

# ENVIRONMENTAL GOVERNANCE AT THE EDGE OF DEMOCRACY

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## INTRODUCTION

Should we cabin democracy to advance environmental protection? It's a more complicated question than it seems, and this Article will argue the answer is "no." However, given the direction of some environmental activism and scholarship today, one might think that turning some degree away from democracy is the best option for combating environmental problems.<sup>1</sup> Vast scholarly literatures and prominent advocacy campaigns

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search for practical solutions to get beyond the conflicts that confound environmental lawmaking.<sup>2</sup> The unpleasant conflict these efforts seek to avoid is politics. Politics is vile, or incompetent, or both, or at least entirely unproductive. And so the bellow of anti-politics swells.

Politics, though, is part of the practice of democracy. It is part of the collective decision making about who has the ability to structure and control coercive power. Any effort to solve public problems without politics is simultaneously an effort to solve them without, or with less, democracy, without distributed, formal control over exercises of power. Perhaps a turn from democracy is what we prefer, but it is not a choice we should make without acknowledgment and clear-eyed analysis.

This Article has a simple but challenging goal: to demonstrate that democratic practice is not only necessary for the legitimate exercise of state power, but also for the legitimate exercise of certain private powers, specifically, private environmental governance (PEG). PEG is an emerging practice and scholarly paradigm that aims to address environmental concerns without resorting to political, and therefore democratic, practices. Definitionally, PEG strives for public goals, such as climate change mitigation, through private dealings rather than government coercion.<sup>3</sup> When Walmart insists its suppliers reduce waste in their packaging,<sup>4</sup> or when firms multi-laterally establish a non-profit to certify sustainable fisheries and then agree to source only certified

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<sup>1</sup> See, e.g., Joshua Ulan Galperin, *Board Rooms and Jail Cells: Assessing NGO Approaches to Private Environmental Governance*, 71 ARK L. REV. 403, 404-405, 408 (2018) (comparing two NGOs to show how their different philosophies are both grounded in private environmental governance (PEG) and then reviewing the legal literature about PEG) [hereinafter *Board Rooms and Jail Cells*].

<sup>2</sup> Part II, *infra*.

<sup>3</sup> Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 133 (2013) [hereinafter Vandenbergh, *Private Environmental Governance*]; Part II, *infra*.

<sup>4</sup> Michael P. Vandenbergh, *The New Walmart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA. L. REV. 913, 927 (2007) [hereinafter Vandenbergh, *Walmart*].

seafood,<sup>5</sup> that is PEG. The instrumental impacts of PEG are huge, particularly with respect to climate change,<sup>6</sup> and the real potential of government action to achieve the same emissions reductions is, so far, bleak.<sup>7</sup> That is a clear, loud, and unimpeachably powerful call to PEG.

The PEG literature has carefully catalogued examples and successes,<sup>8</sup> analyzed how the study of PEG both diverges from,<sup>9</sup> and runs parallel to,<sup>10</sup> traditional environmental scholarship, and mused on the mechanisms of accountability in PEG.<sup>11</sup> What PEG scholarship has yet to do is consider the PEG endeavor not simply as an option beyond, or complementary to, state-led governance, but as an essential part of the larger democratic ecosystem in which society does not just choose policies and goals, but, through the process of political interaction, shapes the collective will from which policies and goals emerge.<sup>12</sup> In that political ecosystem, PEG is not just an addition to traditional, state-led, public governance. Instead, PEG's authority has an influence *on* public governance. To take a simple abstract example, PEG may provide proof of concept for an environmental policy that then allays fears of burdensome government directives. Or, conversely, PEG may distract from efforts to develop effective government regulation.<sup>13</sup> Whatever the case, we need more critical study of these political interactions between private and public environmental policy.

This Article thus seeks not to indict PEG, but to fill a gap. The PEG literature asserts that PEG must work alongside public governance but has yet to fully consider and detail why that is true, why PEG and public governance are both essential, and why the former should not replace the latter. This Article explains why PEG is important, but also why we must consider whether it lacks critical features of public governance. The overarching answer to why private governance cannot supplant public governance is that the very distinction of public versus private is

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<sup>5</sup> *Id.* at 923.

<sup>6</sup> MICHAEL P. VANDENBERGH & JONATHAN M. GILLIGAN, *BEYOND POLITICS: THE PRIVATE GOVERNANCE RESPONSE TO CLIMATE CHANGE* 5 (2018).

<sup>7</sup> *Id.* at 4.

<sup>8</sup> *E.g.*, Vandenberg, *Private Environmental Governance*, *supra* note 3, at 147-56.

<sup>9</sup> *E.g.*, Vandenberg, *Walmart*, *supra* note 4, at 915.

<sup>10</sup> Sarah E. Light & Eric W. Orts, *Parallels in Public and Private Environmental Governance*, 5 MICH. J. ENVTL. & ADMIN. L. 1 (2015).

<sup>11</sup> VANDENBERGH & GILLIGAN, *supra* note 6, at 383-92.

<sup>12</sup> Vandenberg does consider the interplay between PEG and public governance. Vandenberg, *Private Environmental Governance*, *supra* note 3, at 197-198. But his consideration is an instrumental one that understandably leaves out larger questions of democratic theory. Part V of this Article further addresses this distinction.

<sup>13</sup> Michael P. Vandenberg, Jim Rossi, & Ian Faucher, *The Gap-Filling Role of Private Environmental Governance*, 38 VA. ENVTL. L.J. 1, 3-4 (2020).

unsatisfactory and cannot support approaching each form of governance as fundamentally different. Thus, this Article tries to prove that private environmental governance pulls all the same democratic triggers as public governance. These triggers are politics, choice, and liberty.

The first trigger for democracy is politics. PEG scholarship has been too quick to dismiss the role of PEG as a form of politics (and politics as part of democracy). Although the study of PEG has been largely descriptive—explaining that PEG is worthy of study, can achieve significant impacts, and is a cohesive field<sup>14</sup>—it also makes a bold normative claim: in the absence of state-led solutions, private solutions are essential.<sup>15</sup> More forcefully, PEG promises not only a solution in lieu of politics, but a way to get “beyond politics.”<sup>16</sup>

The weakness in this normative claim is that it implies too simple a notion of politics. It seems, from the promise to move beyond politics, that politics is merely argument about the affirmative action of government. But politics is a central part of democracy. Politics encompasses the entire array of public decision making, affirmative and negative, electoral and rhetorical, majoritarian and deliberative, state and non-state.<sup>17</sup> Politics is not just the operations of the state; it is the operations of the people in formulating ends and means.<sup>18</sup> It is the ecosystem of behaviors, both nominally public and private, that influence collective action.<sup>19</sup> This conception of democratic politics includes the retrospective accountability of elections but also the preliminary impulses of idea formation, justification, and debate.

As far as PEG promises to eschew politics, it is promising to avoid existing democratic fora for public decision making, and that avoidance, coupled with broad powers over natural resources, is exactly what gives PEG its largely unobstructed instrumental power. This is all politics. Politics is the entire emergent process of collective decision making. Democracy is the more discrete and formal aspects of that process, including voting, suing, petitioning, commenting, and legal reasoning, among other state-protected avenues of participation. In other words, when I say “politics” I generally mean the process of governing, particularly the process of debating policy. When I say “democracy,” I generally mean a system of government in which authority originates

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<sup>14</sup> E.g., Vandenberg, *Private Environmental Governance*, *supra* note 3.

<sup>15</sup> VANDENBERGH & GILLIGAN, *supra* note 6, at 8.

<sup>16</sup> *Id.* at 1.

<sup>17</sup> See generally JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS: AN ESSAY IN POLITICAL INQUIRY* (Melvin L. Rogers ed., Penn State Press 2012).

<sup>18</sup> See RICHARDSON, *infra* note 23, at 136 (distinguishing between what the public wants to achieve and how the public wants to achieve it).

<sup>19</sup> See David P. Baron, *Private Politics*, 12 J. ECON. & MGMT. STRATEGY 32, 33 (2003).

with the governed. Democracy is formal and ontological while politics is informal and practical. As I will argue, in a democratic state, politics is part of democratic practice because how people choose to govern within the formal structures (democracy) is shaped by the informal processes of governing (politics).

Given that this Article makes a case for considering PEG in light of democracy, I go slightly beyond just a simple definition of democracy. I also briefly sketch a broad vision of democracy, asserting that American democracy includes majoritarian direction and accountability, liberal individual participation, reason-giving, and deliberation.

With the rise of nationalistic and arguably tyrannical populism around the world, this is an inauspicious time to sing the praises of, or in fact to demand, democracy.<sup>20</sup> But two imperatives urge us not to turn away from democracy. First, many of the real failings that we attach to democracy are, in fact, failings of populism and majoritarianism, not of a more complete democracy.<sup>21</sup> With the robust, inclusive, and constrained democracy that I have just sketched and will further describe, we may avoid the pitfalls of majoritarianism. Second, even if we accept that democracy has failed, we have to grapple very seriously with the question of whether academics or corporate leaders can justly wave away democracy, even deeply flawed or failing democracy. That requires either great power or great hubris. The question thus becomes whether private environmental governance is a dismissal of democracy in this vein.

The second trigger for democracy is the need for collective choice. When PEG scholarship asserts that private industry can achieve essential environmental protection, it is accurate. However, it takes for granted that environmental protection is a shared goal and that the specific tools private actors employ are broadly desirable. In other words, PEG takes for granted a prerequisite of any public policy: choice. The pursuit of collective welfare should be a collective decision, not a fate imposed upon the public.

Environmental protection has long labored under the illusion of fate, of neutral principles like a balance of nature, welfare maximization, or mystical providence.<sup>22</sup> These principles pretend to relieve the public from

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<sup>20</sup> E.g., Yasmeen Serhan, *Populism is Morphing in Insidious Ways*, THE ATLANTIC, Jan. 6, 2020, <https://www.theatlantic.com/international/archive/2020/01/future-populism-2020s/604393/>; *On Tyranny, Populism—and How to Best Respond Today*, THE ECONOMIST, Jul. 30, 2018, <https://www.economist.com/open-future/2018/07/30/on-tyranny-populism-and-how-best-to-respond-today>.

<sup>21</sup> E.g., Serhan, *supra* note 20.

<sup>22</sup> JEDEDIAH PURDY, AFTER NATURE: AN ENVIRONMENTAL POLITICS FOR THE ANTHROPOCENE 264 (2015) [hereinafter PURDY, AFTER NATURE]. See also, Jody Freeman, *The*

making choices, at least from making the hardest choices about which goals to pursue. But these principles amount to little in a world that is marked by irreducible contestability<sup>23</sup> and the undeniable consequences of human choices.<sup>24</sup> Put differently, “[e]nvironmental policy making is a choice among futures.”<sup>25</sup> When PEG promises a less contested path to one particular future, it masks the important choices that we should make, chief among them, the choice of what future we want. If we have collective choices to make, how do we go about making them? The answer is politics, which on some level is just a disagreeable synonym for democracy.<sup>26</sup> While the PEG scholarship looks at how firms successfully govern, for the most part it does not look at how people, through democracy and the state, govern firms.<sup>27</sup> This Article is a step toward that deeper democratic consideration of PEG.

The third trigger for democracy is liberty. Democracy becomes especially important when substantial power imbalances allow some to interfere with or dominate others. Non-interference and non-domination are two competing formations of liberty.<sup>28</sup> In the case of PEG, the leading firms both interfere with and dominate the public’s interaction with the natural world.<sup>29</sup> Again, were firms engaged in PEG not able to interfere and dominate then their PEG would be of little value. It is only because some firms have the power to control global resources that their engagement in environmental governance amounts to anything.

As with so much else in this Article, the key to thinking about liberty is dismissing the public-private distinction. The state has the power to constrict liberty in myriad ways. That power is acceptable to the extent that the interference or domination is democratically authorized or the power is democratically revoked. Non-state actors also have power to interfere and dominate and so there is reason to use democracy to authorize or revoke that power.

Non-state actors could possibly provide for many of the same aspects of democracy that a state could provide. As I will argue in a companion

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*Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543, 566 (2000) (writing that there is no “natural ordering” that provides easy distinctions between, for example, public and private.).

<sup>23</sup> HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY 35-36 (2002).

<sup>24</sup> PURDY, AFTER NATURE, *supra* note 22, at 16-17.

<sup>25</sup> *Id.* at 264.

<sup>26</sup> Part III, *infra*.

<sup>27</sup> *But see*, Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 140 (2019); and to a lesser extent, Light & Orts, *supra* note 10.

<sup>28</sup> Part VI, *infra*.

<sup>29</sup> *Id.*

article, however, on the whole it does not.<sup>30</sup> As a result, PEG is at the same time effective and undemocratic. As long as PEG, just like public governance, impacts collective choice, individual liberty, and the distribution of power, it is a problem to do so without democracy.<sup>31</sup>

When I say that PEG needs democracy, I mean that in two distinct ways. First, PEG itself, the individual firms aiming to reduce their environmental impact and the conservation projects of those firms, should strive to include more opportunities for majoritarian direction, individual participation, reason-giving, and deliberative decision making. This would be progress. It may also be unrealistic and would certainly be too little. Second, it is important to recognize that the democratic state also has the power to shape PEG and govern it from the outside. The most complete way to inject democracy into PEG is to use the democratic state to ensure that the power of PEG is only what we want it to be. PEG may be denominated as a private action but the key theme here is that the denomination makes little real difference.

In rejecting any fundamental distinction between public and private spheres, this Article instead uses the terms to reflect general practice and expectations, in which “public” invokes notions of either widespread concern or state-centered action, while “private” means non-state control. This distinction signals that state and non-state alike may impact individual liberty because both wield real, meaningful, and identifiable power. But PEG is a slight of hand when it comes to that power. It inspires us to look away from the functional distribution of power and toward the flamboyant triumphs and impressive opportunities of private undertakings. While we look in that direction we may fail to see and debate the existence of coercive power, the extent of that power, or even the process by which that power is wielded.<sup>32</sup> When power is dominant or coercive, regardless of its source, it calls for democratic consideration, at least.<sup>33</sup>

The Article begins the case for assessing PEG’s democratic qualifications first, in the next section, by carefully explaining what PEG is and then, in Section II, by briefly defining democracy in order to give

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<sup>30</sup> Joshua Ulan Galperin, *The Public Role in Private Governance* (forthcoming) (manuscript at 5) (on file with author).

<sup>31</sup> GRANT MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* 5 (1967).

<sup>32</sup> *See id.* at 55-57.

<sup>33</sup> *Id.* at 356 (“[O]ne of the genuine necessities of politics [is] the necessity to recognize power where it exists and to coopt it for the minimum needs of the large[r] society.”) ; *see generally*, THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* xix (40th ann. ed. 2010) (arguing that government hides its coercive authority by delegating decision making to private actors and technocrats, thereby cutting off the possibility of transparent and open conversation about the use of coercion, but not cutting off the actual coercion).

context to the remainder of the analysis. The following sections essentially make the point that the public-private distinction alone cannot answer the democratic question. The distinction is too flimsy. Should one argue “but we don’t need democracy because PEG is private action,” the following sections assert that the private designation does not help because PEG is political, it avoids collective decision making, and it is coercive. Environmental governance, whether or not we call it “private,” must be democratic governance. To that end, Section III shows why PEG is a political endeavor that forcefully impacts public governance and popular preferences. Section IV explains the deep and important choices that environmental protection poses and argues that we must rely on democracy to make those choices because there are no easy or automatic tools for environmental decision making. Section V illustrates how non-state behavior can interfere and dominate, can coerce, individuals and therefore impact individual liberty in the same way as state governance. Because PEG is not disconnected from individual liberty, there is a need for individuals to have some meaningful control. Section VI concludes by considering how we draw the line between those private undertakings that demand democracy and those that can proceed without. That line is hard to draw, but much PEG falls clearly on the side of democracy.

In short, the lesson of this Article is that PEG is a democratic participant, not a bystander. For that reason, it should be subject to democratic practice. In a companion piece I will argue that, as it stands, PEG has a democracy deficit, but we can mitigate that deficit and seek democratic oversight through traditional forms of state governance.<sup>34</sup>

## I. PRIVATE ENVIRONMENTAL GOVERNANCE

That private firms can and do make environmental decisions outside the scope of public regulation is not news. As I drafted this Article, from the window of my office in Pittsburgh, Pennsylvania, I could see the impacts of U.S. Steel’s environmental decisions, made without the commands of regulation as early as 1901.<sup>35</sup> The company likely did not make those early decisions with “environmental stewardship” explicitly in mind, but the coke they burned, the solid waste they released, and the water they used all contributed to widespread environmental impacts.<sup>36</sup> Today, U.S. Steel is explicit about its environmental impacts, its ability

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<sup>34</sup> Galperin, *The Public Role in Private Governance*, *supra* note 30.

<sup>35</sup> See generally KENNETH WARREN, *BIG STEEL: THE FIRST CENTURY OF THE UNITED STATES STEEL CORPORATION, 1901-2001* 7 (2008).

<sup>36</sup> E.g., Andrea Di Schino, *Environmental Impact of Steel Industry in* HANDBOOK OF ENVIRONMENTAL MATERIAL MANAGEMENT (Chaudhery Mustansar Hussain ed., 2019).



to make decisions that ripple far beyond the borders of its facilities.<sup>37</sup> For instance, the company promises to reduce its greenhouse gas emissions because it recognizes that those emissions contribute to governing the global climate.<sup>38</sup> The decisions they made in 1901 were as much private environmental governance as their decisions today.

What is new today is the framing and study of private environmental decisions as a cohesive field of governance worthy of pursuit and study, as well as the scale of explicit private initiatives. Within the legal literature, the credit for this innovation goes to Michael Vandenberg, who first introduced the issue in 2007 when he wrote principally of Walmart's efforts to provide public environmental benefits using supply-chain contracts requiring better environmental performance from its suppliers.<sup>39</sup> In 2013 Professor Vandenberg went a step further and formally defined the field in an article simply titled *Private Environmental Governance*.<sup>40</sup> That paper carefully defined PEG, offered a PEG typology with leading examples, distinguished PEG from traditional environmental governance, and anticipated a number of objections to the new field of study.<sup>41</sup> With the field of PEG open for discussion, Sarah Light and Eric Orts offered the next major innovation in 2015 when they explored the "parallels" between the policy instruments available in both public and private environmental governance<sup>42</sup> and recommended considering the normative implications of instrument choice.<sup>43</sup> Many others have begun exploring PEG,<sup>44</sup> but Vandenberg remains the dean and leader of the field. In 2018 he published, along with colleague Jonathan Gilligan, the book on the subject, *Beyond Politics: The Private Governance Response to Climate Change*.<sup>45</sup> To fully understand PEG, any reader must consult, at least, these major publications. This section, nevertheless, will first attempt to briefly summarize them and highlight a few practical examples.

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<sup>37</sup> See U.S. STEEL, SUSTAINABILITY REPORT 10-11, 29-43 (2019), [https://www.ussteel.com/documents/40705/43725/U.+S.+Steel+2019+Sustainability+Report\\_web.pdf/52f7fb7e-a2aa-c80b-7d72-202afc5ab5ff?t=1603766679756](https://www.ussteel.com/documents/40705/43725/U.+S.+Steel+2019+Sustainability+Report_web.pdf/52f7fb7e-a2aa-c80b-7d72-202afc5ab5ff?t=1603766679756).

<sup>38</sup> *Id.* at 39-43.

<sup>39</sup> Vandenberg, *Walmart*, *supra* note 4, at 925-28.

<sup>40</sup> Vandenberg, *Private Environmental Governance*, *supra* note 3.

<sup>41</sup> *Id.* at 129-30.

<sup>42</sup> Sarah E. Light & Eric W. Orts, *Parallels in Public and Private Environmental Governance*, 5 MICH. J. ENVTL. & ADMIN. L. 1, 13 (2015).

<sup>43</sup> *Id.* at 54.

<sup>44</sup> *E.g.*, Joshua Ulan Galperin, *Foreword: Private, Environmental, Governance*, 9 GEO. WASH. J. ENERGY & ENVTL. L. 1, 4 (2018) (introducing a range of new PEG scholarship included in a new symposium publication) [hereinafter Galperin, *Foreword*].

<sup>45</sup> VANDENBERGH & GILLIGAN, *supra* note 6.

### A. *Defining Private Environmental Governance*

Private environmental governance is “private-private interactions” that produce standards for environmental behavior and thus control environmental quality<sup>46</sup> “without the coercive force [] of government.”<sup>47</sup> PEG is “private actors perform[ing] traditionally governmental roles, such as reducing negative externalities and managing public goods or common pool resources.”<sup>48</sup>

To understand the profound nature of this definition is to understand the traditional framing of environmental governance, the rate at which traditional environmental governance is *not* happening, and the rate at which private environmental governance *is* happening.

“If you took an introductory environmental law class at almost any law school, read almost any environmental law casebook or undergraduate policy textbook, read the 300 or more environmental law articles published every year, or followed environmental policy debates in the mass media, you would be fully justified in believing” that environmental governance is the stuff of legislative statutes detailed through administrative regulation and enforcement.<sup>49</sup> The success and failure of environmental law is seemingly measured by government policy. It was a great environmental success when President Obama announced his administration’s Clean Power Plan.<sup>50</sup> It was a great failure when President Trump announced his repeal of that same policy.<sup>51</sup> Since 1970 when the National Environmental Policy Act became the first modern environmental law,<sup>52</sup> we have gauged environmental success by new laws and new actions under those laws.<sup>53</sup>

Today new laws are exceedingly rare. After the passage of the 1990 Clean Air Act Amendments, Congress has passed just one major environmental law, a revision to the Toxic Substance Control Act in

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<sup>46</sup> Vandenberg, *Private Environmental Governance*, *supra* note 3, at 133.

<sup>47</sup> VANDENBERGH & GILLIGAN, *supra* note 6, at 124.

<sup>48</sup> *Id.* at 121.

<sup>49</sup> Vandenberg, *Private Environmental Governance*, *supra* note 3, at 130.

<sup>50</sup> Press Release, Remarks by the President in Announcing the Clean Power Plan, White House (Aug. 3, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/08/03/remarks-president-announcing-clean-power-plan>

<sup>51</sup> Press Release, Env’t. Protection Agency, EPA Finalizes Affordable Clean Energy Rule, Ensuring Reliable, Diversified Energy Resources while Protecting our Environment (Jun. 19, 2019), <https://www.epa.gov/newsreleases/epa-finalizes-affordable-clean-energy-rule-ensuring-reliable-diversified-energy>

<sup>52</sup> National Environmental Policy Act, 42 U.S.C. § 4321 *et. seq.* (2019).

<sup>53</sup> Vandenberg, *Private Environmental Governance*, *supra* note 3, at 131.

2016.<sup>54</sup> It seems that this rare congressional action is the exception that proves the rule that we are in an age of “statutory inaction,” an age that has lasted longer than the age of action that ran from 1970 through 1990.<sup>55</sup> Despite so much inaction, there is still an “assumption that government must be the actor that responds to” environmental concerns.<sup>56</sup>

According to Vandenberg, the assumption is rooted in the way environmental law is taught and discussed,<sup>57</sup> but it does not reflect the reality in which private organizations are achieving important emissions reductions.<sup>58</sup> For example, with respect to climate change, private initiatives could reduce annual greenhouse gas emissions more than 3 billion tons annually over the next decade.<sup>59</sup> To put this number in context, meeting the leading international goal for climate reduction would require global annual reductions of 5 billion tons each year.<sup>60</sup> The possibility of PEG gets us significantly closer to that goal. The next part will sketch out a few examples of the types of private initiatives that make up this striking potential.

#### B. *Private Environmental Governance in Practice*

PEG in practice does not look entirely different from public environmental governance. That, along with its massive potential, is what makes PEG so important.

Professors Sarah Light and Eric Orts explain that the traditional tools of public governance are the same tools scholars observe in PEG.<sup>61</sup> A memorable mnemonic for remembering the key environmental policy instruments is James Salzman’s “Five P’s.”<sup>62</sup> The Five P’s—prescriptive regulation, property rights, penalties, payments, and persuasion—are the basic elements that make up environmental governance.<sup>63</sup> With some tweaks to the mnemonic, Light and Orts demonstrate that PEG uses these same elements.<sup>64</sup> For example, where government compels private firms to use a particular emissions reduction technology—prescription—

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<sup>54</sup> *Assessing and Managing Chemicals Under TSCA: The Frank R. Lautenberg Chemical Safety for the 21st Century Act*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/frank-r-lautenberg-chemical-safety-21st-century-act>.

<sup>55</sup> Vandenberg, *Private Environmental Governance*, *supra* note 3, at 131.

<sup>56</sup> VANDENBERGH & GILLIGAN, *supra* note 6, at 3.

<sup>57</sup> *Private Environmental Governance*, *supra* note 3, at 130-31.

<sup>58</sup> VANDENBERGH & GILLIGAN, *supra* note 6, at 3.

<sup>59</sup> *Id.* at 5.

<sup>60</sup> *Id.* at 6.

<sup>61</sup> Light & Orts, *supra* note 10, at 4.

<sup>62</sup> James Salzman, *Teaching Policy Instrument Choice in Environmental Law: The Five P’s*, 23 DUKE ENVTL. L. & POL’Y. F. 363, 363-64 (2013).

<sup>63</sup> *Id.* at 364.

<sup>64</sup> Light & Orts, *supra* note 10, at 13.

private organizations might similarly require the most environmentally advanced technology.<sup>65</sup> A private firm that certifies the environmental benefits of buildings could, for instance, require that any firm seeking certification use only the most efficient HVAC systems.<sup>66</sup> Where government creates private property rights and private individuals are expected to act in the best interest of their own property, private firms may similarly distribute rights throughout the firm, for example, by allocating water to different divisions so that each division has an incentive to use water more efficiently.<sup>67</sup>

Where PEG differs more from public governance is that it occurs in a more crowded field, not with one state, or even a few states, but hundreds or thousands of non-state participants. When household and individual behavior is incorporated into the PEG fold, the practice engages literally billions of actors.<sup>68</sup> Likewise, while the power of major industries over environmental resources is coercive with respect to the environment, private firms do not always have coercive authority over business partners the way government has coercive authority over regulated parties.

These public-private distinctions help frame the two major types of PEG: bilateral and multilateral action.<sup>69</sup> Bilateral action, or bilateral standard setting,<sup>70</sup> occurs when two parties agree to environmental practices that the government does not set or mandate.<sup>71</sup> The paradigm of bilateral action is supply chain contracts, in which “corporate buyers impose environmental requirements on their global suppliers.”<sup>72</sup> But bilateral standard setting may also arise in the form of mergers and acquisitions, loans, or insurance policies,<sup>73</sup> as well as good neighbor agreements in which a firm with a major local environmental footprint agrees with a local community to abide by certain non-governmental standards.<sup>74</sup>

Multilateral standard setting is even more indicative of the scope of PEG. In a multilateral project, firms across an industry agree to abide by

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<sup>65</sup> *Id.* 24-26.

<sup>66</sup> *See id.* at 28.

<sup>67</sup> *See id.* at 31.

<sup>68</sup> *The World Population Clock*, U.S. CENSUS BUREAU, <https://www.census.gov/popclock/> (last visited Feb. 7, 2021).

<sup>69</sup> Vandenberg, *Private Environmental Governance*, *supra* note 3, at 146-47.

<sup>70</sup> *Id.* at 148.

<sup>71</sup> *Id.* at 156.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 158.

<sup>74</sup> *Id.* at 161; *see also* Kristen van de Biezenbos, *Enforcing Private Environmental Governance Standards Through Community Contracts*, 9 GEO. WASH. J. ENERGY & ENVTL. L. 45, 47 (2018).

shared environmental standards.<sup>75</sup> Certification systems are the epitome here. A certification system often begins with a new organization, which engages stakeholders to create environmental standards.<sup>76</sup> Firms that are willing to follow those standards may apply to certify their products (or processes, buildings, or other environmentally relevant components) and display the certification as a demonstration of their pro-environment behavior.<sup>77</sup> Lending standards are another multilateral effort in which “major banks agree to impose [a collaborative set of environmental standards] on project finance borrowers . . . .”<sup>78</sup> Disclosure standards emerge when organizations form to “gather and disseminate environmental information” about leading corporations.<sup>79</sup>

The leading examples of PEG touch all parts of this typology. Walmart, in particular, has been at the forefront of PEG literature and praise.<sup>80</sup> In partnership with the Environmental Defense Fund, an environmental advocacy group, Walmart is using bilateral supply chain contracts to reduce greenhouse gas emissions by 1 billion tons between 2015 and 2030.<sup>81</sup> Walmart also sells only Marine Stewardship Council (MSC) certified seafood.<sup>82</sup> MSC is a multi-lateral certification program.<sup>83</sup> Unilever, an international consumer goods corporation, and the World Wildlife Fund, an environmental advocacy group, formed MSC to create and administer fisheries standards.<sup>84</sup> Only seafood that meets the MSC requirements is eligible for the MSC label, a now easily recognizable blue and white silhouetted fish with an impressionistic “check” mark making up its dorsal (fish speak for “top”) side.<sup>85</sup> The label garners higher visibility, better reputation, and market access.<sup>86</sup> The Forest Stewardship Council provides an analogue in the forest products industry.<sup>87</sup>

PEG is not just for global corporations like Walmart. Yale University, for example, is planning for climate change and trying to reduce its own

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<sup>75</sup> Vandenberg, *Private Environmental Governance*, *supra* note 3, at 148-56.

<sup>76</sup> *Id.* at 148-49.

<sup>77</sup> *Id.* at 149-50.

<sup>78</sup> *Id.* at 151.

<sup>79</sup> *Id.* at 155.

<sup>80</sup> *E.g.*, Vandenberg, *Walmart*, *supra* note 4; Vandenberg, *Private Environmental Governance*, *supra* note 3, at 150; VANDENBERGH & GILLIGAN, *supra* note 6, at 3.

<sup>81</sup> VANDENBERGH & GILLIGAN, *supra* note 6, at 178.

<sup>82</sup> Vandenberg, *Private Environmental Governance*, *supra* note 3, at 150.

<sup>83</sup> *Id.* at 149; *see also* MARINE STEWARDSHIP COUNCIL, <https://www.msc.org/> (last visited Feb. 6, 2021).

<sup>84</sup> Vandenberg, *Private Environmental Governance*, *supra* note 3, at 149.

<sup>85</sup> *Id.*; MARINE STEWARDSHIP COUNCIL, <https://www.msc.org/> (last visited Feb. 6, 2021).

<sup>86</sup> *Why Get Certified*, MARINE STEWARDSHIP COUNCIL, <https://www.msc.org/for-business/fisheries/why-get-certified> (last visited Feb. 6, 2021).

<sup>87</sup> Vandenberg, *Private Environmental Governance*, *supra* note 3, at 148-49.

carbon footprint.<sup>88</sup> To achieve this goal the university has implemented an internal carbon charge, which measures emissions from each building on campus and imposes a \$40 per metric ton charge to the administrative unit that operates the building.<sup>89</sup> The program does not change the University's overall budget, but it provides an incentive for individual units of the school to improve their own environmental performance. Each unit must pay for its own emissions but is also eligible to have the university reimburse the unit if its buildings outperform the rest of the University.<sup>90</sup>

Also distinct from global corporations are non-profit environmental groups. On first blush these groups appear to fall outside the typical definition of "private," because they are membership-based non-profits, but they nevertheless advance non-state environmental protection.<sup>91</sup> The Nature Conservancy (TNC), for example, purchases and manages land for the purpose of protecting it in perpetuity.<sup>92</sup> Activist NGO Greenpeace likewise engages in private governance by using visible and aggressive reputational campaigns against firms it wants to improve.<sup>93</sup> These are both examples of participating in the marketplace to effect environmental change. But many NGOs also play a more tangential role, for example, consulting with private businesses to help them change their environmental behavior.<sup>94</sup>

### C. *Why Private Environmental Governance?*

Why do private firms voluntarily work towards government-like environmental protection goals? In part because their initiatives can deter environmental regulation, in part because there is a self-interested economic benefit from distinctive market behavior, in part because more corporate efficiency is as good for the bottom line as it is for the environment, and in part because some corporate leaders personally support environmental action.<sup>95</sup>

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<sup>88</sup> *Yale Carbon Charge Project Overview*, YALE UNIV., <https://carbon.yale.edu/project-overview> (last visited February 6, 2021); Sarah E. Light, *The New Insider Trading: Environmental Markets within the Firm*, THE CLS BLUE SKY BLOG (May 19, 2015), <http://clsbluesky.law.columbia.edu/2015/05/19/the-new-insider-trading-environmental-markets-within-the-firm/>.

<sup>89</sup> *Yale Carbon Charge, Implementation*, YALE UNIV., <https://carbon.yale.edu/implementation>.

<sup>90</sup> *Id.*

<sup>91</sup> *Board Rooms and Jail Cells*, *supra* note 1, at 405.

<sup>92</sup> *Id.* at 433-35.

<sup>93</sup> *Id.* at 435-37.

<sup>94</sup> *Id.* at 460.

<sup>95</sup> VANDENBERGH & GILLIGAN, *supra* note 6, at 392-93; Coglianese & Nash, *infra* note 133, at 238-39.

Whether it is market factors or personal leadership preferences that drive PEG initiatives, it is plain that the driver is something other than direct government mandates or formal democratic institutions. It is plain that something other than state democracy is controlling major aspects of the global climate and global environment. The preferences of corporate leadership may align with popular or particular political goals. But the personal initiatives of CEOs—initiatives that may end up influencing, for instance, fresh water availability, global temperatures, wholesale collapse or maintenance of essential food supplies—are nevertheless fiat. Benevolent fiat, perhaps.

Environmental decisions that arise from widespread market signals or attempts to lower costs may likewise lead to a greener world while also pleasing consumers and investors.<sup>96</sup> But “consumer” and “investor” are not synonyms for “voter” and “citizen.” The power of consumers and investors comes from their paychecks, not from their personhood.<sup>97</sup> Economic power can and should be a driver of change, but it is not, alone, democratic.

Economic encouragements and leadership initiatives are not, in themselves, democratic, but they are tied to democratic government in a number of ways. First, PEG can fill gaps that state inaction leaves open.<sup>98</sup> Second, by entering the public consciousness, by influencing how we think about environmental protection, by changing the debate around and the costs of environmental governance, PEG can powerfully influence the reality of state action—it can widen the gaps that it purports to fill. This political economy hints that PEG is fundamentally tied to public decision making and demands democratic attention. But before we can fully understand the case for why PEG calls for a democratic reassessment, it is necessary to have a slightly deeper understanding of “democracy” in this context.

## II. DEMOCRACY

A more thorough understanding of democracy will contextualize the thrust of this Article—that PEG should be subject to democratic practice—and the goal of this section is to provide a working definition.

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<sup>96</sup> See generally DANIEL C. ESTY & ANDREW S. WINSTON, GREEN TO GOLD: HOW SMART COMPANIES USE ENVIRONMENTAL STRATEGY TO INNOVATE, CREATE VALUE, AND BUILD COMPETITIVE ADVANTAGE (Wiley Paperback ed., 2009).

<sup>97</sup> Joshua Ulan Galperin, Graham Downey, & D. Lee Miller, *Eating is Not Political Action*, 13 J. FOOD L. & POL'Y 113, 114-15 (2017).

<sup>98</sup> Vandenbergh, *Private Environmental Governance*, *supra* note 3, at 131-33; Michael P. Vandenbergh, Jim Rossi, & Ian Faucher, *The Gap-Filling Role of Private Environmental Governance*, 38 VA. ENVTL. L.J. 1, 3 (2020).

The section does not explain some fundamental truth about democracy at large, but instead illustrates the practical structure of the robust vision of democracy within the constitutional system of the United States. A realization that “democracy” is more complete, inclusive, just, and complex than mere majoritarianism, more than mere voting and elections, should ease the worries of those who are skeptical of the overall project because they see democracy as part of the problem rather than part of the solution.

Arguably, mere majoritarianism has long been emblematic of democracy.<sup>99</sup> In this view, democracy is simply soliciting eligible voters for their preferences and then granting those with the most popular preference the right to govern.<sup>100</sup> That is clean, simple, and it reflects the fact that elections are highly visible<sup>101</sup> and motivating.<sup>102</sup> But in the United States’ constitutional democracy, there is more at play than voting.<sup>103</sup> Democracy is indeed about public participation, and voting is indeed a part of public participation, but democracy also includes individual participation, reason-giving, and deliberation as critical elements.

In the formal procedures of democracy, majoritarian participation happens through voting.<sup>104</sup> Voting allows people to select representatives to govern,<sup>105</sup> making it an impetus for policy, it is the means through which these representatives themselves make formal decisions in Congress,<sup>106</sup> making it a tool of governing, and it allows the public to

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<sup>99</sup> *E.g.*, JEAN-JAQUES ROUSSEAU, *THE SOCIAL CONTRACT*, (trans. G. D. H. Cole ed. 2002) (1762), [https://socialpolicy.ucc.ie/Rousseau\\_contrat-social.pdf](https://socialpolicy.ucc.ie/Rousseau_contrat-social.pdf).

<sup>100</sup> *Democracy*, DICTIONARY.COM, <https://www.merriam-webster.com/dictionary/democracy> (last visited June 8, 2020) (“[G]overnment by the people *especially*: rule of the majority . . . a government in which the supreme power is vested in the people and exercised by them directly or indirectly through a system of representation usually involving periodically held free elections.”).

<sup>101</sup> *See e.g.*, Oriana Schwindt, *Election Night Ratings: More than 71 Million TV Viewers Watched Trump Win*, VARIETY (Nov. 9, 2016), <https://variety.com/2016/tv/news/election-night-ratings-donald-trump-audience-1201913855/>; John Koblin, *Midterm Elections Deliver a Ratings Surge, With Fox News in the Lead*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/business/media/midterm-election-tv-ratings.html>.

<sup>102</sup> Andrew Gelman & Gary King, *Why Are American Presidential Election Campaign Polls So Variable When Votes Are So Predictable?*, 23 BRITISH J. POL. SCI. 409, 448 (1993); Shane P. Singh & Judd R. Thornton, *Elections Activate Partisanship Across Countries*, 113 AM. POL. SCI. REV. 248, 248 (2019).

<sup>103</sup> Joshua Ulan Galperin, *The Death of Administrative Democracy*, 82 UNIV. PITT. L. REV. (2020) [hereinafter, Galperin, *Death of Administrative Democracy*] (asserting that the U.S. constitutional democracy incorporates majoritarian voting in addition to individual contestation, reason giving, and deliberation).

<sup>104</sup> *E.g.*, THE FEDERALIST NO. 10 (James Madison) (Lillian Goldman Law Library ed., 2008) (“If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote.”).

<sup>105</sup> *E.g.*, U.S. CONST. amends. XV, XIV § 1 cl. 2, XVII, XIX, XXIV.

<sup>106</sup> *Id.* art. I, §§ 3, 7.



retain or replace a representative, making it a powerful form of accountability.<sup>107</sup> Majoritarianism, therefore, is absolutely a central component of democracy, but it is not where democracy begins and ends.

Indeed, while majoritarianism allows public participation in governance, it does not give individuals significant power.<sup>108</sup> And yet, the Constitution demonstrates a clear priority for individual channels of participation in governing, such as the right to petition,<sup>109</sup> or the right to use the court system to seek redress for individual wrongs.<sup>110</sup>

By way of example, whether or not the majority of voters want climate action, they have not elected a Congressional majority capable of delivering legislation to address climate change.<sup>111</sup> In the late 1990s, a group of environmental organizations submitted a rulemaking petition to the Environmental Protection Agency seeking regulatory action notwithstanding congressional inertia.<sup>112</sup> Several years after the petition, the Agency formally denied it, refusing to regulate climate pollutants.<sup>113</sup> In response to the denial, the environmental organizations, along with a group of state and local governments, brought their arguments to the federal courts.<sup>114</sup> That judicial process eventually ended with the Supreme Court holding that the Environmental Protection Agency has the authority to regulate climate pollution and that the Clean Air Act provides specific procedures the Agency must follow before making a decision on such regulation.<sup>115</sup> This example demonstrates that even when there is no action under majoritarian structures, there are other outlets for meaningful individual input.

A democratic system, therefore, must also include an authentically individual component, creating structures through which individuals can seek change regardless of whether they are counted as part of an electoral majority.

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<sup>107</sup> See e.g., Bressman, *infra* note 155, at 462-63 (discussing the underlying assumption in administrative law and policy that elected officials are accountable and responsive to the polity precisely by virtue of being elected); PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 185 (1997) (discussing the centrality of contestability in a republican form of government).

<sup>108</sup> See generally *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (discussing partisan gerrymandering as an effort to influence the way that votes are aggregated such that individual votes lose power when districts are drawn to prefer a particular aggregation.)

<sup>109</sup> U.S. CONST. amend. I.

<sup>110</sup> *Id.* art. III.

<sup>111</sup> E.g., *Massachusetts v. EPA*, 549 U.S. 497, 535 (Roberts, C.J., dissenting) (“Apparently dissatisfied with the pace of progress on this issue in the elected branches, petitioners have come to the courts . . .”).

<sup>112</sup> *Id.* at 510.

<sup>113</sup> *Id.* at 511.

<sup>114</sup> *Id.* at 514.

<sup>115</sup> *Id.* at 534-35.

Both majoritarianism and individualism make space for pre-social or pre-political inclinations (insofar as such things exist) so that each person can push for their own interests in governance. The final two aspects of democracy—reason-giving and deliberation—buttress this space, while also recognizing that interests are not, in fact, pre-social or pre-political, but form through political and social interactions.

Reason-giving as a characteristic of democracy means simply that those who govern must explain and justify their actions.<sup>116</sup> These explanations serve as the feedstock of democratic practice, providing a basis for deciding what actions we support or oppose and also helping to convince or persuade that an action is or is not desirable in the first instance. Returning to the earlier example of climate rulemaking, the Environmental Protection Agency did not simply deny the environmental groups' petition to make a climate rule, they did so with a detailed order that explained the reasons for their inaction.<sup>117</sup> That reasoning was then available to the Court, to the petitioners, and to the public as a form of both explanation and persuasion.

The constitutional roots of reason-giving are particularly exposed in the Due Process clauses,<sup>118</sup> which assure, substantively, that there is a relationship between the reasons for a law and the work that law actually does,<sup>119</sup> and, procedurally, that government articulates a reason prior to any deprivation of life, liberty, or property.<sup>120</sup>

Finally, deliberation is the piece of democracy that ensures a process for considering reasons and weighing decisions.<sup>121</sup> Deliberation is the manner in which individual and government decisionmakers take reasons and analyze them against goals, alternatives, and motivating values. Deliberation, in other words, is the crux of “democratic will-formation,”<sup>122</sup> and that will is then fed back into outlets for individual and majoritarian participation. Revisiting, for a final time, the example of climate change policy, deliberation is apparent in several places. First, after it received the environmental groups' petition for rulemaking, the Environmental Protection Agency formally sought public comment on the matter, inviting public deliberation and material for further administrative deliberation.<sup>123</sup> This process facilitated the Agency's own

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<sup>116</sup> Galperin, *Death of Administrative Democracy*, *supra* note 103, at 52.

<sup>117</sup> *Massachusetts*, 549 U.S. at 511-14.

<sup>118</sup> U.S. CONST. amends. V, XIV.

<sup>119</sup> Bressman, *infra* note 155, at 494, 494 n. 154.

<sup>120</sup> *E.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 345-46 (1976) (explaining that giving reasons for the termination of government benefits is a due process “safeguard”).

<sup>121</sup> Galperin, *Death of Administrative Democracy*, *supra* note 103, at 52-54.

<sup>122</sup> RICHARDSON, *supra* note 23, at 180.

<sup>123</sup> *Massachusetts*, 549 U.S. at 511.

deliberation, but it also instigated a public conversation and provided a more complete record that eventually fed into the Supreme Court's own public-facing deliberation on the matter. In the almost fifteen years since the Court's decision, each aspect of this process has continued to be part of formal government and informal community discussions.<sup>124</sup>

Deliberation thus serves as an analytical component of democracy and as the piece of democracy that recognizes and helps to form an interactive society rather than a collection of cloistered individuals or an aggregation of voters.

The U.S. Constitution evinces deliberation as part of our democracy in a variety of ways. The First Amendment's protection of speech, of course, advances public deliberation.<sup>125</sup> The process of bicameralism and presentment proves that the notion of deliberation is as essential to our government's operation as it is to public participation in democracy. As the Supreme Court has noted, by assuring that laws are considered in both chambers of Congress and by the President, "[t]here is an unmistakable expression of a determination that legislation by the national Congress be a step-by-step, *deliberate and deliberative process*."<sup>126</sup>

These tools, in combination, are a way for people, as voters, individuals, and thinkers, to retain power in a vast governance system. Through democracy people can give power to the state, and they can also revoke it.

When applied outside of the state, democracy becomes a way to affirmatively, articulately, and perhaps equitably distribute power. Maybe democracy-outside-the-state is one idea too far, however. More realistically, where there are substantial power differences in the private sector, power differences that call for democratic engagement, then democratically-driven state control of that power is appropriate.

With an understanding that democracy is a complex system including, in some measure, majoritarianism, individualism, reason-giving, and deliberation, it should be clear why politics and democracy are largely one and the same. Politics may be informal and democracy may be formal, but each of these pieces influences the others, meaning that to move away from politics is to move away from democracy as well. With this understanding, it should also be easier to ask whether the political-democratic system is an appropriate fit for PEG.

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<sup>124</sup> E.g., Sam Evans-Brown, *How Massachusetts v. EPA Forced the U.S. Government to Take On Climate Change*, INSIDE CLIMATE NEWS, Jun. 4, 2020, <https://insideclimatenews.org/news/04062020/massachusetts-v-epa-emissions-pollution-climate-change> (describing the various ways that the Court's decision has influenced public policy in the intervening years).

<sup>125</sup> U.S. CONST., amend. I.

<sup>126</sup> *I.N.S. v. Chadha*, 462 U.S. 919, 959 (1983) (emphasis added).

Deciding whether democratic governance is necessary for PEG begins with understanding what PEG and robust democracy are. It requires better understanding the ways that PEG is influential upon, and tantamount, to public governance. These relationships are the subject of the next three sections.

### III. POLITICS

The extended definition and practical review of PEG, as well as the introductory sketch of democracy, both provide a good baseline for the argument that PEG deserves democratic attention. This section begins this argument in earnest by showing that the wall between PEG and state environmental governance is merely rhetorical, as PEG and state governance co-exist in a political-economic ecosystem where each impacts the other. Then, through an attempt to understand the political economy of PEG,<sup>127</sup> this section will demonstrate that PEG is political and therefore deserves democratic attention. This part considers four issues: first, the traditional but overdrawn distinction between public and private and the importance of the existing distribution of power; second, the ability of PEG to serve as a source of new ideas for public governance; third, the ability of PEG to displace public governance; and fourth, the role of PEG in the larger trajectory of environmental governance.

#### A. *PEG Defies Common Notions of Public And Private*

It is long past time to reject a strict public-private distinction, and PEG helps in that endeavor. As the introduction notes, I use the terms in their vernacular sense, where “public” signals government, and where “private” signals operations that are certainly influenced by, but still removed from, government. Despite the stubbornly persistent language of “public” and “private” to indicate a meaningful, even fundamental, barrier between the two “realms,”<sup>128</sup> the PEG literature does not pretend that PEG exists in a void where state authority does not.<sup>129</sup> PEG scholars are plainly aware that government choices about, for instance, contract and property law, undergird the ability of private firms to govern the

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<sup>127</sup> Political economy regards the ecosystem of government and nongovernment actions—politics and economics in the lingering lexicon of distinctions—to recognize that politics and economics are tightly and ubiquitously intertwined rather than independent spheres. Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. F. 179, 181 (2018).

<sup>128</sup> Freeman, *supra* note 22, at 547; Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 940 (2007).

<sup>129</sup> E.g., VANDENBERGH & GILLIGAN, *supra* note 6, at 441.

environment.<sup>130</sup> PEG shows not only how the public transcends its perceived domain to influence private ordering, but also how the private too can transcend imagined boundaries and carry out the traditionally public responsibility of governing the environment.<sup>131</sup>

Nevertheless, as much as such a thing can exist, PEG is governance without the state.<sup>132</sup> In other words, it operates largely free from affirmative government engagement. This is not to say that the state does not engage in environmental governance, but that particular private endeavors are formally distinct from government endeavors. PEG may emerge to avoid state regulation,<sup>133</sup> it may make use of state-granted rights in contract and property,<sup>134</sup> but it is not an affirmatively cooperative strategy like market-mimicking policies or, for instance, affirmative and conscious privatization of specific government functions.<sup>135</sup>

Proponents of PEG have not advocated for it in lieu of government action, but as a complement.<sup>136</sup> The literature is explicit on this point, saying unequivocally, for instance, that “the climate problem will not be solved without government responses”<sup>137</sup> but that PEG can “buy time until substantial shifts occur in public support” for government action.<sup>138</sup>

The reason PEG can happen in a political climate that does not achieve public governance is because PEG is “not subject to the barriers that confront government,”<sup>139</sup> even while PEG has powers similar to those of the state. Thus, while government may have the power to implement ideal solutions, the argument for PEG says that it does little good to focus only

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<sup>130</sup> E.g., Vandenberg, *Private Environmental Governance*, *supra* note 3, at 136 (recognizing that contract law structures supply chain governance); Light & Orts, *supra* note 10, at 29-30 (describing property law as a “determination by the government” and a tool of PEG).

<sup>131</sup> VANDENBERGH & GILLIGAN, *supra* note 6, at 441-42.

<sup>132</sup> Notwithstanding the constant reminder that at a minimum the state shapes the “private” law of contract, property, and tort and more broadly shapes the entire distribution of power, particularly economic power, that structures the so-called “private” world.

<sup>133</sup> Joshua Ulan Galperin, *Trust Me, I’m a Pragmatist: A Partially Pragmatic Critique of Pragmatic Activism*, 42 COLUM. J. ENVTL. L. 425, 485 (2017) [hereinafter Galperin, *Trust Me*] (citing Cary Coglianese & Jennifer Nash, *Motivating Without Mandates? The Role of Voluntary Programs in Environmental Governance*, in *DECISION MAKING IN ENVIRONMENTAL LAW* 237 (Lee Paddock et al. eds., 2016)).

<sup>134</sup> E.g., Vandenberg, *Private Environmental Governance*, *supra* note 3, at 136 (recognizing that contract law structures supply chain governance); Light & Orts, *supra* note 10, at 29-30.

<sup>135</sup> Cf. Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369 (2003) (“Private entities provide a vast array of social services for the government; administer core aspects of government programs; and perform tasks that appear quintessentially governmental, such as promulgating standards or regulating third-party activities.”).

<sup>136</sup> VANDENBERGH & GILLIGAN, *supra* note 6, at 17.

<sup>137</sup> *Id.* at 3.

<sup>138</sup> *Id.* at 8.

<sup>139</sup> *Id.* at 9.

on ideal solutions that are not also viable.<sup>140</sup> Viability is at the heart of PEG's advancement.<sup>141</sup> PEG is viable and public governance is not, the argument goes.<sup>142</sup> Or, at least, if one is to advance solutions it is necessary to consider not just the ideal functionality of those solutions, but their political odds.<sup>143</sup> PEG is politically viable because it is not burdened with the same political challenges as public governance.<sup>144</sup> From this analysis comes Vandenberg and Gilligan's title "Beyond Politics" and the promise that PEG can "bypass" the aversion to government action.<sup>145</sup> This is the notion that animates much of the critical analysis in this Article.

Putting aside the fact that today we can clearly see a rise in political attacks on private initiatives,<sup>146</sup> the argument that PEG can move us beyond politics is firmly rooted in the idea that PEG does not require new government initiatives.<sup>147</sup> Couched in this argument is the implication that some constraint is lost, some flexibility gained, when we bypass government. It is that lost constraint that makes state action unviable and inefficient to PEG advocates.

One thing that is *not* lost is power: the power to coerce and to distribute control. Government does not have a monopoly on the power to coerce and dominate.<sup>148</sup> The reason that private industry is capable of such important strides towards environmental protection is because private industry can coerce the public relationship with and use of the environment; it can "bind[] the entire planet into a shared and possibly

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<sup>140</sup> *Id.* at 13-14, 89-90.

<sup>141</sup> *Id.* at 9, 13, 27, 391.

<sup>142</sup> *Id.* at 89.

<sup>143</sup> Jonathan M. Gilligan & Michael P. Vandenberg, *Accounting for Political Feasibility in Climate Instrument Choice*, 32 VA. ENVTL. L.J. 1, 2 (2014).

<sup>144</sup> VANDENBERGH & GILLIGAN, *supra* note 6, at 69-80.

<sup>145</sup> *Id.* at 3-4.

<sup>146</sup> Ross Douthat, *Tucker Carlson Versus Conservatism*, N.Y. TIMES, Jan. 12, 2019, <https://www.nytimes.com/2019/01/12/opinion/sunday/tucker-carlson-fox-news-republicans.html>; David French, *Walmart's Retreat on Guns Means Woke Capitalism Is Here to Stay*, NAT'L REV., Sept. 4, 2019, <https://www.nationalreview.com/2019/09/walmarts-retreat-on-guns-means-woke-capitalism-is-here-to-stay>; Megan McArdle, *Opinion, Woke Capitalism Sells Out Conservatives. It Can Sell Out Their Opponents, Too*, WASH. POST, Aug. 27, 2019, [https://www.washingtonpost.com/opinions/woke-capitalism-fears-dont-justify-selling-conservatism-to-trump/2019/08/27/878f90ce-c902-11e9-a1fe-ca46e8d573c0\\_story.html](https://www.washingtonpost.com/opinions/woke-capitalism-fears-dont-justify-selling-conservatism-to-trump/2019/08/27/878f90ce-c902-11e9-a1fe-ca46e8d573c0_story.html). In fact, it seems that the problem here is one of cultural self-identification rather than the role of government. Whether government or private industry advances an initiative is irrelevant. What is relevant is the aim of the initiative and whether the aim fits with one's cultural goals. This is probably obvious but it could be the downfall of any governance effort that promises consensus or facility based on an outdated belief that it is the role of government rather than the aim of governing that creates tension.

<sup>147</sup> VANDENBERGH & GILLIGAN, *supra* note 6, at ix.

<sup>148</sup> Lobel, *supra* note 128, at 966-67.

dismal climatic fate.”<sup>149</sup> By controlling the environment to this degree PEG allows private firms to dictate the distribution of environmental benefits and burdens. More on this later.<sup>150</sup> At this point, the importance of recognizing the coercive power embedded in PEG is to recognize that what is lost when we decide to move away from public governance is emphatically not power. A move to private governance does not automatically or necessarily protect notions of liberty, and it does not assure non-interference or non-domination.<sup>151</sup> So what is lost that allows PEG to move forward so easily while public governance cannot?

One thing that could be lost, but is not, according to the leading proponents of PEG, is accountability.<sup>152</sup> Private ordering, they say, can help mitigate the loss of “democratic accountability” through private mechanisms, including market incentives, peer pressure, reputational risk, and “active participation by environmental advocacy groups . . . .”<sup>153</sup> This may be right. Maybe PEG can exist without giving up the accountability that comes with government action. But accountability alone is far too narrow a view of politics and democracy,<sup>154</sup> and it is not the only, or even the primary, benefit of government action. Rather, accountability is merely one fragment of public governance, one retrospective transect of 360-degree democracy. PEG scholarship might recognize the loss of accountability and offer a reasonable response to that criticism,<sup>155</sup> but in treating accountability as the main feature of politics and democracy, it fails to see the other 359 degrees.

Consider this quote: “[a]lthough the climate problem will not *be solved* without government responses . . . .”<sup>156</sup> The passive voice hides a crowd of important assumptions. Chief among these is that when government acts or fails to act, it is *we* who are responsible. When we put government in active voice it is the people who chose to act, or not act, on environmental protection. And when we discuss the viability of one strategy against another, we cannot judge viability as if it were a matter of passive voice, of some exogenous and unidentified actors. Each proposal, each debate, each action—public or private—influences the

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<sup>149</sup> DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 242 (2010).

<sup>150</sup> See *infra* Section VI.

<sup>151</sup> *Id.*

<sup>152</sup> VANDENBERGH & GILLIGAN, *supra* note 6, at 383-86.

<sup>153</sup> *Id.* at 385-86.

<sup>154</sup> See, e.g., Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003) (recognizing that accountability is a part, but an overblown part, of democratic legitimacy).

<sup>155</sup> VANDENBERGH & GILLIGAN, *supra* note 6, at 384-86.

<sup>156</sup> *Id.* at 3 (emphasis added).

democratic ecosystem. To presume that private governance is not political is to presume that private governance will not be subject to politics, but the mounting right-wing critique of “woke capitalism”—a broader version of private governance—plainly disproves the apolitical premise.<sup>157</sup> Private governance seeks to avoid politics, but in so doing it avoids democratic governance, underestimates the scope of politics, and ignores the role of private power. This is the conceit of political economy and it should propel us to look more closely at the way PEG and public governance interact so that we can better understand the benefits of each.

### B. A Laboratory for Governance

In 1932 Justice Brandeis famously wrote:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.<sup>158</sup>

PEG is a rich source of experimentation outside of government. It creates strategies for addressing environmental problems designed in hundreds or thousands of firms around the world, specific to different industries, and possibly tailored to different environmental problems.<sup>159</sup>

Justice Brandeis is right that the power of experimentation on the small scale can address problems and provide fodder for larger efforts. He is also right that staying such experimentation should be done with care because to stop experimentation is a “grave responsibility.”<sup>160</sup> This Article asserts that people wield too little political power over PEG. This might seem at odds with Brandeis, who clearly puts his penny down on experimentation, but in fact, it highlights a distinction between public and private governance.

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<sup>157</sup> Ross Douthat, *Tucker Carlson Versus Conservatism*, N.Y. TIMES, Jan. 12, 2019, <https://www.nytimes.com/2019/01/12/opinion/sunday/tucker-carlson-fox-news-republicans.html>; David French, *Walmart’s Retreat on Guns Means Woke Capitalism Is Here to Stay*, THE NAT’L REVIEW, Sept. 4, 2019, <https://www.nationalreview.com/2019/09/walmarts-retreat-on-guns-means-woke-capitalism-is-here-to-stay/>; Megan McArdle, Opinion, *Woke Capitalism Sells Out Conservatives. It Can Sell Out Their Opponents, Too*, WASH. POST, Aug. 27, 2019, [https://www.washingtonpost.com/opinions/woke-capitalism-fears-dont-justify-selling-conservatism-to-trump/2019/08/27/878f90ce-c902-11e9-a1fe-ca46e8d573c0\\_story.html](https://www.washingtonpost.com/opinions/woke-capitalism-fears-dont-justify-selling-conservatism-to-trump/2019/08/27/878f90ce-c902-11e9-a1fe-ca46e8d573c0_story.html).

<sup>158</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

<sup>159</sup> Vandenbergh, *Private Environmental Governance*, *supra* note 3, at 139.

<sup>160</sup> *New State Ice Co.*, 285 U.S. at 311.



A preference for experimentation is a second-order preference. Brandeis presumed as a first-order premise that the people hold the power to stop experimentation.<sup>161</sup> He did not say that, because experimentation is important, the power to stop it should be abridged. Surely Brandeis would not have advanced such a notion as he played a central role in the call for more democratic power against the state and industry.<sup>162</sup>

PEG then is a valuable resource for its own climate accomplishments and the way it can feed ideas into democratic conversations around government action. But if PEG achieves these environmental accomplishments without a space for complementary or countervailing democratic power, it has traded a first-order requirement (democratic power) for a second-order preference (experimentation).

### C. Displacement

In addition to putting environmental action ahead of democratic control, PEG has a real potential to make binding law less likely, thereby undermining the entire endeavor. PEG may ultimately displace essential government programs for two reasons. First, PEG might displace through its psychological impact. Second, it might displace because it will raise the costs of governance.

Recent studies have shown that initial engagement in pro-environmental behaviors can have a “negative spillover” on future pro-environmental behaviors, meaning that after undertaking a pro-environment practice, people are less likely to undertake further practices even when the initial behaviors have little utility and the future behaviors have great utility.<sup>163</sup> This research suggests that PEG may deter more complementary or more significant government action despite the fact that PEG advocates concede governmental programs are also necessary. Although there is not definitive proof that PEG will convince voters that public law is unnecessary, the rhetoric of anti-regulatory champions certainly reflects their belief that PEG projects, regardless of effectiveness, should displace the need for government action.<sup>164</sup> Senator

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<sup>161</sup> See *id.* (“[A] single courageous State may, if its citizens choose . . .”) (emphasis added).

<sup>162</sup> K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 11-13, 175-76 (2017).

<sup>163</sup> Alexander Maki, et. al., *Meta-analysis of pro-environmental behavior spillover*, 2 NATURE SUSTAINABILITY 307, 307 (2019); David Hagmann, Emily H. Ho, & George Lowenstein, *Nudging out support for a carbon tax*, 9 NATURE CLIMATE CHANGE 484, 484 (2019).

<sup>164</sup> E.g., Press Release, U.S. Env'tl. Protection Agency, *What They Are Saying About EPA's New Methane Proposal*, (Aug. 29, 2019), <https://www.epa.gov/newsreleases/what-they-are-saying-about-epas-new-methane-proposal> (reporting the statement of Sen. Jim Inhofe asserting that regulations are unnecessary because of voluntary industry activity) [hereinafter *Inhofe Statement*]; see *Interview with Andrea Thomas and Aron Cramer*, CLIMATE ONE (May 6, 2013), <https://www.climateone.org/audio/walmart-emit-less-live-better> (touting Walmart's voluntary

Inhofe has implied that voluntary measures make regulation unnecessary and corporate giants like Walmart have also suggested as much.<sup>165</sup>

This psychological displacement may be a by-product of PEG, but it may also be intentional. Surely there are firms that undertake PEG projects and regret any displacement those projects cause. It is hard to prove this assertion, but the Patagonia clothing company might be an example. Patagonia is a leader on PEG.<sup>166</sup> The company's founder, Yvon Chouinard, seems to be a genuinely dedicated environmentalist who has intentionally worked environmental protection into the very heart of his business.<sup>167</sup> But Patagonia's story is likely so prominent because Patagonia is an outlier.

Though there has been no empirical research on the subject, one might assume that deeply committed environmental companies are one extreme of the PEG spectrum. In the middle lies a large number of companies that are ambivalent about the broader impacts of their PEG projects. This ambivalence, though not its frequency, is evidenced by the understanding that many firms advance PEG for the financial, not environmental, benefits it provides.<sup>168</sup>

On the far end of the spectrum from Patagonia lie those companies that intentionally engage in PEG to avoid, displace, or undermine regulation. The story of U.S. Steel in the introduction to this Article highlighted the long, unremarked history of passive PEG, but here we are talking about regressive, or anti-environmental private governance: private governance aimed at avoiding or undoing environmental law. There can be no doubt that such a thing exists.<sup>169</sup> Sociologist Justin Ferrell, for example, has conducted a quantitative text-analysis to demonstrate that corporation-funded campaigns are designed to undermine climate change science and

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efforts during a period when Walmart was also seeking to avoid the deeper, mandatory, emissions cuts that might have come from federal law) [hereinafter *Walmart Interview*]; Marc Gunther, *Why Corporate America Is Reluctant to Take a Stand on Climate Action*, Apr. 2, 2015, THE GUARDIAN, <https://www.theguardian.com/sustainable-business/2015/apr/02/corporate-america-climate-change-fight-epa> (documenting Walmart (and other corporate) opposition to climate change policy) [hereinafter *Corporate Reluctance*].

<sup>165</sup> *Inhofe Statement*, *supra* note 165; *Walmart Interview*, *supra* note 165; *Corporate Reluctance*, *supra* note 165.

<sup>166</sup> Press Release, U.N. Environment Programme, *US Outdoor Clothing Brand Patagonia Wins UN Champions of the Earth Award*, Sept. 24, 2019, <https://www.unenvironment.org/news-and-stories/press-release/us-outdoor-clothing-brand-patagonia-wins-un-champions-earth-award#:~:text=From%20a%20small%20company%20making,of%20money%20to%20environmental%20causes>.

<sup>167</sup> See Nick Paumgarten, *Patagonia's Philosopher-King*, THE NEW YORKER, Sept. 12, 2016, <https://www.newyorker.com/magazine/2016/09/19/patagonias-philosopher-king>.

<sup>168</sup> ESTY & WINSTON, *supra* note 96; VANDENBERGH & GILLIGAN, *supra* note 6, at 392-93.

<sup>169</sup> *Inhofe Statement*, *supra* note 165; *Walmart Interview*, *supra* note 165; *Corporate Reluctance*, *supra* note 165.

foster climate change denial.<sup>170</sup> Perhaps unsurprisingly, while positive PEG may be well advertised,<sup>171</sup> the efforts of specific firms to undermine climate change progress are well hidden by schemes to shield donor identities.<sup>172</sup> Regardless of the number of firms engaged in regressive PEG, Ferrell's research suggests that displacement of public governance, including both existing and future law, is surely the very purpose of some PEG endeavors.

Further, and more structurally, PEG could also raise the cost of environmental action, thereby changing the political-economic calculus for public governance. The model PEG project will involve changes in firm behavior that achieve some environmental benefit.<sup>173</sup> For example, a firm may reduce its energy use<sup>174</sup> or earn a sustainability label for one of its products.<sup>175</sup> Those changes will come at an initial cost, though we should expect that they will ultimately also provide some financial benefit.<sup>176</sup> Energy savings may require investment in new technology but will ultimately reduce operating expenses. A given certification scheme may require new monitoring and reporting costs but will allow the firm to charge a premium for its products. The rational firm, even when motivated first by the preferences and values of leadership rather than market motivation, will seek to implement changes that provide the most benefit at the least cost.<sup>177</sup> This logic creates a PEG "dispatch order," in which each voluntary PEG program leaves only more expensive or less beneficial projects next-up on the menu of options.

Should the time come when the state is poised to again act on environmental protection, prior PEG efforts—championed because they are apolitical—would make government action less likely. Why? First, having undertaken low-cost PEG projects and being left with only the more expensive options, private firms will have less incentive to support binding state action because that option will likely come at a higher internal cost.<sup>178</sup> Second, for state action that relies on cost-benefit analysis

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<sup>170</sup> Justin Farrell, *Corporate Funding and Ideological Polarization About Climate Change*, 113 PROC. NAT. ACAD. SCI. 92, 96-97 (2016).

<sup>171</sup> Bruce Watson, *The Troubling Evolution of Corporate Greenwashing*, THE GUARDIAN, Aug. 20, 2016, <https://www.theguardian.com/sustainable-business/2016/aug/20/greenwashing-environmentalism-lies-companies>.

<sup>172</sup> Farrell, *supra* note 171, at SI Appendix 3-4.

<sup>173</sup> VANDENBERGH & GILLIGAN, *supra* note 6, at 119.

<sup>174</sup> *Id.* at 120.

<sup>175</sup> *Id.* at 150.

<sup>176</sup> See generally ESTY & WINSTON, *supra* note 96.

<sup>177</sup> E.g., Amartya Sen, *Rational Behavior in 6* THE NEW PALGRAVE DICTIONARY OF ECONOMICS 856-57 (2008).

<sup>178</sup> Though it is possible that technological or financial incentive changes since the initial project might marginally change this analysis.

prior to promulgation,<sup>179</sup> costs will outweigh benefits. This is because the costs of environmental law will be higher if the low-cost options are already complete, and the benefits will be lower if the high-benefit options are already complete. This calculation will imply smaller marginal societal benefit from new law. It will have the same effect as private firms lobbying against new regulations, though it will come not in the form of political pressure but seemingly neutral managerial calculations, making the anti-regulatory case in a way that seems objective and devoid of the politics of lawmaking or prior PEG actions.

In short, PEG can lead to accidental and intentional displacement, robustly influencing the politics of environmental protection. Despite protests that it is “beyond politics”, whether through hidden public disinformation campaigns, ugly legislative lobbying, or tidy cost-benefit analyses, PEG is a political heavyweight.

#### D. *The Narrative Trajectory of Environmental Law*

The weight is not merely imaginary. PEG positions itself as a new way of looking at environmental governance, but it is also a point on a long trajectory away from public governance. PEG, in other words, contributes to an anti-state, maybe anti-democratic narrative proving again that it is neither a wholly freestanding endeavor nor an apolitical one.

The narrative of environmental governance often begins with the New Deal, in which the proactive state emerged on a large scale.<sup>180</sup> By the 1960s and 1970s, there was skepticism growing on the left and right about the role of government.<sup>181</sup> On the left, that skepticism catalyzed greater public input into a government that was seen as favoring elite interests.<sup>182</sup> On the right, the skepticism came to a head in the Reagan Administration, which took a strong stand against regulation across the board.<sup>183</sup> The anti-regulatory sentiment of the 1980s did not bring about an immediate retreat from environmental law, but instead gave rise to environmental

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<sup>179</sup> For example, the Supreme Court has ruled that certain administrative rulemaking under the Clean Air Act requires the Environmental Protection Agency to undertake a cost-benefit analysis prior to agency action. *Michigan v. EPA*, 135 S.Ct. 2699, 2710-11 (2015). The requirement for cost-benefit analysis could also be explicit in the substantive statute. *E.g.*, Safe Drinking Water Act, Pub. L. No. 104-182, § 1(a), 10 Stat. 1936 (codified as amended at 42 U.S.C. § 300g-1(b)(3)(C)(i-iii) (2018)); *see* Lisa Heinzerling, *Cost-Nothing Analysis: Environmental Economics in the Age of Trump*, 30 COLO. NAT. RES., ENERGY & ENVTL. L. REV. 287, 288 (2019).

<sup>180</sup> *E.g.*, Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 422 n.1 (1987).

<sup>181</sup> Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1681-82 (1975).

<sup>182</sup> *Id.*

<sup>183</sup> *Deregulation Then and Now*, REGULATORY REV., Mar. 11, 2019, <https://www.theregreview.org/2019/03/11/deregulation-then-and-now/>.

law that promised to look less like law. The Clean Air Act Amendments of 1990 are the prime example.<sup>184</sup> The acid rain trading program offered a market-mimicking strategy for reducing air pollution in lieu of earlier clean air strategies that relied on mandated performance and technology.<sup>185</sup> Cap and trade was distinctly law, but it was less law-*ish*. During the Clinton administration the trajectory moved slightly further from traditional regulation by introducing ideas of pragmatic New Governance that welcomed public-private collaboration.<sup>186</sup> Examples of this include the Negotiated Rulemaking Act<sup>187</sup> and Project XL. The latter was a pilot program in which the Environmental Protection Agency agreed to relieve private industry of the burdens of regulation if the industry could achieve the same results using its own strategies.<sup>188</sup> The next step was privatization of many government functions, like site inspections.<sup>189</sup>

The trajectory I am tracing here begins with a visible and central role for the state, then injects more participation into state decision making to account for private and public interests. Next, regulation becomes “lighter” by re-creating markets. Then regulation becomes a collaboration between government and regulated industries—the regulation remains regulatory, but turns to private hands. Today, we are in a state where regulation fades and private governance emerges. This trajectory contributes, fairly or unfairly, to the skepticism of democracy and is self-reinforcing, as it likely also results from the widespread skepticism that has been around for years. Consider Rahman, for example:

Despite the near-universal lip service to the idea of democratic rule of the people in American politics, the reality is that much of contemporary political discourse has absorbed and internalized a deep skepticism of democracy’s effectiveness and desirability . . . .For some it is the market

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<sup>184</sup> Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified as amended at 42 U.S.C.A. §§ 7401-7671).

<sup>185</sup> Joshua Galperin, *Thirty Years of Third-Stage Environmentalism*, HUFFINGTON POST, Nov. 28, 2016, [https://www.huffpost.com/entry/thirty-years-of-third-stage-environmentalism\\_b\\_583c7fc5e4b037ba5d6ae4ad](https://www.huffpost.com/entry/thirty-years-of-third-stage-environmentalism_b_583c7fc5e4b037ba5d6ae4ad).

<sup>186</sup> *E.g.*, President William J. Clinton, Remarks Announcing the Initiative to Streamline Government (Mar. 3, 1993), available at <http://govinfo.library.unt.edu/npr/library/speeches/030393.html> (“The Federal Government simply can’t do everything and there are many things the States or the private sector could do better.”).

<sup>187</sup> Negotiated Rulemaking Act, Pub. L. No. 101-648, 104 Stat. 4969 (1990) (codified as amended at 5 U.S.C. §§ 561-570).

<sup>188</sup> Project XL, U.S. EPA, <https://archive.epa.gov/projectxl/web/html/index.html>.

<sup>189</sup> Robert L. Glicksman & David L. Markell, *Unravelling the Administrative State: Mechanism Choice, Key Actors, and Regulatory Tools*, 36 VA. ENVTL. L.J. 318, 368 (2018).

that appears more likely to produce socially desirable outcomes and be robust to capture.<sup>190</sup>

These words plainly show that PEG has become important because of the skepticism, and also bolsters the skepticism, of democracy.

Though we can assert and sincerely believe that PEG is not a replacement for public governance but merely a buttress or temporary fallback,<sup>191</sup> that is not the political narrative into which it falls. Whatever role we want PEG to play, its political place is not something any individual chooses. This is partly why the democratic practice described in the third section of this Article is so important. A structure for collective choosing allows us to be explicit about the trade-off between private volunteerism and public direction, and even provides some level of control over the way we use information. Whether or not we have the right structure, we are still engaged in politics, so the goal is to make politics work.

The goal of this section was to demonstrate that PEG is not free from politics, the politics of state action is not free from PEG, and therefore democracy is necessary for PEG. The following section continues down this path, arguing that not only is PEG political, but it involves many complex choices demanding democratic consideration.

#### IV. CHOICES

PEG recommends a path “beyond politics” but that path is not viable because politics is not merely an obstacle—politics is all there is. Any path will lead us directly into the mouth of politics. In the words of Professor Kysar, “[r]esponsibility is unavoidable”<sup>192</sup> and all our choices have moral content; none bypass the complexity of collective reality. The choice to rely or not rely on private governance is a political choice. It is just a choice to use or not use the democratic processes of the state.

From the state perspective, inaction is a political choice because “[a] policy of nonintervention is as political as any other.”<sup>193</sup> From a more universal vantage, it is a collective choice to attack problems through the state or through non-state actors. A collective decision to pursue PEG rather than state governance is a political decision even if it is not a government decision and even if it is not an affirmative decision. Of course, one response to this line of thinking is that wherever government is in a position to supplant PEG but does not, that *is* a democratic action.

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<sup>190</sup> RAHMAN, *supra* note 163, at 4.

<sup>191</sup> VANDENBERGH AND GILLIGAN, *supra* note 6, at 383.

<sup>192</sup> KYSAR, *supra* note 149, at 16.

<sup>193</sup> MCCONNELL, *supra* note 31, at 247.

Inaction is also an option for the institutions of government. Narrowly, this is probably true: the availability of state-sponsored democratic practice means that failure of the state to act is a species of collective choice. The problem, however, is that PEG asks us to sidestep state institutions for democratic decision making. Government inaction with regard to PEG, then, is not always the result of democracy—it may be the result of inattention to democracy.

In this section, I do not argue that turning to PEG is a bad choice. I argue instead that we must recognize the necessity of making political choices because there is no neutral and irreducible principle that can autonomously answer for us. Because we must choose, we must have a forum for collective choice. That forum is democracy. Because PEG does not let us escape political choices, we have yet another trigger for democratic assessment of PEG.

To build the case that environmental policy forces us to make collective choices best addressed with democratic institutions, I consider and reject three “rules” on which some might wish to rely as natural mandates for environmental policy that would allow us to escape political choices and joint responsibility. There is not a rule of distinction between public and private action, not a rule of natural balance, and not a rule of quantifiable aggregate welfare. These false rules incorrectly merge “is” and “ought,” supposing that what we think we know about the natural order of the world tells us what the law must be.<sup>194</sup> They are just samples of the sort of foundationalist objectification that tries, but fails, to constrain discretion, truncate choice, and make the effort and responsibility of democracy unnecessary.

#### A. *Revisiting the Public-Private Distinction*

The first place we might wish to find easy answers could be the seemingly natural ordering of the market. For generations, many have operated under a belief that there are two distinct spheres of human operation, the public sphere and the private sphere.<sup>195</sup> If this premise were true, then we could practice politics with an easy rule: the public should not interfere with the private but for exceptional circumstances. Those

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<sup>194</sup> RAYMOND WACKS, *PHILOSOPHY OF LAW: A VERY SHORT INTRODUCTION* 13 (2d ed. 2014).

<sup>195</sup> David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 1 (2015); Freeman, *supra* note 22, at 588; William W. Buzbee, *Accountability Conceptions and Federalism Tales: Disney’s Wonderful World?*, 100 MICH. L. REV. 1290, 1302 (2002);

CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD’S POLITICAL-ECONOMIC SYSTEMS* ix (1977); ROBERT L. HALE, *FREEDOM THROUGH LAW* vii (1952); *see* KYSAR, *supra* note 149, at 51.

circumstances might include market failure where private-private interactions produce negative externalities that only the public sphere could remedy through coercion.<sup>196</sup>

As it is at the heart of an argument for democratic control of PEG, I again reiterate that the problem with using the public-private distinction is that the distinction is much less defined than popular accounts suggest. Private markets are not free of government.<sup>197</sup> Government is not even free of private markets.<sup>198</sup> Government establishes, develops, and enforces the currency of private markets: the law of property, contract, and tort.<sup>199</sup> Government also shapes corporate behavior,<sup>200</sup> and consumer preferences.<sup>201</sup> “[M]arket demands themselves do not spontaneously spring up, they have to be nurtured by government,”<sup>202</sup> nurtured by public road building, corporate chartering, limits on or permission for unionization, allowance of some monopolies, protections of speech, state law preemption, and so many other areas where public choices and laws weigh on “private” inclinations.<sup>203</sup> Without this basic level of coexistence private markets could not function. At a more complex level government raises taxes, offers subsidies and tax incentives, and in many other ways distributes the resources that allow meaningful participation in markets. Neither at the fundamental level nor at the level of contemporary practice are the public and the private distinct in ways that lets us chart a neutral or consistent path. Instead, we have to choose our direction and then chose it again at each intersection.

### B. *Nature Is No Guide*

The second place we search, in vain, for easy answers is the ordering of nature. The ideal of this fixed end is to reduce our political debate to ecological principles, with the grandest and most hallowed guide among those principles being the “balance of nature.” “At one time, a comforting balance-of-nature paradigm promised continued, steady ecological

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<sup>196</sup> Grewal & Purdy, *supra* note 196, at 6.

<sup>197</sup> Grewal & Purdy, *supra* note 196 at 15-16; Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 140 (2019).

<sup>198</sup> Freeman, *supra* note 22, at 547; *see generally* Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. 467 (2020) (describing various forms of hybrid public-private governance, focusing primarily on law that requires private firms to act as enforcement authorities with respect to other private actors with which they do business).

<sup>199</sup> Grewal & Purdy, *supra* note 196, at 16.

<sup>200</sup> *E.g.*, Light, *supra* note 198, at 140 (explaining that government shapes environmental law not only through environmental laws, but through corporate law, securities regulation, antitrust, and bankruptcy.)

<sup>201</sup> *See* LINDBLOM, *supra* note 195, at 173.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 174.



services.”<sup>204</sup> The vision of a steady environmental system led environmental thinkers to propose an environmental politics with the prime directive of non-interference or, if interference was unavoidable or inadvertent, restoration of the natural balance.<sup>205</sup> But there is no balance of nature, there never was.<sup>206</sup> Nature is in constant flux, dynamism the watchword, not stability, which is how we explain emergent processes as magnificent as evolution.<sup>207</sup> The idea of balance, if it ever were real, is certainly put to rest when we consider the modern concept of the Anthropocene, in which human activity impacts, or is integrated with, literally every aspect of the natural world.<sup>208</sup> There is no nature distinct from humanity and no external balance that humanity can pursue.

Just as the discrete line between public and private was a fiction that could guide but not dictate political goals, we might choose to try to create a balance of nature. That is a perfectly proper normative goal, but it should not claim positive natural origins. Some critics point to the foundational environmental laws of the 1970s and complain that those laws are solidly pointed towards restoring a balance with which humans had long interfered.<sup>209</sup> That could be an indictment of the laws, but it could also be evidence of a political choice based not on what nature commanded, but what people chose. In this latter view, the idea of balanced nature does not command fidelity. But maybe a collective will has shaped a myth of balanced nature that reflects our preferences rather than our predestination, because the reality of nature is not necessarily what people want.<sup>210</sup> Regardless, the point is to forget nature as a ukase that demands any possible path to environmental progress and to reconceive nature as a source of innovation and contestation.<sup>211</sup>

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<sup>204</sup> Robert L. Fischman, *Letting Go of Stability: Resilience and Environmental Law*, 94 *IND. L.J.* 689, 690 (2019).

<sup>205</sup> *Id.*

<sup>206</sup> See generally OSWALD J. SCHMITZ: *THE NEW ECOLOGY: RETHINKING A SCIENCE FOR THE ANTHROPOCENE* (2017) (explaining the long fascination with balance of nature in environmental science); PURDY, *AFTER NATURE*, *supra* note 22 (tracing the history of environmental thought and how fixed views of nature are disrupted in a world where humans exert such obvious control over all of Earth's systems.)

<sup>207</sup> E.g., CHARLES DARWIN, *ON THE ORIGIN OF SPECIES* (1859) (introducing the idea that through constant change at the organismal level, entirely new species emerge).

<sup>208</sup> See generally, PURDY, *AFTER NATURE*, *supra* note 22.

<sup>209</sup> Fischman, *supra* note 205, at 708.

<sup>210</sup> *Id.* (explaining that the reality of nature is unpredictable but that people strive for law that creates predictability).

<sup>211</sup> See PURDY, *AFTER NATURE*, *supra* note 22, at 194.

### C. *Math Is No Substitute*

The third, and final, place to fruitlessly toil for easy answers is welfare economics. Welfare economics is in some ways the embodiment of a classical but also radically liberal ideal that individualism is all there is.<sup>212</sup> The insistence on thinking only of the individual and no emergent society, culture, or polity allows the welfare economist to identify public goals by aggregating individual preferences and using the aggregate to produce state policy.<sup>213</sup> In other words, the state can quantify the internal preferences of individuals, calculate an optimum policy and optimum tools for pursuing that policy, thereby withdrawing from any fraught public deliberation and erasing the need to make difficult choices.

The problems of this easy answer come in a practical and theoretical register. The practical problems are extensive, and include the impossibility of actually quantifying individual preferences, comparing those vastly different preferences, and ultimately, figuring out how to do the math.<sup>214</sup> The theoretical problem, more important for the purposes of this analysis, is that welfare maximization begins and ends with individual preference rankings and quantification. By zeroing in on the individual as the source of value it becomes impossible to account for political others: we cannot account for the desires of people outside of our political jurisdiction, for future generations, or for nonhuman life.<sup>215</sup> The rhetorical simplicity of knowing what we must do by measuring what we want covers up the yawning void implicit in “we,” because the individuals measured cannot include all the individuals who may be subject to law.

The other theoretical problem is even more tethered to the need for robust democratic awareness at the heart of this Article. Welfare maximization assumes that we can measure individual wants and then calculate collective goals. But this assumption ignores that the process of calculating, deliberating, and reasoning shapes values and preferences.<sup>216</sup> Neither exists ignorant and independent of the other.<sup>217</sup> In short:

[The] calculus of choice is premised on the notion that public policy should impartially and objectively reflect the determinants

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<sup>212</sup> See KYSAR, *supra* note 149, at 15 (describing welfare economics and welfare maximization as rooted in individualism).

<sup>213</sup> *Id.* at 15, 71.

<sup>214</sup> See generally, FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2002) (detailing the functional problems of cost benefit analysis).

<sup>215</sup> KYSAR, *supra* note 149, at 18.

<sup>216</sup> *Id.* at 15.

<sup>217</sup> *Id.*

of individual well-being, paying no heed whatsoever to goals or interests that are articulated at the collective level. The approach seeks precisely to eliminate collective discretion and judgement by formalizing and determining—empirically—the content of public policy according to individual welfare consequences.<sup>218</sup>

Welfare economics produces something real, something that might be a useful guide, but that has no claim to objective reality or fundamental certainty. Like the public-private distinction or the balance of nature, it is just a guide or a helpful myth, and it does not relieve us of the hard work of choosing our futures.

#### D. What Should We Do?

The specific point here is that the first principles of some environmental thinking get us no further than first base. The general point is that objectivist governance, public or private, is not realistic. This is not to say that real knowledge, even certainty, about the world is impossible, just that where there is certainty it can provide us only the “is” and not the “ought.”<sup>219</sup> If our knowledge about the world gave us an ought we would only need to ask “what shall we do?” as in, what is *necessary* to get to a predetermined goal?<sup>220</sup> What is necessary to reduce greenhouse gas emissions by 5 billion tons annually? Choosing tools is a relatively easy endeavor.<sup>221</sup> Instead, we are asking “what should we do?” as in, what ought we aim for, what do we prefer, what do we want?<sup>222</sup>

The core assurance of each of the three arguments I have considered in this section is that they can provide us with an unassailable definition of a public good and from there we need only develop effective instruments to work towards that good. This makes democratic efforts much simpler, if not totally unnecessary. With this framing we can identify three ways to define a public good, three ways that the foundationalist principles we have rejected might have informed a fixed common goal. The objectivist definition of a public good holds that the public good is a “determinant object” on which we must agree.<sup>223</sup> Identifying a balance of nature that is quantifiable and meaningful would have fit within this definition. The welfarist meaning of public good takes on a part of what we are aiming for in this section, admitting that the

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<sup>218</sup> *Id.* (emphasis removed).

<sup>219</sup> See James L. Huffman, *Protecting the Environment from Orthodox Environmentalism*, 15 HARV. J. L. & PUB. POL'Y. 349, 354–57 (1991).

<sup>220</sup> RICHARDSON, *supra* note 23, at 136.

<sup>221</sup> MCCONNELL, *supra* note 31, at 46.

<sup>222</sup> RICHARDSON, *supra* note 23, at 136.

<sup>223</sup> *Id.* at 38.

public good is indeed a subjective idea, yet while the welfarist public good has no “settled content . . . it does have settled form:” the aggregation of individual preferences.<sup>224</sup> This looks something like the public good we might be forced to accept if we relied on only quantifiable human preferences to answer our biggest collective questions. To Henry Richardson, there is a third option, the “liberal public good,” which is an identifiable goal, but unlike the objectivist and welfarist definitions, the liberal good is never fixed. The liberal public good is not independent of the actual content of the public.<sup>225</sup> Thus, where the objectivist good is a fixed object and the welfarist good is a calculated subject, both emerge from some source other than a self-aware, reasoning public.<sup>226</sup> The liberal public good results from collective deliberation and shifts with that deliberation—the deliberation is an ingredient in the good, or a step in the recipe. While Richardson calls this the Liberal Public Good, I might call it the Democratic Public Good to distinguish it from the classical and neoliberal foundations of welfarist versions. Regardless, the point is clear: public decision making is not a purely or even primarily objective or scientific project with certain answers. It is a project of attentive interaction.

When called “scientific governance,” the idea of totally objective policymaking is attributed to early 20<sup>th</sup> Century Progressives.<sup>227</sup> In that context, Progressives believed that by isolating a reducible public interest or public good they could then apolitically work towards that goal.<sup>228</sup> We should reject the pursuit of objectifying societal ends whether under the Progressive, neoliberal, or ecological flag. But we should not turn away from the Progressives just yet, because the scientific governance, the easy answers and neutral principles they might have applied, was hardly based on a Progressive consensus. The purpose of Progressive scientific governance was to limit discretion—that is, to limit choice—because the Progressives saw private power as too dominant and therefore saw government decisions as the choices only of the powerful.<sup>229</sup>

Recent scholarship is highlighting another aspect of Progressive thought, also sparked by a desire to recognize and tamp down unequal power. This scholarship rejects the Progressive idea that we can control power by avoiding choice and instead focuses on the Progressive efforts

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<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> MCCONNELL, *supra* note 31, at 43, 281.

<sup>228</sup> *Id.* at 43.

<sup>229</sup> *Id.*

to articulately and intentionally redistribute power.<sup>230</sup> Dewey, the pragmatic critic of foundationalism and champion of social deliberation was one of the leading Progressives to avoid objectification as a means of tidying-up social decision making.<sup>231</sup> “It is democracy, according to John Dewey, that is the cauldron in which goals and values are conjured, established, communicated, tested, and ultimately implemented.”<sup>232</sup> When we reject foundationalist neutrality as a path certain to lead us to the objectively right social choice, we are left with the impossible but indispensable task of choosing. “For understanding political choices,” wrote Charles Lindblom (an economist and management scholar, not a Progressive idealist), “we need a concept that will identify not a datum, but an emergent act of will.”<sup>233</sup> That concept is democracy. And democracy was also Dewey’s model for collective choosing. Because environmental protection leaves us with so many choices, and because PEG, as a political endeavor, does not let us escape those choices, it is necessary and appropriate to question whether PEG is sufficiently democratic. This section and the prior thus offer triggers for democracy—politics and choice—and urge that in neither case should PEG escape democratic treatment. The following section adds a third and final call for democracy, making the case that PEG, even as a nominally private endeavor, can infringe liberty, and the infringement of liberty is also an appropriate trigger for democratic practice.

## V. LIBERTY & POWER

Liberty and democracy are not the same thing. Liberty “is principally concerned with the area of control, not with its source.”<sup>234</sup> Democracy is a potential source of control, a form of self-governance that may or may not protect liberty.<sup>235</sup> But, where liberty is at stake, democratic governance can serve as a collective tool to either agree that a limitation on liberty is appropriate or to use the power of a democratic state to stop the infringement. Infringement on liberty is a risk when there is a greatly unequal distribution of power.

In democracies, people have inherent tools to exercise power against, or retract power from, the state. Whether the same is true in PEG is an open question. This section argues that in addition to being a matter of

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<sup>230</sup> *E.g.*, RAHMAN, *supra* note 163, at 33; BLAKE EMERSON, *THE PUBLIC’S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* 28 (2019).

<sup>231</sup> Galperin, *Trust Me*, *supra* note 133, at 436, 438-39; EMERSON, *supra* note 231, at 93-94.

<sup>232</sup> Galperin, *Trust Me*, *supra* note 133, at 438-39 (citing DEWEY, *supra* note 17).

<sup>233</sup> LINDBLOM, *supra* note 195, at 135.

<sup>234</sup> ISAIAH BERLIN, *LIBERTY* 176 (Henry Hardy ed., 2002).

<sup>235</sup> *Id.*

collective political choices, PEG is also a matter of liberty and power, and, as such, democratic consideration is necessary. In broad terms, the choices that trigger democracy are social choices, exercises of power over society, that impact liberty.<sup>236</sup>

#### A. *Defining Liberty*

There are two key competing definitions of liberty today, but each of them can recognize PEG as a potential limitation on liberty. And each of today's dominant views is best understood in light of an earlier view. Writing of this earlier conception of liberty, Hobbes explained that liberty exists where external forces do not prevent people from acting as they have chosen to act.<sup>237</sup> If a person in debt has chosen to pay the debt for fear of going to prison, Hobbes explained, that person still has liberty.<sup>238</sup> Default may have grave consequences and may effectively eliminate the choice not to pay, but the fact that a choice is shaped by those consequences is irrelevant to Hobbes' vision.<sup>239</sup> Regardless of circumstances, there is liberty in this view so long as the person chooses to pay the debt and there is no frustration in that choice.<sup>240</sup>

In a line of argument that has since overtaken the Hobbesian view, Isaiah Berlin explained that the older vision of liberty was too narrow.<sup>241</sup> Illustrating the distinction between Hobbes and Berlin, Philip Pettit uses the metaphor of liberty as a set of doors.<sup>242</sup> Hobbesian liberty means that if a person chooses to walk through door A, because she knows door A is unlocked and the other doors are locked, then there is complete liberty despite the fact that the locked doors shaped the choice to go through door A.<sup>243</sup> In Berlin's view, more is necessary than just the ability to do what you end up choosing to do, because that choice may be entirely predetermined by circumstances, such as knowing that all the other doors are locked.<sup>244</sup> Berlinian liberty, then, is a liberty of non-interference, and demands that there is freedom to go through any of the doors.<sup>245</sup> It is not enough that the door chosen happens to be open because, by locking a

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<sup>236</sup> See, PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 183-87 (1997) (explaining that contestability, as a central feature of democracy, arises to protect liberty as defined as non-domination) [hereinafter *REPUBLICANISM*].

<sup>237</sup> THOMAS HOBBS, *LEVIATHAN* 117 (Dover Thrift ed., 2018).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> Philip Pettit, *The Instability of Freedom as Noninterference: The Case of Isaiah Berlin*, 121 *ETHICS* 693, 698 (2011) [hereinafter, Pettit, *The Instability of Freedom*].

<sup>242</sup> *Id.* at 698, 704.

<sup>243</sup> *Id.* at 698-702.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

single door, there has been an interference with free choice and thus with liberty.<sup>246</sup>

Berlin's definition of liberty fits within the assertion that each of us achieves individual freedom—liberty—when there is an “absence of interference.”<sup>247</sup> Interference includes being subject to orders and sanctions.<sup>248</sup> Thus, when the state tells you that you must drive at a certain speed or install pollution control devices, that is interference with otherwise uninhibited choice. In this non-interference view “there is nothing inherently oppressive about some people having dominating power over others . . . .”<sup>249</sup>

Non-domination is a modern and alternative view of liberty, for which Philip Pettit is a leading advocate. Pettit argues that interference is not the primary concern of freedom; instead, it is that circumstances leave some vulnerable to the will of others.<sup>250</sup> One is dominated when subject to the uncontrolled wishes of another.<sup>251</sup> In the non-domination conception of liberty the concern is not only actual interference, but the ability to interfere, whether or not interference happens.<sup>252</sup> In that respect, if the state has the right to inspect a facility at any time, it dominates the facility operator by holding the ability to enter the property, interfering with their right to exclude even if the government does not exercise its right to inspect.<sup>253</sup>

The door metaphor that Pettit used to explain Hobbesian and Berlinian liberty also helps illustrate Pettit's preferred non-denomination description of liberty. In the Hobbesian view, a person has liberty if they chose a door that is unlocked, even if they select that door because they know that it is the only option available.<sup>254</sup> In the Berlinian view, a person has liberty if all the doors are unlocked.<sup>255</sup> In Pettit's view, the doors must all be unlocked and there must not be a doorkeeper with the ability to keep you away.<sup>256</sup> The fact of the doorkeeper's presence, of the

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<sup>246</sup> *Id.*

<sup>247</sup> PETTIT, REPUBLICANISM, *supra* note 237, at 9; *Liberalism*, STAN. ENCYCLOPEDIA OF PHIL. (Online Edition 2019) <https://plato.stanford.edu/entries/liberalism>.

<sup>248</sup> ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 44-45 (2017).

<sup>249</sup> PETTIT, REPUBLICANISM, *supra* note 237, at 9.

<sup>250</sup> *Id.* at 5; EMERSON, *supra* note 231, at 89-90, 159.

<sup>251</sup> PETTIT, REPUBLICANISM, *supra* note 237, at 5.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* (describing domination as the ability to interfere not necessarily active interference).

<sup>254</sup> Pettit, *The Instability of Freedom*, *supra* note 242, at 698, 704.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 704.

doorkeeper's ability to stop free choice, is a domination, whether or not the doorkeeper actually blocks a door.<sup>257</sup>

*B. Public and Private Burdens on Liberty*

The definitions of both interference and domination highlight that restrictions on liberty, however conceived, can come from private (insofar as it is non-state) power.<sup>258</sup> The state may dominate by having the power to enter property, and it may interfere by mandating certain behaviors. "The particular coercive power of the state—to impose financial penalties, withhold benefits, condemn our property, throw us in jail—is undeniable,"<sup>259</sup> but it does not follow that private coercive power does not exist. There has long been a presumption that deference to the private sphere will "eliminate the phenomenon of power," whether that power is domination or interference, but "powers exist in the hands of [private] groups . . . powers over matters affecting the larger community."<sup>260</sup>

One might argue that something akin to private interference and domination is real but, unlike government control, they are always essentially voluntary and therefore not properly regarded as infringement on individual liberty.<sup>261</sup> At best this is only formally true. In practice, the demands of an uneven economy do not allow most people to escape the dominance or interference of their employer by quitting or forgoing a job, even if the employer limits the employee's liberty based formally on a voluntary employment contract.<sup>262</sup> If one cannot afford to go without work, one is not engaged in a fully voluntary agreement.<sup>263</sup>

Our choices in the private sphere are voluntary in a thin sense. They are limited by our capacities and they are always shaped by social norms. So private choices are not only not fully voluntary, they are never purely individual.<sup>264</sup> Choices are also shaped by relative needs, that is, relative to others in society. "[M]any individuals in the market do not determine their own purposive activity. Instead their agency is shaped by exogenous, unknown, and often averse circumstances,"<sup>265</sup> making the formally voluntary nature of those choices an excuse to ignore them

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<sup>257</sup> *Id.* at 705, 709.

<sup>258</sup> EMERSON, *supra* note 231, at 159-60; RAHMAN, *supra* note 163, at 13, 56.

<sup>259</sup> Freeman, *supra* note 22, at 551.

<sup>260</sup> MCCONNELL, *supra* note 31, at 5.

<sup>261</sup> See ANDERSON, *supra* note 249, at 52-53 (citing Ronald Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 388 (1937)); RAHMAN, *supra* note 163, at 13.

<sup>262</sup> ANDERSON, *supra* note 249, at 53-54.

<sup>263</sup> *Id.* at 52-56.

<sup>264</sup> EMERSON, *supra* note 231, at 160.

<sup>265</sup> *Id.* at 161.



rather than a reflection of a reality in which “a confluence of human-made rules . . . constrains the prospects for individual well-being.”<sup>266</sup>

### C. PEG As Interference and Domination

In the environmental context, the formalist contrivance of free and equal bargaining is a non-starter. There is no purported negotiation and contracting over the global climate, sea level rise, waste, etc. Private actors have largely unfettered control over many environmental resources, not least of which is the global climate.<sup>267</sup> When private firms make private decisions about how to treat this type of global resource, they can dominate, by holding the power to control the global climate, to force changes in lifestyle and consumption. Private actors can dominate by holding the power to, for instance, determine which consumers will be able to buy products and services to help adapt to climate change. Private firms can even determine whether those products and services are available at all. They can dominate to the extent we need their good graces to maintain water or food supplies or power our homes with renewable energy. Private actors can also interfere, for example, by contributing to rising seas that may make our homes uninhabitable, interfering with our choice of where to live, how to adapt, where to seek safety and comfort. Outside of the environmental context private actors may interfere by mandating exactly what we do at work and limiting our hobbies outside of work,<sup>268</sup> but with respect to climate change, they can interfere by contributing to the warming and drought that take away our choice to live on today’s coast or in arid climates, our choice to work in or enjoy certain industries like winter recreation, or even drink tap water, go outside when we want, or grow and eat the food we prefer.

I doubt there can be much skepticism about the ability of private firms to interfere with and dominate our interactions with the natural world. Nevertheless, some concrete examples may help put a finer point on the issue. In the United States roughly half the population, over 160 million

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<sup>266</sup> RAHMAN, *supra* note 163, at 13.

<sup>267</sup> See, e.g., VANDENBERGH & GILLIGAN, *supra* note 6, at 5 (explaining that private firms could help reduce climate changing emissions by 3 billion tons and thereby implying that private firms alone have substantial control over the global average temperature and the future of climate stability). I have a memory of attending a talk at which Professor Vandenberg recounted when Willie Sutton was asked why he robbed banks. “Because that’s where the money is,” Sutton replied. In my memory, Mike said something like the following: Private firms are Sutton’s banks. We need to approach private firms because that is where the pollution is. Unable to find a reference to or transcription of this talk, I asked Mike if he remembered it. He said he could imagine himself saying that, but he didn’t think he had. Since Mike isn’t willing to take credit for the Sutton reference, I will take the credit. Why is PEG important? Because that is where the power is.

<sup>268</sup> ANDERSON, *supra* note 249, at 49-50.

people, live on the coasts, supporting 66 million jobs and producing well over half the country's GDP.<sup>269</sup> Climate change, however, poses a serious threat to the coasts.<sup>270</sup> Faced with the threats of climate change, coastal residents and businesses have a number of choices. People on the coast may choose to do nothing. Much like the result of not paying Hobbes' debt, doing nothing is one option, but the threat of complete destruction from storm surges or rising seas violently interferes with that choice.<sup>271</sup> Private firms, with control over at least 3 billion tons of greenhouse gas emissions annually,<sup>272</sup> are the actors who dominate by making that choice realistically impossible and arguably interfere by taking away the genuine choice to stay.

Climate change's threat to coastal communities is hardly constrained to limiting the choices of vacation beach communities. Indigenous people along coasts, including in the United States, are doing the astounding work of adapting their lives to a changing climate. The Alaska Native Village of Kivalina has been preparing for decades to address the rising seas that result from private emissions of greenhouse gases.<sup>273</sup> The people of Kivalina have a variety of choices, but their choices are both obviously and subtly structured by the imperious power of the private firms that contribute to the rising seas, offer promises of improvement through green products that are not available in the most remote regions of Alaska, and produce the material that has so far failed to protect the community from coastal erosion.<sup>274</sup> As a result, the Native Village of Kivalina is hard at work relocating. Relocating homes, finding ways to retreat during the worst storms, rebuilding their school on higher ground, and seeking locations for a new permanent village.<sup>275</sup> These are emotional and staggeringly complex efforts that are heavily weighted by the relationship between the people of Kivalina and those who have the power to mitigate climate change and provide adaptation tools.

If climate change is too abstract, there are more concrete examples. The Marine Stewardship Council certifies sustainable fisheries and major retailers like Walmart only source MSC-certified seafood.<sup>276</sup> But seafood

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<sup>269</sup> Joshua Ulan Galperin, *Raisins and Resilience: Elaborating Horne's Compensation Analysis with an Eye to Coastal Climate Change Adaptation*, 35 STAN. ENV. L.J. 3, 4-5 (2016).

<sup>270</sup> *Id.* at 5.

<sup>271</sup> *See, e.g., id.* at 27 (describing the devastation of coastal storms).

<sup>272</sup> VANDENBERGH & GILLIGAN, *supra* note 6, at 5.

<sup>273</sup> *Relocating Kivalina*, U.S. CLIMATE RESILIENCE TOOLKIT, <https://toolkit.climate.gov/case-studies/relocating-kivalina> (last visited Mar. 9, 2021).

<sup>274</sup> *Id.* (identifying a variety of projects, including public-private partnerships all of which rely on some degree of private engagement through raw material, labor, or investment).

<sup>275</sup> *Id.*

<sup>276</sup> Vandenberg, *Private Environmental Governance*, *supra* note 3, at 150.

bearing the MSC logo sells at a premium.<sup>277</sup> MSC and retailers like Walmart dominate those consumers because economic institutions are set up in such a way that the average consumer has little power to address sustainable seafood without MSC and Walmart's permission; they must spend more money and accept the MSC label. We can see the same domination on the other side of the supply chain. The owner of a small fishing fleet may bristle at the MSC program because it is not sustainable enough,<sup>278</sup> or because it is too expensive to participate,<sup>279</sup> or because she simply does not care about sustainability. But the economic system is such that the owner of this small fleet may need permission from the world's largest retailers before she can sell her catch and many will not grant that permission if she does not attain MSC certification.<sup>280</sup>

To bring the examples closer to home, PEG may also interfere with and dominate those who wish to access open spaces or have encounters with animals in nature. The male Attwater's Prairie Chicken performs a stunning courtship dance that has long caught the eye of both females of the species and conservationists.<sup>281</sup> But the species is critically endangered today.<sup>282</sup> If we want to visit the species, we need permission from private landowners like the Nature Conservancy.<sup>283</sup> The power to exclude from nature is the power to dominate. Moreover, the Nature Conservancy not only has the power to welcome or exclude, it also has the power to maintain or further endanger the Attwater's Prairie Chicken,<sup>284</sup> giving this large organization the power to interfere with the ability to ever again see this bird in nature.

This private power to dominate and interfere demonstrates how liberty is at stake in PEG, but it can also demonstrate that constraints on liberty often fall unevenly, making some form of accessible and equitable democratic control even more important. Pollution trading programs have

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<sup>277</sup> Daniel Zwerdling & Margot Williams, *Is Sustainable-Labeled Seafood Really Sustainable?*, NAT. PUB. RADIO, Feb. 11, 2013, <https://www.npr.org/2013/02/11/171376509/is-sustainable-labeled-seafood-really-sustainable>.

<sup>278</sup> E.g., Frank Wijen & Mireille Chiroleu-Assouline, *Controversy Over Voluntary Environmental Standards: A Socioeconomic Analysis of the Marine Stewardship Council*, 32 ORG. & ENVTL. 98, 104-05 (2019).

<sup>279</sup> *Id.* at 102.

<sup>280</sup> See Vandenbergh, *Private Environmental Governance*, *supra* note 3, at 150 (noting that Walmart and McDonald's sell only MSC certified seafood).

<sup>281</sup> FRIENDS OF THE ATWATER PRAIRIE CHICKEN REFUGE, <https://attwater.org/> (last visited Mar. 9, 2021).

<sup>282</sup> *Id.*

<sup>283</sup> See Justin Gillis, *Group Earns Oil Income Despite Pledge on Drilling*, N.Y. TIMES, Aug. 3, 2014, <https://www.nytimes.com/2014/08/04/science/group-earns-oil-income-despite-pledge-on-drilling.html#:~:text=In%201999%2C%20the%20Nature%20Conservancy's,from%20the%20primary%20breeding%20grounds>.

<sup>284</sup> *Id.*

been a popular tool for environmental protection since they first appeared at scale in the 1990 Clean Air Act Amendments.<sup>285</sup> Policymakers design trading schemes to reduce overall pollution, but those reductions have unequal benefits because polluters can “pick and choose where actual cuts happen.”<sup>286</sup> As it happens, these choices lead to a huge disproportionate impact on Black people, who are exposed to 56% more pollution than average consumption habits would generate.<sup>287</sup> To be fair, cap-and-trade programs like this are often public policy, not PEG.<sup>288</sup> But private firms have also adopted voluntary trading regimes where there is even less oversight of the discriminatory impacts.<sup>289</sup> Major energy companies like Shell and British Petroleum have established intra-firm trading programs between different units of the business.<sup>290</sup> Shell has major facilities in the U.S. in communities with different racial make-ups.<sup>291</sup> The ability to increase pollution at one facility and decrease at another will have a positive effect on pollution globally, but could severely burden a given community. This is a burden on liberty with respect to the very ability to live a long and healthy life, to say nothing of the ability to simply spend time outdoors. This disproportionate burden on the liberty of people of color makes it even more important to aim for a meaningful, inclusive, and participatory democracy.

The point of both the political philosophy and practical examples is simple: the key to understanding when democracy is necessary does not depend on the distinction between public and private action. The key is liberty, which is susceptible to domination and interference by both private and public actors. Economically, these forms of private domination and interference are called externalities, an orderly name that suggests they are just slight predicaments at the edges of liberalism. In

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<sup>285</sup> Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified as amended at 42 U.S.C.A. §§ 7401-7671); *see also*, Joshua Galperin, *Thirty Years of Third-Stage Environmentalism*, HUFFINGTON POST, Nov. 28, 2016, [https://www.huffpost.com/entry/thirty-years-of-third-stage-environmentalism\\_b\\_583c7fc5e4b037ba5d6ae4ad](https://www.huffpost.com/entry/thirty-years-of-third-stage-environmentalism_b_583c7fc5e4b037ba5d6ae4ad).

<sup>286</sup> Liam Denning, *Fighting Climate Change Means Fighting Racial Injustice*, BLOOMBERG, Jun. 13, 2020, [https://www.bloomberg.com/opinion/articles/2020-06-13/fighting-climate-change-means-fighting-racial-injustice?sref=2o0rZsF1&cmpid%3D=socialflow-twitter-view&utm\\_medium=social&utm\\_source=twitter&utm\\_content=view&utm\\_campaign=socialflow-organic](https://www.bloomberg.com/opinion/articles/2020-06-13/fighting-climate-change-means-fighting-racial-injustice?sref=2o0rZsF1&cmpid%3D=socialflow-twitter-view&utm_medium=social&utm_source=twitter&utm_content=view&utm_campaign=socialflow-organic).

<sup>287</sup> *Id.*

<sup>288</sup> *E.g.*, Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified as amended at 42 U.S.C.A. §§ 7401-7671).

<sup>289</sup> Light & Orts, *supra* note 10, at 38-39.

<sup>290</sup> *Id.* at 39.

<sup>291</sup> *See Projects and Locations*, SHELL U.S., <https://www.shell.us/about-us/projects-and-locations.html> (last visited Jan. 31, 2021).

fact, they are forms of interference and domination core to thinking about liberty.<sup>292</sup>

If private firms did not have the power to decide matters affecting the larger community, even the entire globe, then PEG would be no special thing. Only because private actors can govern the environment, because private actors have such great power in this realm, does PEG become a topic worthy of consideration.

Where there is power to cabin liberty, or, as Professor Emerson says, when there is power to prevent people from “determining our own commitments and plans,”<sup>293</sup> whether through interference or domination, there should be a way to counterbalance or legitimate that power.<sup>294</sup> In Professor Richardson’s words, “[w]e are dominated to the extent that we are subject to the arbitrary power of others . . . .Power is arbitrary when it is not adequately controlled by a fair process of decision . . . .”<sup>295</sup> Democracy is the fair process. It is a system for assuring, whether in the non-interference or non-domination frame, that when liberty is invaded there is a voice for the subjects of the invasion.<sup>296</sup>

#### CONCLUSION

This Article asserts that private environmental governance, despite being a nominally private endeavor, should be subject to democracy. When I say that democracy is necessary to control PEG, I mean two things. First, when firms engage in PEG, they should consider structuring their commitments in a way that invites the majoritarian, individual, reason-giving, and deliberative forms of participation necessary for a robust democracy. This is important, though it is probably unrealistic insofar as it asks too much of PEG leaders. It is also not enough on its own. Thus, the second thing I mean when I say that PEG needs democracy is that public, state-driven governance is also essential to controlling excessive power imbalances and environmental domination. We all have to “do” democracy better in order to take advantage of the control that democracy should provide. That is, we should use the state to shape PEG as we want to see it.

This might seem a futile call to some readers. In recent years commentators have forcefully argued that the government is failing at

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<sup>292</sup> See EMERSON, *supra* note 231 at 89-90, 151.

<sup>293</sup> *Id.* at 150.

<sup>294</sup> E.g., RICHARDSON, *supra* note 23, at 27 (explaining that when freedom is limited there must be legitimation of the limitation).

<sup>295</sup> *Id.* at 250.

<sup>296</sup> *Id.* at 187.

many critical tasks, of which environmental protection is just one.<sup>297</sup> This is true but it is not inescapable. Whether public governance succeeds or fails is something we can control. Moreover, a government that succeeds is not such an unrealistic ideal that it is not worth pursuing. It was only 30 years ago that the U.S. last enacted a major environmental law.<sup>298</sup> Other foundational environmental laws were born only 20 years before that.<sup>299</sup> Just prior, the United States sent people to the moon,<sup>300</sup> and just before that the Civil Rights Act became law.<sup>301</sup> The New Deal, a generation earlier, with all its flaws and injustice, is at least evidence of a government that can be wildly productive.<sup>302</sup> At the turn of the 20<sup>th</sup> century the Pure Food and Drug Act saved countless lives.<sup>303</sup> The list, of course, continues. There is no point in imagining, arguing, or despairing that the collective public enterprise is hopeless. The evidence to the contrary is too great.

Despite hints in that direction, the leading scholars and advocates of PEG are clear that they do not think PEG is a substitute for public governance.<sup>304</sup> This Article should enrich a dialogue to more clearly articulate *why* PEG is no substitute. One might argue that PEG is no substitute because the private sector alone cannot achieve enough environmental progress without government mandates, that even with PEG, government is necessary to reach quantitative conservation goals. That is an instrumental argument, and a convincing one. It is an argument at which other PEG scholars have nodded.<sup>305</sup> Thus, the PEG literature has

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<sup>297</sup> E.g., Dana Milbank, *The U.S. Government is Failing Catastrophically at its Most Basic Function*, THE WASH. POST, Mar. 16, 2020, <https://www.washingtonpost.com/opinions/2020/03/16/this-crisis-looks-worse-than-911-2008-collapse-will-we-finally-fix-our-politics/>; James Speth, *Environmental Failure: A Case for a New Green Politics*, YALE ENVIRONMENT 360, Oct. 20, 2008, [https://e360.yale.edu/features/environmental\\_failure\\_a\\_case\\_for\\_a\\_new\\_green\\_politics](https://e360.yale.edu/features/environmental_failure_a_case_for_a_new_green_politics).

<sup>298</sup> Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990) (codified as amended at 42 U.S.C.A. §§ 7401-7671).

<sup>299</sup> National Environmental Policy Act of 1969, 83 Stat. 852 (codified as amended at 42 U.S.C. § 4321 *et. seq.*); Clean Air Act of 1970, 84 Stat. 1676 (codified as amended at 42 U.S.C.A. §§ 7401-7671); Clean Water Act of 1972, 86 Stat. 816 (codified as amended at 33 U.S.C. § 1251 *et. seq.*); Endangered Species Act of Endangered Species Act of 1973, 87 Stat. 884 (codified as amended at 16 U.S.C. 1531 *et. seq.*).

<sup>300</sup> *July 20, 1969: One Giant Leap For Mankind*, NASA, [https://www.nasa.gov/mission\\_pages/apollo/apollo11.html](https://www.nasa.gov/mission_pages/apollo/apollo11.html) (last visited Mar. 9, 2021).

<sup>301</sup> Civil Rights Act of 1964, 78 Stat. 241 (codified at 42 U.S.C. § 1981 *et. seq.*).

<sup>302</sup> Steven A. Ramirez, *The Law and Macroeconomics of the New Deal at 70*, 62 MD. L. REV. 515, 517 (2003).

<sup>303</sup> Pure Food and Drug Act of 1906, 34 Stat. 768 (1906).

<sup>304</sup> VANDENBERGH & GILLIGAN, *supra* note 6, at 17.

<sup>305</sup> See, e.g., *id.* at 5-6 (explaining that PEG can achieve a roughly 3-billion-ton reduction in greenhouse case but that a 5-billion ton reduction will be necessary to stay below 2.5 degrees Celsius of global warming, so that government action may also be needed).

already taken the first step in opening a dialogue about the relative value of public and private efforts. This Article seeks to enrich that dialogue by taking a second step, arguing that in addition to the instrumental differences, PEG may not be a substitute for public governance because PEG may not provide sufficient democratic opportunity. This Article focuses on the different democratic qualities of public and private governance, not merely their different quantitative capacities for reaching numeric goals. It makes the assertion that merely because environmental governance is “private” does not, and should not, free it from democratic consideration. The next step in this conversation, which I will take in a future article,<sup>306</sup> begins with the premise that PEG needs democracy and asks whether PEG does, in fact, provide for democratic practice. Finding that it does not, I will offer constructive ideas for closing the gap.

I hope that here, roughly 20,000 words later, the fact that PEG needs democratic reflection seems obvious, but I recognize that there is a heavy burden when suggesting that something currently left to individual whim should instead be subject to some form of equitable collective deliberation.

Many—arguably all—non-governmental behaviors have real impacts on the wider world. The temperature at which I keep my hot water heater,<sup>307</sup> whether I use chemicals on my lawn,<sup>308</sup> the type of lightbulbs I use,<sup>309</sup> these all influence the global environment. Should they, too, be subject to democracy? To an extent, of course, they all are. The democratic state does regulate decisions that seem like individual minutia until the individual is aggregated into huge environmental impacts.<sup>310</sup> But the democratic question weighing on PEG is not only whether the state can or should control private governance to some extent, perhaps by making mandatory those environmental measures that are currently voluntary.

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<sup>306</sup> Galperin, *The Public Role in Private Governance*, *supra* note 30.

<sup>307</sup> See generally Christopher M. Keinath & Srinivas Garimella, *An Energy and Cost Comparison of Residential Water Heating Technologies*, 128 ENERGY 626 (2017) (reviewing the energy impacts of water heating technologies).

<sup>308</sup> E.g., Elizabeth M. Cook, Sharon J. Hall, & Kelli L. Larson, *Residential Landscapes as Social-ecological Systems: A Synthesis of Multi-scalar Interaction Between People and their Home Environment*, 15 URB. ECOSYSTEMS 19, 30 (2012) (noting that residential fertilizer use has an impact on soil emissions).

<sup>309</sup> See Jennifer C. Cole et al., *Marketing Energy Efficiency: Perceived Benefits and Barriers to Home Energy Efficiency*, 11 ENERGY EFFICIENCY 1811, 1812, 1819 (2018) (identifying home energy use as a major factor in climate change and studying how consumers reacted to different light bulb marketing strategies).

<sup>310</sup> E.g., 10 C.F.R. Part 429 (regulating consumer products); Minn. Stat. Ann. §18c.60 *et. seq.* (banning phosphorus fertilizer on residential lawns).

The more complicated democratic question that weighs on PEG is whether the operations of PEG can become more democratic, whether PEG can integrate democratic practices. This is where the heavier burden arises because it is absurd to argue that every behavior with environmental impacts demands a democratic process. When I choose whether or not to fertilize my lawn, democracy has a role because law can constrain that decision by prohibiting fertilizer or regulating the types of fertilizers I use. But, when I act within the constraints of the law, democracy has no entry into my individual will—when do I fertilize, which parts of my lawn? My argument in this Article is that democracy should have entry into the will of at least some PEG, transforming it from pure will into shared decision making.

Why should PEG be democratic? What is the line that separates some PEG from ordinary lawn care? Scale and intent are certainly components. In fact, in a strict sense, my lawn care is PEG because it is not state action and in the aggregate it has impacts on the global environment. The line is thus drawn somewhere between discrete behaviors that are orders of magnitude from having a global impact and intentional strategies that are designed specifically for global, or at least national, sway. In more practical terms, the individual or local business falls to one side of the line while the multinational corporation or industry-wide collaboration falls on the other. To borrow famous language from Justice Stewart, “I shall not today attempt to further define the kinds of [PEG] I understand to be embraced within [the democratic demands of this Article]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . .”<sup>311</sup> The question of which PEG efforts demand democracy is an ad hoc assessment. Scale, intent, politics, choice, and liberty are all factors in the assessment.

The political nature of a PEG endeavor is an important inquiry. Does the PEG project fill a traditionally governmental role—in the way the Marine Stewardship Council regulates common pool resources?<sup>312</sup> Could it be part of an effort to influence government policy—in the way a global retailer might try to avoid deep decarbonization efforts by touting its own voluntary initiatives?<sup>313</sup>

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<sup>311</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). While lawn care seems to fall comfortably on one side of the line, global environmental governance falls on the other, and perhaps an issue like human rights does as well. Surely there are others.

<sup>312</sup> Vandenberg, *Private Environmental Governance*, *supra* note 3, at 149-50.

<sup>313</sup> See *Inhofe Statement*, *supra* note 165; *Walmart Interview*, *supra* note 165; *Corporate Reluctance*, *supra* note 165 (indicating, together, that corporate efforts might be taken as a good reason to avoid government regulation).



If a PEG endeavor presumes collective goals or strategies and has the ability to make a measurable change, then it may be suitable for democracy. Thus, the next inquiry is whether the PEG action, or advocacy for that action, begs the “if” and “how” questions of environmental protection. Does a project assume a particular environmental goal is desirable—“if” we want it in the first place—or that any path to that goal will do—if the goal is desirable “how” will we achieve it? When I make decisions regarding my lawn, I may consider the impact on the environment, but environmental protection is not the purpose, I assume nothing about larger social goals, and in any event, I imagine most homeowners would have something to say about reducing nutrient pollution entirely through individual lawn-care decisions while leaving industrial agricultural pollution unbothered. When I plant, cut, weed, water, or fertilize, I have no intention of making meaningful change beyond my yard. The point is that environmental protection is rife with choices about goals and strategies, but the scale of environmental problems makes these choices collective rather than individual.

The final inquiry is about liberty. Not all private endeavors, even those that have political impact or ignore important collective questions, will have the ability to dominate, interfere, or coerce. In that respect, the environmental aspect of private environmental governance is an unusual call to democracy because the environment in which we live is so essential to what we do, and what we want to do, but also so susceptible to interference and domination.

The very real politics of PEG, the vast choices that we face in environmental protection, and the threat to liberty that emerges from private governance all point to the need for a collective voice that only democracy can provide. That voice must have at least two roles. The minor, local, role of remarking on the details of policy, and the major, global, role of “stand[ing] outside” specific policy tools and considering what we want.<sup>314</sup> In the PEG context, our collective voice might say that a climate labeling scheme relies on standards that are too lax and therefore we want more stringency. That is the minor role. Our collective voice might also say that we do not want a private resolution but a binding, public one that expressly restricts emissions. Both the programmatic-local and existential-global roles of voice are central to democracy, so we are left with a clear charge to determine whether PEG provides the forum for our collective debate and articulate voice.

Nobody, certainly not the leading proponents of PEG, contend that they *want* to trade democracy for private governance. Their argument is

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<sup>314</sup> KYSAR, *supra* note 149, at 16.

that we can only address environmental problems if we pursue public and private governance in parallel.<sup>315</sup> The problem is that this framing suggests independent endeavors each on a public and a private plane. The reality is that private and public governance are on the same plane, dependent and linked together by expressions of public will, past and present. Public choices have shaped the legal and economic structures that undergird private power and the political dynamics that pursue or resist binding environmental law. In turn, PEG shapes public preferences and influences public and individual decision making. But PEG may not fully possess the democratic features of majoritarian expression, individual input, reason giving, and deliberation that undergird public governance. Without those features, PEG can only marginally and delicately grasp public will. A marginal and delicate grasp in an existential struggle to address a titanic public crisis.

Even with only a marginal grasp, each entreaty to PEG has a claim to bringing us one step—even a small step—closer to resolving the crisis, but it is no small concern that it does so by relying on private supremacy quite possibly at the expense of collective power. We can argue the exact balance of public and private control at the margins, but we cannot argue this: PEG is fundamentally submissiveness to private power because, if it were not, PEG would have little claim to instrumental effectiveness. If there were no power differential, major PEG players would not have the unusual power to effect instrumental change. We can argue whether or not submissiveness to private power is desirable. But we should first consider whether PEG gives us too little occasion for that argument and no passage, no failsafe, should we decide to escape private dominance.

In the words of Frederick Douglass, “power concedes nothing without a demand.”<sup>316</sup> The democratic mechanisms of the state are a starting point for making that demand. They do not work well enough, but they can provide the exit, should we choose it. PEG can bring us closer to some environmental goal, but without a process for reasoning together we cannot rightly call it *our* environmental goal.

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<sup>315</sup> VANDENBERGH & GILLIGAN, *supra* note 6, at 17.

<sup>316</sup> Frederick Douglass, West India Emancipation, Speech Delivered at Canandaigua, N.Y. (Aug. 4, 1857), in LIFE AND WRITINGS OF FREDERICK DOUGLASS 426, 437 (Philip S. Foner ed., 1950).