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Spring 2018

## Foreword: Private, Environmental, Governance

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# Private, Environmental, Governance

Joshua Ulan Galperin\*

Private environmental governance (“PEG”) is not new as a practice, but, as an explicit academic pursuit, it is just beginning. 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.

With this expansive concept, the practice of PEG can be found in every private decision ever made with respect to resource use and the environment. However, Garret Hardin’s *Tragedy of the Commons* in 1968 was one of the first works to expressly describe the practical nature, and potential failures, of private control over public resources.<sup>1</sup> Hardin did not, however, express his ideas in the language of PEG.<sup>2</sup> Likewise, a generation later, in telling their stories of how communities can collectively, and without external government force, manage natural resources, Elinor Ostrom and Robert Ellickson were not using the explicit framework of PEG.<sup>3</sup>

As a legal pursuit, the categorical study of PEG seems to have begun in 2007, when Michael Vandenberg described how Wal-Mart’s (and many other firms’) supply-chain contracting served a public environmental protection function.<sup>4</sup>

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1. See Garrett Hardin, *The Tragedy of the Commons*, 162 *Sci.* 1243, 1245 (1968).
2. See *id.*
3. ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 1–2 (James E. Alt & Douglass C. North, eds., 1990); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 *STAN. L. REV.* 623, 627 (1986).
4. Michael P. Vandenberg, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 *UCLA L. REV.* 913, 925–28 (2007) [hereinafter *Wal-Mart*]. Again, the ideas of private environmental governance preexisted this work, but the phrase—and therefore the field of study—can arguably be traced to Vandenberg. For example, the phrase was used in international relations literature prior to Vandenberg’s article. See, e.g., Robert Falkner, *Private Environmental Governance and International Relations: Exploring the Links*, 3 *GLOBAL ENVTL. POLS.* 72, 72 (2003); see also Michael P. Vandenberg, *Private Environmental Governance*, 99 *CORNELL L. REV.* 129, 139 (2013) [hereinafter *Private Environmental Governance*], [http://www.vanderbilt.edu/csdi/events/prvtgov\\_van.pdf](http://www.vanderbilt.edu/csdi/events/prvtgov_van.pdf) (“[A]n enormous amount of scholarship has been published on private governance activities, although much of that scholarship has appeared in the social science literature or areas of the legal literature outside of environmental law.”).

More recently, Vandenberg’s article *Private Environmental Governance* has formally defined the field.<sup>5</sup> And though the field and practice of PEG are still emerging, there is no argument that it is attracting the interest of scholars.

The 2017 J.B. & Maurice C. Shapiro Environmental Law Symposium, from which this issue of the *George Washington Journal of Energy and Environmental Law* is collected, is evidence of the new attention being paid to PEG. The pieces you will read in this issue will address all aspects of this definition with great insight.

But before releasing you to these brilliant contributions, I want to move away from PEG and instead consider the individual parts, distinct from the explicit inquiries in the larger field. Others have carefully defined “private environmental governance.”<sup>6</sup> I want to look more closely at “private,” “environmental,” and “governance” individually.

## “Private”

Within the study of PEG, “private” describes the locus of decision-making. Whereas modern environmental decision-making is public, or governmental, here it is nongovernmental.<sup>7</sup> But this public-private distinction is not the whole definition of private. Private also denotes individuality in the liberal tradition.<sup>8</sup>

Recognizing the centrality of individual liberty to the concept of privacy blurs the public-private distinction and complicates the notion of private governance. As John Dewey has cautioned, when viewed as a matter of liberty, “private” control has the same risks to individual autonomy as government control.<sup>9</sup> Private liberty is a negative right and, as such, it is largely irrelevant whether the negative right is against a government, a neighbor, a corporation, or a coalition of benevolent corporations. Judge Evelyn Keyes has written that negative liberty is the concept “that people have private lives in which they are free to make their own moral decisions without the imposition upon them of *society’s* moral point of view.”<sup>10</sup> The idea of “private” in classic liberalism is the idea of personhood; it is the idea that certain rights are no more alienable by neighbors than by the state.

5. *Private Environmental Governance*, *supra* note 4, at 133.
6. *E.g.*, *id.* at 146; Sarah E. Light & Eric W. Orts, *Parallels in Public and Private Environmental Governance*, 5 *MICH J. ENVTL. & ADMIN. L.* 1, 3 (2015).
7. *Wal-Mart*, *supra* note 4, at 915–16.
8. *E.g.*, Ronald Dworkin, *Liberalism, in PUBLIC AND PRIVATE MORALITY* 136–37 (Stuart Hampshire, et. al. eds. 1978).
9. JOHN DEWEY, *LIBERALISM AND SOCIAL ACTION* 33–37 (Capricorn ed. 1963).
10. Evelyn Keyes, *The Just Society and the Liberal State: Classical and Contemporary Liberalism and the Problem of Consent*, 9 *GEO. J. L. & PUB. POL’Y* 1, 55 (2011) (emphasis added).

There are contemporary and classic liberal responses to this idea of “private.” The contemporary response is that individual choices as expressed by market transactions, or lack thereof, are the levers of individual power with which private autonomy is protected from nongovernmental infringement.<sup>11</sup> The classic liberal response is that the common law of contract, property, and tort are private actions to defend private rights against nongovernmental infringement.<sup>12</sup>

Funneling these issues back into the context of PEG, there are two points for further consideration. First, if market transactions serve as checks to protect private autonomy from nongovernmental control, does the fact that only *aggregate* market signals will catalyze PEG actually provide protection on the *individual* level? If we regard the idea of private as merely nongovernmental, aggregate market signals seem like an effective way to drive corporate behavior. If we regard the idea of private as one of individuality and negative liberty, then aggregate market signals, reflections (at least arguably) of society’s preferences, may not provide sufficient individual authority.

The second point is that the classical check on private control, the common law, has a diminished role in PEG. While corporate parties to green supply-chain contracts, for instance, may bring common law suits for breach, individuals outside of these transactions, but within the environment, are given relatively little autonomy. Suits for misleading advertising,<sup>13</sup> nuisance,<sup>14</sup> and dignitary affronts,<sup>15</sup> have had little success in the PEG context, leaving private individuals with limited checks against potentially insufficient private governance. Citizen suits under the major federal environmental statutes create invaluable individual empowerment, of course, but these do nothing to enforce the terms of non-regulatory private promises.

The notion of “private” in PEG is cabined, a one-dimensional notion. It is particularly nongovernmental, but it does not reflect the importance of individual empowerment. This is no existential flaw of PEG; rather, it is a call for additional work by scholars and advocates to promote a vision of PEG that better empowers individuals.

## “Environmental”

There is a broad trend within the environmental movement<sup>16</sup> and environmental sciences<sup>17</sup> to better promote and under-

stand the reality that “environment” is not merely something outside of humanity but is, indeed closely and inextricably, intertwined with humanity. In *After Nature*, Jed Purdy eloquently traces the dynamic history of the human perception of nature; but, even within that dynamism, Purdy paints a picture of a somewhat consistent view over most of the twentieth century.<sup>18</sup> Purdy describes the consistent view of nature as a thing outside of human systems and needing protection from humans.<sup>19</sup> In 1995, historian William Cronon offered one of the most provocative and persuasive arguments against this human-environment dichotomy in his essay, *The Trouble with Wilderness; Or, Getting Back to the Wrong Nature*.<sup>20</sup> Professor Cronon’s basic challenge was that a distant, distinct environment (specifically, the ideal of wilderness), is a fantasy if the ideal is a “tabula rasa that supposedly existed before we began to leave our marks on the world.”<sup>21</sup>

Over time, other thinkers have morphed Cronon’s critique of the human-nature divide into an even more provocative promise of a technological panacea in which we can leverage human ingenuity to create a firewall between a productive human realm and a merely aesthetic environmental one.<sup>22</sup> For instance, the *Ecomodernist Manifesto* offers an unexpected take on the nature of the environment.<sup>23</sup> Like Cronon, the *Manifesto*’s authors understand—to a degree—the indivisibility of humans and the environment. They draw an essential link between human well-being and environmental resources, and that link endures in human industry as much as in the human romance with nature.<sup>24</sup> The Ecomodernists remind us that commerce (including food, energy, and settlement), demand the use of environmental resources.<sup>25</sup> Herein is the modern conceit: that we cannot idealize the environment as an “other” because it is central to our survival.

Ecomodernism promises that as a mere necessity, we can discharge our environmental responsibility by largely “decoupling” our human systems from environmental ones, leaving only the essential connection that will transport environmental resources into human systems.<sup>26</sup> “Intensifying many human activities . . . so that they use less land and interfere less with the natural world,” explain the Ecomodernists, “is the key to decoupling human development from environmental impacts.”<sup>27</sup> In this view, “environment” is not distinct, but if we work hard enough—if we have sufficient technological savvy—then perhaps we can exorcise “environment” from our human requirements. This new dis-

11. See, e.g., David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 *LAW & CONTEMP. PROBS.* 1, 6 (2014).

12. See, e.g., *Liberalism*, STAN. ENCYCLOPEDIA OF PHIL. (Online Edition 2018) <https://plato.stanford.edu/entries/liberalism/> [https://perma.cc/B5J2-H6BE].

13. *E.g.*, Lateef v. Pharmavite LLC, No. 12-C-5611, 2013 WL 1499029, at \*4 (N.D. Ill. Apr. 10, 2013).

14. *E.g.*, Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 415 (2011).

15. Melissa Mortazavi, *TAINTED: Food, Identity, and the Search for Dignitary Redress*, 81 *BROOK. L. REV.* 1463, 1469–70 (2016).

16. See, e.g., *About Us: Vision and Mission*, THE NATURE CONSERVANCY, <https://www.nature.org/about-us/vision-mission/index.htm?intc=nature.tnav.about> [https://perma.cc/XW9J-DUYW] (last visited Aug. 22, 2017) (“Our vision is a world where the diversity of life thrives, and people act to conserve nature for its own sake and its ability to fulfill our needs and enrich our lives.”).

17. OSWALT J. SCHMITZ, *THE NEW ECOLOGY: RETHINKING A SCIENCE FOR THE ANTHROPOGENE*, 6 (2017).

18. JEDEDIAH PURDY, *AFTER NATURE: A POLITICS FOR THE ANTHROPOGENE* (2015).

19. See *id.* at 3–14.

20. William Cronon, *The Trouble With Wilderness; Or, Getting Back to the Wrong Nature*, in *UNCOMMON GROUND: RETHINKING THE HUMAN PLACE IN NATURE* 69, 69 (William Cronon, ed., 1995) [hereinafter *The Trouble With Wilderness*].

21. *Id.* at 80.

22. *Id.* at 81–82.

23. JOHN ASAFU-ADJAYE, ET AL., *AN ECOMODERNIST MANIFESTO* 6 (Apr. 2015), <https://static1.squarespace.com/static/5515d9f9e4b04d5c3198b7bb/t/552d37bbe4b07a7dd69fcd9bb/1429026747046/An+Ecomodernist+Manifesto.pdf> [https://perma.cc/E8LT-LH4F].

24. *Id.* at 6, 25.

25. See *id.* at 7.

26. *Id.*

27. *Id.*

inction—this decoupling—unlike the idealized wilderness Cronon challenged, would not be imagined. It would be real.

Cronon's solution is quite different from that of the Ecomodernists. Cronon tells us that the reality of environmental ubiquity demands direct engagement and undying responsibility.<sup>28</sup> It means that we can never “flee into a mythical wilderness to escape history and the obligation to take responsibility for our own actions.”<sup>29</sup> To the extent we “pretend” wilderness is our “real home,”<sup>30</sup> “we give ourselves permission to evade responsibility for the lives we actually lead.”<sup>31</sup> Thus, in criticizing the fallacy of wilderness and the human-environment divide, Cronon's realism demands more, not less, responsibility for all our choices because our choices “at home” are no less environmental choices than our choices in the “environment.”<sup>32</sup>

In the context of PEG, there is an awkward balance between the modernist promise of innovation, demands for personal responsibility, and the importance of a ubiquitous environment. PEG is, after all, the study of innovations in governance. It is about developing new tools for limiting harms, expressing good behaviors, and capitalizing on consumer preference. To that end, it embraces the modernist promise. Likewise, though PEG may exclude robust individual participation, in relying on consumer behavior, it provides an environmental protection tool (shopping) for many who believed they otherwise had none. It is environmental ubiquity, however, that offers what might be the most philosophically interesting question. Accepting that the environment is not an “other,” but is in fact part of every human system, provides the bridge to making commerce an environmental issue as much as species conservation or pollution control.

Although it creates a newly accessible environmental protection tool, a downside of treating “environmental” as a part of commerce as much as it is part of wilderness, is that this sameness could make it easier to evade environmental responsibility. An accessible, omnipresent, and critical environment should demand constant attention and care, while an accessible, omnipresent, and simple tool may allow us to take “environmental” for granted as part of our shopping habits.

## “Governance”

If commercial behavior is environmental behavior, then PEG is not necessarily environmental “governance”—it is simply commercial or economic decision-making that considers a new variable: the environment.

In his 2007 article, Professor Vandenberg defined governance exactly as I would, by saying it is a restriction on behavior.<sup>33</sup> This simple definition leaves room for the growing explorations of governance that have dotted the literature of the legal and sociological fields as well as that of politi-

cal science, without overly complicating the basic notion of restrictions and limits as central to “governance.”

These limits can arise from a number of sources, chief among them public law, private law, and community norms. Public law is the area most familiar to environmental scholars and practitioners.<sup>34</sup> This is the positive law that legislative bodies establish through statutes and regulators establish through administrative rules. There is no question that these public, positive laws restrict environmental choices in a number of ways, thereby governing environmental behavior.<sup>35</sup> Private law restricts the field of private interactions.<sup>36</sup> Private law includes the law of contract that restricts the way two parties may bargain, or the law of torts that establishes liability for a variety of noncontractual wrongdoings. Although mostly retrospective, private law restricts behavior through injunction or, more typically, the payment of damages. Community norms are the most exotic to legal scholars, though they are hardly unknown.<sup>37</sup> Norms are informal expectations among a community and although they do not carry the penal or pecuniary threats of positive, governmental laws, they can restrict behavior based on “complex continuing relationships” in a given community.<sup>38</sup> All three of these mechanisms are governance mechanisms because they restrict behaviors. The restrictions take different forms, from legal penalties and fines to damaged social relations. In most cases, a blend of norms and positive laws will interact to restrict behavior.<sup>39</sup>

In the context of PEG, it is important to understand and untangle the source of restrictions. Certainly, the contractual relationships that shape supply chain sustainability, or the norm-based relationships that, at a minimum, animate cooperative labeling programs, restrict environmental behavior. A contract may require greenhouse gas reporting, for instance, or an eco-label program may restrict the number of producers from which a retailer can purchase. Professor Vandenberg writes that in PEG, “[e]nforcement occurs through shaming, boycotts, private inspections, contract terminations or nonrenewals, and preferential purchasing”<sup>40</sup> Accurate though it is, this conflates the sources of pressure on specific PEG activities and the pressures to engage in PEG in the first place. In the first instance, shaming and boycotts could pressure a company to engage in PEG. In the second instance, private inspections, contract terminations, and preferential purchasing enforce existing PEG commitments.

Understanding how to govern existing PEG programs is an important and informative area of scholarship that will improve the effectiveness of existing PEG efforts.<sup>41</sup> But it is equally interesting, and more important for widespread PEG engagement, that we understand what governs entrance into PEG in the first place. The answer to this question seems to

28. *The Trouble With Wilderness*, *supra* note 20, at 88–89.

29. *See id.* at 90.

30. *Id.* at 81.

31. *Id.*

32. *Id.* at 89–90.

33. *Wal-Mart*, *supra* note 4, at 916.

34. *See Private Environmental Governance*, *supra* note 4, at 130–31.

35. *Id.*

36. *Id.* at 130–34.

37. *See, e.g., Ellickson*, *supra* note 3, at 624.

38. *Id.* at 628.

39. *Id.* at 667–68.

40. *Private Environmental Governance*, *supra* note 4, at 137.

41. *See, e.g., Light & Orts*, *supra* note 6, at 9–10.

fit into two categories: profit and personality.<sup>42</sup> Marketing, consumer demand, and regulatory avoidance are all drivers of entrance into PEG that find their genesis in the profit motive. Corporate culture, or the culture of top management, is rooted in self-identity and personality.

Some, like me, might have the instinct to say that, although profit and personality are valid and important drivers of PEG engagement, they are not “governance” in the same way that positive law or norms are governance. The clear mandate of positive laws, or the rich complexity of norms which, when ignored, can produce meaningful consequences, might give rise to this instinct. But economic incentives, though strictly voluntary, certainly can have a similar impact to norm-based incentives, and therefore govern in a similarly meaningful way.

The certainty that economic incentives are “governance” rather than volunteerism, however, erodes when paired with the sway of corporate culture. The profit motive is a powerful one, and no doubt that motive controls and restricts corporate behavior to a real degree. But corporate personality is also a driver. It is more difficult to say that corporate culture or personality is strictly “governance” because it is a wholly internal proposition, one that does not restrict behavior because it is, in an important sense, the thing that other governance mechanisms seek to control. If corporate personality is an influential driver of PEG engagement—that is, if personality can tip the balance—then profit seems like a far weaker form of governance than law and norms. The weakness of profit as a form of “governance” means that PEG advocates, and perhaps scholars as well, need to strengthen the profit argument quantitatively, and qualitatively need to better understand, and build, virtuous corporate cultures.

PEG spans a range of issues much wider than this brief survey of “private,” “environmental,” and “governance” suggests. What this survey might nevertheless illustrate is that, with respect to all three titular words, PEG is less than the sum of its parts. “Private,” in the liberal sense, is much broader than the simple nongovernmental meaning that PEG ascribes. “Environmental,” with all the debate around its place in our physical and emotional systems, is, within PEG, merely about commerce: its role is in our economic system. “Governance,” which demands restrictions and control, typically by external mechanisms, applies to market-driven behaviors that motivate PEG; but this external governance is weakened by the power of internal personalities that may advance or restrain productive PEG engagement. In the context of PEG, each word is asked to carry much less weight than it would carry in other settings.

42. See Karen Bradshaw Schulz, *New Governance and Industry Culture*, 88 NOTRE DAME L. REV. 2515, 2521 (2015) (identifying brand development, corporate culture, customer demand, and regulatory avoidance as key drivers of socially responsible corporate activities).

None of this analysis should devalue the importance of PEG in any way. Rather, if we allow the individual words to shoulder the full burden of their broader meanings, this analysis is a start to make PEG an even more robust field of practice and research than it already is. And it is indeed robust. The contributions to this issue shine light on some of the particular and existential spaces still in the PEG shadows.

Looking specifically at the role of institutional investors, Lisa Benjamin manages to cover all three titular words in some detail. Her contribution details the risks and opportunities that climate change presents to institutional investors in the wake of the 2015 Paris Agreement, specifically with respect to voluntary, nonstate participation.<sup>43</sup>

Sarah J. Morath tackles “environmental” by identifying the growing trend of private animal welfare commitments. Professor Morath applies PEG’s framework to corporate animal welfare efforts to uncover the various motivations as well as the impacts of these new animal welfare strategies.<sup>44</sup>

Albert Lin further explores the boundaries of “private” in his piece about Pope Francis’ Encyclical, *Laudato Si’*, as a form of PEG. Just as Professor Morath applied the framework of PEG to an area not always considered “environment,” Lin applies the framework to an area not always, or not traditionally, considered “private.”<sup>45</sup>

Kristen van de Biezenboz adds more nuance to the nature of “governance” as merely voluntary in PEG, offering an innovation in enforceability and accountability. She proposes a strategy for making PEG more effective by combining large-scale schemes, such as the Carbon Principles, with small-scale schemes, such as Good Neighbor and Community Benefit agreements.<sup>46</sup>

My own contribution, an edited version of my talk at the Symposium,<sup>47</sup> focuses on how to maintain the best aspects of public “governance” as we shift to more “private” leadership. I ask what the role of private non-profit advocacy groups should be in PEG.<sup>48</sup>

The diverse contributions to this symposium issue are case-in-point that PEG is more than meets the eye, though maybe less than “private,” “environmental,” and “governance” on their own. This two-sided complexity assures that while there is still work to be done, and still practical and philosophical puzzles to solve within the new field, PEG is here to stay.

43. Lisa Benjamin, *Institutional Investors in the UK and “Carbon-Major” Companies: Private Environmental Governance Post-Paris*, 9 GEO. WASH. J. ENERGY & ENVTL. L. 5 (2018).

44. Sarah J. Morath, *Private Governance and Animal Welfare*, 9 GEO. WASH. J. ENERGY & ENVTL. L. 21 (2018).

45. Albert Lin, *Pope Francis’ Encyclical on the Environment as Private Environmental Governance*, 9 GEO. WASH. J. ENERGY & ENVTL. L. 33 (2018).

46. Kristen van de Biezenbos, *Enforcing Private Environmental Governance Standards Through Community Contracts*, 9 GEO. WASH. J. ENERGY & ENVTL. L. 45 (2018).

47. This talk itself is drawn from the following article: Joshua U. Galperin, *Trust Me, I’m a Pragmatist: A Partially Pragmatic Critique of Pragmatic Activism*, 42 COLUM. J. ENVTL. L. 425 (2017).

48. Joshua U. Galperin, *Pragmatism, Pragmatism, and Private Environmental Governance*, 9 GEO. WASH. J. ENERGY & ENVTL. L. 50 (2018).