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# Pragmatism, Pragmativism, and Private Environmental Governance

Joshua Ulan Galperin\*

John Johnson<sup>1</sup> called nongovernmental organization activism on issues of private environmental governance “quiescent.” That is almost exactly what I want to talk about today. I would not use the word quiescent so much as inadequate, but I intend to address the same issue. If private environmental governance is growing in importance—if it is possibly becoming a substitution for public regulation, as some have suggested—then we need to think carefully about how advocacy organizations participate in private environmental governance.

But before I embark on a deeper exploration of this question, I want to share a very short story. When I was in eighth grade, I wrote a paper on the 1968 Democratic National Convention, as some of you may know—or, heaven forbid, remember—there was a lot of unrest at that convention. In particular, the Yuppies pushed, they protested, they even nominated a pig for the Democratic candidacy.<sup>2</sup> With everything happening in the world, the Yuppies thought that pushing on their friends was more effective than pushing on their enemies—in that case, the Republican Party. That is the tack

I am taking here. If this seems like an attack on my fellow environmentalists, please keep in mind that I only pick on them because it is where I think we can generate the most positive change, not because I have any existential dissatisfaction with their work.

One of the things I want to do here is coin a term. The term is “pragmativism.” I have come up with the word because I have been thinking about how the philosophy of pragmatism applies to environmental activism. So, there you have the etymology: pragmatism plus activism equals pragmativism.

Pragmatism is an American philosophical tradition that has been applied in the law, including to judicial decision-making<sup>3</sup> and administrative decision-making.<sup>4</sup> But nobody has yet considered the role of pragmatism in environmental activism.

I think it is important to study the subject because a lot of activists explicitly describe their efforts as pragmatic. For example, the Environmental Defense Fund (“EDF”), my primary study subject today, uses the word “pragmatic” 170 times on its website, and the Nature Conservancy uses the word 230 times.<sup>5</sup>

I propose that, while the frequent use of the word does not have a lot to do with pragmatic philosophy, it does embody a consistent ideology and practice, which, among other

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1. Walton College Professor of Sustainability, University of Arkansas Sam M. Walton College of Business. Johnson spoke at the closing panel entitled “Scene Setting—What Is Happening With PEG Outside the Academy?” of the 2017 J.B. & Maurice C. Shapiro Environmental Law Symposium on Private Environmental Governance at the George Washington University Law School.

2. DAVID FARBER, CHICAGO ’68 167 (1988) (describing nomination of “Pigassus” the pig by Yuppies at the 1968 Democratic National Convention).

3. See, e.g., Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1653 (1990); Michael Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L.J. 687, 688, 691 (2003) (reviewing RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003)); Justin Desautels-Stein, *At War With the Eclectics: Mapping Pragmatism in Contemporary Legal Analysis*, 2007 MICH. ST. L. REV. 565, 566; Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1569 (1990).

4. See, e.g., Colin S. Driver, *Policy-making Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 393 (1981); Charles E. Lindblom, *Still Muddling, Not Yet Through*, 39 PUB. ADMIN. REV. 517, 517 (1979); Charles E. Lindblom, *The Science of “Muddling Through,”* 19 PUB. ADMIN. REV. 79, 79–81 (1959).

5. A search for variants of the word “pragmatism” on The Nature Conservancy’s website returned 230 results. A search on the Environmental Defense Fund’s website returned 170 results (search conducted on March 1, 2018). See also Peter Kareiva, *Conservation Science: How the Conservancy Leads With Science*, THE NATURE CONSERVANCY, <https://www.nature.org/science-in-action/leading-with-science/index.htm> [https://perma.cc/U2VM-5BZK] (last visited March 1, 2018); *Pragmatists: The New Face of Environmentalism Is You*, ENVTL. DEF. FUND, <https://www.edf.org/fourth-wave/pragmatist> [https://perma.cc/5YSR-KEGQ] (last visited Mar. 1, 2018).

things, includes particular deference to private environmental governance.

That nexus is why the conversation about pragtivism is relevant here. We tend to think of advocacy organizations as pressing for public policy changes, but more and more there is a move towards advocacy organizations focusing on private behavior. In some cases, you see organizations like the World Wildlife Fund and the Nature Conservancy even acting more like consultancies than advocates.<sup>6</sup> But this discussion will focus more on advocacy around private environmental governance than consulting, although I think that role is quite important as well.

To bring this thinking to life, I want to start with an Endangered Species Act<sup>7</sup> (“ESA”) case study. Although the ESA is obviously a public regulatory regime, over the years it has spawned a number of creative private tools such as Habitat Conservation Plans, which invite private planning in return for more flexibility in harming listed species,<sup>8</sup> and Candidate Conservation Agreements, which welcome private conservation as a substitute for species listing in the first place.<sup>9</sup> Both of these tools trade public regulation for private governance, with the laudable aim of achieving more effective conservation.

My point here is not to argue that the ESA is a private governance tool. It obviously is not. But it does create a surprising space for private efforts. Sometimes these efforts are laudable and sometimes they are a disaster. The question then is how advocacy organizations, particularly those who pride themselves on being pragmatic, balance strong environmental protection and flexible private governance in their own advocacy strategy.

The story of the Dunes Sagebrush Lizard is a tale of misplaced reliance on private governance that may have turned out the way it did because of an organizational commitment to pragtivism.

The U.S. Fish and Wildlife Service (“FWS”) proposed to list the Dunes Sagebrush Lizard under the ESA because its populations had been declining for at least thirty years.<sup>10</sup> Much of the lizard’s key habitat was on land owned by oil and gas companies in Texas.<sup>11</sup> Unsurprisingly, the Texas oil and gas industry sought to avoid ESA listing. They did so by drafting what I will call the “Texas Conservation Plan” or

the “Plan.”<sup>12</sup> That Plan would make use of a Habitat Conservation Plan and Candidate Conservation Agreement.<sup>13</sup>

The Texas Conservation Plan is a voluntary plan. No landowner is forced to join and the terms of the plan are unenforceable—that is, there are apparently no standards to which the State of Texas or the FWS can hold the industry.<sup>14</sup> I say “apparently” no standards because of the way the details are obfuscated in the Texas Conservation Plan, which I will explain in a moment. In any case, if any standards do exist, they are not included in the actual Texas Conservation Plan. Instead, they are written into “certificates of inclusion.”<sup>15</sup> These certificates are essentially private contracts by which individual private landowners sign on to participate in the Plan under terms that they privately negotiate.<sup>16</sup>

To be clear, the Plan itself offers guidance. The Plan says that landowners should avoid building in lizard habitat *if possible*, and, if they must build in habitat, then they should, *if they are willing*, minimize destruction, and, *if they must* destroy habitat, then it would be nice if they would mitigate that destruction. I’m being glib and paraphrasing, but the content really is not an exaggeration.<sup>17</sup> The only potentially enforceable requirement in the Plan is a total cap on habitat conversion.<sup>18</sup> However, I have serious doubts about the ability to enforce that.<sup>19</sup> Specific requirements—if any exist—apply variably to different landowners as they are included only in individual certificates.<sup>20</sup>

Here is the rub: the certificates are completely confidential.<sup>21</sup> Not only are they confidential to the public, but they are also confidential to the FWS.<sup>22</sup> As such, citizens, public interest groups, academics, scientists, and the federal government agency charged with implementing the ESA are all prohibited from reviewing the agreements that purport to conserve the species in question.

As if that is not a troubling enough exercise of private governance at the expense of public governance, the Texas Con-

6. See, e.g., MARK R. TERCEK & JONATHAN S. ADAMS, NATURE’S FORTUNE: HOW BUSINESS AND SOCIETY THRIVE BY INVESTING IN NATURE xvii-xix (2013); WORLD WILDLIFE FUND, BCG ECONOMIC VALUATION: METHODOLOGY AND RESOURCES, 2 (Apr. 22, 2015), <http://www.worldwildlife.org/publications/bcg-economic-valuation-methodology-and-resources> (describing World Wildlife Fund’s partnership with the Boston Consulting Group).

7. 16 U.S.C. §§ 1531 et seq. (2012).

8. 16 U.S.C. § 1539(a)(1)(B) (2012); see J.B. Ruhl, *Is the Endangered Species Act Eco-Pragmatic?*, 87 MINN. L. REV. 885, 922 (2003).

9. Jack G. Connors, *Conserving Habitat Before It Is Too Late*, 35 PUB. LAND & RES. L. REV. 147, 160 (2014).

10. See Endangered and Threatened Wildlife and Plants; Endangered Status for Dunes Sagebrush Lizard, 75 Fed. Reg. 77801, 77802 (Dec. 14, 2010).

11. See *id.* at 77804–06.

12. U.S. FISH & WILDLIFE SERV., TEXAS CONSERVATION PLAN FOR THE DUNES SAGEBRUSH LIZARD (SCELOPORUS ARENICOLUS) (2012), [https://www.fws.gov/southwest/es/Documents/R2ES/TX\\_Cons\\_Plan\\_DSL\\_20110927.pdf](https://www.fws.gov/southwest/es/Documents/R2ES/TX_Cons_Plan_DSL_20110927.pdf) [hereinafter TEXAS PLAN]; Jay Root, *Oil Lobbyists Oversee Protection of Threatened Lizard*, TEXAS TRIB. (Apr. 24, 2013), <https://www.texastribune.org/2013/04/24/oil-lobbyists-oversee-threatened-lizard-protection/> [<https://perma.cc/P9U7-54KN>].

13. TEXAS PLAN, *supra* note 12, at 4–6.

14. TEXAS PLAN, *supra* note 12, at 1; YA-WEI LI & TIM MALE, DEFS. OF WILDLIFE, DUNES SAGEBRUSH LIZARD: THE CAUTIONARY TALE OF A CANDIDATE SPECIES DENIED 3 (2013).

15. TEXAS PLAN, *supra* note 12, at 1.

16. *Id.* at 8.

17. See *id.* at 38–39.

18. See *id.* at 58.

19. It is unclear whether the cap applies to habitats enrolled in the Texas Conservation Plan or to all lizard habitats. If the cap only applies to enrolled habitats, then it would be very easy to remove land from engagement with the Plan in order to avoid reaching the cap.

20. *Id.* at 1, 31; LI & MALE, *supra* note 14, at 2.

21. TEXAS PLAN, *supra* note 12, at 31.

22. *Id.* For further explanation of the problems with cap enforceability, see Joshua Ulan Galperin, *Trust Me, I’m A Pragmatist: A Partially Pragmatic Critique of Pragmatic Activism*, 42 COLUM. J. ENVTL. L. 425, 464–65 (2017).

servation Plan was also privately implemented. The Texas Oil and Gas Association incorporated a new nonprofit to take responsibility for the plan and it established a three-person board of directors made up entirely of registered lobbyists for the Texas Oil and Gas Association.<sup>23</sup>

Despite what looks like a pretty lousy deal for the Dunes Sagebrush Lizard—one that over-relies on private leadership at the expense of species conservation—the FWS concluded that this plan was good enough and decided to withdraw its listing proposal.<sup>24</sup>

There is a lot to unpack here, but the part of this story that stands out the most is the rhetoric that surrounded the final decision. For example, EDF immediately spoke out in support of the Texas Conservation Plan. EDF praised this landmark policy as “proof that working with landowners can pay big dividends for wildlife.”<sup>25</sup> EDF released this statement at the time the FWS made its non-listing decision.<sup>26</sup> Given that little time had passed, it was impossible to say that the Texas Conservation Plan was proof of “big dividends for wildlife.” If anything, it was merely proof that private governance can displace public governance. However you feel about that observation, you have to agree that it would be years before EDF, or anybody else, could conclude that the Plan would benefit the lizard population.

Years have passed, and the Plan turns out not to have been such a great deal for the lizard. Defenders of Wildlife documented significant habitat destruction, lack of mitigation, and the fact that all of this was going unreported, all of which the industry and the State of Texas initially denied.<sup>27</sup> Luckily, the use of satellite imagery offered conclusive proof.<sup>28</sup>

I was surprised that what seemed like such a bad environmental move drew praise from EDF, a well-respected environmental advocacy organization. Of course, EDF has been at the forefront of “collaborative,” “cooperative,” “win-win,” privately driven environmental protection for at least thirty years.<sup>29</sup> EDF might be the original pragmatist organization. They have said often that this form of governance and their advocacy for it is pragmatic.<sup>30</sup> My hypothesis here is that EDF’s self-identification as pragmatists may have inadvertently led to a focus on tools they perceive as pragmatic at the expense of larger environmental goals.

23. Root, *supra* note 12.

24. Endangered and Threatened Wildlife and Plants; Withdrawal of the Proposed Rule to List the Dunes Sagebrush Lizard, 77 Fed. Reg. 36871, 36872 (June 19, 2012) [hereinafter Rule Withdrawal].

25. Press Release, Envtl. Def. Fund, EDF Supports Fish & Wildlife Service Approach for Dunes Sagebrush Lizard (June 13, 2012), <https://www.edf.org/news/edf-supports-fish-wildlife-service-approach-dunes-sagebrush-lizard> [<https://perma.cc/A9ST-ZJ4R>].

26. *Id.*; Rule Withdrawal, *supra* note 24.

27. YA-WEI LI, ANDERSON SHEPARD & TIM MALE, DEFS. OF WILDLIFE, HABITAT DISTURBANCES UNDER THE TEXAS HABITAT CONSERVATION PLAN FOR THE DUNES SAGEBRUSH LIZARD 3 (2013), <https://www.defenders.org/sites/default/files/publications/dunes-sagebrush-lizard-mapping-report.pdf>.

28. *Id.* at 4, 8.

29. See Frederic D. Krupp, *The Making of a Market-Minded Environmentalist*, STRATEGY+BUSINESS (June 10, 2008), <http://www.strategy-business.com/article/08201?gko=97ea9> [<https://perma.cc/3YK8-78JX>] [hereinafter *Making of a Market-Minded Environmentalist*]; Frederic D. Krupp, *New Environmentalism Factors in Economic Needs*, WALL ST. J., Nov. 20, 1986, <http://www.wsj.com/articles/SB117269353475022375>.

30. See note 8.

This brings us to the point where I have to tell you a little more about pragmatism and pragmatism.

As a philosophy, pragmatism has been around for nearly 150 years. The philosophy begins with the idea that it is unhelpful (if not impossible) to make any claim to justify behavior based on fundamental truths about the world.<sup>31</sup>

Let me put that idea into more familiar environmental terms. On the one hand, you have the fundamental claim of utilitarianism, instrumentalism, consequentialism. Whatever specific name you might give it, this is the claim that we need to protect the environment because of the benefits to humanity in doing so. On the other hand, you have claims of inherent or intrinsic rights—we need to protect the environment because other life (or ecosystems) have rights that we must not abridge, or that we have a duty to protect.<sup>32</sup>

These two perspectives describe fundamental, fixed truths—foundational principles that arguably dictate behavior. A pragmatist, however, would remind us that the world is full of diverse values—some people believe one way, others believe the opposite, and many believe something entirely different. Pragmatists argue that we cannot say who is right, indeed it may be that nobody is right, so we respect the *subjective* plurality of values and not try to decipher just one nominally *objective* value.<sup>33</sup>

There is much more to pragmatism, but this is not a philosophy lesson, and if it were, I would not be the most qualified teacher. So let me move quickly away from academic philosophy and into an idea of my own conception where I cannot get myself into as much trouble.

Pragmatism is the intersection of pragmatism and activism, but it is also something much more specific than that. It is a specific type of activism that describes itself as pragmatic, but does not necessarily have anything to do with pragmatic philosophy. Pragmatism does, however, have some consistent, identifiable traits. That is, those advocacy organizations that tend to identify themselves as pragmatic—and that I call pragmatist—do indeed operate under a unique philosophy, albeit one that I am defining post hoc, not one that these organizations have carefully detailed themselves.

Pragmatism has three main components. First, is a commitment to environmental protection. It is important to remember that these are environmental organizations with a clear goal of environmental protection. The second component is a nominal rejection of dogma and ideology. I expect this is the reason pragmatists affiliate themselves with pragmatism: because the philosophy demands that we eschew dogmas. I consider this a nominal rejection because the mere commitment to environmental protection, the act of having a mission, is an ideological commitment in itself. There is an additional ideological commitment that I will I will return to later.

31. Kelly A. Parker, *Pragmatism and Environmental Thought*, in ENVIRONMENTAL PRAGMATISM (ENVIRONMENTAL PHILOSOPHIES) 21, 22 (Andrew Light & Eric Kats eds., 1996).

32. *Id.* at 34–35.

33. Justin Desautels-Stein, *At War With the Eclectics: Mapping Pragmatism in Contemporary Legal Analysis*, 2007 MICH. ST. L. REV. 565, 583.

The third component of pragtivism is that pragtivists promote and use a specific set of tools. The tools of pragtivism are probably familiar to those working in private environmental governance. These tools are economic and market-based programs, corporate partnership and collaboration, regulatory flexibility, avoidance of litigation, and so-called “win-win” solutions. All of these are tools that pragtivists imply are only available to them because they reject the dogmatic constraints of traditional, unpragmatic, environmentalism.<sup>34</sup>

I am sure this is obvious by now, but I am skeptical of pragtivism and I therefore want to offer a few critiques. I will then conclude with a framework for improving pragtivism, a framework that I think is relevant to private environmental governance as well.

I begin my critique by briefly returning to the Dunes Sagebrush Lizard. A lawsuit regarding the lizard made its way to the U.S. Circuit Court for the District of Columbia.<sup>35</sup> The court’s opinion reflects the way pragtivist rhetoric can influence judicial decision-making and possibly displace more demanding environmental protection. This is one of the main reasons I think this is an important topic—it is not as if these strategies begin and end in philosophical waxing. The way we talk about private environmental governance, about environmentalism as a whole, filters out to the public, lawmakers, and judges, and influences their thinking as well. You have all probably seen some of U.S. Environmental Protection Agency (“EPA”) Administrator Scott Pruitt’s comments on EPA shortly after his appointment, including his assertion that EPA may not have the tools to accomplish certain environmental goals.<sup>36</sup> Pruitt *may* have gotten this idea from environmental advocates who have similarly been saying that new strategies in private governance are essential because the federal government does not have the tools to deal with twenty-first century environmental problems.<sup>37</sup>

Returning to the lizard, the D.C. Circuit Court approved the Texas Conservation Plan as a way to “engage private businesses in conservation efforts”<sup>38</sup> and essentially apologized for the Plan’s shortcomings by saying that the plan “may not be foolproof, but neither is every regulatory regime.”<sup>39</sup> Here are clear pragtivist talking points—the same points EDF made in supporting the Texas Conservation Plan. First, if a policy engages business, then that is a good thing and a sign of value in-and-of itself. Second, the court treats ideology as

too impractical. We cannot strive for perfection, the court seems to say, so something less than perfect is fine. I agree. But neither the court nor EDF really give an indication of *how* imperfect environmental protection can be before it is simply not good enough.

Although pragtivists often caveat promotion of their ideology by promising that the environment needs a whole spectrum of environmentalism, and they promise they are not repudiating more stringent environmental regulation, environmentalists are always competing for the hearts and minds of courts, policymakers, and the public. For this reason, we need to be careful about how our words actually influence this competition.

This brings me to my second critique. In 1986 Fred Krupp, the president of EDF, wrote an important piece in the *Wall Street Journal*.<sup>40</sup> Krupp argued that it was time to transition to a third stage of environmentalism.<sup>41</sup> The first stage, according to Krupp, was Teddy Roosevelt’s wilderness conservation.<sup>42</sup> The second stage was Rachel Carson’s human and ecological health protection.<sup>43</sup> His third stage is more or less what I am now calling pragtivism.<sup>44</sup>

This was a groundbreaking, thoughtful essay that captured so much of the history of environmental policy in just a few hundred words. Despite its thorough and clear-eyed assessment, Krupp’s telling of this story misses one major piece of the purpose of second-stage environmentalism. When the second stage came along it was not only the new science—the new ecological awakening—that was important; it was also about a just and accountable process.<sup>45</sup>

To explain briefly: the so-called second stage gave us our central environmental law. It gave us the National Environmental Policy Act, the Clean Air Act, the Clean Water Act, the Endangered Species Act, and more. These laws don’t *just* protect health and the environment, they establish new mechanisms of governance to combat the problems of agency capture. The new mechanisms of governance limited administrative discretion by creating strict timelines, establishing ratcheting, science-based standards, and, perhaps most importantly, allowing the public to break industry’s grip on administration by permitting citizen suits.<sup>46</sup>

When pragtivists sing the praises of partnership, flexibility, and private governance, they are not offering something entirely new (although perhaps it is improved). They are offering something old. They are offering environmental policy as it existed before the “second stage.” It was this old form of environmental policy that was demonstrably ineffective for environmental protection and that necessitated the

34. See, e.g., Peter Kareiva, *Conservation Science: How the Conservancy Leads With Science*, THE NATURE CONSERVANCY, <http://www.nature.org/science-in-action/leading-with-science/index.htm> [https://perma.cc/C3TQ-VZCM] (last visited May 15, 2017) (chastising a vision of traditional environmentalism as “facile” and hopelessly “heroic”).

35. *Defs. of Wildlife & Ctr. for Biological Diversity v. Jewell*, 815 F.3d 1, 1 (D.C. Cir. 2016).

36. Kimberly A. Strassel, *Scott Pruitt’s Back-to-Basics Agenda for the EPA*, WALL ST. J. (Feb. 17, 2017), <https://www.wsj.com/articles/scott-pruitts-back-to-basics-agenda-for-the-epa-1487375872>; Chris Mooney & Brady Dennis, *On Climate Change, Scott Pruitt Causes an Uproar—and Contradicts the EPA’s Own Website*, WASH. POST (Mar. 9, 2017), <https://www.washingtonpost.com/news/energy-environment/wp/2017/03/09/on-climate-change-scott-pruitt-contradicts-the-epas-own-website/>.

37. E.g., Daniel C. Esty, *Red Lights to Green Lights: From 20th Century Environmental Regulation to 21st Century Sustainability*, 47 ENVTL. L. 1, 4 (2017).

38. *Defs. of Wildlife*, 815 F.3d at 3.

39. *Id.* at 17.

40. *New Environmentalism Factors in Economic Needs*, *supra* note 29.

41. *Id.*

42. *Id.*

43. *Id.*

44. *See id.*

45. Theodore Lowi provides an excellent overview of this point. THEODORE J. LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY* (1st ed. 1969).

46. David J. Sousa & Christopher McGrory Klyza, *New Directions in Environmental Policy Making: An Emerging Collaborative Regime or Reinventing Interest Group Liberalism*, 47 NAT. RES. J. 377, 399–400 (2007).

second stage in the first place. In this way, pragtivism is moving environmentalism backward, not forward.

That is the core of my second critique: pragtivism is downplaying, if not ignoring, past failures, and repackaging these failed tactics as the heart of their ideology.

I am reminded here of what Tom Lyon argued at the Shapiro Symposium.<sup>47</sup> He argued that there is no evidence pragmatists are more effective than traditionalists. Well, he said there are no case studies of truly effective private environmental governance, but I prefer to understand that as a commentary on pragtivism. In either case, the point is that whether looking back at pre-second-stage environmental policy or current practice in private environmental governance, the evidence of widespread and meaningful success is disappointing. This, then, is a call for pragtivists to look closely at experience from decades ago and from today and think about what does and does not work.

The third and final critique is that pragtivism does not really reject dogma, it merely substitutes one dogma for another. It substitutes “what works” (i.e., the path of least resistance), for more values-driven efforts. My practical concern here is that when pragtivism takes values out of the equation in an effort to compromise, it becomes too easy for policy to backslide. Values, I argue, make for stickier policy. On the other hand, when “what works” is the touchstone of your philosophy, you let others decide what actually can work. You wait for others to say “ok.” That is not a good strategy.

What works to get the oil and gas industry to move forward on the dunes sagebrush lizard? Will enforceable government regulations work? No. Will enforceable private standards work? No. But a confidential, voluntary, and unenforceable plan works to get agreement, so this is where pragtivists are likely to land again and again.

Now let me walk all these critiques back just a little. The things that pragtivists advocate, particularly private governance, are necessary but not sufficient. Perhaps as academics, we have an obligation—an obligation that the judiciary certainly has—to see all sides of an issue, to assess policy in a cabined, practical way. But that is not the obligation of advocates who are supposed to have ideas that shape the tenor of debates. And I say “tenor” very intentionally. Advocates should provide substance, but the tenor, the values, and the energy of a debate are equally important. Thus, advocates need to create the excitement that will change the public dialogue. If advocates are turning away from that responsibility, where will the big, transformative ideas come from?

To address all these concerns, I have tried to come up with a series of challenges. I put these challenges to pragtivists, and ask them to consider each when they are contemplating their own advocacy strategy.

At base, I want pragtivists to stop implying they do not have any ideology or philosophy.<sup>48</sup> They do—we all have implicit modes of decision-making. But pragtivists deny it. To paraphrase pragmatist philosopher Charles Sanders Peirce: it does little good to ignore our own philosophical motivations, to pretend they do not exist. If we do that, we end up with sloppy, uncritical ethics.<sup>49</sup>

I ask pragtivists to recognize, consider, and refine their own dogmas rather than deny them. To that end I offer the following list to help with that self-reference and refinement of any policy, partnership, or project:

1. **TRANSPARENCY:** Is the policy transparent? How did the pragtivist arrive at the policy and does the implementation of the policy have a degree of transparency?
2. **ACCOUNTABILITY:** Is the private party responsible, answerable, and accountable if they do not follow through on their promises of environmental protection?
3. **MONITORING:** Are there provisions for monitoring policy implementation? Is there data-gathering and availability? Are there means for adapting policy based on monitoring information? Is there third-party access to data?
4. **OUTCOME AGGREGATION:** Would it be acceptable if every environmental policy followed the same template as the policy in question? In other words, would the environmental outcomes of a single policy be sustainable if that policy were replicated widely? Would we be congratulating ourselves if every threatened or endangered species were subject to the voluntary and confidential terms of the Texas Conservation Plan?
5. **PRECAUTION:** Does the policy embody reasonable precaution? This is not about the precautionary principle, per se, but about considering future costs of the policy. Does it rely on speculative future contingencies such as future market conditions, political balance, corporate leadership, or brand value? And if the predictions about those contingencies are wrong, what would be the environmental costs?
6. **CONFIDENCE:** Is there good reason to have confidence in a private sector partner? Has the partner demonstrated a commitment to environmental protection in the past? If the partner has a good track record, less rigor is probably needed; if it has a bad track record, more rigor is wise.
7. **PARTICIPATION:** Do the processes of policy development and implementation make room for public participation?

47. Dow Professor of Sustainable Science, Technology and Commerce, University of Michigan Stephen M. Ross School of Business. Lyon spoke at the closing panel entitled “Climate Change: Drivers of Private Climate Governance” of the 2017 J.B. & Maurice C. Shapiro Environmental Law Symposium on Private Environmental Governance at the George Washington University Law School.

48. MARK R. TERCEK & JONATHAN S. ADAMS, *NATURE'S FORTUNE: HOW BUSINESS AND SOCIETY THRIVE BY INVESTING IN NATURE*, at xv-xvii, 197–98 (2013); *New Environmentalism Factors in Economic Needs*, *supra* note 29.

49. See Parker, *supra* note 31, at 24 (quoting Charles S. Peirce, *How to Make Our Ideas Clear*, in 1 COLLECTED PAPERS OF CHARLES SANDERS PEIRCE, PRINCIPLES OF PHILOSOPHY, ¶ 129 (Charles Hartshorne & Paul Weiss eds., 1932)).

8. STRATEGY: What is the strategic impact of a policy? How does it influence future negotiations? If a policy is thin and speculative, does an activist praise it or accept it grudgingly?
9. SIGNALING: Finally, does the policy, or the rhetoric around the policy, communicate important environmental values or some other nonenvironmental values? Does support for a policy tell the public that neo-liberalism is the goal, and the environment is merely an accidental beneficiary, or that environmental protection is the goal? Policy changes behavior, it reflects values, but it also drives values. Does the policy in question engender environmental values?

My top priority with this framework, with this entire line of research and criticism, is to keep environmentalism diverse. If I am skeptical of pragtivism, or of private environmental governance, it is only because I see how successful it has been in winning the minds of environmentalists, and I want to make sure that the environmentalism does not go too far in any one direction. Some movement in that direction is good, but not too much, because there are traits of traditional public governance that we do not want to lose.

Therefore, what I hope this framework will do is keep some of the most important aspects of traditional public environmental law in the sightline of those advocating for more private environmental governance. There can be no doubt that we need private environmental governance, but that does not mean that we can press private governance into

the service of every public problem. No doubt people at the Shapiro Symposium understand this, but does that understanding filter out to the public and policymakers?

When Scott Pruitt says EPA's job is done,<sup>50</sup> maybe he is hearing and manipulating ideas of pragtivism and private governance. Certainly, our traditional laws have accomplished a great deal: they have picked the low-hanging fruit. But, as my colleague Dan Esty has compellingly argued—as the concept of private environmental governance implies—we need a new approach for new problems, for the high-growing fruit.<sup>51</sup> Indeed, we do, but we have to remember that the low fruit regrows every year, so EPA's job is never done. The new approach, whatever it is, must complement but not displace the traditional approach.

Likewise, there are traits of the traditional approach that probably should be part of any new strategies for environmental governance. This is why there are traits of public governance, particularly around public engagement, embedded in my framework. Public engagement, on public or private governance, can build more robust policy, more public satisfaction, and can help sway values. Ultimately, whether private or public, the best environmental behavior comes when there are deeply held environmental values. But we may be neglecting and then losing some of those values as we eagerly reach for a new strategy. While we try to woo folks with seemingly different values to become part of our new approach, we need to be exceedingly careful not to lose the consensus that got us where we are today.

50. See Strassel, *supra* note 36.

51. Esty, *supra* note 37, at 11, 81; see also Daniel C. Esty & Marian R. Chertow, *A Vision for the Future*, in *THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY* 231, 231–32 (Marian R. Chertow & Daniel C. Esty, eds., 1997).