

# Governing Private Governance

Joshua Ulan Galperin\*

*After the Supreme Court's opinion in Dobbs rejected an individual right to reproductive choice, many private firms chose to govern reproductive healthcare by covering employee access to abortions. As mass shootings continue to plague the country, some firms have decided to govern firearm safety by discontinuing sales of assault weapons. While the climate crisis continues to upend life on Earth, corporate leaders are engaging in private environmental governance by voluntarily reducing their own emissions, demanding reductions within their supply chains, and pressuring peers and competitors to do the same. Each of these endeavors represents a form of private governance in which private firms seek to advance some view of public welfare despite, and often in spite of, government policy. This Article argues that private governance is an important source of policy, but we must*

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\* Associate Professor of Law, Elisabeth Haub School of Law at Pace University. I began working on this piece in 2019 and decided it needed to be three articles. It therefore grows from two related pieces: Joshua Ulan Galperin, *Environmental Governance at the Edge of Democracy*, 39 VA. ENV'T L.J. 70 (2021) [hereinafter Galperin, *Environmental Governance*]; and Joshua Ulan Galperin, *A Restatement of Democracy*, 69 VILL. L. REV. 55 (2024) [hereinafter Galperin, *Democracy*]. I had the privilege of workshopping those articles and this one with many great scholars, and I want to repeat my acknowledgements here. Most importantly, Mike Vandenberg. Other thank yous go to Carliss Chatman and Maybell Romero; Doug Kysar; Judd Thornton; scholars at the 2019 UCLA environmental law workshop, including Ann Carlson, William Boyd, Heather Payne, Monte Mills, Tony Arnold, Annie Eisenberg, Steph Tai, and Kerrigan Bork; participants at Vermont Law School's 2019 Environmental Scholarship Colloquium, particularly Tom Lininger, Laura Mott, Jonathan Rosenbloom, Cale Jaffe, Tom McHenry, and Timothy Malloy; 2020 University of Arizona environmental workshop participants, David Adelman, Bruce Huber, Katy Kuh, Dave Own, Shi-Ling Hsu, Sanne Knudsen, Todd Aagaard, and Cliff Villa; AALS 2020 administrative and environmental law section workshopers, Emily Hammond, Donald Kochan, Kristin Hickman, Andy Grewal, Bridget Dooling, Anthony Moffa, Steve Gold, Sarah Fox, Richard Lazarus and Robin Craig; participants in Columbia Law School's Sabin Colloquium on Innovative Environmental Scholarship, Greg Dotson, Conor Dwyer Reynolds, Tara Righetti, Wyatt Sassman, Kristin van de Biezenbos, David Wright, and Pat Parenteau; readers at Texas A&M's Annual Enviro Schmooze, Rhett Larson, Dan Farber, Uma Outka, and Tim Mulvaney. Finally, to those who workshopped and (presumably) read drafts of this article more than once, Mike Pappas, Sharon Jacobs, Alex Klass, Mike Gerrard, Felix Mormann, Vanessa Casado Perez, Jim Salzman, and Tim Malloy, the last of whom called this article "mind-bending," which could only have been a compliment, right? Finally, thank you to my research assistants Umair Saleem, Karina Krul, and Kaitlyn Marchant.

*approach it carefully because private power can come at the expense of democracy.*

*Focusing specifically on private environmental governance (“PEG”), this Article explains that there is an important role for democratic oversight even when policies emerge from non-governmental sources. Taking a multidimensional view of democracy that includes majoritarian impulse, individual contestation, reason-giving, and deliberation, the Article demonstrates that PEG has a democracy deficit. Private institutions often lack democratic practices, raising concerns about specific private policies. Moreover, and more importantly, private governance regimes can undermine public control of decision-making, diminishing opportunities for democratic public governance.*

*There are, however, two remedies to this democracy deficit. First, private governance regimes should enhance their democratic practices by incorporating democratic institutional designs from administrative law. However, this solution alone does not fully address private governance’s broader democracy deficit. The deficit stems from the devaluation of democratic public politics and society’s diminished engagement in democracy, to which private governance contributes. Thus, to fully resolve the broader deficit, this Article encourages leveraging the authority of the state to reallocate power and ensure more thoughtful public decision-making.*

*By challenging the traditional assumptions surrounding private governance and offering remedies for its democracy deficit, this Article offers a fresh perspective on environmental governance. It calls for a comprehensive reevaluation of PEG’s role within the democratic ecosystem, emphasizing the importance of democratic practices to achieve effective and equitable environmental protection.*

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## INTRODUCTION

In very recent memory, private firms have established reproductive policies supporting employee access to abortion in the wake of *Dobbs*,<sup>1</sup> limited access to assault weapons in the wake of mass killings,<sup>2</sup> and made pledges about trans rights in the wake of state-level attacks on the same.<sup>3</sup> Private entities establish private regimes to advance their visions of social progress. This is notable for numerous reasons, not least of which is ideological confusion.<sup>4</sup> As *The Economist* reports, “Today’s populist Republicans have jettisoned many classical conservative values, but their departure from a decades-long alliance with America’s corporations is one of the most notable rebellions. ‘Old-fashioned corporate Republicanism won’t do in a world where the left has hijacked big business,’ Ron DeSantis, Florida’s governor, recently wrote.”<sup>5</sup>

Partisanship, it seems, drives politics more than traditional ideologies. Environmental, social, and governance (“ESG”) investing is another paradigmatic example. It would have been reasonable to assume the Republican Party, which for generations has been the party of limited regulation and trust in private innovation,<sup>6</sup> would, at the very least, have no objection to private firms channeling their wealth into ESG strategies. Likewise, it would have been reasonable to assume the Democratic Party,

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1. See Kate Gibson, *These Companies Are Paying for Abortion Travel*, CBS NEWS (July 2, 2022, 9:18 AM), <https://www.cbsnews.com/news/abortion-travel-companies-paying-benefits-amazon-starbucks-target/> [<https://perma.cc/GTG7-ZBS7>]; Maggie McGrath & Jena McGregor, *These Are the U.S. Companies Offering Abortion-Related Benefits*, FORBES (May 7, 2022, 6:30 AM), <https://www.forbes.com/sites/maggiemcgrath/2022/05/07/these-are-the-us-companies-offering-abortion-related-benefits/?sh=30ec2fd476ea> [<https://perma.cc/Y4V2-JAV5>].

2. See Rachel Siegel, *Dick’s Sporting Goods Overhauled Its Gun Policies After Parkland. The CEO Didn’t Stop There.*, WASH. POST (May 31, 2019, 5:34 PM), [https://www.washingtonpost.com/business/economy/dicks-sporting-goods-overhauled-its-gun-policies-after-parkland-the-ceo-didnt-stop-there/2019/05/31/9faa6a08-7d8f-11e9-a5b3-34f3edf1351e\\_story.html](https://www.washingtonpost.com/business/economy/dicks-sporting-goods-overhauled-its-gun-policies-after-parkland-the-ceo-didnt-stop-there/2019/05/31/9faa6a08-7d8f-11e9-a5b3-34f3edf1351e_story.html) [<https://perma.cc/BWJ8-HPJY>].

3. See *56 Major Companies Respond to Alarming Effort to Erase Transgender People from Legal Protection*, NAT’L LGBTQ TASK FORCE (Nov. 1, 2018), <https://www.thetaskforce.org/56-major-companies-respond-to-alarming-effort-to-erase-transgender-people-from-legal-protections/> [<https://perma.cc/D4E9-8YYP>].

4. See David Gelles, *How Environmentally Conscious Investing Became a Target of Conservatives*, N.Y. TIMES (Mar. 1, 2023), <https://www.nytimes.com/2023/02/28/climate/esg-climate-backlash.html> [<https://perma.cc/2BBB-NEPS>].

5. *Conservative Americans Are Building a Parallel Economy: For-Profit Polarisation*, ECONOMIST (June 1, 2023), <https://www.economist.com/united-states/2023/06/01/conservative-americans-are-building-a-parallel-economy>.

6. See *id.*

which has been more skeptical of unregulated private endeavors,<sup>7</sup> would have more criticisms of multinational corporations driving environmental behavior. And yet, across the country, Republican politicians have been railing against green business strategy while Democrats defend it.<sup>8</sup> Partisan sectarianism drives political outrage.<sup>9</sup> *Issues* like climate change rally some partisans more than *strategies*, like private-sector investments or government regulation.<sup>10</sup> This sectarianism is one of the reasons so many problems are practically unsolvable today.<sup>11</sup>

In the past we may have sought consensus policies that avoid politics, but given partisan sectarianism, perhaps it is better to develop policies that earnestly embrace politics as a tool for softening partisan fundamentalism. This Article argues that we should attend to the structures of governing institutions to understand how institutions engage people in politics and influence people's political ideals and allegiances. Broadly speaking, it argues that rather than avoiding politics, governing institutions should be avowedly political—which is to say, democratic.

Empowering and embracing explicitly political institutions is a challenge today. As this Article will further argue, growing reliance on private power to achieve public goals is a political problem because private firms are not subject to the same democratic practice as the state. There may be an argument here about the fundamental need for democracy, but there is a more practical concern. Without democratic systems, private control tends to

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7. *See id.*

8. *See* Max Zahn, *What Is ESG Investing and Why Are Some Republicans Criticizing It?*, ABC NEWS (Feb. 15, 2023, 7:15 AM), <https://abcnews.go.com/Business/esg-investing-republicans-criticizing/story?id=97035891> [<https://perma.cc/YVL6-SYP7>]; Courtney Vinopal, *Democratic AGs Defend ESG Strategies After Republicans Pressure BlackRock to Drop Sustainability Principles*, OBSERVER (Nov. 22, 2022, 3:38 PM), <https://observer.com/2022/11/democratic-ags-defend-esg-strategies-after-republicans-pressure-blackrock-to-drop-sustainability-principles/> [<https://perma.cc/J36G-D58Q>].

9. *See* Clark Merrefield, *Political Sectarianism in America and 3 Things Driving the 'Ascendance of Political Hatred,'* JOURNALIST'S RES. (Oct. 29, 2020), <https://journalistsresource.org/politics-and-government/political-sectarianism-political-hatred/> [<https://perma.cc/3M3H-ZHTU>].

10. *See, e.g.*, Adrian Vermeule (@Vermeullarmine), TWITTER (May 24, 2023, 5:00 AM), <https://twitter.com/Vermeullarmine/status/1661341318595985408> [<https://web.archive.org/web/20230524120916/https://twitter.com/Vermeullarmine/status/1661341318595985408>] (criticizing private LGBTQ+ pride efforts and criticizing other conservatives for failing to use “state power” to “make corporate entities feel the sting of political enmity”).

11. *See* Eli J. Finkel et al., *Political Sectarianism in America*, 370 SCIENCE 533, 535 (2020).

conceal the government's, and thus the political community's, power to make change. It is a "denial of democracy."<sup>12</sup>

Unfortunately, this problem is not limited to private governance. Over the past decade, numerous decisions from the Supreme Court have also concealed and undercut the power of government, specifically administrative agencies. For instance, *West Virginia v. EPA*'s "major questions doctrine" forbids innovative public policy.<sup>13</sup> Other cases like *Free Enterprise Fund*<sup>14</sup> and *Seila Law*<sup>15</sup> promote presidential control of regulatory policy at the expense of more reasoned, collaborative, and "on the ground" administrative decision-making. These trends tend to inhibit and hide the ability and successes of administrative agencies, making it difficult for the political community to value, evaluate, and coalesce around strategies to shift the role of government vis-à-vis private leadership.

To the extent private governance becomes (or remains) the norm, it is important to ask questions about the democratic nature of private governance institutions. This Article therefore asks questions about the role private firms play in democratic governance and offers proposals for how institutional design can advance democracy.<sup>16</sup>

To understand both the role of private firms in democratic practice and the design features that can make governing institutions more democratic, this Article focuses on private environmental governance ("PEG"). PEG refers to affirmative efforts of non-state actors to achieve environmental protection goals that governments would normally address.<sup>17</sup> Private environmental impacts are as old as time, but intentional private *governance* is much newer,

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12. Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1794 (2020).

13. See *West Virginia v. EPA*, 597 U.S. 697, 699 (2022); *EPA Proposes New Carbon Pollution Standards for Fossil Fuel-Fired Power Plants to Tackle the Climate Crisis and Protect Public Health*, U.S. EPA (May 11, 2023), <https://www.epa.gov/newsreleases/epa-proposes-new-carbon-pollution-standards-fossil-fuel-fired-power-plants-tackle> [<https://perma.cc/9AAX-3VZF>] (describing a "traditional approach" to regulation that "build[s] on the momentum" of the private sector).

14. See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010).

15. See *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197 (2020).

16. For other recent work on this general question in a different substantive area, see, for example, Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418 (2020).

17. See Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 146 (2013) [hereinafter Vandenbergh, *Private Environmental Governance*]; *infra* Part I; Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 139 n.5 (2019); Michael P. Vandenbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913, 914–15 (2007) [hereinafter Vandenbergh, *Wal-Mart*].

and attention is quickly growing in the legal literature.<sup>18</sup> This scholarship has been brilliant and incisive. It has also been confidently optimistic about the role of PEG.<sup>19</sup> Optimistic because PEG is an effective instrument for environmental protection.<sup>20</sup> Private efforts are making headway.<sup>21</sup> Government efforts, in comparison, are floundering.<sup>22</sup> Given this, and that legal scholarship on PEG is new,<sup>23</sup> PEG has not been subject to much constructive criticism.

This Article is among the first to take a skeptical approach to PEG. The skepticism stems from the under-studied role of PEG as a part of the political and democratic ecosystem. The prevailing argument for PEG is that it is apolitical and therefore the inefficiencies of state governance do not, and should not, burden it.<sup>24</sup> This argument has two shortcomings.<sup>25</sup> First, PEG is political. The role private firms play in governing the environment can influence thinking about environmental protection, displace state-driven environmental governance and individual behaviors, and become part of the narrative of environmental, not to mention partisan, politics. Second, while PEG may be efficient because it does not share the procedural burdens that the state must overcome, those burdens have value. Those burdens, of public participation, transparent reasoning, careful deliberation, among others, are not *just* process, they are features of democratic practice. In short, PEG is efficient because it can achieve public goals without meeting the democratic demands of public governance.<sup>26</sup>

The fact that PEG does not fit neatly into the public-private distinction should attract careful, and critical, attention. Although the terms “public” and “private” appear frequently in this Article, the goal is to overcome the public-private distinction. The distinction is the persistent belief that things described as “private” should be assertive and largely free from government intrusion or political oversight, while things described as “public” should be restrained and subject to scrutiny.<sup>27</sup> This simply does not hold up. Public and

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18. See Joshua Ulan Galperin, *Foreword: Private, Environmental, Governance*, 9 GEO. WASH. J. ENERGY & ENV'T L. 1, 1 (2018).

19. See, e.g., MICHAEL P. VANDENBERGH & JONATHAN M. GILLIGAN, *BEYOND POLITICS: THE PRIVATE GOVERNANCE RESPONSE TO CLIMATE CHANGE* 3 (2017).

20. See *id.*

21. See *id.* at 4–5, 8.

22. See *id.* at 69–70.

23. Galperin, *supra* note 18, at 1.

24. See VANDENBERGH & GILLIGAN, *supra* note 19, at 69–70.

25. See *infra* Part I; see also Galperin, *Environmental Governance*, *supra* note \*.

26. See *infra* Part III.

27. See David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L & CONTEMP. PROBS. 1, 1 (2014); see also *infra* Part I.

private are so intertwined—with law shaping all non-state endeavors, non-state actors deeply influencing law, and both brandishing coercive power—that a distinction is barely helpful.<sup>28</sup> Thus, in this Article the terms do not signify an essential or fundamental separation. Where the distinction is helpful is simply in communication. “Private” is useful to describe non-state actors and “public” to describe state actors. This is how I use the terms.

I first argue that despite the “private” designation, we must still attend to the democratic aspects of PEG.<sup>29</sup> The next step is to articulate an understanding of democracy. The understanding I advance here is that democracy is not merely a process for public governance. Instead, democracy is a multidimensional process of communal decision-making, including decisions about how to distribute power between state and non-state actors. The process of multidimensional democracy includes opportunities for majoritarian voting, individual participation and contestation, reason-giving, and deliberation.<sup>30</sup>

Recognizing that PEG is political and is part of a democratic system, the third step is to consider whether PEG can meet democratic demands. This Article argues that it cannot, or perhaps merely does not. Not fully. PEG has a democracy deficit.<sup>31</sup> The deficit has two parts, and the final step is to propose a remedy for each.

The first part of the democracy deficit is local, that is, it resides within private governance itself. The internal, local deficit is simply that private decision-making does not generally offer much in the way of democratic practice. It does not have mandatory or sufficient opportunities for majoritarianism, reasoning, or deliberation.<sup>32</sup> In short, the public has little authority over private strategy. The constructive approach to remedying this internal deficit is to borrow institutional designs from administrative law, which, although far from perfect, is a structure that lives up to many demands of multidimensional democracy, shifting some authority to the public.<sup>33</sup>

The second part of PEG’s democracy deficit is global or external, insofar as it is not located within the structure of private governance but radiates from PEG as a relational and political enterprise. The problem here is that PEG, particularly when it is most successful, can devalue democratic public

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28. See, e.g., Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. ONLINE 179, 181 (2018); see also *infra* Part II; Galperin, *Environmental Governance*, *supra* note \*, at 89.

29. See Galperin, *Environmental Governance*, *supra* note \*, at 89–90.

30. See Galperin, *Democracy*, *supra* note \*, at 78–96; *infra* Part III.

31. See *infra* Part III.

32. See *infra* Part III.

33. See *infra* Part IV.



politics, subverting the role of public governance and thereby diminishing society's determination to participate in democracy.<sup>34</sup> As a remedy to the internal deficit, better democratic structures within PEG can make PEG more inclusive, more responsive, and more effective. But ultimately, that internal solution is voluntary, puts more burden on companies doing the most rather than those doing the least, and cannot fully solve the external deficit. Even adopting democratic aspects of administrative governance, PEG would remain an exercise of private authority over individuals and the natural world.

The more complete response to PEG's democracy deficit, therefore, is not only to tweak the internal mechanisms for exercising private power, but to use the public authority of the state to reallocate power in a way that reflects more affirmative, articulate, and thoughtful public choice. The constructive way to remedy PEG's global deficit is to "do democracy" better: to recognize PEG as a democratic issue; to design institutions, including those of PEG; to fully embrace democratic practice; and to optimistically engage the existing public avenues for democratic control.

This Article supports this conclusion as follows: Part I defines private environmental governance and summarizes why PEG needs democratic scrutiny. First, PEG is political. Second, PEG presents public choices and democracy is the forum for making those choices. Third, PEG can curtail liberty, and democracy is the best tool for consenting or objecting to such constraints. Having established the need for democratic attention, Part II explains that democracy is a structure for collective decision-making and summarizes the concept of "useful" or "multidimensional" democracy for analyzing whether an institution contains sufficient democratic structures. Part II further asserts that the institutions of federal administrative governance contain many of the necessary democratic elements and therefore serve as a good template for private governance. Part III asks whether PEG meets democratic standards and concludes that, beyond pathways for individual input and contestation, it does not. Part IV introduces two proposals for democratizing PEG. First, PEG could adopt democratic tools from administrative law to make PEG more internally democratic. The second and more lasting remedy is to invest in state institutions that facilitate

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34. I discuss several aspects of this subversion in this Article. One aspect I do not discuss, but that is worth noting, is a consequence of the first shortcoming of private governance. Because the public has little control over private action, when private governance dominates, there is a feeling of powerlessness and frustration that can broadly undercut trust in institutions to solve problems. *See generally* Margot J. Pollans, *Inundations* (Mar. 23, 2024) (unpublished manuscript) (on file with author); Margot J. Pollans, *Eaters, Powerless by Design*, 120 MICH. L. REV. 643 (2022).

democracy, and then to recognize that PEG is effective because it relies on an unequal distribution of power and that only collective authority can legitimize or reshape that distribution.

## I. PRIVATE ENVIRONMENTAL GOVERNANCE NEEDS DEMOCRATIC CONSIDERATION

PEG describes efforts of private actors to govern the environment, but PEG does not escape politics simply because it is private. The public-private distinction is useful in terms of identifying the general type of actor—“public” denoting government actors and “private” denoting non-governmental actors.<sup>35</sup> But the distinction does not provide a fundamental threshold for careful civic attention through politics and democracy. In support of the assertion that PEG needs democracy, this Part defines PEG more fully, and then demonstrates that PEG is political, presents serious collective choices that deserve public attention, and can impact individual liberty. Because PEG is political, contentious, and coercive, this Section concludes by explaining that PEG deserves democratic attention.

### A. *Defining Private Environmental Governance*

Michael Vandenberg, the leading scholar and proponent of PEG, defines it as

actions taken by non-governmental entities that are designed to achieve traditionally governmental ends such as managing the exploitation of common pool resources, increasing the provision of public goods, reducing environmental externalities, or more justly distributing environmental amenities. The actions taken by these non-governmental entities often include the traditional standard-setting, implementation, monitoring, enforcement, and adjudication functions of governments.<sup>36</sup>

PEG, then, is private-private dealings that not only *happen* to result in environmental effects, but that specifically use private power to control the environment.

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35. See Kapczynski, *supra* note 28, at 181–82.

36. Vandenberg, *Private Environmental Governance*, *supra* note 17, at 146.

Walmart is a good example.<sup>37</sup> Walmart only sells seafood that the Marine Stewardship Council certifies.<sup>38</sup> Without any government mandate, a group of NGOs and corporations created the Marine Stewardship Council to set private standards for sustainable fisheries.<sup>39</sup> This is an example of multi-lateral PEG, where firms band together to establish governing criteria. When Walmart insists its suppliers source seafood from certified fisheries,<sup>40</sup> that is an example of bilateral PEG, which happens when two private parties engage in practices to control environmental resources.<sup>41</sup> The typical form of bilateral PEG is a major buyer like Walmart using its supply-chain contracts to assure suppliers adhere to certain standards, such as Marine Stewardship Council certification.<sup>42</sup> When customers shop at Walmart and see the Marine Stewardship Council branding on seafood products, that empowers consumers to also engage in PEG. This consumer-side behavior often gets distinct treatment in scholarship on “eco-labeling” and “sustainable consumption” because of its visibility.<sup>43</sup> Despite the special attention, it is also a form of PEG. Finally, firms can individually make changes to their practices that can have environmental consequences. Microsoft, for example, has established an internal program to limit the company’s carbon emissions.<sup>44</sup> Not relying on multi-lateral collaboration, bilateral contracting, or consumer behavior, we can call this unilateral PEG.

PEG along these lines can have positive impact on environmental protection.<sup>45</sup> Walmart alone reduced its greenhouse gas emissions by twenty-eight million tons between 2010 and 2015 and plans to reduce emissions one billion tons by 2030.<sup>46</sup> Beyond Walmart, some estimates suggest voluntary initiatives from just a handful of global corporations could reduce emissions by three billion tons annually.<sup>47</sup> Global average temperatures will continue to rise, but to keep the average increase to 2°C, the world needs emissions

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37. See generally Vandenberg, *Wal-Mart*, *supra* note 17 (using Walmart as the key example in an early paper on PEG).

38. *Id.* at 923.

39. See *Our Governance*, MARINE STEWARDSHIP COUNCIL, <https://www.msc.org/about-the-msc/our-governance> [<https://perma.cc/N74L-MBBE>].

40. See Vandenberg, *Private Environmental Governance*, *supra* note 17, at 150.

41. See *id.* at 156.

42. See *id.*

43. See Jason J. Czarnezki et al., *Crafting Next Generation Eco-Label Policy*, 48 ENV'T L. 409, 409–10 (2018).

44. See Sarah E. Light & Eric W. Orts, *Parallels in Public and Private Environmental Governance*, 5 MICH. J. ENV'T & ADMIN. L. 1, 35 (2015).

45. See VANDENBERGH & GILLIGAN, *supra* note 19, at 3.

46. *Id.*

47. *Id.* at 5.

reductions of roughly five billion tons each year.<sup>48</sup> It seems PEG can get us 60% of the way to that goal.<sup>49</sup>

The definitions and potentially huge successes of PEG do not fully answer one question: why do firms work to govern the environment? The answer is unclear, but there are two related possibilities. The first option is simply that some corporate leaders have a personal interest in environmental protection and, recognizing their outsized power, they advance private governance initiatives.<sup>50</sup> The second option is that firms engage in PEG when it benefits their bottom line.<sup>51</sup> Whether green initiatives reduce costs, reduce risks, or set a firm apart from others in a crowded market, PEG may have a measurable financial benefit.<sup>52</sup>

### B. *The Political Role of Private Governance*

The leading book on PEG praises the pursuit because it is so *possible*, so free from the burdens of politics that weigh down public governance.<sup>53</sup> Indeed, the book is titled *Beyond Politics*.<sup>54</sup> It is not true, however, that PEG is beyond politics. PEG is an acutely political endeavor. PEG can directly influence public governance. PEG is a laboratory for environmental protection strategies, a substitute for binding regulation, and a protagonist in the dominant narrative of environmental law. PEG is therefore not “beyond politics,” it merely lacks the formal procedures of public decision-making we normally expect from the government. In short, PEG is not beyond politics, it is beyond democracy.

The politics of PEG are both productive and counterproductive. On the productive side, PEG can be a laboratory for testing governance strategies that might become a component of binding, public environmental law.<sup>55</sup> There has not been significant research in this area, but one positive example

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48. *Id.* at 6.

49. *See id.* at 5–6 (discussing the ability of PEG to achieve three billion tons of annual greenhouse gas emissions reductions of the five billion *necessary* to maintain 2°C).

50. *Id.* at 392–93; Cary Coglianese & Jennifer Nash, *Motivating Without Mandates: The Role of Voluntary Programs in Environmental Governance*, in *DECISION MAKING IN ENVIRONMENTAL LAW* 238–39 (LeRoy Paddock et al. eds., 2016).

51. *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* (2006).

52. *Id.* at 11.

53. VANDENBERGH & GILLIGAN, *supra* note 19, at 69–70.

54. *Id.*

55. Vandenberg, *Private Environmental Governance*, *supra* note 17, at 139.

might be “green public procurement.”<sup>56</sup> Green public procurement is the process in which governments, as consumers, account for the environmental impacts of their purchases.<sup>57</sup> This public endeavor is an analogue to, for example, Walmart’s green private procurement of only Marine Stewardship Council-certified seafood.<sup>58</sup> Although it is not clear that Walmart or any other private effort is a but-for cause of any public program, it is clear that scholarship urges governments to use green procurement to mimic private projects.<sup>59</sup>

A related assertion of productive politics and experimentation is positive spillover into government action.<sup>60</sup> Spillover is the “effect of an intervention on subsequent behaviors not targeted by the intervention.”<sup>61</sup> A spillover is positive when an intervention—in this case, a private environmental program—increases pro-environmental behaviors elsewhere.<sup>62</sup> Thus, if private environmental strategies lead to government action, perhaps because they give lawmakers new ideas or perhaps because the private initiative reduces political barriers, that is a laudable positive spillover.

The positive spillover theory has intuitive appeal but raises an empirical question. If PEG programs are accelerating, demonstrating new ideas and a private willingness to act, why is public environmental lawmaking still practically impossible, maybe even growing more difficult? Rather than seeing positive spillovers leading to new public policy, we see *opposition* to environmental progress growing in tandem with private efforts.<sup>63</sup> This raises the possibility—perhaps more empirically supportable than positive spillover given the widespread antagonism to environmental protection<sup>64</sup>—that private regimes do “too much.” If there were less PEG, or if firms did not advertise their efforts, they would generate less political hostility and maybe even leave

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56. Jason J. Czarnezki, *Green Public Procurement: Legal Instruments for Promoting Environmental Interests in the United States and European Union* (Dec. 13, 2019) (Ph.D. dissertation, Uppsala University), <https://ssrn.com/abstract=3504676> [<https://perma.cc/34Q2-24A8>].

57. *Id.* at 11.

58. See Vandenberg, *Private Environmental Governance*, *supra* note 17, at 150.

59. Czarnezki, *supra* note 56, at 34.

60. Heather Barnes Truelove et. al., *Positive and Negative Spillover of Pro-Environmental Behavior: An Integrative Review and Theoretical Framework*, 29 *GLOB. ENV'T CHANGE* 127, 127 (2014).

61. *Id.* at 128.

62. *Id.*

63. See Ari Drennen & Sally Hardin, *Climate Deniers in the 117th Congress*, *CTR. FOR AM. PROGRESS* (Mar. 30, 2021), <https://www.americanprogress.org/article/climate-deniers-117th-congress/> [<https://perma.cc/L33N-8ZAC>].

64. See *id.*

the public and lawmakers feeling more pressure to act. Regardless of the best answer, this spillover paradox is further evidence that private governance is powerfully political.

The possibility that private firms might invent new environmental strategies that spillover into public law might bring to mind Justice Brandeis' famous quote from *New State Ice*, that "a single courageous state may, if its citizens choose, serve as a laboratory; and try novel economic and social experiments without risk to the rest of the country."<sup>65</sup> This quote, and its relevance for the politics of PEG, raises two important issues. First, Brandeis' praise of states as laboratories rested on the presumption that the boundaries of a courageous state would cabin any risk of experimentation.<sup>66</sup> PEG does not fit neatly into this experimental protocol because the boundaries of legal jurisdictions do not constrain private firms. If a PEG project's risk manifests, there is no natural "fire break." Second, Brandeis wrote in praise of experimentation, but he did so with an explicit understanding that experimentation should result from democracy.<sup>67</sup> Put differently, democracy, not experimentation, is the priority for Brandeis. Experimentation is an option, but it is an option that only democratic practice can choose.

Other political aspects of PEG do not offer the same possible upsides as spillover and experimentation. The next political aspects of PEG also highlight why a role for democracy ought to precede a preference for experimentation.

PEG can displace public governance, making binding public law more difficult to attain even as it remains essential. Some psychological research shows that when people engage in environmentally friendly behavior in a first instance, they are less likely to engage in similar behavior in the future even when the follow-up engagement would have greater benefits.<sup>68</sup> This research is focused on individual behaviors, not the behaviors of elected officials, but it suggests two troubling possibilities. First, individuals may not feel pressure to engage in environmental policy if they have already engaged in PEG, such as purchasing Marine Stewardship Council-certified seafood from Walmart. Second, governments may not feel pressure to adopt environmental protection laws if they think private regimes are sufficient. Although the latter

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65. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

66. *See id.* (viewing experimentation "without risk to the rest of the country" as a "happy incident" of a state's choice to serve as a laboratory).

67. *See id.* (stressing that "a single courageous state may, if its citizens choose, serve as a laboratory" (emphasis added)).

68. Alexander Maki et al., *Meta-Analysis of Pro-Environmental Behavior Spillover*, 2 NATURE SUSTAINABILITY 307, 307 (2019); David Hagmann et al., *Nudging Out Support for a Carbon Tax*, 9 NATURE CLIMATE CHANGE 484, 484 (2019).

possibility is a larger jump from the research, the talking points of some elected officials already point to private governance as a reason to forgo public governance.<sup>69</sup>

In addition to the psychological explanation for public policy displacement, there is also a more structural, political-economic, source of displacement. PEG projects seek to achieve environmental benefits,<sup>70</sup> presumably at the lowest cost possible.<sup>71</sup> This creates two political problems, although only one results in recognizable politicking. If firms undertake low-cost voluntary PEG projects, should the government try to impose binding regulations, the cost of those regulations will be higher for the firms that have already advanced low-cost strategies. These firms will have reason to object to the new regulations that will cut into their bottom line and they may lobby against them. Had the same firms not engaged in PEG, there would still be a cost to new regulations, but the cost would be lower if the firms had not yet picked their low-hanging fruit.

The subtler political-economic source of displacement is cost-benefit analysis. Some environmental statutes require agencies to calculate the costs and benefits of a regulation before promulgation and to only promulgate rules with quantifiable net benefits.<sup>72</sup> Again, if firms undertaking PEG projects chose the least-cost option first, a regulation that demands new action may come with higher costs, thereby reducing net benefits. This will have the same displacement impact as lobbying, but it will look like compulsory, objective calculations.

The final point about how PEG is a political force is that PEG is part of a long narrative about environmental law. The leading work on PEG is

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69. See, e.g., Press Release, EPA, 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> [<https://perma.cc/LR3H-MRBL>] (statement of Sen. Jim Inhofe arguing that regulations are not necessary because of PEG); Edward Ongweso Jr., *Facebook Asks Lawmakers Not to Regulate Crypto Too Harshly Just Because of All the Fraud*, VICE (Dec. 7, 2022, 7:00 AM), <https://www.vice.com/en/article/v7v8dm/facebook-asks-lawmakers-not-to-regulate-crypto-too-harshly-just-because-of-all-the-fraud> [<https://perma.cc/V6C8-MQSY>] (describing Facebook's lobbying against strong cryptocurrency regulation in light of its own private governance efforts).

70. VANDENBERGH & GILLIGAN, *supra* note 19, at 119.

71. See, e.g., Amartya Sen, *Rational Behaviour*, in 4 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 71–72 (John Eatwell et al. eds., 1998) (explaining, in part, that rational actors seek to reduce costs).

72. See, e.g., Safe Drinking Water Act, 42 U.S.C. § 300g-1(b)(3)(C)(i)–(iii); *Michigan v. EPA*, 576 U.S. 743, 753–55 (2015); see also Lisa Heinzerling, *Cost-Nothing Analysis: Environmental Economics in the Age of Trump*, 30 COLO. NAT. RES., ENERGY & ENV'T L. REV. 287, 288 (2019).

perfectly clear that PEG should not displace public governance.<sup>73</sup> Unfortunately, it is easy to see PEG not as a complement to public governance, but as a non-governmental endpoint on the path of environmental protection from command-and-control dictates to voluntary private leadership.

The story begins with grave environmental threats but no semblance of environmental governance.<sup>74</sup> Eventually a strong and assertive state emerges with its command-and-control directives.<sup>75</sup> These directives brought important changes but, the story goes, they were suffocating innovation. Then a new source of market-mimicking environmental law emerged to reduce the heavy burden of law while still advancing environmental protection.<sup>76</sup> More was necessary, however, because market-mimicking regulation was still regulation. Public-private collaboration was the next improvement. Here, the affliction of law could recede further because the government could agree to relieve private firms of regulatory compliance obligations so long as those firms could achieve sufficient progress on their own initiative.<sup>77</sup> Even further progress might be possible if the government were not responsible for inspecting the efforts of regulated businesses, but if other private firms took on that task.<sup>78</sup> This did not remove the government entirely, but it relegated the government to the margins. And thus, we arrive at PEG as the next, and perhaps ultimate, step in this tale. PEG finally, completely, and naturally strikes public governance from environmental protection.

This story of environmental law is not the tale PEG scholars are trying to weave.<sup>79</sup> The intent, however, is less important than how different people will receive it, and we know that some receive PEG as a promise that the

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73. VANDENBERGH & GILLIGAN, *supra* note 19, at 383.

74. Joshua Ulan Galperin & Douglas A. Kysar, *Uncommon Law: Judging in the Anthropocene*, in CLIMATE CHANGE LITIGATION IN THE ASIA PACIFIC 15, 15–16 (Douglas A. Kysar & Jolene Lin eds., 2020).

75. Vandenberg, *Private Environmental Governance*, *supra* note 17, at 144; Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 422 n.1 (1987).

76. See, e.g., Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended at 42 U.S.C. §§ 7401–7671); Joshua Galperin, *Thirty Years of Third-Stage Environmentalism*, HUFFPOST (Nov. 28, 2016, 4:19 PM), [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) [<https://perma.cc/UM38-SEV2>].

77. See, e.g., *Project XL*, EPA ARCHIVE, <https://archive.epa.gov/projectxl/web/html/index.html> [<https://perma.cc/R25N-Q4EK>].

78. Robert L. Glicksman & David L. Markell, *Unraveling the Administrative State: Mechanism Choice, Key Actors, and Regulatory Tools*, 36 VA. ENV'T L.J. 318, 368 (2018).

79. VANDENBERGH & GILLIGAN, *supra* note 19, at 383.



government can step back from responsibility.<sup>80</sup> With something as significant as PEG, it is impossible to control the political narrative.

PEG may provide guidance and experimentation for public governance—this is a beneficial political role. PEG may also displace public governance or contribute to a notion of public law as outmoded—this is a harmful political role. Because PEG is political, we must seriously consider how the public can use democracy to assert more control over these impacts.

### C. Choices in Environmental Governance

Politics is not the only reason for public control over private governance. Environmental governance across-the-board poses important choices, but it is not proper to leave these choices only to private industry. They are collective choices that need public attention through democratic structures.

The reason we may feel comfortable putting private firms, with limited democratic process, in charge of environmental governance is because a set of mistaken assumptions obscures the fact that there are many important public choices underlying environmental protection. The mistaken assumptions are a series of pseudo-rules that ask us to defer to an imagined natural ordering rather than engaging in public debate and choice. These rules are the public-private distinction to which I have already referred, balance-of-nature as an obligatory environmental goal, and the scientism of welfare economics.

It would be easy to defer to PEG and avoid collective choices if it were true that the public could ignore private initiatives. The longstanding faith in a distinction between public and private responsibility endorses this ignorance.<sup>81</sup> Government should not interfere with private work, this old rule tells us, unless there is a market failure that demands government intervention.<sup>82</sup> Without market failure, then, there is no difficult choice with which the public needs to grapple because the invisible hand of the market will resolve choices.

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80. See EPA, *supra* note 69; Ongweso, *supra* note 69.

81. Grewal & Purdy, *supra* note 27, at 1; Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 588 (2000); William W. Buzbee, *Accountability Conceptions and Federalism Tales: Disney's Wonderful World?*, 100 MICH. L. REV. 1290, 1294 (2002); CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS*, at ix (1977); ROBERT L. HALE, *FREEDOM THROUGH LAW*, at vii (1952); DOUGLAS A. KYSAR, *REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY* 51 (2010).

82. Grewal & Purdy, *supra* note 27, at 6.

This argument fails because private markets are hardly free from government intervention.<sup>83</sup> The law of contract, tort, and property are essential to the operations of private firms, but they are public interventions.<sup>84</sup> Corporate law and securities law influence the behavior of private firms even concerning their environmental conduct.<sup>85</sup> Perhaps most importantly, government interventions shape private market demands through policies related to—for example—roads, corporate formation, unionization, anti-trust, speech, and more.<sup>86</sup> This complexity shows that simply deferring to private markets to resolve hard choices is insufficient because public governance builds, maintains, and shapes markets themselves. Indeed, “the rise of the modern state was a necessary condition for the rise of the modern corporation.”<sup>87</sup>

Like faith in the public-private distinction, faith in the so-called balance of nature also falsely promises environmental policy without public choice.<sup>88</sup> For generations of environmental thinking, there was an understanding that the natural world existed in a delicate balance.<sup>89</sup> That belief was helpful because if humans upset the balance, then they had objectively damaged the environment and the goal of any environmental policy could be simply to maintain or restore the natural balance.<sup>90</sup> Like the public-private distinction, a more careful inspection shows there is no steady balance. Instead, the world is a dynamic system in constant flux.<sup>91</sup> Balance could be a useful myth, or model to which environmental policy can strive, but this is a collective

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83. *Id.* at 1, 13; Light, *supra* note 17, at 140. For what it is worth, the government is not even free from private interventions. Freeman, *supra* note 81, at 588. *See generally* Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. 467 (2020) (identifying hybrid public-private governance systems).

84. Grewal & Purdy, *supra* note 27, at 13.

85. Light, *supra* note 17, at 140.

86. LINDBLOM, *supra* note 81, at 173.

87. Taisu Zhang & John D. Morley, *The Modern State and the Rise of the Business Corporation*, 132 YALE L.J. 1970, 1973 (2023).

88. Joshua Ulan Galperin, *4Cs at 4°C: Counting, Contestation, Communication, and Consideration for Collectively Constructing Concepts of Climate Change*, in ADAPTING TO HIGH-LEVEL WARMING: LAW, GOVERNANCE, AND EQUITY (Katrina Kuh & Shannon Roessler eds., forthcoming 2024).

89. Robert L. Fischman, *Letting Go of Stability: Resilience and Environmental Law*, 94 IND. L.J. 689, 690 (2019).

90. *Id.*

91. *See* JEDEDIAH PURDY, *AFTER NATURE: A POLITICS FOR THE ANTHROPOCENE 2* (2015) (exploring the idea of the Anthropocene as a challenge to views of nature that look for natural balance). *See generally* OSWALD J. SCHMITZ, *THE NEW ECOLOGY: RETHINKING A SCIENCE FOR THE ANTHROPOCENE* (2016) (critiquing the idea of balance of nature in the natural sciences).

political decision, not an automatic resolution to environmental governance.<sup>92</sup> Thus, again, because this pseudo-rule proves useful but not absolute, we are confronted with an important public choice about environmental protection.

Welfare economics is the final trick on which environmental decision-makers often rely to avoid articulating collective public goals. Welfare economics seeks to capture public interests by collecting individual preferences and aggregating these preferences under the assumption that the sum of individual wants must equal collective wants.<sup>93</sup> If we measure individuals to calculate collective goals, then we can direct our policymaking to those aggregate interests rather than wrestling with uncertain democratic deliberations.<sup>94</sup>

The mathematical promise of welfare economics fails as a tool for avoiding social choice because it is mathematically and theoretically insufficient. Mathematically, it is impossible to identify, measure, compare, and aggregate individual preferences in a way that meaningfully identifies public will.<sup>95</sup> Perhaps this strategy gives guidance, but it does not give answers. Theoretically, the idea of individual preferences properly aggregating to reflect collective will falls short in two ways. First, welfare-economic aggregation will always fail to count some segments of society. Individual preference measurements can too easily ignore people outside of a relevant jurisdiction, future generations, and non-human lives.<sup>96</sup> Without these participants, the sum cannot reflect reality. The second theoretical failure is that collective will is more than the sum of its parts. Trying to aggregate individual preferences presumes that social processes have no impact on those preferences when, in fact, the social process, the political process, and the democratic process all help frame, shape, and influence individual preferences.<sup>97</sup>

That last flaw in welfare economics—that politics emerge from individual preferences but also shape those preferences—puts a finer point on the overarching argument in this Part. It would be wonderful if we could forgo the challenges of collective choice: the fraught issues, the harsh words, the real violence. But we cannot avoid these challenges because there are no easy rules to help us avoid our shared responsibility. PEG does not help us avoid

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92. Galperin, *supra* note 88, at 6.

93. KYSAR, *supra* note 81, at 15, 71.

94. *Id.*

95. See generally FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2010) (explaining the practical failures of welfare economics with a focus on cost-benefit analysis).

96. KYSAR, *supra* note 81, at 18.

97. *Id.* at 15.

our shared responsibility because calling it “private” does not let it escape civil society. Aiming governance at environmental protection does not mean PEG is achieving undeniable progress. And where PEG can maximize public welfare, that does not mean it necessarily captures collective aspirations.

#### *D. Private Governance and Liberty*

There is at least one more factor that pushes PEG into the realm of democracy: it can curtail individual liberty. In fact, PEG’s ability to improve the global environment comes from its power to control global resources. The exercise of this vast power is a plausible threat to liberty. There may be good reason to sacrifice some liberty to advance PEG and environmental protection, but without a democratic system for controlling that power, PEG operates without consent.

There are two principal ways to define liberty. Liberty as non-interference means that if another agent limits your choices of how to behave, there is not complete liberty.<sup>98</sup> If the government limits a coal plant’s permissible pollution emissions, the government has interfered with the plant operator’s liberty by taking away the choice to emit more. In the alternative, liberty as non-domination means that not only must you have choices, but others must not have the power to intervene in your choice.<sup>99</sup> The same coal plant operator may have a choice to maintain paperwork in pretty much any state of organization. The government may have the power to inspect the coal plant at any time. With the ever-present possibility of inspection, the operator may choose to maintain an electronic record-keeping system to keep the inspector happy. An array of choices is available and the inspector has not exercised any control, but the power relation allows the inspector to dominate.

These are examples of government interfering or dominating. Having rejected any fundamental distinction between public and private action, however, it should be clear that private parties can interfere and dominate in much the same way.<sup>100</sup> A private employer may interfere with an individual choice by prohibiting employees from engaging in certain hobbies or wearing certain jewelry.<sup>101</sup> In the consumer market we may have a formal choice to

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98. Philip Pettit, *The Instability of Freedom as Noninterference: The Case of Isaiah Berlin*, 121 ETHICS 693, 698 (2011).

99. See PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 9 (1997).

100. ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT) 53–54 (2017).

101. *Id.*

buy sustainable or unsustainable seafood, but the domination of an employer, for instance, who holds the power to fire at will, may make our financial status uncertain enough that we do not take the risk of spending more money on sustainable fish.

One might argue that, in the private context, we cannot speak of interference or domination because private choices are the result of voluntary negotiations.<sup>102</sup> Perhaps. In the case of PEG, though, there is not even a superficial negotiation over climate stability, ocean health, freshwater availability, air quality, toxic exposures, etc. But private firms do have the power to control these aspects of the natural world, and in so doing they have the power to interfere with individual choices and dominate individual will. By way of a few superficial examples, as is evident from the fact that private firms can control 60% of the climate pollutants necessary to maintain 2°C warming, firms have substantial control over the global climate.<sup>103</sup> With this control they can interfere by contributing to sea level rise and storm surges, and making it impossible to live on certain parts of the coast, or they can dominate by raising the costs of coastal living so high that the choice is available but unwise.

The last component of liberty is that interference and domination are really only problematic to the extent that the interference or domination is arbitrary.<sup>104</sup> “Power is arbitrary when it is not adequately controlled by a fair process of decision . . . .”<sup>105</sup> The question, then, is whether there is adequate control over the PEG process.

### *E. Private Governance and the Democracy Threshold*

Democracy is a method of public control and is necessary for PEG because a nominal “private” designation does not insulate PEG from collective scrutiny. That lesson is the key to this entire Part. PEG is “private” but it is still political; it does not avoid collective choices; and it can impact individual liberty—each a threshold for democratic engagement.

However, there is a question of where, exactly, we draw the line between those things that need democratic attention and those that are free to operate by private fiat. Certainly, the thresholds of politics, choice, and liberty help

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102. *Id.* at 53 (citing R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 386–405 (1937)); see also K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* 13 (2016).

103. See VANDENBERGH & GILLIGAN, *supra* note 19, at 5.

104. See HENRY S. RICHARDSON, *DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY* 250 (2002).

105. *Id.*

answer this question, but they do not provide quantitative certainty. I suspect that certainty cannot exist. Nevertheless, it is worth considering that there is a fuzzy line. Although I also take this question up elsewhere,<sup>106</sup> I will note here and with fresh eyes that much PEG seems to fall on the democratic side of that fuzzy line, as it can control vast global resources. An individual behavior with environmental impacts—the time at which one chooses to water their lawn, maybe—falls clearly on the other side of the line at least in part because of its vanishingly small individual impact. A local charitable foundation that supports environmental governance at the neighborhood level falls closer to the fuzz, but probably settles nearer individual lawn care because jurisdiction constrains its governance, as with Justice Brandeis’ state laboratories.<sup>107</sup>

I am ambivalent about where we draw this line, in part because there is no single or precise way to answer the question and in part because a priority of this Article is to identify the need for democratic practice in private governance, not to resolve all the follow-up questions. But two aspects of this question deserve more preliminary attention: the incentive structure of line-drawing and the general considerations for how to draw a defensible line.

One important aspect of line-drawing is the unintentional disincentive it might create. If we set the line between democracy and uncontrolled private power such that many more private initiatives are subject to meaningful public oversight, then firms may rather avoid environmental initiatives for fear of added burdens such as litigation.<sup>108</sup> As with greenwashing, where a firm makes environmental claims that turn out to be false or misleading, there is an argument that such claims build pro-environmental norms. Better that some claims are false, the argument goes, than that companies are hesitant to make such claims for fear of reprisal, thereby weakening the emerging pro-environmental norm.<sup>109</sup> Similarly, should a company like Patagonia—with a

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106. See generally Galperin, *Environmental Governance*, supra note \*.

107. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

108. See, e.g., Andrew Jeong, *Delta’s Carbon-Neutral Pledge Is ‘Greenwashing,’ California Lawsuit Says*, WASH. POST (May 31, 2023, 5:20 AM), <https://www.washingtonpost.com/climate-environment/2023/05/31/delta-airlines-carbon-neutral-lawsuit/> [<https://perma.cc/5EST-9HVD>].

109. Anmar Frangoul, *‘Greenwashing’ Is a Good Thing, According to One Renewable Energy Tycoon*, CNBC (Feb. 2, 2023, 1:49 AM), <https://www.cnbc.com/2023/02/02/greenwashing-is-a-good-thing-according-to-one-renewable-energy-tycoon.html> [<https://perma.cc/DL62-FSBZ>]. See generally MICHAEL P. VANDENBERGH ET AL., PRIVATE ENVIRONMENTAL GOVERNANCE 106 (2024) (“[E]ven partially fulfilled commitments may make important contributions to climate mitigation by creating a sense among corporate managers that climate commitments are the norm.”).

laudable environmental track record<sup>110</sup>—subject its supply chain decisions to democratic practice and face the prospects of added costs, embarrassment, and negative publicity when a laggard making no effort to advance environmental goals is “off the hook”?<sup>111</sup> Where we draw the line that triggers democratic practice will weigh heavily on these concerns.

As to where we draw the line, again, though there is enormous room for debate and almost certainly no correct answer, two factors can help in the analysis. The hypothetical example above, about lawn care, hints at the first factor: *environmental* impact. Those private endeavors with more environmental impact deserve more democratic attention. They deserve more attention because bigger impacts are more likely to affect politics, public choices, and liberty. This presents some difficulty because the private governance strategies that have the biggest environmental effects are the ones that are most necessary for environmental protection but, under this thinking, are also the ones subject to the constraints of democracy. That reality brings us to the second factor.

Private governance regimes that have potential for the biggest *political* impacts should also trigger more democratic attention. If a private environmental policy seems likely to impact the political ecosystem, then it deserves democratic attention. Those policies that come with the loudest claims about their benefits or that seek to ward off or otherwise influence regulation are the ones that most impact the public governance ecosystem. If firms are actively managing that governance ecosystem, then democratic practice should guide the private regime.

We thus have two factors for determining when private governance triggers democratic oversight. The first—environmental impact of the private policy—should be somewhat intuitive but raises the problem of democracy disincentivizing good environmental behavior. The second—political impacts of the private policy—recognizes that private initiative is not only about explicit proximate consequences but also about fair governance. Democracy is not primarily a consequentialist practice that we judge based on outcomes. Democracy is the way communities govern themselves and address power disparities. As such, when a private environmental policy can

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110. See, e.g., Press Release, U.N. Env't 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> [<https://perma.cc/CRB8-5Z3H>].

111. However out of style, one solution to the democratic disincentive is public regulation establishing uniform standards and requiring performance as a matter of law rather than private preference.

have an outsized impact on environmental governance, democratic engagement is necessary even if that engagement might slow environmental protection. The goal of democracy is not to advance the issues that I think are most important, it is to provide a forum for collective governance without favoring specific outcomes. Most would probably object to a benevolent green dictator because benevolence does not reduce dominance and culpability. At the same time, focusing on political impacts as a democratic trigger helps to elevate important issues into a more robust and inclusive public debate, thereby increasing the likelihood of good environmental consequences.

The last aspect of this discussion is *how much* democracy to demand once a private regime crosses a threshold triggering at least some democratic practice. I am again ambivalent on this question because it is impossible to pin down a correct answer. However, the two factors I just discussed will continue to play an important role. In this case, a sliding scale of democratic practice is probably warranted. Those private regimes with greater environmental and political impact probably call for more democratic practice, while those with less impact may be legitimate with less democracy. This is a loose balancing test, not a precise formula.

At this stage, we need not assess every example of environmental governance if we can agree that the most powerful and instrumental PEG ventures deserve democratic attention. With that agreement, it is necessary to have a better grasp of what democracy really means in this context and how it looks in practice, which is the charge of the next two Sections, and then to assess whether PEG is sufficiently democratic, which is the goal of Part III.

## II. USEFUL DEMOCRACY

Doug Kysar wrote that “a political community must always, in a nontrivial sense, stand outside of its tools of policy assessment, maintaining a degree of self-awareness and self-criticality regarding the manner in which its agency is exercised.”<sup>112</sup> That is the essence of the prior Part: PEG is political, contestable, and has an impact on our freedom, so it should be the result of our agency, not fiat. Kysar as well as others including, significantly, Professor Purdy, have shown the myriad of environmental issues that face the public but are often hidden—intentionally or not—under promises of easy, apolitical answers.<sup>113</sup> I hope my analysis of PEG is a useful part of that

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112. KYSAR, *supra* note 81, at 16.

113. PURDY, *supra* note 91, at 47; RICHARDSON, *supra* note 104, at 244.



canon.<sup>114</sup> Having revealed the political significance of so much environmental governance, Kysar and Purdy leave us with the prompt to grasp democracy as the device for collective choosing.<sup>115</sup> Drawing on a related article,<sup>116</sup> this Part goes a step further to propose a practical structure of democracy that is well suited for making complex social choices in a diverse and fraught political community. First, this Part considers the value of “corporate democracy” and concludes that, while the phrase describes a particular view of more expansive corporate governance, it is really no substitute for more traditional visions of democracy. Thus, as a second step, this Part defines democracy as a constant, iterative experience of contestation, deliberation, and reason-giving, alongside the impulse and accountability of majoritarian voting. The last Section of this Part shows how these democratic pillars are not just ideals. They are practicable.

#### A. Corporate Democracy?

There is significant literature on what we might call “corporate democracy,”<sup>117</sup> but it is not the sort of broad-spectrum democracy we would expect when considering how policymakers engage with the public. When scholars use the term “democracy” in the corporate context, they are addressing “debates over the optimal allocation of power *within* public corporations”<sup>118</sup> That is the key lesson of this short Section. Corporate democracy is about corporate governance, not about the role of corporations *as* governors.

The central issue in discussions of corporate democracy is what power arrangements will make firms most successful. Lucian Bebchuk, a leading proponent of shareholder democracy, argues that more shareholder power will “improve corporate governance and enhance shareholder value.”<sup>119</sup> In

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114. See generally Galperin, *Environmental Governance*, *supra* note \*.

115. KYSAR, *supra* note 81, at 222; PURDY, *supra* note 91, at 256.

116. See generally Galperin, *Democracy*, *supra* note \*.

117. See, e.g., Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005); Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735 (2006) [hereinafter Bainbridge, *Director Primacy and Shareholder Disempowerment*]; Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601 (2006); Usha Rodrigues, *The Seductive Comparison of Shareholder and Civic Democracy*, 63 WASH. & LEE L. REV. 1389 (2006); Lisa M. Fairfax, *Making the Corporation Safe for Shareholder Democracy*, 69 OHIO ST. L.J. 53, 61 (2008); Michael J. Goldberg, *Democracy in the Private Sector: The Rights of Shareholders and Union Members*, 17 U. PA. J. BUS. L. 393 (2015).

118. Goldberg, *supra* note 117, at 394 (emphasis added).

119. Bebchuk, *supra* note 117, at 836; see also Fairfax, *supra* note 117, at 56.

the alternative, Stephen Bainbridge is a prominent critic of shareholder power, arguing that centralizing authority in boards and management is “the most cost-effective and efficient means of governing corporate affairs.”<sup>120</sup>

The choice is not simply two-sided, with shareholders on one side and management on the other. So-called “stakeholders” are also an important consideration. Corporate stakeholders are “employees, customers, creditors, suppliers, and other groups impacted by the corporation.”<sup>121</sup> In the context of PEG, particularly climate-change-oriented PEG, all living things on Earth might be stakeholders, though the term is not defined so broadly.<sup>122</sup> The concept of corporate stakeholders, although narrow in a global sense of democracy, is where literature on corporate democracy comes closest to more traditional notions of democracy.

Thus, the role stakeholders play in the debates is worth further consideration. A leading critique of increased shareholder power is that as shareholders gain control of corporate action, they will seek to advance their own narrow interests at the expense of stakeholders.<sup>123</sup> For instance, shareholders may disregard the wellbeing of workers, the environment, or host communities in order to increase their own profits. On the other hand, the default alternative to “shareholder democracy” is more power in the hands of directors and managers, which could be bad for both stakeholders and shareholders.<sup>124</sup> Managers and boards may have various commitments that do not align with either shareholders or stakeholders, including their own compensation and longer decision-making horizons.<sup>125</sup>

Another angle on corporate democracy is the concept of the “universal owner” or “portfolio primacy.” Broadly speaking, the idea is that index funds are not focused on a single corporation, but on the growth of a diverse investment portfolio.<sup>126</sup> When a concern like climate change threatens to disrupt global markets, index fund managers will use their widespread power as shareholders to reduce the global threat rather than focus myopically on the value of any single corporation.<sup>127</sup> The universal owners, who give primacy to their entire investment portfolio, might push for greenhouse gas

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120. Fairfax, *supra* note 117, at 55–56; *see also* Bainbridge, *Director Primacy and Shareholder Disempowerment*, *supra* note 117, at 1746.

121. Fairfax, *supra* note 117, at 56.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. Roberto Tallarita, *The Limits of Portfolio Primacy*, 76 VAND. L. REV. 511, 514 (2023).

127. *Id.* *See generally* Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1 (2020).

reduction policies, fuel transitions, and other sustainable policies at specific firms in order to benefit the entire portfolio. In some ways, this approaches democracy because it seems to advance goals that are more aligned with what we might expect from the public-at-large. Of course, that assumes that index fund managers and the public-at-large have the same interests. But confirming that interest alignment requires some democratic process on the front end. Such a process does not exist and so we only hope that when fund managers are seeking to maximize their investments, they also accidentally represent the same interests that the public might prefer.

In any case, at a more practical level, Roberto Tallarita has demonstrated limits on portfolio primacy that undermine any claim it might have to democracy-mimicking outcomes. Tallarita notes that the companies causing the most significant climate harms are not publicly traded and are, therefore, outside the ambit of index fund managers.<sup>128</sup> Index fund managers own large companies primarily in rich economies and therefore have the incentive to address climate risks only to the extent those risks affect their firms and economies, which are less vulnerable than small firms and poor economies.<sup>129</sup> Finally, the diversity of index fund investments creates “fiduciary conflicts” that limit their push for climate measures.<sup>130</sup> Arguably, the “universal owner” with a diverse portfolio will not bring about a resolution to climate change. Even if it could, it would be difficult to describe the process as a democratic one.

To put some of this analysis in the vernacular of democratic theorists, debates about corporate democracy are debates about the proper corporate *dêmos*.<sup>131</sup> In democratic theory, debates about the *dêmos* are debates about whom to engage and how to engage them in democratic participation.<sup>132</sup> This is generally a question of where to draw boundaries: around existing jurisdictional lines, certain groups of people, and so forth.<sup>133</sup> Corporate democracy similarly asks whether the *dêmos* is only shareholders (including universal owners), whether stakeholders have a role to play, and, if so, how to structure the participation of either, or both, vis-à-vis corporate boards and management. These are important discussions for both corporate governance and public policy. Yet they are not discussions of democracy because they

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128. Tallarita, *supra* note 126, at 517.

129. *Id.* at 517–18.

130. *Id.* at 518–19.

131. See generally Sarah Song, *The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State*, 4 INT'L THEORY 39 (2012).

132. *Id.* at 41–43.

133. *Id.*

predominantly focus on power *within* the corporation and not external power *over* the corporation. What, then, is democracy?

### B. *Elements of Democracy*

Professor Rubin wrote that it is impossible to agree on the meaning of democracy and, thus, when we tie notions of good governance to the concept of democracy, we end up importing inarticulate “premodern” notions into our debates that do not reflect modern political commitments.<sup>134</sup> He is right. But rather than “getting past democracy,” I want to spend time clearly defining it so that it is a useful concept. And while we might never agree on a single definition of democracy,<sup>135</sup> my goal is to sketch a useful one, drawn from tested theories and constitutional design, not universal truths.

To many, the term democracy simply means elections.<sup>136</sup> Majoritarianism has long been a symbol of democracy,<sup>137</sup> but never the entire democratic structure. Voting is indeed a pillar of democracy, but it is just one among several. In addition to voting, which alone can explain a great deal of the accountability and impulse in a democratic system, a multidimensional democracy also includes contestation, deliberation, and reason-giving. In combination, these complementary dimensions can produce a harmonic democracy that is both robust and satisfying. The remainder of this Part provides a short summary of each element.<sup>138</sup>

#### 1. Majoritarianism

Majoritarianism refers to a voting system where the largest group of voters has the authority to make governing decisions or to select leaders who become the only officials authorized to make governing decisions.<sup>139</sup> Voting thus serves as the impulse of democratic governance, empowering people to elect representatives and leaders. It also operates in the legislative process,

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134. Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 714 (2001).

135. *Id.*

136. Galperin, *Democracy*, *supra* note \*, at 84.

137. *See, e.g.*, ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 4–5 (1980). *See generally* JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Routledge 2005) (1762).

138. For more detail on each, including a discussion of the theoretical and constitutional precedents for each element, see generally Galperin, *Democracy*, *supra* note \*.

139. *Id.* at 78.

providing democratic resolution by closing policy debates and enacting laws through majority rule.<sup>140</sup>

The nuances of majoritarian democracy are many. Among modern democratic theorists, there are those like Joseph Schumpeter who promoted minimalist majoritarianism without any endorsement of competing processes or values, even those that might undermine fair elections.<sup>141</sup> Anthony Downs drew closely from Schumpeter's thinking in advancing majoritarianism but went a small step towards thicker majoritarianism by demanding something like universal adult suffrage and limits on the ability of electoral winners to permanently entrench themselves.<sup>142</sup> Robert Dahl saw a fuller majoritarianism still, explaining that various fundamental rights like expression, press, and assembly were all necessary to make majoritarianism functional and fair.<sup>143</sup> Regardless of the specifics, the core idea is that a majority rule system is central to democratic practice.

Majoritarianism is one of the fundamental liberal aspects of democracy. It is based on the premise that everyone has formal equality and formally equal access to governance because everyone is an equal part of the sovereign whole.<sup>144</sup> Due to the lack of consensus in complex and diverse societies, rather than exercising that sovereignty directly, voting serves as a mechanism to legitimize institutional state power.<sup>145</sup>

## 2. Individual Contestation and Participation

Democracy goes beyond majoritarianism by providing opportunities for individual participation and contestation, safeguarding individuals and groups even within collective decision-making.<sup>146</sup> Individual contestation allows people to engage actively, rather than limiting their participation only

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140. *Id.*

141. See JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 269 (Harper Colophon Books 3d ed. 1975) (1942).

142. ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 23–24, 29 n.11 (1957).

143. ROBERT A. DAHL, ON DEMOCRACY 8–16 (2d ed. 2015).

144. Galperin, *Democracy*, *supra* note \*, at 79.

145. *Id.* (citing Jane Mansbridge, *Using Power/Fighting Power: The Polity*, in DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 53 (Seyla Benhabib ed., 1996)).

146. *Id.* at 82.

to voting.<sup>147</sup> It enables individuals to challenge political settlements, the status quo, and instances of coercion.<sup>148</sup>

Like majoritarianism, there are different perspectives on the specifics of individual contestation. At its thinnest, the idea of individualism grants individuals only the chance to express their opinions as part of the electoral process.<sup>149</sup> At its thickest, theorists like Philip Petit urge that institutions must empower individuals to contest any form of domination.<sup>150</sup> But across the board, individual contestation should provide avenues to protect individuals and groups without concern for their status as a political majority or minority.

Also like majoritarianism, liberalism undergirds individual contestation, safeguarding individual voices (and collections of individuals) from being fully overshadowed by other processes like majoritarian aggregation, purported consensus that could erase minority perspectives, or rigid rationalism.<sup>151</sup> Individual contestation also provides for more political equality by granting space even to those who are denied the right to vote or are in the voting minority.<sup>152</sup>

### 3. Reasoning

Reason-giving is two-sided, requiring decision-makers to justify their actions and providing opportunities for the public to express their own reasons for their respective positions on public issues.<sup>153</sup> Decision-makers must explain their objectives and how their chosen actions align with them. Public reason-giving also gives individuals and groups the opportunity to share their knowledge and values with decision-makers and fosters collaborative self-awareness among democratic participants.<sup>154</sup>

As with each element I describe here, there are differences of opinion with respect to reason-giving. Some, like law-and-economics proponents in recent decades or a subset of early twentieth-century progressives, view reason as an analytical formula based only on logic and objective goals, like a definitive

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147. *Id.*

148. *Id.* (citing Manbridge, *supra* note 145, at 46); Glen Staszewski, *Obergefell and Democracy*, 97 B.U. L. REV. 31, 61 (2017).

149. *See* DAHL, *supra* note 143, at 37.

150. PHILIP PETIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 213 (2012); *see also* RAHMAN, *supra* note 102, at 96.

151. Galperin, *Democracy*, *supra* note \*, at 83.

152. *Id.*

153. *Id.* at 87.

154. *See* RICHARDSON, *supra* note 104, at 38–39 (describing three different conceptions of how “public good” constrains political power).

and quantifiable public interest.<sup>155</sup> In this view, reason-giving is part of a technocratic and managerial policymaking process that is at odds with my multifaceted view of democracy. Others, like Joshua Cohen, would place strict requirements on the type of appropriate reasons, limiting them to reasons that are compelling to others and that recognize others as equal participants.<sup>156</sup> If reasons do not meet these criteria, Cohen would reject them as invalid.<sup>157</sup> Rawls' "veil of ignorance" is a similar criteria because it proposes that reasons are acceptable only when they come from a position of ignorance about one's position in society.<sup>158</sup> All these criteria are indeed significant aspects of respectful and effective cooperation, but they set too high a bar for basic democratic reason-giving.

The element of reason-giving I advance here is more straightforward, focusing on the expression of genuine reasons, irrespective of their general acceptability, formal logic, or alignment with a notion of the public good. Democratic reasons can be rationalist and technical, scientific, economic, or they can reflect feelings, goals, and values, ensuring that policy purposes and values are expressed rather than concealed.

Reason-giving is a generative and creative element of democracy. Majoritarianism and contestation are classically liberal because they focus on an individual's ability to assert their personal perspective against the collective.<sup>159</sup> In this way, liberalism presumes that the individual perspective is truly individual, emerging independent from politics and democracy.<sup>160</sup> If there is truth to that assumption, it is certainly not the whole truth.<sup>161</sup> Each person's interaction with others and with institutions of all stripes helps shape their values.<sup>162</sup> Reason-giving is a call-and-response in which people listen and act and consider the presence and values of others. This process can generate new values or shift preexisting ones.<sup>163</sup>

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155. See RAHMAN, *supra* note 102, at 35.

156. Joshua Cohen, *Procedure and Substance*, in DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 100 (Seyla Benhabib ed., 1996).

157. *Id.*

158. See generally JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999).

159. See *supra* Sections III.B.1 & III.B.2.

160. Galperin, *Democracy*, *supra* note \*, at 66.

161. *Id.* at 94.

162. Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 YALE L.J. 1122, 1135 (2010).

163. Mathilde Cohen, *Reasons for Reasons*, in APPROACHES TO LEGAL RATIONALITY, LOGIC, EPISTEMOLOGY, AND THE UNITY OF SCIENCE 38 (Dov M. Gabbay et al. eds., 2010).

#### 4. Deliberation

Deliberation involves discussing ideas, making proposals, reaching informal agreements, and settling on official decisions which themselves may become the starting point for further deliberation.<sup>164</sup> Based in large part on both internal and external reason-giving, decision-makers will contemplate reasons in light of possible actions, considering the weight of different reasons, alternatives, costs and benefits, and other factors in the process of reaching a decision. At a practical level, processes like negotiation, debate, and discourse are all part of the deliberative process.

There has been much debate, especially in political philosophy, about the importance and meaning of deliberation. Jürgen Habermas advanced deliberation as the heart of democracy, seeing it as a necessary tool in developing political consensus.<sup>165</sup> Where deliberative democracy sees deliberation as a tool for building consensus, others reject the notion of consensus altogether and simply see deliberation as a process for developing political norms, including norms that recognize the value of outside voices and the presence of outsized voices.<sup>166</sup> For instance, if we recognize the “back room” negotiations of big firms, big interest groups, and government leaders as a deliberative moment within the democratic process, then we can consider strategies for making the deliberation more inclusive. As with other democratic elements, for the purposes of useful democracy, I am not advancing an idealized version of deliberation. I am suggesting only that democratic institutions rely on deliberative processes at various points.

Deliberation is an inherently collective endeavor, which, like reason-giving, helps mold values, perspectives, and preferences rather than just advance pre-political positions. It has transformative power because the very nature of deliberation is to consider different ideas.<sup>167</sup> At a bare minimum, that forces us to recognize that there are others who have ideas and therefore deserve some attention. In that way, deliberation forces us from our individualist bunkers into some semblance of political engagement.<sup>168</sup> Sometimes that deliberative engagement will change our minds, other times

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164. Galperin, *Democracy*, *supra* note \*, at 94.

165. Jürgen Habermas, *Three Normative Models of Democracy*, in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* 24 (Seyla Benhabib ed., 1996); Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 *YALE L.J.* 1, 25 (2022).

166. PETTIT, *supra* note 150, at 268.

167. Mansbridge, *supra* note 145, at 47.

168. Galperin, *Democracy*, *supra* note \*, at 94.



it simply compels us to confront disagreement.<sup>169</sup> Either way, deliberation puts us in contact in a way that is necessary for democratic practice.

### C. *Democracy in Administration*

The democratic elements that I have just presented are not farfetched goals. We can see them in the real world, though we do not find them ideally implemented or in perfect harmony. Thus, there is much work still ahead. But understanding that some version of each element is already part of different governing institutions should provide motivation to do that work and, as this Article suggests, to extend that work beyond state institutions.

In support of my forthcoming argument in the following Part—that the administrative state is a good model for improving private governance—this Section briefly illustrates how these democratic elements manifest in the federal administrative state. The institutions of administrative law have many significant flaws, including lack of transparency and inequity in who influences agency decision-making.<sup>170</sup> Some critics argue, however, that administrative governance is not merely flawed, but that it is fundamentally illegitimate.<sup>171</sup> The critics generally assert that agencies—“bureaucrats” as critics prefer to call them—are unelected, unaccountable, and not subject to the democratic will of the people.<sup>172</sup> In short, the criticism is that administrative governance is illegitimate and unconstitutional because it is undemocratic. To pull together and illustrate the elements of useful democracy that I just described, and to provide a model for improvements to PEG, as I discuss in the next Parts, this Section argues that, to the contrary and despite very real defects, administrative governance represents a robust form of democratic governance. This assessment should help clarify useful

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169. CHANTAL MOUFFE, *AGONISTICS: THINKING THE WORLD POLITICALLY* 7 (2013).

170. JOSHUA GALPERIN & E. DONALD ELLIOTT, PROVIDING EFFECTIVE NOTICE OF SIGNIFICANT REGULATORY CHANGES 36–47 (2022), [https://www.acus.gov/sites/default/files/documents/Providing%20Effective%20Notice%20of%20Significant%20Regulatory%20Changes%20Final%20Report\\_0.pdf](https://www.acus.gov/sites/default/files/documents/Providing%20Effective%20Notice%20of%20Significant%20Regulatory%20Changes%20Final%20Report_0.pdf) [<https://perma.cc/Z2QE-J7RL>].

171. See Ryan Calo & Danielle Keats Citron, *The Automated Administrative State: A Crisis of Legitimacy*, 70 EMORY L.J. 797, 845 (2021) (arguing that there is a democratic legitimacy issue with administrative state); Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 719 (2016). See generally PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

172. See *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 224–25 (2020) (holding that the Consumer Financial Protection Bureau contravened governmental scheme of separation of powers, because administrative director was not elected by people).

democracy and provide a point of comparison with PEG—and eventually a rough model for PEG’s improvement.

American administrative law is a practical institution of democracy. Despite handwringing about the democratic legitimacy of the administrative state by those who see democracy merely as majoritarianism and then complain that bureaucrats are not popularly elected,<sup>173</sup> some scholars have identified administrative law as a way to legitimize governance and as a possible exemplar of robust democracy in the federal government, recognizing its promise and suggesting reforms.<sup>174</sup> Others argue that administrative law is legitimate because of the way it combines articulation and recourse,<sup>175</sup> even as it rejects fuzzy and outdated notions of democracy.<sup>176</sup> This Section builds on these lines of support for the legitimacy of the administrative state in light of multidimensional democracy, in order to later explain how private governance can model administrative law.

Administrative law is a form of “middle democracy,” above parochial localism but more meaningful and individually substantial than elections and national legislation.<sup>177</sup> Beyond voting, administrative action is the formal aspect of federal democracy with which most people engage, and it is therefore a uniquely valuable structure for fostering multidimensional democracy. It is, today, the basic tool for self-governance.<sup>178</sup> Further, the current structure and law of administration, while patently flawed, provide a starting point for fostering multi-faceted democratic discussions. As Part IV will further detail, lessons from administrative middle democracy could therefore help inoculate PEG, making projects more democratic.

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173. See generally Joshua Ulan Galperin, *The Death of Administrative Democracy*, 82 U. PITT. L. REV. 1 (2020) (identifying examples of elected administrators and demonstrating that electoral majoritarianism does not grant them clear legitimacy and, therefore, arguing that majoritarianism is not proper measure of democracy).

174. See, e.g., *id.* at 6; RAHMAN, *supra* note 102, at 3; RICHARDSON, *supra* note 104, at 214–15; BLAKE EMERSON, *THE PUBLIC’S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* 150 (2019); JERRY L. MASHAW, *REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT* 164–65 (2018). See generally Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490 (2006).

175. Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2119 (2005).

176. Rubin, *supra* note 134, at 713–14.

177. AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 12 (1996); Archon Fung, *Recipes for Public Spheres: Eight Institutional Design Choices and Their Consequences*, 11 J. POL. PHIL. 338, 339 (2003).

178. Rubin, *supra* note 175, at 2120.

Administration is essential to good governance because it avoids “frustration” that would result from democratic will without the structures to implement that will.<sup>179</sup> This is administration’s instrumental function. In addition, administration is discursive, it offers—or could offer—the facilities to form opinions, to give and debate reasons, to reconsider opinions, and, finally, to implement.<sup>180</sup> I have proposed a practice of democracy having four components: majoritarian impulse and accountability; individual participation and contestation; reason-giving; and deliberation. Administrative law embodies each.

The majoritarian facet of administration comes from Congress and the President. Both are majoritarian institutions.<sup>181</sup> Congress provides impulse and accountability through its electoral structure. The impulse comes from Congress’s initial authorization and structuring of administrative power. That is, Congress makes laws.<sup>182</sup> Through the power to make laws Congress also provides accountability. If agencies do not function the way Congress intended, or even if the intent changes, Congress has the power to remake or unmake the law.<sup>183</sup> As Congress itself is attentive to majoritarian preferences,<sup>184</sup> it provides a level of majoritarian control over administrative behavior. The President, too, offers electoral oversight of agencies through the constitutional mandate that the President “take care” that the bureaucracy faithfully execute the laws<sup>185</sup> and through various mechanisms of White House oversight and management.<sup>186</sup> The President does not have the ability to make law, but the President’s oversight of administration, tied to the President’s electoral mandate, is an important form of majoritarianism.

Individual participation and contestation in administration comes in both constitutional and statutory forms. The Petition Clause of the First Amendment establishes individual access to government outside of the majoritarian process.<sup>187</sup> Professor Blackhawk argues that this individual access is not a historic anomaly or forgotten promise, but one of the

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179. See EMERSON, *supra* note 174, at 6.

180. *Id.* at 93.

181. U.S. CONST. art. I, § 2, cl. 1 (providing for popular election of representatives); *id.* amend. XVII, § 1 (providing for popular election of senators); *id.* art. II, § I, cl. 2 (providing for presidential election through the Electoral College).

182. *Id.* art. I.

183. *Id.*

184. *Id.* art. I, § 2, cl. 1 (establishing two-year term limits).

185. *Id.* art. II, § 3.

186. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277–81 (2001).

187. Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1559 (2018).

constitutional origins of the entire administrative state.<sup>188</sup> Congress has structured administrative law to grant substantial opportunity for individual participation. Individuals can petition for administrative action (or object to administrative inaction).<sup>189</sup> When agencies are pursuing regulations, the Administrative Procedure Act assures that “interested persons” “shall” have “an opportunity to participate in the rule making through submission of written data, views, or arguments.”<sup>190</sup> These administrative access points are open to all, and, though the most powerful participation is limited to those who can marshal the most persuasive information,<sup>191</sup> there is unambiguous individualism in this system. Attendant to the administrative structures themselves is also abundant judicial review. Judicial review is arguably the most formidable source of individual contestation because it gives properly situated individuals the power to directly change administrative behavior.<sup>192</sup> Judicial review is readily available under the Administrative Procedure Act even when other statutes do not provide this opportunity for individual contestation.<sup>193</sup>

Undoubtedly, participation can “run amok,” particularly in administrative decision-making, muddying signals and erasing some voices.<sup>194</sup> This reinforces the need to match participation with other dimensions of democracy while also thoughtfully structuring opportunities for participation around specific proposals and actions, as noted in Section IV.B.

There are statutory and constitutional bases for reason-giving in the administrative state. Although it applies in only limited circumstances, the Fifth Amendment’s Due Process Clause requires the government, including administrative agencies, to provide a reason whenever it deprives a person of life, liberty, or property.<sup>195</sup> Statutorily, the Administrative Procedure Act

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188. *Id.* at 1628.

189. Administrative Procedure Act, 5 U.S.C. § 553(e).

190. § 553(c).

191. Galperin, *supra* note 173, at 60–61; EMERSON, *supra* note 174, at 151.

192. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 534–35 (2007) (holding, after an administrative petition and legal challenge by environmental advocacy groups, that without proper reasons for inaction, an agency must act).

193. 5 U.S.C. § 702.

194. Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 177 (1997).

195. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 489 (1972) (concluding an agency must give notice of its claims—that is, reasons for its actions—and an adjudicatory decision-maker must give reasons for its findings); Mathews v. Eldridge, 424 U.S. 319, 345–46 (1976) (giving reason for action is a “safeguard against mistake,” and existing procedures were fair because the agency gave reasons).

requires that agencies give reasons for most agency actions.<sup>196</sup> The “arbitrary and capricious” standard of judicial review directs courts to set aside agency action that is unreasoned.<sup>197</sup> When an agency does not provide reasons for an action, courts hold that the action is arbitrary.<sup>198</sup> Moreover, agencies may not provide only fabricated reasons.<sup>199</sup> Lastly, courts will not accept reasons for action that the agency develops only *after* taking the action.<sup>200</sup> Of course, administrative reasoning is not perfect. For example, what courts will accept as a valid administrative reason is generally limited to technocratic, rather than value-oriented or political, explanations.<sup>201</sup> The form of reason-giving I described in the prior part would allow a much broader set of reasons than what we generally see from agencies.

Deliberation, as always, is closely tied to reasons. Administrative agencies must not only give reasons, they also must deliberate over their actions and guarantee that the interested public is a part of that deliberation. This means that agencies must follow deliberative procedures and that the substance of their reasons is evidence of meaningful deliberation.<sup>202</sup> The procedures are embodied in several provisions of the Administrative Procedure Act, particularly in the notice and comment process.<sup>203</sup> That process assures that agencies publicly declare the details of their planned actions, explain the legal basis for actions,<sup>204</sup> and accept public input.<sup>205</sup> The agency must also ensure that the public can deliberate on the same information that is available to administrative officials.<sup>206</sup> The agency must then *consider* the information the public has submitted<sup>207</sup> and be open to changing its direction based on public

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196. See 5 U.S.C. § 706(2)(a). Lisa Bressman makes a persuasive argument that the demand for reason-giving is more constitutional than most scholars acknowledge and that, while the Administrative Procedure Act does indeed prohibit arbitrary action, there are constitutional provisions, beyond Due Process, that likewise prove that reason-giving is a constitutional principle. See generally Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462 (2003).

197. § 706(2)(a).

198. See, e.g., *Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, 591 U.S. 1, 30–33 (2020).

199. Cf. *Dep’t of Com. v. New York*, 588 U.S. 752, 780 (2019) (stating an agency must “clearly disclose” and “adequately sustain” the bases for its action (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943))).

200. *Id.*

201. Walters, *supra* note 165, at 61.

202. See *Regents of Univ. of Cal.*, 591 U.S. at 19–23.

203. 5 U.S.C. § 553.

204. § 553(b).

205. § 553(c).

206. See *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 251 (2d Cir. 1977).

207. § 553(c).

input.<sup>208</sup> This public-agency interaction is aimed at consequential deliberation and is central to agency action, though certainly there are many ways in which agencies could better engage the public in this deliberative process.<sup>209</sup> Substantively, the reasons that agencies give for action must reflect deliberation by connecting the facts as they are known with the actions the agency decides to take.<sup>210</sup>

These assertions about the democratic functions of administrative governance are not just theoretical. Scholars are also demonstrating them empirically.<sup>211</sup> Anya Bernstein and Christina Rodríguez have produced the most significant recent research in this area.<sup>212</sup> Although described in terms of accountability rather than a broader democratic frame,<sup>213</sup> their interviews with federal administrators confirm the dual majoritarian and reason-giving role of presidential appointees,<sup>214</sup> the contestatory space that agencies provide to internal and external participants,<sup>215</sup> and the deliberative networks within and between administrative agencies.<sup>216</sup>

Because administrative forms are near to the public and rest on multidimensional democracy, they can provide both the internal techniques for designing more democratic PEG and the external practice for considering the larger question of whether we choose PEG and to what extent. But, first, with multidimensional democracy in mind, we can revisit private environmental governance. The next Part argues that, in context and to different degrees, PEG fails to achieve democratic demands.

### III. ASSESSING PRIVATE ENVIRONMENTAL GOVERNANCE IN A DEMOCRATIC CONTEXT

This Part tries to understand whether PEG is democratic by comparing PEG against each of the democratic dimensions identified in the last Part. I make this comparison with an eye to both the global question—how do we

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208. *See Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 (D.C. Cir. 1973).

209. ADMIN. CONF. OF THE U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2018-7: PUBLIC ENGAGEMENT IN RULEMAKING 2, 4–5 (2018).

210. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

211. Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1603–05 (2023).

212. *See generally id.*

213. *Id.* at 1604.

214. *Id.* at 1606.

215. *Id.* at 1604, 1607.

216. *Id.* at 1606–07.

empower or confine PEG in the first place?—and an eye to the local question—could a particular PEG program have sufficient democratic practice? This Part argues that PEG lives up to one demand of democratic practice, individual participation and contestation, but not others. This limitation leaves PEG short of the democratic ideal and leaves us with the democratic question of whether we can accept this democratic deficiency. Unfortunately, PEG as a system of governance does not clearly provide, and indeed may weaken, the practices we use to answer the question “can we accept less-than-democratic PEG?” There are some subtle arguments that imply private governance does not need democratic legitimacy. This Part begins by addressing these. It then looks carefully at whether PEG embodies each democratic dimension.

#### A. Does PEG Need Democracy?

Relying on private industry to address environmental problems does not free us from politics, it just hides politics from view. We must, therefore, uncover the political-democratic issues at play. So, sheesh, talk about a crisis of legitimacy. Handwringing over democratic legitimacy in the administrative state has been long and loud.<sup>217</sup> That worry is premised on a gap between the power of administrative agencies to resolve contentious political questions through regulatory coercion without the benefit of electoral credentials.<sup>218</sup> A similar concern looms over the Supreme Court, which hands down monumental decisions about individual rights,<sup>219</sup> congressional purpose,<sup>220</sup> and the very structure of our government,<sup>221</sup> but, by design, is not subject to majoritarian accountability.<sup>222</sup> By what right does

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217. See, e.g., JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 22–23 (Yale Univ. Press 1938); Freeman, *supra* note 81, at 545; Galperin, *supra* note 173, at 33 n.195 (cataloguing citations to statements concerning the legitimacy of the administrative state).

218. Galperin, *supra* note 173, at 1.

219. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

220. See, e.g., *Sackett v. EPA*, 598 U.S. 651 (2023).

221. See, e.g., *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197 (2020).

222. See U.S. CONST. art. II, § 2, cl. 2 (empowering the President to appoint “Judges of the supreme Court”). What’s more, the Court has said on many occasions that it cannot resolve certain disputes because the disputes are political and therefore outside the ambit of the Court’s expertise. See, e.g., *Rucho v. Common Cause*, 588 U.S. 683, 704–06 (2019).

private industry regulate climate, air, water, and land? So far there is no explicit answer,<sup>223</sup> though there is a series of mostly implicit arguments.

One line of thinking might follow Foucault's assertion that "the techniques of government have become the only political issue, the only real space for political struggle and contestation."<sup>224</sup> Many environmentalists feel environmental goals are not in debate, only how we accomplish them.<sup>225</sup> Were that the case, PEG would be just a contestable tool for an indisputable end. Yet, there is so much evidence in modern politics that core values drive debate more than governance instruments. Whether it is immigration,<sup>226</sup> reproduction,<sup>227</sup> or consumer protection<sup>228</sup>—values prevail.

Another implicit answer to the question of why PEG is legitimate is that private firms have the power to address environmental issues and so we should take advantage of that power.<sup>229</sup> But surely the implication that "might makes right" is insufficient, even if it is practically true.

A third argument is that PEG is democratic enough. PEG has an ambivalent relationship with democracy. On the one hand, as this Part asserts, PEG does not effectively advance democracy *today*. On the other hand, by providing what may be the only avenue towards environmental protection, PEG may advance intergenerational justice and, therefore, intergenerational

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223. Light and Orts argue that the laws and processes under which private firms are created are themselves legitimate and, therefore, the power of the firm is also legitimate. Light & Orts, *supra* note 44, at 65. I agree as a general matter but think this misses the larger question about control over the environment. A legitimately incorporated firm does not necessarily legitimately control the natural environment. We need to distinguish between the legitimacy of a firm to operate and the legitimacy of a firm to govern global resources.

224. Michel Foucault, *Governmentality*, in *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* 87, 103 (Graham Burchell et al. eds., 1991).

225. See Joshua Galperin, Opinion, 'Desperate Environmentalism' Won't Save the Environment, L.A. TIMES (Oct. 29, 2015, 5:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-galperin-environmental-desperation-20151029-story.html> [<https://perma.cc/94HG-UUVD>].

226. Clare Foran et al., *Border Funding Bill Fractures House Democratic Progressives and Moderates*, CNN (June 28, 2019, 2:01 PM), <https://www.cnn.com/2019/06/28/politics/border-funding-bill-house-democrats-divided-progressives-moderates/index.html> [<https://perma.cc/PDY2-KTG4>].

227. Emma Green, *When Your Pregnancy Is Political*, ATLANTIC (July 7, 2019), <https://www.theatlantic.com/politics/archive/2019/07/lila-rose-anti-abortion/593404/> [<https://perma.cc/ESR5-FTCQ>].

228. Beau Brunson, Opinion, *Kraninger's CFPB Gives Consumers the Tools to Help Themselves*, HILL (June 5, 2019, 4:00 PM), <https://thehill.com/opinion/finance/447099-kraningers-cfpb-gives-consumers-the-tools-to-help-themselves> [<https://perma.cc/7S6M-4NDY>].

229. VANDENBERGH & GILLIGAN, *supra* note 19, at 13.



democracy.<sup>230</sup> The idea is simply that future generations will suffer from climate change more than the living.<sup>231</sup> Allowing PEG to mitigate climate change can help preserve future generations and reduce future inequality, albeit with some cost to democracy today. This argument does not sufficiently justify a democratic deficit because exercising multidimensional democracy today could also achieve the environmental protection necessary to protect future generations. PEG is one approach to intergenerational justice, but it is not the only approach.

A fourth justification for PEG's legitimacy is that private firms are private and therefore the question of legitimacy is irrelevant because private entities do not have coercive power.<sup>232</sup> That argument fails because, if private firms did not have coercive power, they could not meaningfully address environmental problems. Every right (to make private decisions about emissions, waste, property use) "entails a correlative duty."<sup>233</sup> This argument against the need for democracy is then also insufficient if we agree that it is the duty, the constraint of liberty, or the power to coerce that demands democracy and not a constructed distinction between public and private.

There is no unshakable reason that PEG should be immune from democratic considerations, and so we must turn to an analysis of whether PEG meets the expectations of multidimensional democracy.

## B. Democratic Practice and PEG

### 1. Majoritarianism in PEG

It is difficult to untangle majoritarianism from non-majoritarian aspects of PEG, or any consumption-driven endeavor. The basic assumption of majoritarian voting is one person, one vote; while the basic assumption of markets is one dollar, one "vote," giving those with more dollars more

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230. See Michael P. Vandenberg & Kaitlin T. Raimi, *Climate Change: Leveraging Legacy*, 42 *ECOLOGY L.Q.* 139, 152 (2015); Michael P. Vandenberg, Opinion, *Environmental Protection Requires More than Social Resilience*, *REGUL. REV.* (Oct. 1, 2018), <https://www.theregreview.org/2018/10/01/vandenberg-environmental-protection-requires-social-resilience/> [<https://perma.cc/GZ3C-ECCU>].

231. Vandenberg, *supra* note 230.

232. VANDENBERGH & GILLIGAN, *supra* note 19, at 385 (suggesting the "limited coercive force" of private firms means that "concerns about accountability should influence the design of private initiatives, [but] not prevent these initiatives").

233. ANDERSON, *supra* note 100, at 47.

influence.<sup>234</sup> If we view majoritarianism merely as aggregation of preferences—whether those preferences are expressed as votes or as dollars, purchases, and investments—then PEG does have an aspect of majoritarian accountability through “market incentives” and “reputational risk.”<sup>235</sup> On the programmatic scale, a firm might implement a program (the impulse function of majoritarianism) based on the success of similar programs or a firm might reconsider or jettison a program (the accountability function of majoritarianism) if the market signals are negative or the program’s shortcomings damage the firm’s reputation.

Obviously, if we treat market-based participation as majoritarianism, we are accepting what is an inequitable form of majoritarianism, but it is certainly a functional way to account for the aggregate preferences of many individuals. Nevertheless, I think it is more proper to categorize market behaviors as non-majoritarian individual participation so that we can clearly recognize majoritarianism as individual, per-person aggregation. To do otherwise not only endorses an injustice in which we accept wealth as a valid aspect of majoritarianism, but also hollows-out individual participation, which I have highlighted specifically to categorize the opportunities for more classically liberal engagement.

Accepting that markets are not a good measure of majoritarian preference, PEG does not provide obvious majoritarian opportunities, either as a form of impulse or accountability. Years ago, Shell proposed a plan to neutralize an old deep-sea oil rig by sinking it to the bottom of the ocean.<sup>236</sup> Experts agreed that sinking the rig was the best environmental option.<sup>237</sup> Nevertheless, after an apparently misleading public campaign against Shell’s plan, consumer boycotts persuaded Shell to change directions.<sup>238</sup> This is an example of economic activism influencing environmental governance. The power to change Shell’s behavior came from dollars, not votes. In fact, were there an institution through which Shell could have more carefully gauged per-person preferences rather than per-dollar calculations, they may have decided to continue down the more environmentally friendly path.<sup>239</sup> The popularly elected British government, for instance, had approved the plan to sink the rig, which is some suggestion that popular opinion may have diverged from

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234. See Jason J. Czarnecki et al., *Eco-Labeling*, in OXFORD HANDBOOK ON COMPARATIVE ENVIRONMENTAL LAW 26–27 (2019).

235. VANDENBERGH & GILLIGAN, *supra* note 19, at 386–87.

236. ESTY & WINSTON, *supra* note 51, at 65.

237. *Id.*

238. *Id.*

239. See *id.* (noting the British government, with a majoritarian responsibility, supported the plan).

the economic signals.<sup>240</sup> Moreover, political science research has long recognized that individual economic behaviors are not a good indicator of political preferences.<sup>241</sup>

The fact that misinformation related to Shell's plan might have driven a wedge between traditional majoritarian and economic influences on decision-making also helps illustrate why a one-dimensional understanding of democracy is a problem. Had Shell established structures for more express reason-giving and public deliberation, one instance of misleading public campaigning may have been marginalized in the more complex decision-making institution.

The analysis in the previous paragraphs, and particularly in the example, addresses the local role of majoritarianism: its role in informing a particular PEG project or even a firm's larger PEG strategy. Here, a boycott, which is a signal of financial majoritarianism, shifted Shell's approach to a specific project. If we accept market majoritarianism, we must also consider its role in weighing existentially on PEG as a collective choice, on whether or how much we should let private initiative govern and coerce our relationships with the environment.

Presumably, the public could reject PEG as an endeavor by boycotting products that emerge from PEG programs. This raises the broader issue of market signals since boycotting, for instance, a "low emissions" label would not recognizably signal that environmental governance is better left to the state.<sup>242</sup> The market signaling problem here is that firms cannot properly disaggregate the environmental signals from other preferences consumers express through the market.<sup>243</sup> Firms would have to parse signals in the labor market, the consumer market, and business-to-business transactions.<sup>244</sup> Each sends different signals of different quality, and firms cannot integrate and analyze all of this in a way that leads to responsive behavior.<sup>245</sup> This, however, is also true of public democratic politics. Rarely, if ever, is a signal so clear that a politician or a CEO can interpret it without introducing other

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240. *Id.*

241. *See, e.g.,* Stanley Feldman, *Economic Self-Interest and Political Behavior*, 26 AM. J. POL. SCI. 446, 446 (1982).

242. *See* Czarnezki et al., *supra* note 234, at 30.

243. *See* LINDBLOM, *supra* note 81, at 37.

244. *See id.*

245. *See id.*

sources of information.<sup>246</sup> This is why a useful definition of democracy must include other forms of democratic practice beyond majoritarianism.

## 2. Individual Contestation and Participation in PEG

Placing market activity in an individualist analytical bucket is both normatively and analytically cleaner. Normatively, it admits that wealth has a role in market ordering, but not that market signals are a fair or even tenable representation of public opinion. Analytically, it lets us think about the ways that individuals, as individuals rather than just market participants, can influence PEG projects. To that end, I repeat the nub of the prior Section: individuals can spend money through consumption and investment to influence the way firms undertake private governance.<sup>247</sup> Individuals can choose to invest in projects, or buy products, that reflect good environmental behavior. They can conversely refrain from giving dollars to PEG projects that are insufficient, thereby signaling the need to revisit those efforts. The Shell example, in which the economic restraint of enough individuals persuaded Shell to forgo an environmental strategy, shows that using individual wealth is a powerful tool for motivating private economic behavior.

There are additional mechanisms within PEG for individual participation. The amplified power of advocacy groups can shape the way firms implement PEG: filtering market signals so firms can be responsive, impressing the value case upon management, or offering technical advice.<sup>248</sup> The Nature Conservancy, for instance, does not sue or shame private firms but instead partners with them to help advance strategies that are economically and environmentally beneficial.<sup>249</sup> Advocacy groups, individual shareholders, and shareholder organizations can leverage their ownership by using shareholder resolutions to press changes on firm leadership, though so far this strategy

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246. See BRYAN D. JONES & FRANK R. BAUMGARTNER, *THE POLITICS OF ATTENTION: HOW GOVERNMENT PRIORITIZES PROBLEMS* 205 (2005); Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1252 (2012) (describing the idea that elections can convey particular policy information as “perhaps too ambitious”).

247. See *supra* Section III.B.1.

248. See generally Joshua Ulan Galperin, *Board Rooms and Jail Cells: Assessing NGO Approaches to Private Environmental Governance*, 71 ARK. L. REV. 403 (2018) (assessing different roles NGOs play in facilitating PEG); VANDENBERGH & GILLIGAN, *supra* note 19, at 385.

249. Galperin, *supra* note 248, at 433–35.

has had mixed results.<sup>250</sup> Professor Fairfax, for instance, has written on corporate governance and the push and pull between management and shareholders.<sup>251</sup> Shareholder activism creates a sense of doubly powerful shareholders, drawing on market-based and individual-based power over corporate managers.

In this context, Fairfax notes that shareholder power has not translated into significant changes in corporate governance.<sup>252</sup> “[T]he rise of passive investing, which attempts to replicate the returns of an index rather than surpass them,” also reduces the incentive to “spot empire-building bosses or lazy boards.”<sup>253</sup> This logic suggests that the passive investor may not be policing corporate environmental behaviors. Indeed, because of passive investing and other factors, such as high interest rates that make it harder for firms to venture into “side projects” like environmental governance, it has become harder to hold corporate managers to account.<sup>254</sup>

Despite the hurdles, the opportunity for investors to drive corporate behavior is real. For example, investors and investor groups have been pushing firms to disclose more of their particularized risks from climate change.<sup>255</sup> Relatedly, in July 2020, investment bank Morgan Stanley became the first investment bank to disclose how its investments will contribute to climate change.<sup>256</sup> This momentum has slowed in recent years, with shareholders voting down significant environmental governance proposals during the 2023 proxy season, but the opportunity has not disappeared.<sup>257</sup>

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250. *Activist Investors Are Needed More than Ever*, ECONOMIST (May 24, 2023), <https://www.economist.com/leaders/2023/05/24/activist-investors-are-needed-more-than-ever>; Lisa M. Fairfax, *Toward a Theory of Shareholder Leverage*, 62 UCLA L. REV. DISCOURSE 66, 92, 92 (2014); MARC GOLDSTEIN, INST. S’HOLDER SERVS., THE STATE OF ENGAGEMENT BETWEEN U.S. CORPORATIONS AND SHAREHOLDERS 12 (2011), [https://www.shareholderforum.com/e-mtg/Library/20110222\\_ISS-IRRC.pdf](https://www.shareholderforum.com/e-mtg/Library/20110222_ISS-IRRC.pdf) [<https://perma.cc/B8D2-NVRQ>].

251. Fairfax, *supra* note 250, at 92.

252. *Id.*

253. *Activist Investors Are Needed More than Ever*, *supra* note 250.

254. *Id.*

255. Nicole Dienst, *How the Fed and Wall Street View of Climate Change Is Evolving Under Pressure*, CNBC (July 22, 2020), <https://www.cnbc.com/2020/07/22/fed-gets-new-carbon-warning-will-never-be-a-vaccine-for-climate.html> [<https://perma.cc/TJN8-WMDR>]. Additionally, the Securities and Exchange Commission has promulgated rules to require certain climate-related risk disclosures. *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668 (Mar. 6, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

256. Dienst, *supra* note 255.

257. Catherine Boudreau, *Exxon and Chevron Investors Shoot Down Climate Proposals After a Year a Record Profits*, BUS. INSIDER (June 1 2023, 11:05 AM), <https://www.businessinsider.com/exxon-chevron-investors-reject-climate-change-proposals-2023-6> [<https://perma.cc/Y32Q-VWNZ>].

C-suite peers can also participate as individuals, playing a similar role to NGOs.<sup>258</sup> The requirement of Security and Exchange Commission public filings, such as 10-Ks, adds to transparency that can facilitate NGO and C-suite pressures.<sup>259</sup> Should the Commission's freshly promulgated climate-related disclosures rule survive legal challenge, there will be even more resources available to support individual participation and contestation in private environmental governance.

Firms at the forefront of PEG can also create their own—albeit voluntary—frameworks for individualized public participation that go beyond or augment market-based engagement. Unilever, for example, has a complex Unilever Compass Strategy that creates venues for input to the board, management, and operating companies.<sup>260</sup> Individual participation in the Compass Strategy comes in at least two forms: internal, in which different levels of this hierarchy are invited to engage with each other on all aspects of sustainability operations, and external, in which the public can engage.<sup>261</sup> Unilever explicitly invites outside participation from a variety of stakeholders and has even created a dynamic stakeholder process that moves different interests in and out of the participatory framework, presumably to generate more—and more varied—participation.<sup>262</sup> Participating stakeholders include the usual suspects: NGOs, investors, customers, suppliers, governments, and trade associations.<sup>263</sup> Despite the robust participatory framework, it is not clear how stakeholders begin engagement with Unilever, whether the door is open or an invitation is necessary. This is a stark difference from participation in many public institutions, though it is still a notable system for its attention to public engagement. In a similar vein, the Forest Stewardship Council (“FSC”), which certifies sustainable forest products, has a mechanism through which stakeholders can report concerns and violations of the Council's standards.<sup>264</sup> However, the Council seems to limit complaints to only certain stakeholders without providing an avenue for formal input to the general public.<sup>265</sup> On the other hand, the Council has developed a detailed and

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258. VANDENBERGH & GILLIGAN, *supra* note 19, at 386.

259. *See, e.g.*, 15 U.S.C. § 78m(a).

260. *Engaging with Stakeholders*, UNILEVER, <https://www.unilever.com/planet-and-society/responsible-business/engaging-with-stakeholders/> [<https://perma.cc/7JSE-KWUM>].

261. *See id.*

262. *See id.*

263. *See id.*

264. *See Stakeholder Reporting*, FOREST STEWARDSHIP COUNCIL, <https://us.fsc.org/en-us/certification/forest-management-certification/stakeholder-reporting> [<https://perma.cc/U2AA-UKYN>].

265. *See id.* (restricting access to reporting forms).

well-articulated written complaint process that, other than the possibly limited access, provides a good starting point for individual contestation.<sup>266</sup>

Even in situations with no intentional participatory framework, some uniquely positioned firms have opportunities to engage. In business-to-business contracts, one of the main legal structures of PEG,<sup>267</sup> some firms may influence the shape of a PEG project through courts if there is a breach of contract.<sup>268</sup> Breach of contract suits are generally only available to contracting parties and a very narrow range of intended beneficiaries.<sup>269</sup> Although contract law provides only a slim avenue for individual participation, contracting firms with the right mindset and right relationship to a contract can have some direct influence, just as an individual may participate in public environmental decision-making through citizen suits.<sup>270</sup> (It is possible to see the legal participation through contract law as a state-based inroad, or a “standard democratic process” rather than a part of PEG,<sup>271</sup> because it resorts to the state-based justice system. But in its strictest construction, the “private” in PEG is still dependent on the law of contract.)

For the big-picture question about the presence or absence of PEG, investors, consumers, peers, advocacy groups, and contracting firms may be able to influence or even control choices about establishing PEG programs. Huge investors, for example, might be able to invest in an industry and force consideration of the entire enterprise.<sup>272</sup> These market forces could possibly (though maybe not plausibly) send signals to stay away from PEG, but they still fall far short of meaningful participation in the existential question of PEG’s role. They fall short because if a sufficiently large investor or a sufficient aggregation of consumers, an advocacy group, or a colleague from another firm were able to signal a skepticism of PEG, they would only be sending that signal to firms. They would not be sending signals to the entire industry, collection of industries, or the government in its capacity to redistribute power over environmental protection. And what are firms to do? To reject a self-conscious PEG program is not to stop governing the environment. It is not to stop coercing everybody to live in the environment

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266. FOREST STEWARDSHIP COUNCIL, PROCESSING FSC POLICY FOR ASSOCIATION COMPLAINTS: FSC-PRO-01-009 V4-0 EN, at 6 (2020), <https://us.fsc.org/download.processing-fsc-pfa-complaints-fsc-pro-01-009-v4-0-en.537.htm> [<https://perma.cc/TVB7-SBA2>].

267. Vandenberg, *Wal-Mart*, *supra* note 17, at 914–15.

268. *Id.* at 968.

269. RESTATEMENT (SECOND) OF CONTRACTS § 302 (AM. L. INST. 1981).

270. Joshua Ulan Galperin, *Trust Me, I’m a Pragmatist: A Partially Pragmatic Critique of Pragmatic Activism*, 42 COLUM. J. ENV’T. L. 425, 487 (2017).

271. VANDENBERGH & GILLIGAN, *supra* note 19, at 385–86.

272. Vandenberg, *Wal-Mart*, *supra* note 17, at 917, 921.

that is consequent of private commercial activity.<sup>273</sup> Only the public law, “the self-expressed commitments of an integrated political community,” can affirmatively change the structure of power so that PEG does what a political community wants.<sup>274</sup> Only the public law can provide existential consent to private governance.<sup>275</sup> States’ failure to act on climate change creates the space and arguable need for PEG, but it does not provide consent to the consequences of PEG.

### 3. Reason-Giving in PEG

PEG does not have inherent mechanisms for reason-giving. Do not misunderstand this. It is, of course, very easy and very common to have reasons for a certain PEG project or for undertaking PEG more broadly. There are exogenous reasons, such as those that Professor Vandenberg has offered persuasively on many occasions.<sup>276</sup> But there cannot be any intrinsic rule for giving express reason as there is, for instance, in administrative law.

People can express their own reasons for PEG, but these reasons are not part of a private governance regime. They come from the outside and, should firms operating PEG programs hear these reasons, those firms are free to ignore them. The academic literature on PEG, for instance, or the NGOs focused on advancing PEG, seek to give progressive and meaningful shape to private governance.<sup>277</sup> Social media has provided a new outlet for a broad explanation of firm behavior. ESG and sustainability reports are full of express reasoning. Third-party NGOs, like ISEAL, have even promulgated codes to guide how individual firms develop their PEG regimes, including requirements that participating firms explain the reasons for their sustainability plans.<sup>278</sup>

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273. See Galperin, *supra* note 18, at 1 (“Private environmental governance [] is not new as a practice . . . . Every environmental externality internalized (or not), every kilowatt of electricity used (or not), every private decision that affects the natural environment or human health is arguably a form of environmental governance. Poor governance, perhaps, but governance nevertheless.”).

274. KYSAR, *supra* note 81, at 239.

275. LINDBLOM, *supra* note 81, at 12–13, 17.

276. See, e.g., Vandenberg, *Wal-Mart*, *supra* note 17, at 914; Vandenberg, *Private Environmental Governance*, *supra* note 17, at 133; VANDENBERGH & GILLIGAN, *supra* note 19, at 385.

277. Light & Orts, *supra* note 44, at 64–65.

278. ISEAL ALL., SETTING SOCIAL AND ENVIRONMENTAL STANDARDS: ISEAL CODE OF GOOD PRACTICE 11, cl. 5.1 (2014), <https://www.isealalliance.org/get-involved/resources/iseal-standard-setting-code-good-practice-version-60> [<https://perma.cc/ET6W-FEQM>].



Where there are reasons, however, the expression of those reasons, is rarely, and never strictly, required and the reasons may or may not reflect reality. In large measure, it is doubtful that firms ever could give reasons that sufficiently reflect reality. The reality is that PEG happens because many firms and industries simply *do* govern the matrix in which humans live.<sup>279</sup> Private governance can only fully explain its existence and effectiveness by reference to the unequal distribution of power.<sup>280</sup> That distribution is the result of countless state and private decisions that are not easily fashioned into an express reason, certainly not a contemporaneous reason, and certainly not a reason that PEG *must* express.<sup>281</sup> Reasoning in PEG might be plentiful, but it is always gratuitous and rarely, if ever, complete. It is not an innate part of PEG as is, for example, individual participation, since the individual consumer is necessary to the very existence of a commercial operation.

The “sustainability report” or “corporate social responsibility report” is a now ubiquitous form of reason-giving, but it is an example of how gratuitous reason-giving can fail because firms offer reasons voluntarily and, therefore, the reasons need not actually undergird governance or reflect reality. Volkswagen (“VW”), for example, once had a reputation as a sustainability leader. The Dow Jones Sustainability Indices listed VW as a best-in-class sustainable company year after year, including in 2015.<sup>282</sup> The recognition fits with VW’s sustainability reason-giving. In its 2014 *Sustainability Report*, VW gave reasons for its environmental governance, saying “responsibility and environmental protection . . . have become genuine value drivers.”<sup>283</sup> VW asserted that it took sustainability seriously because it would “not seek short-term success at the expense of others.”<sup>284</sup> Its reasons for good environmental governance go on, of course. And, of course, these reasons amounted to little after the public learned VW had been lying about its environmental efforts

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279. Galperin, *supra* note 18, at 1.

280. GRANT MCCONNELL, PRIVATE POWER & AMERICAN DEMOCRACY 56 (1966); RAHMAN, *supra* note 102, at 10.

281. RAHMAN, *supra* note 102, at 13.

282. Lauren Hepler, *Volkswagen and the Dark Side of Corporate Sustainability*, GREENBIZ (Sept. 24, 2015), <https://www.greenbiz.com/article/volkswagen-and-dark-side-corporate-sustainability> [<https://perma.cc/G6F5-AYSS>].

283. VOLKSWAGEN GRP., SUSTAINABILITY REPORT 2014, at 14 (2014), [http://www.volkswagenag.com/content/vwcorp/info\\_center/en/publications/2015/04/group-sustainability-report-2014.bin.html/binarystorageitem/file/Volkswagen\\_Sustainability\\_Report\\_2014.pdf](http://www.volkswagenag.com/content/vwcorp/info_center/en/publications/2015/04/group-sustainability-report-2014.bin.html/binarystorageitem/file/Volkswagen_Sustainability_Report_2014.pdf) [<https://perma.cc/3W54-QAE2>].

284. *Id.*

and equipping its cars with software to cheat emissions testing.<sup>285</sup> The reasons VW freely offered did not match its practices—and there was little or nothing to assure such a match.

The counterargument to my claim that PEG need not give reason, and cannot give complete reasons, is that the built-in reason for PEG decisions is economic: “Smart companies get ahead of the Green Wave and lower both financial and operational risk. Their environmental strategies provide added degrees of freedom to operate, profit, and grow.”<sup>286</sup> This is the “green to gold” explanation.<sup>287</sup> Economic incentives can explain why companies undertake PEG projects and why they may shape their projects as they do. But this reason is incomplete to the point that, as a stand-alone, it is only a caricature.<sup>288</sup>

The economic reason is incomplete in three ways. First, as mentioned above, it ignores the underlying distribution of power that allows firms so much leeway and control over environmental resources. Second, “the notions that corporations and other organizations only respond to profit or self-interest is too thin to fully explain the behavior we are observing.”<sup>289</sup> In fact, other important drivers—such as corporate personality, norms, and values<sup>290</sup>—play a role, but those drivers are nowhere expressed in whatever communicative framework PEG offers. As PEG only necessarily “speaks” in the language of private-private market transactions, there is no mandatory outlet for expressing these values in a way that is easily integrated into consumer and supply-chain decision-making. The reasons are real; we can study them qualitatively and maybe quantitatively, but in the practice of PEG—in the contracts, labels, standards, and market transactions—they have no necessary expression.

The third and final factor that makes the economic reason incomplete is that the additional explanations undermine the credibility of the economic reasons. Two factors I consider here—economic incentives and what we might call corporate values—create a negative feedback loop. If market factors are the reason for PEG, we might have a candidate for reason-giving. If corporate values are the reason for PEG, we might have a candidate for

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285. See Peter Whoriskey et al., *VW Emissions Cheating Affects 11 Million Cars Worldwide*, WASH. POST (Sept. 22, 2015), [https://www.washingtonpost.com/business/economy/vw-emissions-cheating-affects-11-million-cars-worldwide/2015/09/22/30f59bca-6126-11e5-9757-e49273f05f65\\_story.html](https://www.washingtonpost.com/business/economy/vw-emissions-cheating-affects-11-million-cars-worldwide/2015/09/22/30f59bca-6126-11e5-9757-e49273f05f65_story.html) [<https://perma.cc/3J63-U87Y>].

286. See ESTY & WINSTON, *supra* note 51, at 13.

287. *Id.*

288. VANDENBERGH & GILLIGAN, *supra* note 19, at 392.

289. *Id.*

290. *Id.* at 392–93; Coglianese & Nash, *supra* note 50, at 238–39.

reason-giving. But if the market drives PEG, then values cannot be *the* reason. If values are the reason, then market incentives cannot be *the* reason. The complexity creates a need for clearer reasons.

In the case of VW's air pollution scandal, VW had claimed that values and, specifically, the protection of people over short-term economic gain, were the drivers of its environmental governance.<sup>291</sup> This was not a conflation of the values and profits but an explicit rejection of the latter. As the scandal shows, the promise of letting environmental values override short-term economic gains was both false and, even if it had had some truth, a great oversimplification. Patagonia makes similar claims about its deeply embedded environmental values,<sup>292</sup> and its reputation as an exceptionally good environmental actor is widespread.<sup>293</sup> It seems genuine that founder Yvon Chouinard has imbued the company with deep environmental care.<sup>294</sup> If there is a company where values dominate economics, this might be it. But Patagonia is not shy about advertising its environmental activism prominently on its webpage,<sup>295</sup> where it also sells \$699 jackets.<sup>296</sup> This does not undermine Patagonia's values, but it demonstrates that we cannot tease apart economic and value-based reasoning. As in the case of Patagonia, economics and values might reinforce each other, while in the case of VW, they may defeat each other. The two can, and surely do, coexist, but as PEG is detailed in labels, contracts, dollars, and cents, there is no necessary impulse for expressing reasons or the balance of reasons.

#### 4. Deliberation in PEG

PEG has some, but not all, of the deliberative qualities of a democratic system. Recall that deliberation has two aspects: the practical and the self-referential. The practical process of deliberation stems largely from reason-giving, and proceeds by making proposals, discussion, informal agreement, and formal agreement, all of which iterate endlessly. PEG generally does not

291. VOLKSWAGEN GRP., *supra* note 283, at 12.

292. Nick Paumgarten, *Patagonia's Philosopher-King*, NEW YORKER (Sept. 12, 2016), <https://www.newyorker.com/magazine/2016/09/19/patagonias-philosopher-king> [<https://perma.cc/85RN-XN7H>].

293. *See, e.g.*, Press Release, U.N. Env't Programme, *supra* note 110.

294. Paumgarten, *supra* note 292.

295. *Environmental Activism*, PATAGONIA, <https://www.patagonia.com/activism/> [<https://perma.cc/8PWC-PY2V>].

296. *Men's Tres 3-in-1 Parka*, PATAGONIA, [https://www.patagonia.com/product/mens-tres-3-in-1-parka/28388.html?dwvar\\_28388\\_color=BLK&cgid=mens-jackets-vests#start=1](https://www.patagonia.com/product/mens-tres-3-in-1-parka/28388.html?dwvar_28388_color=BLK&cgid=mens-jackets-vests#start=1) [<https://perma.cc/79PB-FFL4>].

make proposals in the small scale, nor is PEG itself a proposal on the large scale. On the small scale, firms act and then gauge results. At large, PEG need not stem from a proposal because the distribution of power allows firms and industries to govern the environment without specific consent or debate.

Occasionally, firms voluntarily cede some of this power and agree to deliberative procedures for governing the environment. This typically happens when firms engage third-party organizations that establish a more deliberative process for private environmental standard-setting. ISEAL, which I discussed in the previous Section, is one example and represents a model in which a third party develops a general process, including deliberative aspects, that individual firms may adopt.<sup>297</sup> LEED is another, more prominent example with a more specific focus. LEED is a certification system for “green buildings” from the U.S. Green Building Council.<sup>298</sup> The Green Building Council sets standards for building design and then offers LEED certification to buildings that meet those standards.<sup>299</sup> These standards result from a deliberative process involving ten committees and well over one hundred participants.<sup>300</sup> As a result, LEED is subject to two important and related criticisms. The first is that LEED’s deliberative process is cumbersome and produces standards that are too costly and complex.<sup>301</sup> The second criticism is that LEED standards do not deliver on their promises of environmental protection.<sup>302</sup> The participants in LEED’s deliberative process are many in number, but they also largely represent building, architecture, consulting, finance, and related industries.<sup>303</sup> This may be sufficient diversity to inject varying self-serving interests to complicate the standards but

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297. ISEAL ALL., *supra* note 278, at 3, 16 cl. 5.8 (requirement 4).

298. *LEED Rating System*, U.S. GREEN BLDG. COUNCIL, <https://www.usgbc.org/leed> [<https://perma.cc/B4JV-GHFN>]; Brian Barth, *Is LEED Tough Enough for the Climate-Change Era?*, BLOOMBERG (June 5, 2018, 5:00 AM), <https://www.bloomberg.com/news/articles/2018-06-05/reconsidering-leed-buildings-in-the-era-of-climate-change> [<https://perma.cc/9BH7-V977>].

299. U.S. GREEN BLDG. COUNCIL, *supra* note 298.

300. *USGBC LEED Committees*, U.S. GREEN BLDG. COUNCIL (Feb. 2024), <https://www.usgbc.org/resources/usgbc-leed-committees> [<https://perma.cc/KVW2-TS6K>]; see also Kaleb Keller, *LEEDing in the Wrong Direction: Addressing Concerns with Today’s Green Building Policy*, 85 S. CAL. L. REV. 1377, 1381–82 (2012).

301. DAVID OWEN, *GREEN METROPOLIS: WHY LIVING SMALLER, LIVING CLOSER, AND DRIVING LESS ARE THE KEYS TO SUSTAINABILITY* 224 (2009); see also ROBERT ORR, *THE PROBLEMS WITH LEED* 3 (2014), <http://leanurbanism.org/wp-content/uploads/2014/06/Orr-LEED.pdf> [<https://perma.cc/PT5J-RJ9E>] (describing LEED as “overly complicated,” “time consuming,” and designed to advance existing technologies for the benefit of participants rather than innovation).

302. See, e.g., Keller, *supra* note 300, at 1403–04.

303. *Id.* at 1381.

insufficient to inject a strong commitment to serious environmental protection.

There are several lessons here. First, deliberation can be a burden whether it is public or private. Second, and more importantly, deliberation is necessary for collaborative projects regardless of public or private initiation. The biggest difference between public and private deliberation, then, is that public deliberation invites a wider array of participants. This may add to the burden, but it also diversifies the interests in the deliberation, likely giving a more consistent and meaningful voice to environmental protection for the sake of environmental protection rather than for the sake of branding or cost-savings. Third, where private standard-setting organizations use branding incentives to engage firms in PEG, there is a natural tendency towards weaker standards that will engage more businesses, and, thus, the most deliberative private standard-setting organizations might also be the least assertive.<sup>304</sup>

Fourth, and finally, deliberation in PEG could possibly be as robust as, or even more robust than, public deliberation, but it will be constrained to voluntary procedures around individual efforts. It will not be global deliberation about the overall role of private governance. In administrative rulemaking, for example, the public and government officials will consider not only the nuances of a proposal but whether federal regulation is appropriate as compared to state regulation or even to no regulation at all.<sup>305</sup> The very operation of the governance system is on the table. The same is not true for private governance. The organizations that facilitate and implement PEG have already decided that PEG is important and are instead deliberating on the specifics of execution.<sup>306</sup> Frequently, as is the nature of market-based

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304. Jonathan C. Borck & Cary Coglianese, *Voluntary Environmental Programs: Assessing Their Effectiveness*, 34 ANN. REV. ENV'T. & RES. 305, 305 (2009) (noting that designers of voluntary programs may err on the side of weak standards in order to engage more voluntary participation).

305. See Administrative Rulemaking, Guidance, and Enforcement Procedures, 84 Fed. Reg. 71714 (Dec. 27, 2019) (stating that “[t]here should be no more regulations than necessary . . . [and that] policy makers should consider whether the specific problem to be addressed requires agency action . . . and whether any other reasonable alternatives exist that obviate the need for a new regulation”) (to be codified at 49 C.F.R. pt. 5); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR NO. A-4, at 20 (2023), <https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf> [<https://perma.cc/K9FL-7MJN>] (stating that policymakers should consider whether state or local regulation would be more appropriate than federal regulation).

306. See, e.g., ISEAL ALL., *supra* note 278, at 3 (explaining that “[t]he four goals of ISEAL are to: Demonstrate and improve the impacts of [private] sustainability standards systems; Improve the effectiveness of sustainability standards systems; Increase the adoption of

programs, they begin with a standard, product, contract, press release, or tweet letting the public know what is happening.<sup>307</sup> The deliberation is narrow and comes before the public has an opportunity to engage. PEG, for better and worse, is fiat. This is why proponents offer it as an alternative to the cumbersome, proposal-laden process of public governance.<sup>308</sup>

What PEG can do is spur discussion. This Article is proof. But a vast and unorganized quantity of deliberative opportunities may reduce participation and weaken the deliberation within each forum.<sup>309</sup> Thus, a focal point of democratic deliberation is necessary to encourage effective politics. Democratic practice, through the framework of the state, has the advantage of basing discussion on explicit reasons, proposals, and formal endpoints such as a vote or rule proposal,<sup>310</sup> which PEG lacks. To the extent it exists, PEG's deliberation is often more vaguely formed because the purpose of the discussion is less evident and tied less to express policies. LEED, for example, is subject to plenty of debate.<sup>311</sup> But that debate is around general efficacy,<sup>312</sup> motivation,<sup>313</sup> and capacity for change.<sup>314</sup>

As a broad endeavor, PEG has clearly already started a conversation.<sup>315</sup> That conversation has addressed the general merits of PEG as a frame for environmental protection, alongside the performance and value of individual PEG efforts.<sup>316</sup> These discussions are productive but frustrated by the fact that they are granted no formal position in PEG decision-making. That frustration, though, is not unknown to public democratic institutions. In the public realm, some conversation is given official respect in, for example, the administrative

sustainability standards systems; and Define credibility for sustainability standards systems" without establishing a goal of determining whether private sustainability standards systems are an appropriate mode of environmental governance).

307. See, e.g., Vandenberg, *Wal-Mart*, *supra* note 17, at 914–15; Vandenberg, *Private Environmental Governance*, *supra* note 17, at 156.

308. Jonathan M. Gilligan & Michael P. Vandenberg, *Accounting for Political Feasibility in Climate Instrument Choice*, 32 VA. ENV'T. L.J. 1, 23–24 (2014). See generally VANDENBERGH & GILLIGAN, *supra* note 19.

309. John S. Dryzek et. al., *The Crisis of Democracy and the Science of Deliberation*, 363 SCIENCE 1144, 1144 (2019); Rossi, *supra* note 194, at 177.

310. RICHARDSON, *supra* note 104, at 165–67.

311. See, e.g., Keller, *supra* note 300, at 1403 (critiquing LEED); OWEN, *supra* note 301, at 224 (same); ORR, *supra* note 301, at 3 (same); Barth, *supra* note 298 (same).

312. Keller, *supra* note 300, at 1403.

313. Barth, *supra* note 298.

314. *Id.*

315. See generally Galperin, *supra* note 18, at 1 (introducing a symposium on private environmental governance); Douglas A. Kysar & Michael P. Vandenberg, *Introduction: Climate Change and Consumption*, 38 ENV'T. L. REP. 10825 (2008).

316. See, e.g., VANDENBERGH & GILLIGAN, *supra* note 19.

record, and there is often final agency action in the wake of conversation.<sup>317</sup> Yet significant conversation also happens in the absence of specific policy proposals, when there is never final action related to the discussion, as is common in the legislative process.<sup>318</sup>

Whether in public or private governance, the ambient exchange that exists apart from the channelized course of legislation and regulation feed the second aspect of deliberation in democracy: deliberation helps foster community self-recognition. Consumers and PEG decision-makers, like large investors and corporate leaders, think and talk about PEG and recognize their joint role in it.<sup>319</sup> That joint deliberation can influence the decisions that the community and individuals within the community make regarding PEG.<sup>320</sup> The decisions that consumers make may be limited in their impact, but investors have broader power, and corporate leaders have more power still.<sup>321</sup> This self-recognition has the potential to remake PEG time and again.

The problem with the self-aware community that PEG does form is that this community may undermine the presumed nature of PEG. PEG's promise of great achievement comes from the ability of private actors to escape the deliberative burdens that are part of state action.<sup>322</sup> Some of the deliberative burdens stem from the formalities of multidimensional democracy, like the ability to sue or veto.<sup>323</sup> Other burdens grow directly out of the substrate of community—because the nature of community is the recognition of responsibility between its members.<sup>324</sup> Once responsibility emerges, the effortlessness with which non-state actors can approach the governance necessarily lessens. The nourishing incumbrance of community norms or

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317. See, e.g., Administrative Procedure Act, 5 U.S.C. § 553 (providing mechanisms for public participation in administrative decisionmaking).

318. See, e.g., Alex Barron, Opinion, *Lessons from Congress' Last Big Battle on Climate*, HILL (June 26, 2019, 4:30 PM), <https://thehill.com/opinion/energy-environment/450494-lessons-from-congress-last-big-battle-on-climate> [<https://perma.cc/WJ8A-3YK8>] (noting that Congress never voted on the 2008 proposed legislation for climate change despite significant public debate on the proposal).

319. Galperin, *supra* note 248, at 463–64 (recounting a presentation by Laura Phillips of Walmart talking about the company's PEG efforts).

320. See LINDBLOM, *supra* note 81, at 192.

321. *Id.* at 202.

322. See generally VANDENBERGH & GILLIGAN, *supra* note 19.

323. See *id.* at 66 (“Even if carbon pricing is enacted into law, it will face obstacles and repeal efforts as soon as it begins to have an effect. The delays and legal challenges to the Affordable Care Act (Obamacare) provide examples of such opposition[.]”).

324. See, e.g., Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 628–29 (1986).

respect gets in the way of uncomplicated action in which decision-makers regard themselves first, or only, as unconnected individuals.

The emergence of communities brings to mind a more mundane occurrence: traffic. I have called my spouse, friends, or colleagues to apologize for being late, blaming the fact that “I am stuck in traffic.” The truth is not that I am stuck in traffic, but that “I *am* traffic.”<sup>325</sup> This recognition that the world does not simply happen around me, but that I am an active and connected part of shaping it, forces me to see through the eyes of the drivers around me. Seeing through other eyes may mean that I do not block an intersection, speed by on the shoulder, or otherwise advance my initial interest at the expense of others who, like me, *are* traffic. There is, however, a problem with this metaphor. I rarely drive. I take public transit. I do not see myself as stuck in traffic or part of traffic because the way I choose to travel does not give me the same choices as driving in a car. The bus driver may recognize the traffic community, but the passenger does not. This is the same relationship, the same truncated community, that PEG creates. The corporate leader may form a community, but the consumer-citizen is related differently to that community. The consumer-citizen’s choices are still cabined into consumption choices that, like sitting in the back of the bus, offer only a blinkered view of the community because they offer too little opportunity to sincerely participate.<sup>326</sup>

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The recognition that PEG does not embody every facet of democracy is not an indictment of PEG. Instead, it is praise of democracy. When we hear that PEG is really quite modest because it does not aim to replace the government—because it is merely the most viable option, certainly not the best<sup>327</sup>—we need a forum to make that humility a reality, lest politics without participation take PEG to a different, more oppressive place. If modesty is all we want from PEG, we need a forum that allows us to engage in politics fully,

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325. I heard this rephrasing years ago, though I cannot remember exactly when or where. The very same day I first drafted this paragraph I happened to see a tweet from RuPaul that said exactly this. RuPaul (@RuPaul), TWITTER (X), (July 9, 2019, 7:00 AM), <https://twitter.com/RuPaul/status/1148592721994498048> [<https://web.archive.org/web/20190711054451/https://twitter.com/RuPaul/status/1148592721994498048>]. It is my pleasure to have the opportunity to cite RuPaul. A Westlaw search indicates that while RuPaul has been mentioned in seven law review articles, this is the first citation!

326. *See, e.g.*, Britton-Purdy et al., *supra* note 12, at 1789 (describing the negative consequences of “limited influence over both their individual lives and our collective political future”).

327. VANDENBERGH & GILLIGAN, *supra* note 19, at 3.



not accidentally or passively.<sup>328</sup> The next Part offers ideas on how to bring politics explicitly, affirmatively, and optimistically into and around PEG.

#### IV. DEMOCRATIZING PRIVATE ENVIRONMENTAL GOVERNANCE

The Part offers suggestions for improving PEG's deficiencies by looking at ways to establish more democratic structures within PEG programs. It also asks deeper democratic questions about the role of PEG within the larger political ecosystem, and how we can *do* democracy better.

Among other things, this Article has shown that the basic structure of democratic practice is embedded in public administration and that private governance largely lacks similar democratic practice. Now it turns to the question of what democratic administration has to offer private governance.

This is among the first works to turn to administrative law as a model for non-state governance.<sup>329</sup> It is not the only work tending in this direction. Mike Vandenberg and Jim Salzman have a draft manuscript that describes the way private firms develop “private administrative law” as “procedural analogues to the [Administrative Procedure Act].”<sup>330</sup> They acknowledge that “[p]ublic administrative law protects democratic governance” but their attention to the democratic nature of administrative law ends there.<sup>331</sup> Instead, they focus on a broad swath of values including accountability, uniformity, transparency, efficiency, and public participation.<sup>332</sup> Vandenberg and Salzman's manuscript hints at the conclusions of this Article—recognizing and implementing administrative-law-like features in private regimes. However, while Vandenberg and Salzman uncover the details of several important private administrative regimes, their research focuses descriptively on procedural similarities between federal administrative law and private governance regimes.<sup>333</sup> It does not make the normative claim that these features are necessary to advance democratic self-governance.

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328. See, e.g., Jason J. Czarnezki & Katherine Fiedler, *The Neoliberal Turn in Environmental Regulation*, 2016 UTAH L. REV. 1, 2 (recognizing growing reliance on market forces in environmental policy and proposing “checks” on neoliberal strategies rather than mere applause or criticism).

329. See, e.g., Esty, *supra* note 174, at 1523 (arguing that the tools of administrative law could add legitimacy to supranational global governance).

330. Michael P. Vandenberg & James Salzman, *Private Administrative Law* 24–25 (May 4, 2023) (unpublished manuscript) (on file with author).

331. *Id.* at 2.

332. *Id.* at 2–3.

333. *Id.*

This Part does seek to make such a normative claim. It seeks to marshal the democratic properties of administrative law to help govern private regimes by integrating some administrative practices into PEG and by using democratic administrative structures within the state to advance public governance of private regimes. This Part thus offers tools of administration as both a means of better democratizing PEG and as a forum for more articulate and affirmative debate about the role of private as compared to public governance. Turning to the state for lessons to improve PEG, therefore, should in no way suggest that political communities ought to refrain from also actively using the state to achieve environmental governance through the redistribution of economic and environmental power.

Finally, I undertake this endeavor with a full recognition that I am venerating the role of public administrative governance, putting forward the best version with the expectation that it is attainable, not with the promise that we have attained it.

*A. Democratic Administration as an Internal Tool and an External Constraint*

Private governance could improve its democratic credentials if those who design and implement PEG projects incorporated more meaningful opportunities for democratic consideration within their PEG structures. The non-market preferences of leaders and the market-driven efficiencies that primarily influence PEG are insufficient on their own. They are insufficient as direct participation, and they are insufficient as forms for collective social- and political-will formation. Instead, “[r]elying on a fair process of democratic deliberation to work out our views on such matters is indispensable to our doing so intelligently and responsibly.”<sup>334</sup> The benefit of more democratic PEG administration is to create better modes of feedback on the instrumental value of a given PEG program, but it is also to stimulate thinking about “our views on such matters” as PEG, without taking for granted that any route to environmental protection is an essentially better route.

Any absorption of administrative practices in private governance would be voluntary and probably not all upside for firms. After all, “[d]emocracy is a demanding ideal.”<sup>335</sup> But those firms that take advantage of more robust opportunities for the public to influence environmental decisions and shape

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334. RICHARDSON, *supra* note 104, at 241.

335. *Id.* at 242.

environmental preferences would govern the environment with more democratic legitimacy. (The alternative is to dominate and interfere, perhaps with a heartfelt apology, but nevertheless, to dominate and interfere.)<sup>336</sup> These proactive firms can also demonstrate a distinctive commitment to environmental governance that might barrel through market clutter more than PEG projects without democratic commitments. Perez and Vandenberg recently wrote about the benefits of “costly signaling” to help firms distinguish their PEG regimes.<sup>337</sup> Democratization is similar but goes a step beyond. Because it may be costly, it will help firms distinguish themselves, but it will also, and more importantly, provide more opportunity for widespread and robust civic engagement. The signaling will help the firm. The civic engagement will enrich the democratic ecosystem.

This Section first offers internal PEG design strategies that can advance some of the same democratic features as public administrative governance. More significantly, this Section then offers thoughts about how the external public administrative process of the state—democracy—can foster attention to the role of private governance in environmental protection and can redistribute power to better shape PEG in line with democratic preferences.

### 1. Administrative Democracy as a Model

Incorporating majoritarianism into PEG programs poses the most significant problem for making PEG more internally democratic. Many have long seen majoritarianism—on its own, at least—as a threat to good governance.<sup>338</sup> In the administrative state, however, majoritarianism is exogenous.<sup>339</sup> Congress empowers administration, and the President oversees it. But there are few mechanisms for majoritarianism within administration. For example, one will not find statutory commands to consider public preference as expressed by the number of public comments on a proposed

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336. *Id.*

337. Oren Perez & Michael P. Vandenberg, *Making Climate Pledges Stick: A Private Ordering Mechanism for Climate Commitments*, *ECOLOGY L.Q.* (forthcoming 2024) (manuscript at 7) (on file with author).

338. THE FEDERALIST NO. 68 (Alexander Hamilton), NO. 10 (James Madison).

339. Though there is at least one example of elected federal administrators, which shows some effort at majoritarianism in administration. But also, as it is the only example, it tends to prove the rule that administration is not primarily majoritarian. See Joshua Ulan Galperin, *The Life of Administrative Democracy*, 108 *GEO. L.J.* 1213, 1219–21 (2020) (describing the elected federal administrators of the United States Department of Agriculture county committees).

agency rule. The opposite is more typical. Agencies ignore the frequency of public opinion in favor of the substance of opinions.<sup>340</sup>

What then can PEG leaders learn from administrative law? Perhaps the lesson is that majoritarian boundaries, rather than decree, is the proper scope in PEG practice just as in administrative practice. To that end, the same sources of majoritarianism that influence administration already influence PEG. Among the drivers of voluntary private governance are regulatory avoidance and anticipation of legal requirements.<sup>341</sup> In that light, the majoritarian impulses of the state already engage PEG.

The lessons of majoritarianism in administrative democracy are small, but administrative law has more to offer individual participation and contestation in PEG. Firms dedicated to environmental governance could establish a process analogue to the Administrative Procedure Act's right to petition. Firms could create an interface where stakeholders can submit proposals and arguments for new projects or changes to existing programs. Similarly, when firms are acting—either establishing, amending, or halting PEG projects—they could provide notice of their plans and invite public feedback. On their own, these two opportunities drawn from administrative law could amount to nothing because, unlike administrative law, private governance does not come with guarantees of individual enforcement. The entities that have established stakeholder complaint processes, such as FSC, have not had much success. In addition to limiting the process to specific stakeholders, discussed earlier, as with any voluntary program, the FSC complaint structure has proven that a participant can simply withdraw from the private regime to avoid recourse.<sup>342</sup> On the other hand, this is not a complete failure either, as withdrawal could have market consequences for a company that can no longer use the FSC branding.

Given the shortcomings in PEG contestation and complaint structures, three institutional legal mechanisms might add heft to private petitioning and public comment.<sup>343</sup>

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340. See, e.g., Susan Decker, *FCC Says Fake Comments Won't Delay Its Net Neutrality Repeal*, L.A. TIMES (Jan. 5, 2018, 10:00 AM), <https://www.latimes.com/business/la-fi-net-neutrality-comments-20180105-story.html> [<https://perma.cc/54DW-MD3R>].

341. Coglianesi & Nash, *supra* note 50, at 238–39.

342. *FSC Will Not Pursue Mediation with Harita Group*, FOREST STEWARDSHIP COUNCIL (Feb. 7, 2023), <https://fsc.org/en/newscentre/integrity-and-disputes/fsc-will-not-pursue-mediation-with-harita-group> [<https://perma.cc/9L3N-2Q8T>].

343. While the proposals in this section focus on institutional legal mechanisms, Perez and Vandenberg have recently proposed mechanisms of a different type, which they call “credible climate commitments.” See generally Perez & Vandenberg, *supra* note 337. These include

First, more firms might embrace the emerging corporate form known as the “benefit corporation.” The benefit corporate form requires officers and directors “to take environmental (or social) values into account alongside corporate profit for shareholders” and protects the corporation when it puts social values ahead of profits.<sup>344</sup> Although the benefit corporation is more a limit on corporate liability for pursuing non-market values than it is a promise to advance those non-market values,<sup>345</sup> the benefit corporation does create slightly expanded liability for a corporation that fails to pursue certain public interests.<sup>346</sup> For example, the model benefit corporation legislation offers a “benefit enforcement proceeding,” which both creates and limits opportunities to address a corporation’s failure to pursue environmental or social benefits.<sup>347</sup> Under this arrangement, the petition and comment process might facilitate public input into shareholder, director, and management actions, making the social and environmental voice more robust and creating more diverse external challenges.<sup>348</sup>

The second legal mechanism to give democratic meaning to individual participation in PEG is contract law. When firms give PEG programs life through contracts, the contracting parties could write terms that describe how they will consider public petitions and comments and what recourse petitioners and commenters might have to ensure fair consideration. Additionally, should the parties not voluntarily provide mechanisms for public participation, the law of contract has a very small opportunity for third-party beneficiaries to sue to enforce the contract.<sup>349</sup> Only intended third-party beneficiaries may sue to enforce performance, and generally, third-party beneficiaries are only those with a monetary stake in the contract.<sup>350</sup> Getting

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carbon letters of credit and climate pledge green bonds, both of which are meant to make voluntary commitments more sticky and therefore more powerful. *Id.* at 31–32. Tools of this nature could be a major innovation and improvement for PEG insofar as they can make voluntary commitments more powerful. However, it is not clear these tools would offer much in the way of improving democratic practice within private governance.

344. Light, *supra* note 17, at 163.

345. MODEL BENEFIT CORPORATION LEGISLATION § 301(a)(3) (B LAB Apr. 17, 2017).

346. *Id.* § 305. *Contra* Emile Hallez, *First 401(k) Lawsuit over ESG Targets American Airlines’ \$26 Billion Plan*, INVESTMENTNEWS (June 6, 2023), <https://www.investmentnews.com/industry-news/news/first-401k-lawsuit-over-esg-targets-american-airlines-26-billion-plan-238436> [<https://perma.cc/U6MU-U7E5>] (describing a lawsuit against American Airlines claiming that the airline breached its fiduciary duty to investors by creating a sustainable investment option).

347. MODEL BENEFIT CORPORATION LEGISLATION §§ 103, 305 (B LAB Apr. 17, 2017).

348. *See id.* § 305(c) (creating standing to sue for only certain beneficial owners).

349. RESTATEMENT (SECOND) OF CONTS. § 302 (AM. L. INST. 1981).

350. *Id.*

beyond this limit on third-party enforcement would require either explicit contract terms or a change in the law of contract. Changes of this nature would broaden opportunities for contestation and make the exiting administrative-law-like mechanisms more democratically powerful.

It is possible to invite individual, non-majoritarian, participation without any binding recourse. This is the sort of structure we tend to see today in programs like ISEAL, FSC, LEED, and others. What is missing without recourse is the opportunity for genuine contestation. Contestation is so crucial to the democratic analysis because it is the chance to profoundly access the levers of decision-making—to seek redress and to challenge action—rather than just to voice opinions in a structured forum. Contestation is the core of classically liberal democratic autonomy.<sup>351</sup> Contestation does not promise favored outcomes, but it promises a satisfactory process. Thus, some participatory aspects of administrative law, such as petitioning or notice and comment, might be simple to import into PEG programs. As Vandenberg and Salzman are in the process of showing, such “private administrative law” features are making their way into private governance regimes.<sup>352</sup> The contestatory democratic aspects of public administrative law are harder to imagine because they transform private governance from volunteerism to enforceable commitment.

PEG practitioners can also enhance reason-giving and deliberation within private governance by drawing from public administrative law. In this case, the approach does not require the arguably fanciful legal modifications that would be necessary to make private individual contestation more democratic.

Reason-giving in administration is generally confined to the reasons that come along with announcing a new agency action.<sup>353</sup> Rather than imprecise notions of peer pressure or market forces, the latter of which could mean regulatory avoidance; reputation; or any other number of profit-maximizing concerns,<sup>354</sup> PEG programs might express their relevant motivations in a single, clear articulation. Unlike administrative law, there would be no mechanism to assure that the express reason was not pretext,<sup>355</sup> but having a more articulate reason would help stakeholders understand and assess PEG.

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351. Galperin, *Democracy*, *supra* note \*, at 83.

352. Vandenberg & Salzman, *supra* note 330 (manuscript at 2).

353. Administrative Procedure Act, 5 U.S.C. § 553(c); *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

354. VANDENBERGH & GILLIGAN, *supra* note 19, at 384–86.

355. *See Dep't of Com. v. New York*, 588 U.S. 752, 782–83 (2019).

As noted earlier, ISEAL does ask its member organizations to explain the purpose of their sustainability practices,<sup>356</sup> but this has not been a great success.<sup>357</sup> One democratic value of reason-giving is that it can invite more public engagement and create greater pressure to continuously improve private practices. But the voluntary nature of PEG is always limiting because firms that participate in programs like ISEAL are hesitant to accept continuously tightening governance standards.<sup>358</sup> Moreover, ISEAL member firms already complain of too much communication with stakeholders.<sup>359</sup> Rather than greater reason-giving to induce more engaged public governance and, eventually, more stringent ISEAL standards, private firms urge lax or at least fixed standards.<sup>360</sup> This undercuts the discursive and motivational aspects of reason-giving. Reason-giving in PEG will rarely be as useful as it is in a state-centered framework that relies on binding structures backed by sanction, but it can nevertheless improve.

Improved reason-giving would also naturally lead to improved deliberation. Administrative law creates procedures for deliberation, chiefly the opportunity to comment.<sup>361</sup> Incorporating this into PEG would be a step in the deliberative direction and some programs such as LEED have taken steps in this direction, albeit small steps with limited opportunities.<sup>362</sup> But administrative law also requires that agencies tie action to congressional authorization.<sup>363</sup> That is a legal requirement, but it also has the deliberative benefit of allowing the public to assess the value of action as compared to stated goals and metrics. Thus, PEG might supplement case-by-case reason-giving with more fixed goals and metrics for its PEG programs. Unilever has made some progress in this respect, setting broad standards such as achieving net-zero emissions across their value chain by 2039<sup>364</sup> and then adopting specific programs to achieve these goals, including the Unilever “Supplier Climate Programme” to “accelerate the decarbonisation of our shared supply chains across raw materials and ingredients and packaging.”<sup>365</sup> A firm’s

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356. ISEAL ALL., *supra* note 278, at 11.

357. PHILLIP PAIEMENT, TRANSNATIONAL SUSTAINABILITY LAWS 190 (2017).

358. *Id.* at 191.

359. *Id.* at 192.

360. *Id.* at 190.

361. Administrative Procedure Act, 5 U.S.C. § 553.

362. *See, e.g.,* Keller, *supra* note 300, at 1381–82.

363. § 553(b)(2).

364. *Climate Action: Strategy and Goals*, UNILEVER, <https://www.unilever.com/planet-and-society/climate-action/strategy-and-goals/#net-zero-emissions-across-our-value-chain-by-2039> [<https://perma.cc/9XGB-LGRR>].

365. *Id.*

sustainability report, Environmental and Social Governance mission, or even the articles of incorporation, might include specific environmental goals, metrics, and values while each PEG project articulates the way it advances those aims. In this formulation, the sustainability report or mission statement is parallel to a statute while the PEG project is parallel to an administrative rulemaking. Anything articulated in the articles of incorporation might be more like a constitutional provision.

Of course, all of this is merely a simile because, again, the tools of enforcement are largely absent from private governance, regardless of how clearly a firm articulates an environmental principle. Nevertheless, there is surely some benefit where the chain of reasoning is coherent and precise, and where individuals have a definite target around which to structure debate.<sup>366</sup>

All of these local changes to PEG can help legitimize private governance. But because they swirl around individual and public engagement, they also generate a political discussion around PEG's global questions; around the external question of whether we want PEG and, if so, what role we want it to play. Spurring discussion around specific policy instruments—PEG—but distinct from debate over the specific goal—environmental protection—is critical for any reflexive democratic endeavor.<sup>367</sup> “The relevant process of decision cannot be concentrated in a single institutional body[.]”<sup>368</sup> More democracy internal to PEG can whip up the dust of public discourse and spread it over other institutions. Of particular importance, the institutions of government. PEG itself is effective because it is powerful, flexible, and the political process does not burden it; but that flexibility, even when a more democratic process cabins it, makes it impossible for the dust to settle. Government may be relatively inflexible, but constancy is a necessary precondition to settling. Only when the democratic dust settles, even temporarily, can we best assess and act on collective will. The administrative state is well-positioned to move slowly enough so that democratic dust can settle, but quickly enough that it can act before the wind blows again.

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366. See, e.g., Archon Fung, *Putting the Public Back into Governance: The Challenges of Citizen Participation and Its Future*, 75 PUB. ADMIN. REV. 513, 521 (2015); JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* 286–87 (Thomas McCarthy trans., 1984); TOM R. TYLER ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* 12 (1997).

367. EMERSON, *supra* note 174, at 112.

368. RICHARDSON, *supra* note 104, at 179.



## 2. Administrative Democracy as an External Source of Power

Because of its capacity to churn up the deliberation that shapes public will and to shape that will into binding law, the administrative state is a necessary collaborator in private governance, not an impediment. “Collaborator” may even be too weak a word. Probably “supervisor” is better. Unquestionably, matters of environmental protection, and the role that private power should play in achieving it, are matters for presidential and congressional politics. But administrative decision-making offers “forums and interfaces”<sup>369</sup> for shaping collective will around the issue and for structuring that will into law.

Part of the value of administration is indeed its ability to embody democratic principles, but to put that recognition in more practical terms: administration can unite individuals into interested groups, can hear and reflect back the values of those groups, and can translate values into law in the face of countervailing private power. Agencies can coalesce groups because they are “front-line institutions of governance . . . [t]hese institutions lie at the interface between state and society, where the actual practice of devising final government policies and regulations takes place.”<sup>370</sup> When an agency proposes a new rule or, better still, when an agency decides to begin work on a general issue without a specific proposal in mind, it can announce that effort and in so doing “create constituencies[.]”<sup>371</sup> When the Environmental Protection Agency (“EPA”) announces its intent to publish a new rule, environmental organizations, industry groups, and individual citizens can activate.<sup>372</sup> If the issue covers old ground, maybe the same groups engage.<sup>373</sup> But if the issue is new, if it covers new ground, if it is cross-cutting, new groups form.<sup>374</sup>

Agencies can further gather the perspectives of groups and in the process help shape perspectives more fully than they existed before the administrative process, more fully than they emerge from woolly statutory language. Administration is an instrument of Congress, but it is not a simple

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369. RAHMAN, *supra* note 102, at 115.

370. *Id.* at 15.

371. *Id.* at 143.

372. See, e.g., Devan Cole, *New York Times: EPA to Limit Ability to Oppose Pollution Permits*, CNN (July 15, 2019, 8:29 AM), <https://www.cnn.com/2019/07/15/politics/epa-pollution-permits-regulation-changes/index.html> [<https://perma.cc/S4F8-EP7B>] (quoting environmentalists, industry, and citizens on their reactions to a new EPA rule proposal).

373. *Id.*

374. See Jonathan Behrens, *EPA Advancing Transparency Rule As Science Board Pushes Back*, AM. INST. OF PHYSICS (July 2, 2019), <https://www.aip.org/fyi/2019/epa-advancing-transparency-rule-science-board-pushes-back> [<https://perma.cc/J93L-2FK6>] (demonstrating the unusual engagement of the American Institute of Physics in an EPA rulemaking).

“transmission belt,”<sup>375</sup> it is a forum for carrying on the democratic endeavor that erupts during elections, flows through legislative debate, and reengages the public in agency consideration.<sup>376</sup> During elections, the participation is formal and majoritarian. During legislative debates, it is largely informal, reasoned, and deliberative. During administration, it is formal and informal, participatory, reasoned, and deliberative.

Administration cannot be a simple transmission belt because Congress does not—indeed, it cannot and should not—transmit immutable and comprehensive instructions to agencies. In *Chevron v. Natural Resources Defense Council*, the Supreme Court explained that as a matter of democratic legitimacy, the Court would defer to reasonable agency interpretations of law where Congress had left the meaning of its language ambiguous.<sup>377</sup> Although the Court has backtracked,<sup>378</sup> and then, in June 2024, ultimately overturned *Chevron*,<sup>379</sup> the unanimous *Chevron* Court originally reasoned that when Congress left statutes ambiguous, Congress meant to delegate interpretation of that ambiguity to administrative agencies because agencies had, among other qualifications, the democratic authority to interpret unsettled principles in the name of the public.<sup>380</sup> To the *Chevron* Court, that democratic authority came primarily from the President’s accountability “to the people.”<sup>381</sup>

Although the Supreme Court has overruled *Chevron*,<sup>382</sup> agencies not only have a claim to interpreting legal ambiguities that demand policy judgments, they have a perhaps even stronger claim to interpreting the dynamic ambiguities of Congress’s political values.<sup>383</sup> The practice of democracy

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375. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1675 (1975) (introducing the phrase “transmission belt”); A.A. Berle, Jr., *The Expansion of American Administrative Law*, 30 HARV. L. REV. 430, 431 (1917) (introducing the word “transmission” without “belt”).

376. RICHARDSON, *supra* note 104, at 130.

377. *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 865–66 (1984).

378. See generally *West Virginia v. EPA*, 597 U.S. 697 (2022).

379. *Loper Bright Enters. v. Raimondo*, No. 22-451, 2024 WL 3208360, at \*22 (U.S. June 28, 2024) (“*Chevron* is overruled.”).

380. See *Chevron*, 467 U.S. at 865.

381. *Id.*

382. *Loper Bright*, 2024 WL 3208360, at \*22.

383. Even before *Loper Bright*, there was persistent criticism that *Chevron*’s reasoning was flawed. See, e.g., *Kisor v. Wilkie*, 588 U.S. 558, 628 n.114 (2019) (Gorsuch, J., concurring). Among the arguments against *Chevron* is the argument that the Constitution and the Court’s precedent demand that only Article III courts can “say what the law is.” *Id.* at 612 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Justice Gorsuch’s concurrence in *Loper Bright* reiterated that same criticism. See *Loper Bright*, 2024 WL 3208360, at \*30 (Gorsuch, J., concurring). Thus, agencies arguably have no business interpreting Congress’s statutory

helps to establish new goals, it does not operate on fixed principles that are formed automatically before any social considerations hold sway.<sup>384</sup> Because reasons and goals are not fixed, even those “public norms” that are rooted in statutes come to agencies dynamically and ambiguously.<sup>385</sup> The administrative state must then “facilitate rational deliberation over meaning of public norms that are presumptively valid, yet not fully specified.”<sup>386</sup> Agencies can do this because they have created new publics that are capable of providing and reasoning through “information about how the norms will function in practice.”<sup>387</sup> The *Chevron* metaphor is a way to “think of agency deliberation as in some sense a continuation of the public’s and the legislature’s broader process of reasoning about what we should do[.]”<sup>388</sup> Agencies and legislatures are a cooperative team,<sup>389</sup> in which the agency has a special responsibility to “articulate the popular will.”<sup>390</sup>

Receiving presumptive public norms from Congress, allowing the entire public to reflect on those norms, and then articulating the resulting public sense in a specific application does not mean forcing, facilitating, or finding a consensus. That is why the state power of agencies is so important and different from other venues of democratic deliberation. There will be no consensus.<sup>391</sup> So, the agency, with the power of coercion, must settle on a law that captures and articulates a public will that is definitively not uniform but is nevertheless legitimate because of the democratic process. The law, then, implements public will even against the dissent that is certain to remain.

If dissent comes from particular interests with sufficient power, then, absent law, the powerful simply implement their preferences even if those preferences dissent from reasoned public will. Law and regulation are

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ambiguities because that is the role of courts. That critique seems to assume that ambiguity is just a linguistic problem for judges to resolve and never a policy decision for agencies to address. Nevertheless, even if we assume the critique is valid, there is no Constitutional text to suggest that agencies cannot participate in interpreting principles of public will rather than the meaning of law. One might argue that elected officials are more suited for this task, but the elected officials emphatically *do* lead when they write, pass, and sign law. Agencies would not interpret democratic will in the place of the elected (as they may be interpreting law in the place of deferential courts). Agencies instead would interpret democratic initiative as formally codified in statute and only then would they continue to facilitate and interpret collective will in the wake of statutes, reasons, and ongoing deliberation.

384. RICHARDSON, *supra* note 104, at 108–09.

385. EMERSON, *supra* note 174, at 150.

386. *Id.*

387. *Id.*

388. RICHARDSON, *supra* note 104, at 130.

389. *Id.* at 141.

390. *Id.* at 215.

391. *Id.* at 75.

necessary to advance public will in the face of dissent from those with enough power to override public preference. This is not fanciful or radical. Agencies emerged in part because the state-like power of corporations was so great and vast, that new public tools were needed to equalize that power.<sup>392</sup> There was agreement that agencies were the right tool to counter private power, though there was disagreement over whether agencies were useful because they were neutral, technical, and managerial institutions that were more immune to private power or because they were democratic institutions that could resist private power by capturing collectively reasoned (not necessarily scientific or objective) public interest.<sup>393</sup> Regardless of the exact justification, regulation provides a public source of value, power, and law to counter the dominance of particular interests.<sup>394</sup>

Applied to PEG, rather than taking private power for granted and searching for ways to applaud that domination and interference, regulatory agencies can call upon publics, can enable a process in which those publics shape goals, and can use law to shift power according to public preferences.

Congress is inactive, but that does not mean agencies have no authority to act. The EPA might (not hypothetically) propose to address climate change under the authority of the Clean Air Act.<sup>395</sup> That proposal calls up interested individuals into interested publics. The ordinary cast of environmentalists and industry are called up.<sup>396</sup> But the intersectional nature of climate change also calls up publics interested in justice, health, national security, and more.<sup>397</sup> The deliberation takes place in the lingering wake of congressional action and the EPA's proposed rule (which is over 100 pages, not including supporting documents).<sup>398</sup> That deliberation is informal, such as blogs and reports,<sup>399</sup> and formal, such as comment submissions to the EPA.<sup>400</sup> All of this generates the conflict, conversation, and reasoning that at the same time influences public will and informs the EPA in trying to capture and articulate that will. The

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392. RAHMAN, *supra* note 102, at 81.

393. *Id.* at 88–91.

394. EMERSON, *supra* note 174, at 33.

395. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662, 64710 (Oct. 23, 2015) [hereinafter Clean Power Plan] (to be codified at 40 C.F.R. pt. 60).

396. *Id.* at 64704.

397. *Id.* at 64706.

398. *See generally* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34830 (proposed June 18, 2014).

399. *See, e.g.*, Kim Knowlton, *EPA's Clean Power Plan: A Breath of Fresh Air for Public Health*, NRDC: EXPERT BLOG (June 3, 2014), <https://www.nrdc.org/experts/kim-knowlton/epas-clean-power-plan-breath-fresh-air-public-health> [<https://perma.cc/SB6U-L7FC>].

400. *See, e.g.*, Clean Power Plan, 80 Fed. Reg. at 64707.

EPA did capture something when it finalized the Clean Power Plan, attempting to limit private environmental governance in exchange for public environmental governance, by insisting that firms reduce greenhouse gas emissions.<sup>401</sup> The Clean Power Plan was an administrative effort to engage with PEG, telling a small segment of private industry that on some issues they may use their power to deal with environmental problems as they voluntarily choose, but on climate change there is some limit.

Administration is dynamic. With the election of President Trump, the EPA ostensibly captured a different sentiment, an objection to climate action.<sup>402</sup> If we agreed that there was cohesive objection to climate action, even those of us who feel the overwhelming need for urgent progress would have a hard time dismissing what most people assuredly wanted, within constitutional boundaries. Many saw, in Trump's Clean Power Plan repeal, that the EPA was not advancing a reasoned public goal.<sup>403</sup> That belief reflects many concerns, but one is that administrative democracy is an ideal not yet fully achieved. Or worse. With the Court's decision in *West Virginia v. EPA*, it may be that administrative democracy is taboo.<sup>404</sup>

### *B. Criticisms and Reforms of Democratic Administration*

Criticisms of the democratic possibilities of administration include a realization that the dialogue is really only two-way. Publics can interact with agencies and agencies with publics, but different publics do not interact with each other.<sup>405</sup> Another is that the administrative process relies too much on notions of neutral technocracy and management at the expense of public values,<sup>406</sup> and, in particular, the values of those who are political minorities and whose values are marginalized or dismissed because we assume "our values" are neutral while "their values" reflect some peculiar bias.<sup>407</sup> This

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401. *See id.*

402. Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32520, 32520–84 (July 8, 2019).

403. Arjun Krishnaswami, *With ACE, EPA Blows Off Chance to Save Thousands of Lives*, NRDC: EXPERT BLOG (June 19, 2019), <https://www.nrdc.org/experts/arjun-krishnaswami/ace-epa-blows-chance-save-thousands-lives> [<https://perma.cc/PE3Q-QRLY>].

404. *See supra* Part I.

405. RICHARDSON, *supra* note 104, at 220.

406. *See* EMERSON, *supra* note 174, at 2–3; RAHMAN, *supra* note 102, at 141.

407. I recall a former colleague who said something to the effect of "Black people should not study environmental justice. Their stake in the research is too personal." The presumption was

criticism is at the core of the Clean Power Plan repeal, with critics arguing that the EPA was not reflecting public sentiment, but instead reflecting special interests of President Trump's most powerful supporters. The EPA can achieve this by using the purportedly neutral and managerial guise of cost-benefit analysis to play with numbers and make repeal look like a neutral, objectively correct, and efficient selection.<sup>408</sup> This criticism falls largely on judges, who shape the practices of administrators and force them into technocratic reasoning, because judges require technocratic rather than value-based justifications.<sup>409</sup>

Critics also challenge that the administrative state does not do enough to create community<sup>410</sup> and assure that there is more public and more equal participation.<sup>411</sup> That is, to assure that participation does not merely reflect the societal power differentials that the administrative state should work to correct.<sup>412</sup>

Relatively modest reforms might begin to address these issues. Changes in judicial doctrine that respect articulations of public will and not just technical justifications might incentivize the entire democratic endeavor.<sup>413</sup> Initiation of public engagement at early stages of policy planning, rather than only after an agency has developed a complete rule proposal, would allow for more creative deliberation.<sup>414</sup> To promote deliberation not just between publics and agencies, but among different publics, and also to help instigate those publics in the first place, agencies might use a variety of participatory strategies including outreach, citizen juries, focus groups, technical workshops, and much more.<sup>415</sup>

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clearly that a Black scholar, because of the color of their skin, had too much invested in issues at the intersection of race and environmental protection. The problem is that my colleague assumed his relation to the issue was free of bias, as if a white scholar's position of privilege and power does not also deeply impact how he (and I) view issues of racial justice in environmentalism. No person is neutral. The best we can do is have transparent processes to account for unavoidable predispositions.

408. Arjun Krishnaswami, *EPA's Monkey Business Hides ACE Rule Emissions Increases*, NRDC: EXPERT BLOG (June 25, 2019), <https://www.nrdc.org/experts/arjun-krishnaswami/epas-monkey-business-hides-ace-rule-emissions-increases> [<https://perma.cc/83CQ-MJWW>].

409. EMERSON, *supra* note 174, at 147.

410. *Id.* at 173.

411. *Id.* at 21, 151.

412. *Id.*

413. *Id.* at 147.

414. Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 806–07 (2021).

415. *Id.* at 820–21, 821 n.124; RAHMAN, *supra* note 102, at 153–55.

Nick Bagley argues that nearly universal agreement to always add more administrative procedure is not a neutral choice that necessarily improves decision-making but is instead a choice to maintain the status quo.<sup>416</sup> Since democratic reforms may come in the form of new procedures, it is important to pause and consider these procedures in light of Bagley's critique. While he is right that making a procedural choice is making a political choice, not a value-neutral one,<sup>417</sup> we can distinguish between intentional procedures with value-goals, such as democratic practice, and procedures that stem from a place of distrust and therefore serve only to constrain action rather than improve engagement. If "the root of antipathy to federal agencies is not that they act without procedural safeguards" but that people "distrust state power, full stop," then procedures that assure state power is rooted in democratic practice may help ameliorate distrust and address Professor Bagley's concern about the anti-regulatory bias of procedure.<sup>418</sup>

### C. Democratic Administration and Public Endeavors

Any PEG program could voluntarily import any procedural strategies, but the greatest value of these democratic procedures is not how they improve PEG from the inside. It is how they advance formal and informal public reasoning on the outside. That external process must be part of any public endeavor.

"Public endeavor" here does not just mean "state endeavor," it means an endeavor to advance policy and action that deeply impacts the public. PEG is decidedly such an endeavor.<sup>419</sup> So what are we to do? As scholars, it is important to recognize, theorize, and scrutinize the non-instrumental reach of PEG so that we do not inadvertently devalue democracy. We certainly *could* devalue it, but it should be explicit so that it can be reasoned and deliberate.<sup>420</sup> As individuals we should be careful about letting non-democratic forms of engagement dull our sense of political community. Consumerism has some force, but it is not democratic force. As advocates committed to

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416. See Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 360–69 (2019).

417. See *id.* at 350.

418. *Id.* at 387.

419. VANDENBERGH & GILLIGAN, *supra* note 19, at 121–22.

420. See Douglas A. Kysar, *Sustainable Development and Private Global Governance*, 83 TEX. L. REV. 2109, 2147 (2005) ("Nevertheless, even granting the argument of sustainable development proponents that collective decisionmaking regarding resource uses is theoretically necessary, society still might agree—collectively—that the political process is so clumsy, costly, and corrupt as to make deliberate public attempts to define and implement a program of sustainable development more harmful than an unregulated market.").

environmental protection, we should balance the easiest progress against deeper values and long-term consequences.<sup>421</sup> We should do democracy better.

The consequences of improved administrative democracy and then improved democratic will can make PEG better and a more affirmative choice. The worst alternative is a passive plea, as if we prisoners of private dominance have succumbed to a societal Stockholm Syndrome and are now seeking ways to excuse and even champion our environmental captors. Certainly, new environmental regulations might emerge that pare back the private environmental dominance of private firms. Regulations might be command-and-control restrictions, or maybe we pursue what Dan Esty calls “green lights” that incentivize good behavior instead of the “red lights” that prohibit bad behavior.<sup>422</sup> Maybe we force democratic practice into PEG programs by requiring procedures for majoritarian and individual participation, reason-giving, and deliberation. Maybe we look outside of environmental law, as Professor Sarah Light has, and look to the law of the corporation.<sup>423</sup>

Professor Light reminds us in the Progressive tradition that private behavior is not fully private because that behavior is structured by legal regimes that are the result of public decision-making.<sup>424</sup> (Whether or not those decisions were appropriately democratic is another question.) The legal regimes outside of environmental law that have the greatest impact on environmental governance are corporate law, securities regulation, antitrust, and bankruptcy.<sup>425</sup> Corporate law establishes and regulates the duties of firms; securities regulation mandates transparency; antitrust structures multi-lateral industry collaboration; bankruptcy structures environmental liabilities.<sup>426</sup> In each of these fields, public, democratic decision-making can rework the law to change the nuances of PEG without directly regulating environmental behavior. The possibilities of democratic action are vast but,

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421. For a perspective on thinking through values and instrumental ends, see Joshua Ulan Galperin, *Value Hypocrisy and Policy Sincerity: A Food Law Case Study*, 42 VT. L. REV. 345 (2017). For an analysis of how environmental advocates have failed to balance public values against an ideology of short-term progress, and offering a framework for doing better, see generally Galperin, *supra* note 270.

422. Daniel C. Esty, *Red Lights to Green Lights: From 20th Century Environmental Regulation to 21st Century Sustainability*, 47 ENV'T. L. 1, 5 (2017).

423. Light, *supra* note 17, at 140–42.

424. *See id.* at 140–41.

425. *See id.* at 141.

426. *Id.*



more importantly, they are the only possibilities that emerge from public will rather than private coercion.

## V. CONCLUSION

Simply because private governance is not state governance does not free it of the happy burden of democratic practice. Private governance is a valuable instrument for environmental protection. What makes it valuable is the immense power that private parties have over the global environment and their ability to exercise that power without sufficient democratic oversight. Democracy can, however, help PEG in two ways. First, tools of democratic governance improve individual PEG projects so that such projects create more opportunities for majoritarian, individual, reasoned, and deliberative public engagement. Second, globally and externally using democratic institutions within private regimes can build and shape public will to use the democratic authority of governments to better control private power. This democratic engagement would not merely be a good addition to PEG practice. It is a necessary addition because PEG is a political and coercive endeavor that demands collective decision-making. All of this despite its “private” designation.

No matter the private designation, PEG has at least two noteworthy impacts on “public” politics that ought to trigger democratic practice. First, PEG rhetorically presents a way to avoid politics. But to promise a way around politics might weaken or distract from the unavoidable and stubbornly ubiquitous practice of politics.<sup>427</sup> It would be foolish to pretend, in today’s political atmosphere, that government is on the verge of fully addressing pressing environmental issues, but that is no excuse for discounting government. If we compare PEG to recent government initiatives, certainly PEG seems relatively attractive. On the other hand, if we compare private governance to *all* government initiatives, we can remember the unparalleled success of the Clean Air Act,<sup>428</sup> Clean Water Act,<sup>429</sup> or Montreal Protocol,<sup>430</sup> for example. These public laws used comprehensive administrative regulatory frameworks, stringent administrative and public enforcement, and even international cooperation to reduce air and water pollution, restore the

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427. PURDY, *supra* note 91, at 45.

428. *See* Clean Air Act, 42 U.S.C. §§ 7401–7642 (1970) (amended 1990).

429. *See* Federal Water Pollution Control Act, 33 U.S.C. § 1151 (1948).

430. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3.

ozone layer, and safeguard public health on an unprecedented scale.<sup>431</sup> With the long view, it may seem more reasonable and plausible to use public law as a model for private regimes or even to strive for public law. Certainly, public governance has its own flaws,<sup>432</sup> but they should not mute its demonstrated successes.

When we compare private and government initiatives, we must remember that there are two aspects to this comparison. First, we can ask whether private or government initiatives have better outcomes. Second, we also need to consider how the institutional structures of private governance compare to the institutional structures of public governance. When we compare institutional structures, as I've attempted to do in this Article, we can see that public governance offers democratic features that private governance lacks. Government institutions do not just translate pre-political individual preferences into public policy. They also empower democratic practice that can help shape public values. Those public values, in turn, can reshape government.

Recognizing government and public values are both dynamic, we can return to the comparison of public and private outcomes. When we make this comparison, we need not look only at the government we have today, which is concededly not solving big problems. But knowing that government changes with democratic practice, we can look at what government can and has achieved in the past: momentous action on public health and safety, national defense, civil rights, transportation, space exploration, and environmental protection, as just a few examples. When we compare these highwater marks of public policy to the successes of private governance, suddenly, private initiatives may not seem so obviously better.

When public governance is failing, the best path is not to disengage, which might let government processes atrophy, but to exercise public governance and offer a vision for a more effective system. Private governance could indeed contribute to this exercise. It could contribute to a vision for a more effective system. But to do that private governance must have more widespread mechanisms for public discourse and must play a more modest role in the larger democratic ecosystem of which the state is an indispensable part.

The second way that PEG has an important effect on public governance is the shade it casts on government. PEG discourse offers an implicit (and almost certainly unintentional, but nevertheless critical) indictment of

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431. See 42 U.S.C. §§ 7401–7642; 33 U.S.C. § 1151.

432. See ORG. FOR ECON. COOP. & DEV., GOVERNMENT AT A GLANCE 2009, 19–41 (2009).

democracy itself.<sup>433</sup> We can understand PEG to say that politics makes environmental protection too difficult and so we should reject politics, that is, reject individual and collective self-governance. Understood this way, PEG takes primary democratic purposes—individual and collective control over matters of widespread concern, non-domination, and non-interference—and subverts those democratic motives in the service of (at best) environmental protection or (at worst) private enrichment.

This subversion forces us to consider what we value as a baseline of decision-making and what we use as a mere instrument. Are democratic politics merely a tool that we use only while it serves our immediate ends?

The only way to carry out this inquiry, to identify “immediate ends,” is democratic politics.<sup>434</sup> PEG, in its current form, does not even let us ask whether democracy is a value that constitutes our collective endeavors or only a tool that has proven too cumbersome to drive change.

We cannot and should not escape politics. So, we need to attend to the democratic institutions designed to provide impetus and forums for collective decision-making. Legislation is the climax of lawmaking, but administration is the ongoing process of governing, which necessarily creates a regular interface with both subjects and beneficiaries of law.<sup>435</sup> Administrative law, therefore, provides an attractive institution for articulating widespread preferences and political goals. Administrative law likewise combines the various dimensions of democratic practice in an imperfect but distinctive system that melds majoritarian and individual participation alongside reason-giving and deliberation.<sup>436</sup> This system is thus a good model for private governance programs that seek more trussing to the public and less dependence on the murky signals of markets or vicissitudes of individual leaders.

Insofar as the administrative system is close to the public in daily lives and capable of engaging public self-recognition, values, and debate, it can also serve as an external, global forum for democratic decision-making about the distribution of environmental power. And, most remarkably, the public authority of administrative law can affirmatively adjust the distribution of environmental power such that environmental governance, if we choose, becomes more genuinely democratic.

The current structure of administrative law is surely missing pieces, particularly a more explicit space for offering expressions of value as

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433. Galperin, *Environmental Governance*, *supra* note \*, at 70–73.

434. See Kysar, *supra* note 420, at 2113–14.

435. RAHMAN, *supra* note 102, at 23–24.

436. See *supra* Part IV; Galperin, *supra* note 173, at 50–51.

opposed to technical and legal considerations.<sup>437</sup> Nevertheless, the unending course of formulating and implementing law in a deliberative and non-arbitrary forum is not just a tool of democratic collaboration, it is also the best opportunity to shape collective intentions about environmental protection and therefore to debate the questions implicit in, and central to, politics, democracy, liberty, collective choice, and yes, private governance.

Whether or not administrative law is the right legal institution, even if there are too many missing pieces and the technocratic mindset too prevalent, there must be some institution for intentional collective agency whenever we are engaged in coercive, global, contentious politics such as PEG. This is as true for private industry as it is for the state. As true for benevolence as it is for malevolence. Tyranny is arbitrary and dominating power.<sup>438</sup> Generosity and instrumental effectiveness do not forgive tyranny.

That is strong language, so let me be clear: none of this is meant as a final condemnation of PEG. Instead, it is a praise of democracy and a call to evaluate PEG in a democratic rather than purely instrumental light. When we hear that PEG is really quite modest because it does not aim to replace government or because it is simply the most viable option, certainly not the best,<sup>439</sup> we need a forum to make that humility a reality lest politics without attention take private governance to a different, more oppressive place. If modesty is all we want from private governance, we need a forum that allows us to engage in politics fully, not accidentally or passively. That forum is democracy.

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437. See *supra* Section III.B; EMERSON, *supra* note 174, at 20–21, 147, 151, 173; Walters, *supra* note 201, at 61.

438. *Tyranny*, DICTIONARY.COM, <https://www.dictionary.com/browse/tyranny> [<https://perma.cc/AS9K-T4WJ>].

439. VANDENBERGH & GILLIGAN, *supra* note 19, at 3.