

Fall 2016

## Private Complements to Public Governance

Emily S. Bremer

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Emily S. Bremer, *Private Complements to Public Governance*, 81 Mo. L. REV. (2016)

Available at: <https://scholarship.law.missouri.edu/mlr/vol81/iss4/14>

This Conference is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

## Private Complements to Public Governance

Emily S. Bremer\*

If Philip Hamburger's arguments were to win the day, and the administrative state were abolished or significantly reduced in size and scope, what would replace it?<sup>1</sup> If it were abolished completely, perhaps the simplest answer could be given: only the classical institutions of government created by the U.S. Constitution – the Legislature, Executive, and Judiciary – would remain.<sup>2</sup> In the more likely event that the administrative state were reduced in size or scope, one or more alternative approaches might be needed to fill the resulting regulatory gaps. Indeed, a principal justification for the administrative state is that the needs of modern regulation are beyond the capacity of the classical institutions of government.<sup>3</sup> If so, then without administrative agencies, some other institution or approach would be needed to address modern regulatory problems.

This Article suggests that private governance offers an attractive alternative or complement to the administrative state. It is commonly assumed that without administrative agencies, there would be no regulation. As a foundational matter, this Article challenges the notion that there are only two, mutually exclusive options: governmental regulation or no regulation at all. Although it is perfectly natural for public law scholars to focus primarily on regulation through government institutions and programs, much regulation is in fact accomplished via mechanisms outside the administrative state.<sup>4</sup> At least in some circumstances, it is not only possible but may even be preferable to use such private governance – alone or in conjunction with public regulation – to achieve public goals.

---

\* Assistant Professor of Law, University of Wyoming College of Law.

1. See PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014). I leave it to other contributors to this Symposium to directly address Philip Hamburger's arguments against the administrative state. Leaving aside the first-order question of whether those arguments are persuasive, I focus exclusively on the possibility of workable alternatives to the modern administrative state.

2. See U.S. CONST. arts. I–III.

3. See Kent Barnett, *Why Bias Challenges to Administrative Adjudication Should Succeed*, 81 MO. L. REV. 1023, 1038 (2016) (“[Under a full-throated nondelegation doctrine,] Congress would be required to legislate on technical subjects on a magnitude too large for it to keep a modern economy and government functioning.”).

4. For example, social norms as a non-legal force regulating conduct have attracted significant scholarly attention. See generally ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2002); ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); cf. Richard H. McAdams, *Signaling Discount Rates: Law, Norms, and Economic Methodology*, 110 YALE L.J. 625, 626 (2001) (“The number of articles using a rational choice framework to discuss the interaction of law and norms is now too large to list even in a law review footnote.”).

Before this possibility can be assessed, “private governance” must be defined. As the term itself suggests, private governance has two components that are both self-evident and yet also warrant elaboration. First, private governance must be *private*, which most importantly means nongovernmental.<sup>5</sup> It thus includes any action by people, entities, or institutions that exist outside of government. Second, private governance must be *governance*, defined broadly as actions in pursuit of traditionally governmental ends.<sup>6</sup> These ends may include the protection of public values, the provision of public goods, and the regulation of social conduct in a manner that is beneficial for society as a whole.

To make this abstract definition of “private governance” more concrete, Part I of this Article begins by offering a number of examples of how private governance presently complements the administrative state. Part II suggests that the concept of comparative institutional advantage offers a touchstone for identifying situations in which private governance may be an effective and attractive alternative to governmental regulation. Recognizing that private governance is not always the best option, however, Part II also suggests some limitations on its use.

### I. A SPECTRUM OF PRIVATE ACTION TOWARD PUBLIC ENDS

There are a variety of ways in which private governance can be used to achieve public ends, and the options can best be understood by organizing them along a spectrum. At one end of the spectrum are regimes that use or leverage private governance mechanisms but are designed, created, driven, and controlled by government. At the other end of the spectrum are regimes that are designed to achieve traditionally governmental ends but are independently designed, created, driven, and controlled by private sector actors and institutions. Frequently the focus of economic analysis, scholars describe these latter regimes as “private ordering” or “private governance.”<sup>7</sup> Between the two extremes are regimes that mix elements of public and private governance, using each approach in some measure to achieve regulatory goals. Over

---

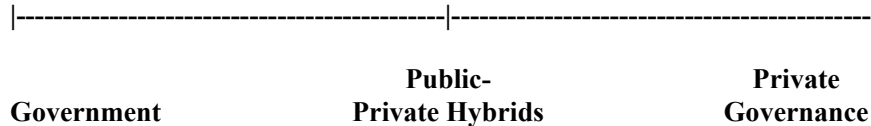
5. See Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029, 2031 (2005) [hereinafter Vandenbergh, *Private Life*].

6. Cf. Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 146 (2013) [hereinafter Vandenbergh, *Private Environmental Governance*] (defining “private environmental governance” as “actions taken by non-governmental entities that are designed to achieve traditionally governmental ends”). Some scholars have used the term “private regulation” to mean essentially the same thing. See, e.g., Lesley K. McAllister, *Harnessing Private Regulation*, 3 MICH. J. ENVTL. & ADMIN. L. 291, 293 (2014) (using the term “private regulation” to refer to situations in which “private actors engage in developing and implementing rules that serve the traditional social goals of public regulation, particularly health, safety, and environmental protection”).

7. See generally Avery Katz, *Taking Private Ordering Seriously*, 144 U. PA. L. REV. 1745 (1996) (discussing the law and economics literature on private ordering).

the last fifteen years, public law scholars have increasingly noted and examined these regimes, referring to them as “public-private hybrids.”<sup>8</sup> Figure 1 offers a visual representation of the full spectrum.

**Figure 1:**



### *A. Government-Dominated Approaches*

On the government side of the spectrum are programs through which government institutions (e.g., Congress or an administrative agency) establish substantive standards of conduct, leaving it to the private sector to implement or enforce those standards.<sup>9</sup> One way this may be accomplished is through the creation of private rights of action to enforce federal statutes.<sup>10</sup> For example, in the employment discrimination context, federal statutes create anti-discrimination rules, and these rules predominantly are enforced by private litigants bringing lawsuits against offending employers in the federal courts.<sup>11</sup> Government is paramount in this regime: Congress created the regime and the

---

8. Vandenberg, *Private Life*, *supra* note 5, at 2032; *see also*, e.g., Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 546–49 (2000) (describing “the reality of public/private interdependence” in regulatory decisionmaking). Public-private hybrids are sometimes also referred to as “government-stakeholder network structures.” Vandenberg, *Private Life*, *supra* note 5, at 2032.

9. This skips over purely governmental regulation because the subject of this Article is how private governance either complements governmental regulation or offers an alternative to it. Of course, even in “purely” government regulation, private parties have some role. As Professor Vandenberg explains, however, “[T]he story about private actors has remained essentially static: Firms attempt to influence regulations, but once an agency promulgates a regulation, a private firm is assumed to either comply or not comply.” Vandenberg, *Private Life*, *supra* note 5, at 2031.

10. *See generally* J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012) (arguing that private regulation through litigation is an integral part of the modern administrative state’s structure).

11. *See*, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(k), 78 Stat. 241, 261 (1964) (codified at 42 U.S.C. § 2000e-5(k)) (providing attorney’s fees to prevailing private parties as an incentive to litigate employment discrimination claims); George Rutherglen, *Private Rights and Private Actions: The Legacy of Civil Rights in the Enforcement of Title VII*, 95 B.U. L. REV. 733, 734 (2015) (explaining that “a crucial feature of Title VII as civil rights legislation” is that it “gives control over enforcement of the statute to the individuals whose civil rights have been violated”); Glover, *supra* note 10, at 1148–1151 (offering labor and employment law as an example of the history of the use of private litigation as a public law enforcement mechanism).

substantive standards that apply within it, the Equal Employment Opportunity Commission (“EEOC”) plays an important role within the regime, and the federal courts control the incremental development of legal norms via individual decisions that have precedential effect. At the same time, individual private citizens must bring the lawsuits in order to animate the regime and make it effective.<sup>12</sup>

### B. Public-Private Hybrids

Moving toward the private ordering end of the spectrum, there are public-private hybrids that involve a greater degree of independent private participation in the achievement of public ends.<sup>13</sup> A key example is the privatization of traditionally public functions, which is often accomplished through government contracting.<sup>14</sup> In these arrangements, public funds are used to pay a private entity to perform a public function that the government has historically performed, such as providing health and welfare services, public education, or prisons.<sup>15</sup> The government is a driving force in these relationships, defining and paying for the work that is performed and retaining significant contractual control over both the public-private relationship and the contractors’ conduct.<sup>16</sup>

In some cases, public-private hybrids may also participate in the development of substantive regulatory standards and in the implementation and enforcement of those standards. In these cases, there may be some contractual relationship between an administrative agency and one or more private actors.<sup>17</sup> But rather than providing public services to citizens, the resulting public-private hybrid engages in one or more of three tasks that are traditionally the province of administrative agencies: “the setting, implementation, and enforcement (including monitoring) of standards.”<sup>18</sup> This occurs through

---

12. There are many other examples of the integral role of private lawsuits in the U.S. regulatory system. See Anna Chu, *The Need to Protect Private Enforcement Mechanisms*, CTR. FOR AM. PROGRESS (Nov. 7, 2014, 9:50 AM), <https://www.americanprogress.org/issues/regulation/news/2014/11/07/100757/the-need-to-protect-private-enforcement-mechanisms/>.

13. See generally Symposium, *Thirty-Third Annual Administrative Law Issue: Agencies, Economic Justice, and Private Initiatives*, 53 DUKE L.J. 291 (2003); Symposium, *New Forms of Governance: Ceding Power to Private Actors*, 49 UCLA L. REV. 1687 (2002).

14. See Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369 (2003); Michele E. Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569, 571 (2001).

15. See Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1237–42 (2003).

16. See Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389 (2003).

17. See Vandenberg, *Private Life*, *supra* note 5, at 2037.

18. *Id.* at 2038.

a variety of methods, including negotiated rulemaking,<sup>19</sup> the incorporation by reference of privately developed standards into regulations,<sup>20</sup> and the use of audited self-regulation or third-party conformity assessment to support governmental regulatory regimes.<sup>21</sup> Another example is second-order regulatory agreements, which are “agreements entered into between regulated firms and other private actors in the shadow of public regulations.”<sup>22</sup> Private parties undertake these agreements independently and without governmental involvement or direction. But they typically do so in response to the presence or absence of regulation.<sup>23</sup>

Although public-private hybrids involve more independent action by private entities to achieve public ends, the government retains primacy in the relationship.<sup>24</sup> For example, Jody Freeman, a scholar who has worked extensively in this area, has suggested “the possibility of harnessing private capacity to serve public goals.”<sup>25</sup> Indeed, public law scholars often consider public-private hybrids attractive because of their potential to improve government performance or solve perceived problems in public regulatory programs.<sup>26</sup>

19. See Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (1990) (codified at 5 U.S.C. §§ 561–570).

20. See National Technology Transfer & Advancement Act of 1995, Pub. L. No. 104-113, § 12(d), 110 Stat. 775 (1996) (codified at 15 U.S.C. §§ 3710a–3710d); Office of Management & Budget, Revision of OMB Circular No. A-119, “Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities,” 81 Fed. Reg. 4673 (Jan. 27, 2016); Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J.L. & PUB. POL’Y 131, 139–41 (2013) [hereinafter Bremer, *Incorporation by Reference*]. The private standardization system is discussed further below. See *infra* Part I.C.

21. See, e.g., Lesley K. McAllister, *Regulation by Third-Party Verification*, 53 B.C. L. REV. 1 (2012) (discussing the use of third-party verification in regulation); Douglas C. Michael, *Federal Agency Use of Audited Self-Regulation as a Regulatory Technique*, 47 ADMIN. L. REV. 171, 218–22 (1995) (discussing the use of private auditing in hospitals).

22. Vandenberg, *Private Life*, *supra* note 5, at 2030.

23. See generally Vandenberg, *Private Life*, *supra* note 5 (discussing the role of second-order agreements in regulation). When these agreements are entered into in order to ensure compliance with existing regulations, they appear to be more like public-private hybrids. When they are entered into to fill gaps where no public regulations yet exist, they may fall further along the spectrum toward private ordering. See *infra* Part I.C.

24. See Vandenberg, *Private Environmental Governance*, *supra* note 6, at 146.

25. See Freeman, *supra* note 8, at 549; see also Nina A. Mendelson, *Private Control over Access to Public Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 MICH. L. REV. 737, 747 (2014) (defining “collaborative governance” as “the public enlisting of private institutions and resources in the process of governance”); McAllister, *supra* note 6, at 295 (examining “whether and how private regulation can be leveraged – or harnessed – by public regulators to achieve the objectives of public law” and address deficiencies of governmental regulation).

26. See Vandenberg, *Private Life*, *supra* note 5, at 2039; Freeman, *supra* note 8, at 548–49.

Government ordinarily is the driving force in these arrangements, the focus of which is the implementation of regulatory standards or objectives established by government institutions.

### C. *Private Ordering*

Moving still further in the direction of private ordering are alternatives in which the primary public connection is to the ends or goals of a regime that is predominantly controlled and driven by private institutions or actors. A good recent example is found in Michael Vandenberg's work on private environmental governance.<sup>27</sup> Private environmental governance includes actions voluntarily and independently undertaken by private sector actors to achieve traditionally public ends in spaces where no governmental regulation presently exists. These activities include collective environmental standard setting, as well as purely private contracts that facilitate bilateral environmental standard setting, monitoring, and enforcement.<sup>28</sup> One example is found in the 465 ecolabelling programs that now exist around the world.<sup>29</sup> In these programs, nongovernmental organizations establish environmental standards and award the privilege of using a particular label on products or services that are certified compliant. Generally, no public law or governmental regulator requires compliance with the standards, participation in the certification process, or display of the label. Private certification systems operate much the same and serve similar functions.<sup>30</sup> Another example is the Leadership in Energy and Environmental Design ("LEED") standards, which are established by the U.S. Green Building Council.<sup>31</sup> These "standards allow builders to certify compliance with efficiency and environmental requirements at several levels of stringency (Platinum, Gold, Silver, and Bronze)."<sup>32</sup>

Moving beyond the environmental context, the U.S. technical standardization system is a vast, predominately private, independent governance structure that has both a long history and a significant role in the achievement of traditionally public goals.<sup>33</sup> Technical standards are essential for technological innovation and interoperability, trade, the economy, and public health and

---

27. See generally Vandenberg, *Private Environmental Governance*, *supra* note 6.

28. See *id.*

29. See, e.g., ECOLABEL INDEX, [www.ecolabelindex.com](http://www.ecolabelindex.com) (last visited Oct. 25, 2016) (tracking 465 ecolabels in 199 countries and twenty-five industry sectors).

30. See Vandenberg, *Private Environmental Governance*, *supra* note 6, at 149–151 (discussing certification systems for forestry sustainability, fishery sustainability, and aquaculture).

31. See *LEED*, U.S. GREEN BUILDING COUNCIL, <http://www.usgbc.org/leed> (last visited Oct. 25, 2016).

32. Vandenberg, *Private Environmental Governance*, *supra* note 6, at 153.

33. See generally Emily S. Bremer, *On the Cost of Private Standards in Public Law*, 63 KAN. L. REV. 279, 299–306 (2015) [hereinafter Bremer, *On the Cost*] (explaining the history and operation of the U.S. standards system).

safety. Although these standards are a ubiquitous part of life, they are largely invisible to the average consumer. The system through which these standards are created emerged in the late 1800s and early 1900s, when a number of private organizations emerged to fulfill the enormous standardization needs of, first, the industrial revolution and, second, the World Wars.<sup>34</sup> Today, this system remains predominately private. But it has grown in size, importance, and sophistication, with a large number of organizations using voluntary consensus procedures to create the standards and then maintain them as technology and other circumstances rapidly change and evolve.<sup>35</sup>

The U.S. standards system has largely escaped the notice of public law scholars – perhaps because it is predominantly private – but its sheer size and central importance to significant, traditionally public ends make it well worth study.<sup>36</sup> It is estimated that there are over 100,000 private technical standards in use throughout the country, created by more than 600 active standards development organizations. To give a rough comparison with public regulation, there are over 100 agencies in the federal government, and not all of these exercise regulatory power. Although federal agencies commonly incorporate private standards into federal regulations, it is estimated that only 2 to 4 percent of all private standards are ever so incorporated.<sup>37</sup> As these numbers suggest, the U.S. standards system is an enormous private governance regime that has relatively minimal interface with governmental regulatory programs. And yet it has for a long period succeeded in efficiently and effectively accomplishing a wide range of public goals.<sup>38</sup>

One way in which these various private governance regimes differ from public-private hybrids is that they generally arise in the *absence* of govern-

---

34. *Id.* at 301, 305, 310.

35. See generally *ANSI Essential Requirements: Due Process Requirements for American National Standards*, AM. NAT'L STANDARDS INST. (Jan. 2016), [https://share.ansi.org/shared%20documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/2016\\_ANSI\\_Essential\\_Requirements.pdf](https://share.ansi.org/shared%20documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/2016_ANSI_Essential_Requirements.pdf).

36. There has been a recent burst of scholarly interest in the incorporation by reference of private technical standards because the copyrights that standards development organizations ordinarily assert in the standards they produce have emerged as a barrier to making incorporated standards as freely available to the public as regulations and other agency documents have become in the Internet age. See Bremer, *On the Cost*, *supra* note 33; Mendelson, *supra* note 25; Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 WM. & MARY BILL RTS. J. 497 (2013); Bremer, *Incorporation by Reference*, *supra* note 20; see also Administrative Conference of the United States, Recommendation 2011-5, *Incorporation by Reference*, 77 Fed. Reg. 2257, 2257 (Jan. 17, 2012) (recommending a collaborative, non-legislative solution to the problem of public access to materials incorporated by reference in federal regulation).

37. See Bremer, *On the Cost*, *supra* note 33, at 306–07.

38. See Bremer, *Incorporation by Reference*, *supra* note 20, at 139–41.



mental direction or regulation.<sup>39</sup> In some cases, private governance fills a gap in governmental regulation.<sup>40</sup> For example, as Professor Vandenberg notes, Congress has failed to enact any major environmental legislation since the Clean Air Act Amendments of 1990, and so private actors have worked to fill the gap by addressing new environmental problems and generating needed environmental norms.<sup>41</sup> The private standards system similarly emerged because of the failure of states and the federal government to meet widespread standardization needs.<sup>42</sup> In other cases, private actors may regulate themselves in an effort to forestall or preempt governmental regulation.<sup>43</sup>

The absence of public regulation distinguishes private governance from public-private hybrids in another important respect: it provides greater latitude for independent private action with little or no governmental involvement. Private control in these areas is more comprehensive, beginning with the development of substantive norms and continuing through the implementation and enforcement of those norms. The resulting regulatory system, although private, may be large, complex, sophisticated, and highly effective. In some instances, so much so that public regulatory authorities may discover that it is necessary to integrate existing private governance regimes into public regulation in order to best protect public values, promote health and safety, or fulfill other statutory mandates.<sup>44</sup> In short, the primacy of government, which is observable at previous points along the spectrum, is generally absent in those areas in which private governance has emerged fully.

## II. CHOOSING PRIVATE GOVERNANCE

If private governance can be considered as an alternative or complement to the administrative state, what metric should be used to identify areas in which the goals of existing public regulation might be addressed effectively through private governance? Perhaps an appropriate metric is that of comparative institutional advantage, a concept often invoked in the separation of powers context.<sup>45</sup> Private actors or institutions may have characteristics that

39. See McAllister, *supra* note 6, at 293.

40. See, e.g., Larry Cata Backer, *Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order*, 18 *IND. J. GLOBAL LEGAL STUD.* 751 (2011) (discussing the role of private actors in transnational governance); John McMillan & Christopher Woodruff, *Private Order Under Dysfunctional Public Order*, 98 *MICH. L. REV.* 2421 (2000) (describing how private ordering of commercial transactions arises in developing economies that are believed to have unreliable formal legal systems).

41. Vandenberg, *Private Environmental Governance*, *supra* note 6, at 131–133.

42. See Bremer, *On the Cost*, *supra* note 33, at 303–04.

43. See McAllister, *supra* note 6, at 294.

44. See Bremer, *On the Cost*, *supra* note 33, at 308–09.

45. See, e.g., William H. Clune, *Courts and Legislatures as Arbitrators of Social Change*, 93 *YALE L.J.* 763, 763 (1984) (“The theory of comparative institutional advantage allocates substantive decisionmaking between

enable them to address certain kinds of regulatory problems more efficiently or effectively than administrative agencies.<sup>46</sup> In such instances, those private actors or institutions may be said to have some comparative institutional advantage over public institutions such as federal regulatory agencies.

Private institutions may have several advantages over government agencies. First, in some cases, addressing a regulatory problem may require specialized experience or knowledge that exists outside of government. For example, developing technical standards ordinarily requires cutting-edge engineering or technological knowledge and experience.<sup>47</sup> It is not primarily a matter of making policy choices or creating rules to manage human conduct or relations. Reflecting this reality, the people who volunteer their time to participate in technical standards development are typically engineers or other technical experts who work in the industry that will use and be affected by the standards.<sup>48</sup> Second, private institutions may be able to respond more nimbly, efficiently, and cost-effectively than administrative agencies to changes in technology, industry practice, or other circumstances.<sup>49</sup> This is partially because public law requirements, such as the procedural requirements for notice-and-comment rulemaking, do not constrain private institutions as they do administrative agencies.<sup>50</sup> Private governance is often voluntary, accomplished by agreement and in accord with self-interest. Under these conditions, it may be easier to take action. And that action may be accorded greater respect and adherence over time.

Just as private governance may have advantages, it may also have limitations. As noted, private governance is often effective and efficient precisely because it is voluntary. But this suggests the possibility that private governance is unlikely to work well to address matters that are highly controversial or significantly contested. If affected parties have strongly divergent inter-

---

courts and legislatures according to their relative ability to make truly representative decisions.”).

46. See, e.g., Vandenberg, *Private Environmental Governance*, *supra* note 6, at 139 (“[G]overnment may not always be the best actor, and public regulation may not always be the best type of intervention. The optimal response may be private governance or a mix of public and private governance.”).

47. See generally ROSS E. CHEIT, *SETTING SAFETY STANDARDS: REGULATION IN THE PUBLIC AND PRIVATE SECTORS* (1990) (examining pairs of public and private standards to evaluate the comparative institutional advantages of private standards development organizations and federal regulatory agencies); cf. Timothy D. Lytton, *Competitive Third-Party Regulation: How Private Certification Can Overcome Constraints That Frustrate Government Regulation*, 15 *THEORETICAL INQUIRIES* L. 539, 539 (2014) (identifying “key features of reliable private certification and analyz[ing] its comparative institutional advantages over government regulation”).

48. See Bremer, *On the Cost*, *supra* note 33, at 308.

49. See Vandenberg, *Private Environmental Governance*, *supra* note 6, at 138.

50. See generally 5 U.S.C. § 553 (2012).

ests, they may not be able to come to an agreement.<sup>51</sup> In such circumstances, the coercive authority of the state may be needed both to decide upon a course of action and to implement or enforce the chosen solution.<sup>52</sup> It may be more appropriate in these situations for public institutions to govern.

In addition to such practical considerations, private governance may raise normative and procedural concerns.<sup>53</sup> When a regime is intended to achieve public ends or protect public values, it may also be important for that regime to adhere to rules and norms that reflect public values.<sup>54</sup> For example, a private governance system should be transparent, so that both its participants and products are knowable to a public that may be affected by that system. Rules to ensure openness and participation by a balanced range of affected interests may similarly be necessary to preserve legitimacy and protect the substantive validity of a private governance regime.<sup>55</sup> Experience shows that government can influence private entities, both directly through regulation and indirectly through relationships and networks, to adopt these and other socially beneficial rules and policies.<sup>56</sup>

### III. CONCLUSION

This Article has suggested that the possibilities for private governance are as numerous and diverse as are the challenges the modern administrative state is designed to address. These possibilities could prove useful in the event that, as Philip Hamburger has urged, the administrative state were to be abolished or significantly reduced in scope. But private governance is also worth considering – either alone or in conjunction with public regulation – in the absence of such extraordinary circumstances. By considering the comparative institutional advantages of public and private actors and carefully evaluating the public norms that may be at stake in a particular regulatory

---

51. See CHEIT, *supra* note 47, at 39–64 (discussing the private sector’s inability to develop an effective standard to prevent the risks of combustible dust due to deep disagreement over fundamentally non-technical issues).

52. See Vandenberg, *Private Environmental Governance*, *supra* note 6, at 143.

53. See, e.g., Ellen D. Katz, *Private Order and Public Institutions*, *Comments on McMillan and Woodruff’s ‘Private Order Under Dysfunctional Public Order’*, 98 MICH. L. REV. 2481, 2481–82 (2000) (arguing that private ordering must be accompanied by public order in order to achieve “greater legitimacy and fairness”).

54. The application of public norms to private actors is referred to as “publicization.” See Avishai Benish & Asa Maron, *Infusing Public Law into Privatized Welfare: Lawyers, Economists and the Competing Logics of Administrative Reform*, 50 L. & SOC’Y REV. 953, 956 (2016).

55. See, e.g., Office of Management & Budget, Revision of OMB Circular No. A-119, “Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities,” 81 Fed. Reg. 4673 (Jan. 27, 2016) (identifying basic procedural expectations for the development of voluntary consensus technical standards).

56. See Freeman, *supra* note 8, at 671–73.

2016]

*PRIVATE COMPLEMENTS*

1125

context, the most effective mixture of public and private governance can be selected. Public law scholars have recognized the potential, and there is significant opportunity to continue and expand upon that work.

