Hadfield, for example, assumes that efficiency is the only such goal for commercial regulation and argues that unrestricted private ordering establishes the “minimal structure necessary to create private institutions that will then operate under market incentives” to allocate public resources. This produces “rules that are optimal in light of the costs of the rules.” To the extent her assumption is correct, and further assuming that additional regulation would not improve efficiency, and outcomes are not unduly influenced by interest groups,

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58 See, e.g., Cutler et al., supra note 51, at 4 (arguing that “[g]iven the rapid globalization of the world economy, the modern state may be unable to cope with the demand for global order, but it is not clear that market-oriented sources of authority are the most desirable alternative”).
59 Cutler et al., supra note 14, at 362.
60 This is the type of private ordering discussed in Part II.B, supra, of this Essay. References in the remainder of this Essay to “private ordering” generally refer to this type of private ordering.
61 For example, the analysis does not examine limitations arising under the Administrative Procedure Act. For a thoughtful discussion of these and other domestic limitations, see A. Michael Froomkin, Wrong Turn in Cyberspace: Using ICANN To Route Around the APA and the Constitution, 50 DUKE L.J. 17, 93–164 (2000) (arguing that ICANN’s private ordering may be illegal under United States law).
62 Thus, I explore the development of the “private non-delegation doctrine” under U.S. common law. See infra note 140 and accompanying text (using this doctrine to test my analysis).
64 Id. at 40–41.
65 Cf. infra notes 162–164 and accompanying text (arguing, in the context of FASB’s private ordering, that where public confidence in the legitimacy of a privately ordered scheme is shaken, governmental delegation should be scrutinized to determine whether it can make the private ordering more efficient).
66 Private ordering sometimes is “susceptible to pressure from cohesive interest groups.” Schwartz, supra note 27, at 919; see also Havighurst, supra note 5, at 5, 9 (discussing the risk that the actors in private ordering will be, or will be influenced by, “firms or industry groups having an economic or ideo-
I have argued elsewhere that she is right.67

This Essay questions, however, whether efficiency is the only goal of commercial regulation, and analyzes the extent to which unrestricted private ordering is appropriate where there are other important goals.68 The analysis begins by examining regulatory theory.

A. Regulatory Theory

Black letter law often states that efficiency is the only goal of commercial regulation.69 Few scholarly works—even those addressing non-commercial regulation—mention other goals of regulation. Even in works that mention other goals, the discussions are typically short and not the focus of the text.70 Most scholarship instead focuses on whether regulation is necessary to correct market failures, such as monopolies, externalities, bargaining power problems, and information problems, in order to increase efficiency.71

This narrow focus on efficiency is shortsighted. For example, scholars talk of fixing market failures in order to increase efficiency without always recognizing that the former term implicitly reflects broader goals.72 Market

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67 See Schwarze, supra note 4, at Part II.A–B (arguing that because efficiency is the only goal of rating agency regulation and additional regulation would not improve efficiency, delegation of government authority to private “rating agencies” should be legitimate).

68 This Essay does not examine the question of interest group influence. Thus, any conclusion herein in favor of commercial private ordering is subject to elimination, or at least mitigation, of such influence. For further discussion of this problem, see sources cited supra note 17.

69 See supra note 15 and sources cited therein.


72 See, e.g., Alan Peacock et al., The Regulation Game: How British and West German Companies Bargain with Government 13 (arguing that market failure analysis is flawed because it views all government regulation as an attempt to rectify market failures even though many policies clearly are focused on other objectives).
failures can also be problematic from a distributional standpoint. Thus, irrespective of overall efficiency, monopolies hurt potential new competitors, externalities hurt third parties, unequal bargaining power hurts the weak, and information problems hurt the uninformed.

A possible explanation for the failure of scholars to take non-efficiency goals into account is that it is sometimes difficult, if not impossible, to determine whether such goals should be included in a normative framework for regulation, even in a commercial context. Consider, for example, the recent dispute over the proper goals of a regulatory scheme for bankruptcy reorganization. Some argue that the only goal of bankruptcy reorganization law should be economic efficiency; others argue that there should also be, and in fact are, distributional objectives, such as rehabilitating troubled debtors and ensuring equality of distribution to creditors. There even can be disagreement over the fundamental question of whether bankruptcy law should permit an inherently bad business to reorganize. Some may advocate reorganization, arguing that bankruptcy law "serves an important purpose in rehabilitating firms that, but for bankruptcy protection, would fail. Jobs would be lost and communities damaged, economically and otherwise." Others, however, would allow reorganization only where it is economically efficient:

If a bad restaurant is replaced by a much better one, employment levels in the city may even increase. Keeping a bad restaurant in business postpones the inevitable and delays a desirable shift of labor and capital to somewhere the inputs can be put to better use.

At least one noted bankruptcy scholar believes this dispute is irreconcilable. This same difficulty in determining whether to include non-efficiency goals may well be inherent in other commercial regulatory schemes.

Another reason that non-efficiency goals are largely ignored is the

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75 Id. at 579 (illustrating the efficiency perspective that firms with inherently bad businesses should be allowed to fail to ensure that their assets are put to the best use).

76 Id. at 598 (concluding that the dispute "is at bottom normative," and hence "[b]ridging the gap between [the disputants] ‘must ultimately dissolve into a study of aesthetics and morals’") (quoting R. H. Coase, The Problem of Social Cost, 3 J.L. & ECON. 1, 43 (1960)). This conundrum is related to the recent media debate over who did more for mankind, Mother Teresa or Mike Milken. See Paul Craig Roberts, Who Did More for Mankind, Mother Teresa or Mike Milken?, BUS. Wk., Mar. 2, 1998, at 28 (discussing this question, originally posed by philosopher David Kelley of the Institute for Objectivist Studies). Some would argue that Milken was a greater benefactor because he increased overall efficiency by creating wealth, jobs, incomes, and new products for large numbers of people, whereas Mother Teresa merely redistributed wealth. There is no intrinsically correct answer.
overwhelming influence of University of Chicago economists\textsuperscript{77} in shaping modern regulatory theory.\textsuperscript{78} For example, originally the United States’s antitrust policies were based on the ideals of defending and promoting fairness, free enterprise and the individual.\textsuperscript{79} Beginning in the 1950s, this approach was challenged by members of the Chicago School, who argued that improvements in social welfare result from improvements in economic efficiency.\textsuperscript{80} Hence, incorporating potential solutions to political or social concerns into the formulation of antitrust policy is unnecessary and potentially harmful.\textsuperscript{81} President Reagan and other presidents later embraced, and had the Department of Justice implement, the Chicago School’s antitrust policies.\textsuperscript{82} Such policies continue to be widely recognized and accepted by courts, scholars and government officials.\textsuperscript{83} As a result, discussions of alternative commercial regulatory goals, even outside of antitrust, have been marginalized.\textsuperscript{84}

\textsuperscript{77} Hereinafter, in text and notes, the "Chicago School."

\textsuperscript{78} Still another possible explanation is that it is difficult for scholars to assess whether non-efficiency goals can be met, and scholars therefore couch the argument in simplified terms to make their analysis feasible. See Memorandum from Nathan Henderson, Duke Law School Class of 2003, to the Author (Sept. 10, 2001) (on file with author).


\textsuperscript{80} ROBERT H. BORK, THE ANTITRUST PARADOX 90–91 (1978).

\textsuperscript{81} See id.; see also Keith Conrad, Media Mergers: First Step in a New Shift of Antitrust Analysis, 49 FED. COMM. L.J. 675, 690 (1997) (explaining that Chicago School economists believe political and social factors distorts antitrust analysis). Moreover, Professor Bork found “not a scintilla of support” in the Sherman Antitrust Act’s legislative history for “broad social, political, and ethical mandates.” Robert H. Bork, Legislative Intent and the Policy of the Sherman Act, 9 J.L. & ECON. 7, 10 (1966).

\textsuperscript{82} See, e.g., CINI & MCGOWAN, supra note 79, at 7; Conrad, supra note 81, at 690; see also Joseph D. Kearney & Thomas W. Merrill, The Great Transformation of Regulated Industries Law, 98 COLUM. L. REV. 1323, 1399 (1998) (noting that deregulation, intended to maximize efficiency, was actually most prevalent under the Clinton Administration).


\textsuperscript{84} See, e.g., MICHAEL D. REAGAN, REGULATION: THE POLITICS OF POLICY 43–44 (1987) (asserting that by the late 1970s, “[t]he most heard voices ... began to assert efficiency in resource allocation as the first and only legitimate justification for regulation” and also arguing that these voices ignored and denied the validity of equity concerns in regulation); Ashutosh Bhagwat, Unnatural Competition?: Applying the New Antitrust Learning To Foster Competition in the Local Exchange, 50 HASTINGS L.J. 1479, 1485–86 (1999) (observing that “[t]he impact of the Chicago School on regulatory policy is less obvious than on antitrust policy, but is almost certainly reflected in the massive wave of deregulation and unbundling that has swept through regulated industries in the past two decades.”).
The foregoing analysis does not, of course, resolve whether non-efficiency goals should be included in any given regulatory scheme. Rather, it shows there is uncertainty as to whether non-efficiency goals should be included. This uncertainty, though, makes it likely that non-efficiency goals will sometimes become part of regulatory schemes. This likelihood is buttressed by the fact that regulation is the result of a political process and not strictly a normative inquiry. Political choice theory teaches that regulatory schemes are influenced by political actors and interest groups, making it difficult to predict the underlying goals ex ante. Even if there are clear normative goals at the outset, the political process may lead to other goals. Some regulatory schemes thus will favor efficiency goals, some may favor distributional and other non-efficiency goals, and some may combine these goals. One cannot always assume that efficiency is the sole goal of commercial regulation.

How does this square, however, with the view that unrestricted private ordering “is justifiable only for those areas of law in which efficiency is the only value at stake”? Where, of course, efficiency is, in fact, the only

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85 Indeed, that non-efficiency goals are often ignored in scholarly literature does not necessarily mean such goals are absent from actual regulatory schemes.

86 Political choice theory, which attempts to describe how the political process affects legislative initiatives, is based on the premise that legislators are self-interested individuals and therefore laws and regulations result from a process in which legislators barter their power in exchange for support in their reelection campaigns from rent-seeking groups. See, e.g., William H. Landes & Richard A. Posner, The Independent Judiciary in an Interest Group Perspective, 18 J.L. & ECON. 875, 877 (1975) (arguing that “legislation is ‘sold’ by the legislature and ‘bought’ by the beneficiaries of the legislation”); James M. Buchanan, Liberty, Market and State 19–27 (1986). Although numerous commentators have attempted to repudiate many of the tenets of this theory, e.g., Abner J. Mikva, Symposium on the Theory of Public Choice: Foreword, 74 VA. L. REV. 167, 168 (1988); Steven Kelman, “Public Choice” and Public Spirit, 87 PUB. INT., Spring 1987, at 80, 81, complete repudiation is stymied by the widespread evidence of rent-seeking behavior by politicians. See, e.g., Geoffrey Brennan & James M. Buchanan, Is Public Choice Immoral? The Case for the “Nobel” Lie, 74 VA. L. REV. 179, 186 (1988) (using 1981 legislation lowering the income tax for members of Congress to exemplify “the essential nature of the political process”).

87 See, e.g., John F. Cooverdale, Text as Limit: A Plan for a Decent Respect of the Tax Code, 71 TUL. L. REV. 1501, 1518 (1997) (arguing that due to the political process, one cannot legitimately speak of legislative intent or purpose because, in the end, actual legislation never fully embodies its goals).

88 This assumption would be especially dubious in jurisdictions outside the United States where the influence of the Chicago School is weaker. For example, the framers of the European Union’s competition policies have resisted the Chicago School’s regulatory philosophy in favor of policies whose primary goal is furthering political integration within the Union. See Jonathan Faull, The Enforcement of Competition Policy in the European Community: A Mature System, 15 FORDHAM INT’L L. J. 219, 221 (1992); Hawk, supra note 79, at 54. Thus, at least in the E.U., non-efficiency rationales for commercial regulation have been recognized and openly debated. See id. at 56–58 (observing that social and political values have played a larger role in E.U. than U.S. antitrust law, that these values are written into important E.U. governance documents, and that the European Commission has even “stated in several [of its] . . . reports that social and human demands may require modification of results otherwise mandated on purely economic grounds such as allocative efficiency”).

89 Hadfield, supra note 3, at 44.
goal., unrestricted private ordering may well be justifiable. But where there are other goals, private ordering should protect those goals in order to ensure legitimacy. I next argue that traditional regulatory safeguards are inadequate for that purpose.

B. The Failure of Traditional Safeguards

As discussed above, commercial and traditional private ordering derive legitimacy from different sources. Whereas traditional private ordering derives its legitimacy from safeguards designed to ensure fair process and reasoned decisionmaking by the private actor, the purported legitimacy of commercial private ordering derives from the notion that the goal of commercial regulation is efficiency and that private institutions can operate more efficiently than government. As a result, commercial private ordering is thought to be legitimate even when unrestricted by the safeguards that provide legitimacy to traditional private ordering.

The analysis in subpart III.A, however, has demonstrated that commercial regulation may have goals other than efficiency. The failure to safeguard these goals may in fact account for a great deal of the uneasiness and perceived illegitimacy associated with commercial private ordering. In this subpart, I consider whether the regulatory safeguards by which traditional private ordering derives legitimacy can be applied to commercial private ordering. I conclude they cannot.

The traditional safeguards evolved because traditional forms of private ordering address matters of health, safety, education, and other activities that are not strictly commercial in nature, where efficiency is generally understood not to be the only goal of regulation. The imposition of these safeguards is costly; but the cost does not, in and of itself, undermine traditional private ordering, which, as discussed, has primary motivations other than cost. The application of traditional safeguards to commercial private ordering, however, would be impractical. These safeguards generally require the application of procedural protections similar to those used in administrative rulemaking to the private rulemaking process. The rationale is that administrative agencies, like private actors, are not directly democratically accountable; hence the same types of safeguards that preserve legiti-

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90 Such as private ordering by credit rating agencies.
91 This conclusion is subject, of course, to the assumptions set forth in supra notes 65–66 and accompanying text.
92 See supra notes 9–11 and accompanying text.
93 See id.
94 Hereinafter, in text and notes, the "traditional safeguards."
95 Recall that where health and safety, for example, are at issue, efficiency is not the only goal of regulation. See supra note 15.
96 See supra notes 9–10 and accompanying text.
macy in one case should preserve legitimacy in the other. 97

[T]he legitimacy questions besetting [rules originated and put into force by private actors pursuant to government delegation] are, or should be, familiar to U.S. administrative lawyers. They parallel concerns about the legitimacy of federal administrative agencies that have been at the heart of administrative law since the beginning. The ultimate issue, in both cases, is the exercise of public power, and the creation of public policy, by an entity without democratic credentials or direct political accountability. 98

Administrative law theory provides at least three justifications for the legitimacy of administrative agency rulemaking: the traditional model, the interest representation model, and the consensus model. 99 The premise of the traditional model is that two constraints legitimize administrative rulemaking: agencies must stay within the bounds of their statutory delegations, and agency discretion is constrained by requirements of fair process and reasoned decisionmaking. 100 The latter constraint requires agencies to “solicit public comment and consider carefully the issues raised, rationally justifying each policy choice.” 101

Both the interest representation and consensus models respond to concerns that the traditional model’s constraints are inadequate to ensure legitimacy. In the seminal article on the interest representation model, 102 Professor Richard Stewart argues that administrative rulemaking is justified

97 Analogy is useful, although imperfect. Compare Cass R. Sunstein, Commentary, On Analogical Reasoning, 106 HARV. L. REV. 741, 767 (1993) (arguing that when there is insufficient information to agree on an overarching theory to deduce the “right” outcome, analogy can help produce a rational legal outcome), with Richard A. Posner, Overcoming Law 518–22 (1995) (arguing that although “[a]nalogies can be suggestive, even illuminating,” their use should not exclude attempts to find facts and policies for deciding the case at hand). In the case of private ordering, the analogy is clearly imperfect. A close comparison of private ordering and administrative law suggests that, in the former case, legitimacy is more tenuous than in the latter. This follows because, although private actors and non-elected administrative agency officials both derive the appearance of accountability through reputation, agency officials are government employees indirectly responsible to the entire populace. See Schwarz, supra note 4, at 15 & n.90 (noting that democratic “accountability is not assured only through elections,” and giving examples of “non-electoral accountability”). In contrast, a private actor’s reputation is limited to only a segment of the populace. Id. at 15 n.90 (arguing that because a rating agency’s reputation is limited to issuers of and investors in securities, rating agencies are accountable only to such issuers and investors, not to the entire populace). Nonetheless, I later argue that the analysis of private ordering and administrative agency delegation should converge where authority is delegated to disinterested and non-conflicted private actors, as is characteristic of the private ordering discussed in this Essay. See infra note 140.

98 Weinberg, supra note 24, at 191 (focusing on ICANN as a private actor that originates and puts in force rules pursuant to governmental delegation).

99 Id. at 221–23.

100 Id. at 221 (arguing also that these constraints are enforceable through judicial review of administrative decisionmaking).

101 Id. at 221–22.

only if all persons affected by the rule are fairly represented in the rulemaking process.\textsuperscript{103} He observes that courts have already adopted this model, as shown by the expansion in the number of persons granted standing to seek judicial review of agency decisions.\textsuperscript{104} The consensus model, on the other hand, is rooted in the belief that legitimacy requires more than just the representation of affected parties in agency rulemaking.\textsuperscript{105} Rather, an administrative agency “should, wherever possible, become a forum in which the interests that will be affected by a given decision can negotiate directly and reach their own consensus, a consensus the agency can then ratify.”\textsuperscript{106}

None of these justifications, however, would appear to be feasible for commercial private ordering. Although one prong of the traditional model (that agencies, or in our case private actors, must stay within the bounds of their statutory delegations) is satisfied, the second prong (that discretion is constrained by general requirements of fair process and reasoned decisionmaking) is not. Indeed, the imposition of these constraints would seem to be inconsistent with the very efficiency that private ordering is supposed to achieve. It would be costly for private actors to have to solicit public comments and rationally justify their privately ordered rules in light of these comments. Additional costs also could arise from legal challenges asserting that the solicitation process was inadequate or that comments were not adequately taken into account.\textsuperscript{107} Private ordering is also less likely than government ordering to satisfy the second prong to the extent the government is—or the public perceives the government as being—the body best able to solicit and balance the views of the populace.

Similarly, neither the interest representation model nor the consensus model would be feasible for commercial private ordering. The interest representation model requires that persons affected by the rule be fairly represented in the rulemaking process. For the reasons discussed above, that would be costly and is better suited to government rulemaking.\textsuperscript{108} The consensus model would require that the private institution become a forum in which affected parties negotiate directly and reach their own consensus,

\textsuperscript{103} Id. at 1712. Professor Stewart likens this to reproducing the pluralistic political process within the agency itself.

\textsuperscript{104} Id. at 1722.

\textsuperscript{105} Weinberg, \textit{supra} note 24, at 222–23.

\textsuperscript{106} Id. at 223. Thus, the traditional model requires administrators to consider a representative sampling of public comment, whereas the interest representation model requires that all affected parties must be represented. In both cases, however, administrators can end up disregarding views in the final formulation of the rule in question so long as they have a rational reason for doing so. The consensus model goes further than both of these models by requiring administrators to ratify the consensus view of affected parties.


\textsuperscript{108} See \textit{supra} note 107 and accompanying text (arguing that it would be costly and counter to custom and practice for private actors to have to solicit public comments and justify their privately ordered rules in light of these comments, and that additional costs could arise from legal challenges to this process).
which the private actor would then ratify. Again, this requirement would be costly, likely offsetting any cost savings that motivates commercial private ordering in the first place.

Commercial private ordering thus requires something else to legitimize it. In the next subpart, I argue that non-efficiency goals could be safeguarded directly by imposing constraints as a less costly way to achieve legitimacy. After developing that argument, I focus on how non-efficiency goals can be identified.

C. Safeguarding Regulatory Goals

Where the goals underlying a regulatory scheme are limited to efficiency, private ordering should be legitimate to the extent it increases efficiency. Where, however, there are important non-efficiency goals, private ordering’s legitimacy will be enhanced by safeguarding those goals. The foregoing discussion demonstrates, however, that commercial private ordering will not be economically viable unless these non-efficiency goals are safeguarded in a cost-effective manner.

To accomplish this, I propose that the goals be safeguarded directly by imposing constraints on the private actors. Before a governmental body delegates authority to private actors, it should first scrutinize the underlying regulatory scheme to determine whether the scheme seeks to attain non-efficiency goals. I later will discuss how this scrutiny should be made. If there are non-efficiency goals, the government could safeguard these goals by requiring the private actors to explicitly demonstrate and report, periodically where needed, on how the goals are being protected. By making these reports publicly available, the government would increase transparency of the private ordering process. Furthermore, the government could act as a filter and withdraw the delegation or impose some lesser penalty if it, or

109 See supra note 11 and accompanying text.
110 See infra Part IV.
111 Public reporting has proven effective to assure transparency in other contexts. For example, the National Environmental Protection Act of 1969 (NEPA) requires federal agencies to prepare Environmental Impact Statements any time they undertake “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332. These Statements are open to public comment prior to their official submission. Id. This model of requiring agencies to consider specified goals and to publicly disclose how those goals are being safeguarded has worked to make the Statements the “heart and soul of NEPA [and they have had] a profound impact on federal agency decision making.” James W. Spensley, National Environmental Protection Act, in ENVIRONMENTAL LAW HANDBOOK 413, 414 (Thomas F.P. Sullivan ed., 15th ed. 1999); see also FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 9.07, 9-292.1 (1999) (observing that Environmental Impact States have “influenced agency decision makers to give more emphasis to environmental values.”).
112 This Essay does not purport to explore all of the ways by which delegating agencies could enforce compliance or by which private actors could demonstrate that they have adequately considered non-efficiency goals. Professor Bressman, however, has usefully phrased some of the issues that such an inquiry would need to consider:

Would [private actors] be required to issue formal reports to the [delegating] agency with every
the public, is concerned that the non-efficiency goals are not being protected. I later discuss how this approach could be applied to ICANN's private ordering in order to increase legitimacy.

Imposing these constraints would enhance legitimacy and should be less expensive than traditional safeguards. Constraints would enhance legitimacy not only by directly protecting regulatory goals but also by helping to offset the aura of illegitimacy inherent in private ordering. This aura arises because the "problem of legitimacy in private rulemaking is a bit like the Wizard of Oz. When human beings [i.e., private actors rather than 'government'] are seen to be behind the process ... the 'authority of the source imposing' law weakens." Constraints, however, would link the privately ordered rules to the underlying regulatory goals which, in turn, derive their legitimacy from the government itself. Moreover, by facilitating transparency, constraints should further "help to alleviate ... concerns about legitimacy."

Memorandum from Lisa Bressman, Associate Professor, Vanderbilt University Law School, to the Author (May 14, 2002) (on file with author) [hereinafter Bressman Memorandum].

As with any administrative process, the government's actions would be subject to judicial review.

See infra Part IV.

Schwarcz, supra note 27, at 977 (quoting JURGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY 266 (Thomas McCarthy trans., 1984)).

Another way of thinking about this is that the democratic process speaks by creating the regulatory scheme. Private ordering is legitimate to the extent it merely implements that scheme in a cost-effective manner. Thus, even in an antitrust context, where there is unusual sensitivity to the risk that private ordering could thwart competition by characterizing the private parties as state actors exempt from federal antitrust regulation, courts have respected such exemption so long as the delegation of authority is "actively supervised" by the State itself." See, e.g., Cal. Retail Liquor Dealers Ass'n v. Mid-

Koelane & Nye, supra note 35, at 8; see also id. at 26 (observing in the context of international private ordering that "[w]hatsoever form accountability takes, transparency will be crucial to assure that accountability is meaningful"); SUSAN ROSE-ACKERMAN, RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE 46 (1992) (arguing that the goal of judicial review should be to improve Congress's accountability by invalidating "[a]nything in the body of the statute inconsistent with the preamble or statement of purpose"); Susan Rose-Ackerman, Judicial Review and the Power of the Purse, 12 INT'L REV. L. & ECON. 191, 202 (1992) (arguing that courts should encourage Congress to develop straightforward and realistic connections between budget appropriations and substantive statutory policy by invalidating spending proposals in appropriations acts that clearly benefit a narrower range of interests than those contemplated in the original substantive act by judging if there is a "minimal sense of proportion between the stated aim of the statute and subsequent appropriations."). Constraints also may resonate with public-choice theory scholars who are wary of "the use of legislation by private interests to obtain an economic advantage beyond what the free market will bear." DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 145 (1991). See, e.g., Bressman Memorandum, supra note 112 (observing that my approach of using "prac-
Constraints also should be less expensive than the cost of traditional safeguards.\(^{118}\) As discussed below, identifying regulatory goals should be relatively inexpensive.\(^{119}\) Moreover, because any monitoring is focused on goals rather than procedures, reporting costs should be nominal. One nonetheless might argue that the traditional approach could be more cost effective than constraints because the former contemplates a one-time solicitation of public comments whereas the latter requires ongoing monitoring. The delegating agency, however, may need to re-engage in public solicitation each time the private actor intends to change its methodology or otherwise act in a way not strictly contemplated by the original solicitation. In contrast, using constraints, the private actors only need demonstrate that the new methodology will continue to protect the regulatory goals. It therefore is not surprising that attempts to approximate the traditional approach in private ordering have met with failure.\(^{120}\)

This is not to say that compliance with constraints will always be cheap. But the cost of compliance should be viewed as a cost of the private ordering; where that cost is prohibitive, the private ordering simply may not be justified. I acknowledge that even the best constraints would not fully satisfy the traditional models that legitimize administrative agency rulemaking because, among other reasons, constraints do not require all affected persons to be represented in the rulemaking process.\(^{121}\) Here, one faces a choice. Because adherence to the traditional models would offset the cost saving that motivates commercial private ordering,\(^{122}\) one either must permit commercial private ordering with second-best safeguards or, effec-

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\(^{118}\) Traditional safeguards are costly because private actors would have to solicit public comments and reasonably justify their privately ordered rules in light of these comments, and additional costs could arise from legal challenges asserting that the solicitation process was inadequate or that comments were not adequately taken into account. See supra notes 107–108 and accompanying text.

\(^{119}\) Cf. infra Part III.D (describing how these goals can be identified). Indeed, even the application of traditional safeguards to private ordering should require identification of these regulatory goals in order to provide public notice thereof and alert the appropriately interested parties.

\(^{120}\) See infra notes 150–151, 163 and accompanying text (discussing that attempts by ICANN and FASB to approximate traditional safeguards have not secured legitimacy and, indeed, are viewed as inadequate). Furthermore, attempts to adapt traditional safeguards to private ordering may be inherently flawed due to the greater ease of “capture” by interest groups. See Scott, supra note 17, at 1826 (arguing that private ordering is especially susceptible to pressure from cohesive interest groups); see also Edward L. Rubin, Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising Articles 3 and 4, 26 Loy. L. A. L. Rev. 743 (1993); Schwarcz, supra note 27, at 919.

\(^{121}\) Traditional safeguards would not be satisfied because, among other reasons, direct safeguards don’t require all affected persons to be represented in the rulemaking process. Later, however, I allow the possibility of hybrids that combine constraints with aspects of the traditional model. See infra note 147 and accompanying text; infra note 140 (discussing the private non-delegation doctrine under U.S. law).

\(^{122}\) See supra note 21 and accompanying text (arguing that the cost of imposing the traditional safeguards would undermine commercial private ordering’s raison d’être).
tively, impose an economic roadblock to such ordering. This Essay does not purport to provide a comprehensive basis for making that choice. Rather, it takes the view that society already has made the choice: commercial private ordering is a widespread phenomenon, and therefore second-best safeguards are preferable to the current paucity of safeguards.

D. Identifying Non-Efficiency Goals

The discussion so far begs the question of how to identify non-efficiency goals. This, in turn, raises a threshold issue: should the focus be on actual or normative goals? I believe that the focus should be on the actual goals sought to be protected by the regulatory scheme and will demonstrate how to identify those goals. As already discussed, it is sometimes difficult to assign normative goals for regulation, and, in any event, regulation is the result of a political process and not strictly a normative inquiry. All this makes it difficult to predict, ex ante, the goals underlying the regulation. The actual goals underlying the final regulatory scheme will, however, represent the legislated policy aspirations. To the extent the legislative process is legitimate, these goals should be legitimate. The goals to be safeguarded are thus more appropriately those that actually underlie the applicable regulatory scheme.

In some cases, it should be relatively easy to identify actual regulatory goals. One need not identify the goals underlying an entire regulatory scheme, merely those goals underlying that portion of the regulatory scheme in which the private actor will have delegated authority. For example, if an administrative agency that derives authority from statutes $X$, $Y$, and $Z$ is delegating authority to a private actor solely under statute $Y$, then one need identify only the goals underlying statute $Y$.

In the United States, Congress often articulates these goals in the actual legislation:

A more precise specification of regulatory goals has been the goal or byproduct of many recent developments in administrative law. . . . Congress has attempted to articulate much clearer standards to guide regulators' behavior. Recent Congresses have largely avoided their predecessors' exhortations to

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123 This assumes, for purposes of argument, that the constraints are second-best from the standpoint of legitimacy. They may not be: ongoing governmental monitoring is more protective of the non-efficiency goals, and therefore arguably more legitimate, than merely entrusting a private actor to safeguard those goals without monitoring—even though that entrusting was once scrutinized by the affected persons. Whether constraints in fact are second-best, however, is beyond this Essay's scope.

124 Of course, neither commercial nor traditional private ordering need be subject to the traditional safeguards that legitimize administrative agency rulemaking where the private actors are merely ministerially implementing a policy that itself has been promulgated in accordance with such safeguards.

125 See supra notes 86–88 and accompanying text.

126 An administrative agency that delegates authority to a private actor in an area where the agency itself has imposed regulatory goals beyond those specified in the legislative scheme could, of course, condition its delegation on observance of those additional goals.
serve the “public interest.” While lists of ambiguous and conflicting desiderata still flow from the pens of legislative draftsmen, the newer statutes reveal a marked improvement in the art of policy specification.\textsuperscript{127} 

For example, in the Reigle Community Development and Regulatory Improvement Act of 1994,\textsuperscript{128} Congress articulated the following goals:\textsuperscript{129} “(1) to promote economic opportunity and growth; (2) to create jobs; (3) to promote economic efficiency; (4) to enhance productivity; and (5) to spur innovation.”\textsuperscript{130} Even where the goals are broad, they at least indicate whether the private ordering should take factors into account beyond mere economic efficiency.\textsuperscript{131}

In other cases, the task of identifying statutory goals will be more difficult, as witnessed by the debate over the goals underlying bankruptcy legis-

\textsuperscript{127} Colin S. Diver, Policymaking Paradigms in Administrative Law, 95 HARV. L. REV. 393, 413 (1981); see also Timothy A. Wilkins & Terrell E. Hunt, Agency Discretion and Advances in Regulatory Theory: Flexible Agency Approaches Toward the Regulated Community as a Model for the Congress-Agency Relationship, 63 GEO. WASH. L. REV. 479, 523 (1995) (stating that “Congress almost always speaks at length to at least the primary questions of policy design and structure” of its legislation); see also ROSE-ACKERMAN, supra note 117, at 44–46 (arguing that courts should insist “that statutes contain statements of purpose”).


\textsuperscript{129} Although I use the term “goals” to describe statutory objectives, the following examples sometimes refer instead to “purposes.” These words can have different connotations. “Purpose” can mean the long-term or general intention, whereas “goal” connotes a specific end, often coupled with some yardstick against which progress can be measured. See, e.g., Diver, supra note 127, at 397–98; see also 15 U.S.C. § 3111 (2000).

The Congress recognizes that general economic policies alone have been unable to achieve the goals set forth in this chapter related to full employment . . . balanced growth . . . and achievement of reasonable price stability . . . . It is, therefore, the purpose of this subchapter to require the President to initiate . . . supplementary programs and policies to the extent that the President finds such action necessary to help achieve these goals . . . .

\textsuperscript{130} Id. The literature in this area, however, applies the term “goals” broadly to encompass statutory purposes, legislative intent, and regulatory objectives. Diver, supra note 127, at 413–14; Mark Seidenfeld, A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes, 73 TEX. L. REV. 83, 96 (1994). I follow that usage.


\textsuperscript{132} Cf. Diver, supra note 127, at 399 (even where a legislative goal “provides only the roughest of road maps, it at least demarcates the quadrant in which to wander”).

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lation. The legislature may articulate vague or even contradictory goals in its legislation or may not articulate goals at all. One must then resort to traditional methods of ascertaining legislative goals that are imperfectly expressed, including examination of “diverse sources, including legislative history.” Where the government entity delegating authority to a private actor itself articulates non-efficiency legislative goals, that determination should, of course, be given great weight. Also, even where there is debate over the goals of a given statute, there may well be agreement on certain of those goals. Identification of statutory goals should at least include any such goals on which there is consensus. One therefore needs to make the inquiry on a case-by-case, statute-by-statute basis. It is not, though, my task in this Essay to determine how to identify specific regulatory goals, merely to show that such goals will often be identifiable.

It sometimes might be impossible to identify actual regulatory goals. Whether or not that inability constitutes a limit on private ordering should depend on whether the increased efficiency of private ordering outweighs the failure to safeguard the goals. An a priori answer is unreliable because balancing regulatory goals and costs is like comparing apples and oranges. One possible approach, though, may be to regard the very fact of governmental delegation as dispositive evidence that, as a policy matter, the increased efficiency of private ordering outweighs the failure to safeguard non-efficiency goals. Justification for this approach would be that a “bright

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132 Supra notes 73–76 and accompanying text. Focusing on the single goal of efficiency avoids the need to make this inquiry but then excludes actual non-efficiency goals. That is short-sighted, like a drunk looking for his car keys under the street lamp because that’s the only place there is clear visibility, even though he may have dropped them elsewhere.

133 See, e.g., Wilkins & Hunt, supra note 127, at 508.


136 The reader should not confuse the foregoing discussion with the even more controversial issue of whether an administrative agency has the right to expand its jurisdiction. See, e.g., Lars Noah, Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law, 41 WM. & MARY L. REV. 1463, 1466 (2000) (describing administrative agency attempts to expand their statutory jurisdiction). If the agency itself lacks authority, then its purported delegation of such “authority” to a private actor would fail ab inito.

137 See, e.g., SINGER, supra note 134, § 45:09, at 51 (“The purpose or reason for an act[] may itself be the subject of controversy no less difficult to resolve than the ultimate question of intent or meaning.”). After reviewing this Essay, however, Prof. Bressman argues that Congress’s failure to articulate actual goals should be regarded as “implicit ‘delegations’ to the [administrative] agency to articulate non-efficiency goals, as appropriate . . . . The upshot is that there should be no case in which it is impossible to identify actual regulatory goals.” Bressman Memorandum, supra note 112. And I have similarly argued that articulation of goals by the delegating governmental entity should be given great weight. See supra note 135 and accompanying text.
line" test reduces administrative costs and legal challenges. The drawback to this approach, however, is its lack of transparency. An alternative approach might be to condition private ordering on government presentation of at least a compelling case that increased efficiency will outweigh any harm caused by the failure to safeguard non-efficiency goals. If coupled with judicial review, this approach would provide some legitimacy; but a drawback is that it would result in greater administrative and judicial costs. Ultimately, therefore, the answer to the foregoing question may be political.

The next Part illustrates how the constraints proposed in this Essay—requiring private actors to explicitly demonstrate how non-efficiency regulatory goals are being protected, coupled with monitoring and judicial review—can be applied to actual cases of commercial private ordering. I don’t claim that these constraints are the only feasible way to safeguard regulatory goals, merely that they constitute a rational way. In this context, it is worth noting, even though my analysis is not limited to American law, that this Essay’s approach of imposing constraints also appears consistent with the evolving direction of U.S. regulatory theory under the so-called non-delegation doctrine, which limits Congress’s ability to delegate lawmaking authority. Although some scholars argue that this doctrine is moribund if not dead, recent case law may have resurrected a "new delegation doctrine" focusing not on "who ought to make law" but rather on "how (or how well) the law is being made." This new doctrine

138 See, e.g., Schwarz, supra note 73, at 573–74 (explaining why a bright-line test reduces costs).
139 See supra notes 61–62 and accompanying text (explaining that because this Essay’s analysis is meant to be germane to foreign and domestic private ordering, the article refrains from focusing on country-specific limitations on private ordering except insofar as those limitations may provide normative insight).
140 Although this doctrine has been applied more stringently where delegation is to a private actor (private non-delegation) rather than to an administrative agency (public non-delegation), that distinction should be irrelevant where—as is characteristic of the private ordering discussed in this Essay—the delegation is to disinterested and non-conflicted private actors. Fromkin, supra note 61, at 153 (concluding that the private non-delegation doctrine "is, in fact, rooted in a prohibition against self-interested regulation"); Lawrence, supra note 9, at 659 ("What is it about a delegation of governmental power to a private actor that we find so worrisome? . . . The concern is that governmental power . . . will be used to further the private interests of the private actor, in contrast to a delegation of such power to "basically disinterested" public officials.); Carter v. Carter Coal Co., 298 U.S. 311 (1935) (criticizing delegation to a private actor as "legislative delegation in its most obnoxious form; for it is not even delegation to an official or official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business"); see also infra notes 142–146 and accompanying text (discussing non-delegation doctrine generally).
141 This federal common law doctrine, not applied by courts since the 1930s, see, e.g., Carter, 298 U.S. 311, was intended as a limitation on administrative arbitrariness and industry capture of the legislative process. 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 3:13 (2d ed. 1978).
142 See Boyle, supra note 6, at 13–16 (summarizing the debate over the non-delegation doctrine’s continued vitality).
“upholds the congressional transfer of lawmaking authority to administrative agencies, but imposes restraints on the exercise of that authority [by requiring agency rules to be] consistent with the broad purposes of the statutory scheme.”

The normative rationale for the new doctrine is the same as this Essay advances for constraints: it reduces transaction costs and it “confine[s] administrative action within reasonable and finite boundaries (so as to prevent ad hoc decisionmaking) [and] generate[s] regulatory policy that is both visible and consistent with the broad statutory purposes (so as to produce accountability and responsive decisionmaking).”

If, nonetheless, others can offer lower cost, more protective, or more rational safeguards than those proposed in this Essay, such alternative safeguards should be considered. For example, hybrids might combine constraints with aspects of the traditional model. My central point, though, stands irrespective of whether there are alternative safeguards: commercial private ordering needs safeguards to obtain legitimacy; traditional safeguards are too costly; and thus, commercial private ordering requires other lower cost safeguards.

IV. APPLICATIONS

To illustrate how constraints can be applied to commercial private ordering, consider first the recent controversy over private ordering by ICANN. As mentioned above, ICANN is a private nonprofit corporation to which the United States government has delegated control of the Internet’s infrastructure of domain name and Internet protocol address identifiers. ICANN ostensibly functions in the commercial sphere.

ICANN has taken somewhat traditional, although in reality superficial, steps to try to gain legitimacy—structuring itself to look like a typical United States government administrative agency in order to give the appearance that it is bound by the same constraints, adopting procedures that


144 Bressman, supra note 135, at 1415 (emphasis added).

145 Id. at 1418-20 (arguing that using broad standards to constrain arbitrary decisionmaking, rather than invalidating the original delegation, is justified because it imposes lower transaction costs); cf. supra notes 118-120 and accompanying text (arguing that constraints will reduce transaction costs).

146 Bressman, supra note 135, at 1418 (referring to the new delegation doctrine); cf. supra text accompanying notes 143-145 (arguing why the constraints proposed in this Essay will enhance legitimacy by tying privately ordered rules to underlying regulatory goals and by facilitating transparency).

147 Another hybrid might have the delegating government agency identify the non-efficiency goals of the regulatory scheme and then solicit public comments solely as to whether the proposed delegation would protect these goals. These hybrid approaches would be truer to the traditional model, although they would be more expensive than constraints alone.

148 See supra note 6 and accompanying text; see also Weinberg, supra note 24, at 189.
make it appear to be similar to an elective government body, and encouraging some discussion among participants in order to assert that its policy making reflects the consensus of the community. Nonetheless, scholars argue that "none of the[se] techniques can deliver ICANN legitimacy," and hence the delegation of authority to ICANN sets a terrible precedent for private ordering. This uneasiness may well reflect that ICANN's formalistic, but cursory, procedural safeguards fail to come to grips with the underlying regulatory goals for Internet regulation.

The first inquiry is whether Internet regulation looks solely to the goal of efficiency or whether there are other important goals. The leading source for this inquiry, at least under American law, is the framework for global electronic commerce issued by the White House in 1997. This document articulates the goals of Internet regulation as "ensur[ing] competition, protect[ing] intellectual property and privacy, prevent[ing] fraud, foster[ing] transparency, support[ing] commercial transactions, and facilitat[ing] dispute resolution." These goals are certainly not all coincident with efficiency. Ensuring competition, for example, appears to foster efficiency but might also imply distributive notions of assuring a range of competition. Protecting property and especially privacy may well conflict with pure efficiency. Yet, the government's delegation to ICANN of the powers to control the Internet domain name system and assign Internet protocol numbers does not appear to safeguard these other goals in any transparent way that the public can observe—hence, the uneasiness.

Constraints, however, not only would help to increase the perception of legitimacy but would also be cost-effective. After scrutinizing the underlying regulatory scheme to determine whether it also includes non-efficiency goals, the following such additional goals would be identified: protecting intellectual property and privacy, preventing fraud, fostering transparency, ensuring competition, and facilitating dispute resolution. By requiring

149 Weinberg, supra note 24, at 225.
150 Id. at 259.
151 See Weinberg, supra note 24, at 257-60; Froomkin, supra note 61, at 168 (cautioning that "there is a real danger that ICANN will not be a fluke but will be used as a model for additional erosions of responsible government").
153 Id. at 3-4.
154 See, e.g., CINI & MCGOWAN, supra note 79, at 3-4 (arguing that competition policy "can serve a multitude of different ends," including "redistribution of wealth" and "protection of small and medium-sized enterprises").
155 Cf. Froomkin, supra note 61, at 169 (arguing that ICANN's decisionmaking "violates basic norms of... accountability"); Kathleen E. Fuller, An Interview with Michael Froomkin, 2001 DUKE L. & TECH. REV. 0001, §§ 34, 38, 41 (Feb. 28, 2001) (arguing that although ICANN agreed to take steps to ensure that its actions are as transparent as possible, in reality there is little transparency), available at www.law.duke.edu/journals/dlt/ARTICLES/2001dltr0001.html (last visited Nov. 21, 2002).
156 See supra note 153 and accompanying text. It should be noted that the Framework for Global
ICANN to safeguard these goals—e.g., by acknowledging these goals in ICANN’s articles of incorporation, requiring ICANN’s management to take these goals into account in decisionmaking, and requiring periodic reporting of how these goals are being protected—the public would obtain the transparency needed to alleviate their concern over ICANN’s being a private, nongovernmental actor, thereby enhancing ICANN’s legitimacy.

Moreover, even though some scholars have argued that ICANN ultimately may gain legitimacy “through its substantive choices,”157 constraints are preferable. Attempting to legitimize private ordering through ex post assessment creates the danger that such ordering will sometimes fail, and private ordering then will be deemed illegitimate and risky. Decisions to engage in private ordering must be judged ex ante.158

Even where efficiency is the sole goal of a regulatory scheme, private ordering sometimes should be subject to constraints. Consider, for example, private ordering by FASB, the independent body of accountants to which the SEC has delegated power to promulgate public accounting standards.159 These standards form the basis of generally accepted accounting principles (GAAP), which in turn are used as a basis for regulatory compliance with the federal securities laws.160 The underlying goal of the federal securities laws is economic efficiency.161

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157 See Weinberg, supra note 24, at 259 (suggesting that ICANN thereby might be able to gain legitimacy).

158 Private ordering that, in retrospect, fails can be terminated at this stage just like failed administrative delegation.

159 See supra note 8 and accompanying text (describing FASB and such delegation of power).

160 Public accounting standards facilitate compliance with securities law by reducing the information asymmetry between issuers of and investors in securities. See, e.g., JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET 70 (1995) (arguing that the primary function of the federal securities laws is remediation of information asymmetries); MARC I. STEINBERG, UNDERSTANDING SECURITIES LAW 1 (1996) (“Undoubtedly, the central focus of the federal securities laws is that of disclosure, thereby providing shareholders and the marketplace with sufficient information to make relevant decisions.”).

161 See, e.g., THOMAS HAZEN, THE LAW OF SECURITIES REGULATION 9 (3d ed. 1996) (observing that efficiency is the central goal of the U.S. securities laws); John C. Coffee, Jr., Market Failure and the Economic Case for a Mandatory Disclosure System, 70 Va. L. Rev. 717, 751–52 (1984) (arguing that the strongest arguments for the mandatory disclosure system under securities law are based on efficiency, not fairness). Although some have suggested that fairness is also an important goal of securities regulation, fairness might only be relevant in this context as a means of achieving efficiency. See, e.g., The Bond Price Competition Improvement Act of 1999: Hearing Before the Subcomm. on Finance and Hazardous Materials of the House Comm. on Commerce, 106th Cong. 9 (1999) (statement of Hon. Arthur Levitt, Chairman, Securities and Exchange Commission) (testifying that “[i]nformed investors,
The recent Enron scandal, however, has shaken public confidence in the legitimacy of GAAP accounting and the FASB. Therefore, to help restore confidence in the securities markets, Congress has created a Public Company Accounting Oversight Board to oversee the accounting industry.\(^{162}\) Even though efficiency is the regulatory goal, this additional regulation is sensible. Where public confidence in the legitimacy of a privately ordered scheme is shaken, governmental delegation should be scrutinized to determine whether it can make the private ordering more efficient.\(^{163}\) In this case, that could happen in two ways: by making FASB perform its tasks better and more reliably or by limiting the negative consequences of FASB’s actions.\(^{164}\) The government’s response to the Enron scandal is intended to accomplish the former.

It also should be noted that this Essay’s analysis of private ordering may shed light on the controversy over government delegation of responsibility for airport safety to the airlines. At least prior to the September 11, 2001 attacks on the World Trade Center and the Pentagon, the United States government delegated responsibility for screening baggage to the airlines.\(^{165}\) Airlines had tried to be efficient, reducing cost by paying security personnel armed with accurate information, ensure that market prices represent fair values. And fair market prices, in turn, ensure that the markets perform their economic function of efficiently allocating capital resources”).

\(^{162}\) See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 101, 116 Stat. 745 (2002) (establishing the Board). The Public Company Accounting Oversight Board’s job is to oversee the audit of public companies that are subject to the securities laws . . . in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports for companies the securities of which are sold to, and held by and for, public investors.

\(^{163}\) Id. § 101(a). Although this Board is, ironically, a private body, id. § 101(b), it would have a degree of independence from the accounting industry. See id. § 101(e) (requiring no more than two of the five Board members to be certified public accountants, and prohibiting Board members from concurrently being otherwise employed).

\(^{164}\) Even though FASB’s legitimacy, like ICANN’s legitimacy, purports to derive from a traditional procedural model. FACTS ABOUT FASB, supra note 7, at 3 (arguing that “FASB follows an extensive ‘due process’ that is open to public observation and participation [and that] [t]his process was modeled on the Federal Administrative Procedure Act”). This model—like for ICANN—has been superficial and has not reflected the crisis of legitimacy resulting from Enron. For example, Liesman observes that FASB’s public meetings at which rules are discussed usually are sparsely attended. The board and advisory council that oversee [FASB] are dominated by members of the accounting industry. When outsiders are present, they tend to be finance executives at corporations that stand to benefit from favorable decisions, or accounting professors whose endowed positions are financed by Big Five accounting firms.

Liesman et al., supra note 24, at A8. This is in accord with Professor Scott’s conclusion, discussed earlier, that private ordering is especially susceptible to pressure from cohesive interest groups. See supra note 17 and accompanying text.

\(^{165}\) Schwarez, supra note 4 (arguing that even where efficiency is the sole goal of private ordering, additional governmental regulation may be appropriate in order to make the private actor perform its tasks better and more reliably, or in order to limit negative consequences of the private ordering).
“about $6 an hour, less than they could earn serving fast food.” The result, however, was that security was jeopardized because “more than 90 percent of the people screening bags have been on the job for less than six months.” Reacting to the events of September 11, the government has taken over the screening of airline baggage and increased the pay level of baggage screeners. The failure of the pre-September 11 approach was that the delegation to the airlines did not adequately account for safety as a regulatory goal, either because the airlines did not recognize safety as a factor that should be fully internalized or devoted insufficient care to protecting safety. In retrospect, this lack of recognition is not completely surprising: although efficiency in a broad sense includes safety, matters such as health and safety are sometimes viewed from a regulatory standpoint as going beyond efficiency. Private ordering, however, should take into account regulatory goals—such as safety—that may not be adequately protected by a purely economic approach.

V. CONCLUSION

Although increasingly part of the national and international polity, private ordering continues to generate public uneasiness and perceptions of illegitimacy. The recent failure of privately ordered public accounting rules in the Enron debacle has only exacerbated these perceptions. This Essay has argued that these concerns are symptomatic of the failure to recognize private ordering’s proper limits.

To identify these limits, this Essay has attempted to establish an overall framework for classifying the various types of private ordering, focusing on rules originated and put into force by private actors pursuant to government delegation. This is the most prevalent type of private ordering and also the type most used in the commercial, financial, and business sectors. Although private ordering of this type generally assumes that efficiency is its only goal, this Essay has argued that there sometimes are important non-efficiency goals, and that current private ordering safeguards fail to pro-

166 Id.
167 Id.
169 See VISCUSI ET AL., supra note 15. The failure to recognize, or at least act on, this dichotomy may have been exacerbated by the fact that, in contrast to the other examples of private ordering in this Essay, airlines delegated baggage-screening responsibility were no longer disinterested because reducing screening costs would increase their profitability whereas any consequences of inadequate screening would likely be felt by other airlines (i.e., the airlines treated those consequences as externalities).
170 Moreover, even where efficiency is the only goal of commercial regulation, private ordering should be subject to governmental scrutiny to determine whether additional regulation would improve efficiency if public confidence in the legitimacy of the private ordering is shaken.
tect those goals. In response, this Essay proposes a system of constraints to ensure that such goals are not lost in the private ordering shuffle.

I do not, however, claim that constraints will assure private ordering's legitimacy. Rather, I propose them as a middle ground: cost-effective controls that, while perhaps second best, enhance our comfort with necessary governmental arrangements. Nor do I claim that the specific constraints proposed in this Essay constitute the only practical constraints, merely that they constitute rational constraints. The central point of this Essay stands irrespective of whether there are other constraints, or even other safeguards: Commercial private ordering needs safeguards to promote legitimacy, traditional safeguards are too costly, and commercial private ordering thus requires lower cost safeguards.