NEGOTIATING ENERGY DEMOCRACY

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I. INTRODUCTION

Once hidden in rural areas and underdeveloped tracts, energy projects[1] have begun appearing in residential neighborhoods, near schools and parks, next to shopping centers and strip malls, and strung along the ribbons of urban highways.[2] Wind turbines churn in viewing distance from airports and gas stations, while the noise and light from hydraulic fracturing operations interrupt the sleep of families living half a mile away from the well pad.[3] In short, energy has moved from the background to our backyards, and the law has been slow to respond to the pushback from communities whose lives are directly and indirectly impacted by these projects.

There is no easy resolution to this problem, and it is unlikely to simply fade away. An ever-growing energy demand both domestically and abroad, plus a shift towards energy sources like natural gas—which is often obtained by hydraulic fracturing and must be transported via pipeline—as well as an increase in low-carbon but land-intensive sources like wind and solar, all but

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1. In this Essay, "energy projects" refers to downstream or wholesale energy projects, including oil and gas wells, solar and wind farms, and installation of electricity transmission lines.

2. *See* Suzanne Goldenberg, *When Fracking Came to Suburban Texas*, GUARDIAN, Dec. 13, 2012, https://www.theguardian.com/environment/2012/dec/31/fracking-in-towns-texas-oil (describing the expansion of hydraulic fracturing into urban and suburban areas and the resulting community pushback).

3. *See* Robert Bryce, *Wind Power is an Attack on Rural America*, L.A. TIMES, Feb. 27, 2017, http://beta.latimes.com/opinion/op-ed/la-oe-bryce-backlash-against-wind-energy-20170227-story.html; Judy Stone, *Fracking is Dangerous to Your Health—Here's Why*, FORBES (Feb. 23, 2017) https://www.forbes.com/sites/judystone/2017/02/23/fracking-is-dangerous-to-your-health-heres-why/#102427aa5945 (describing the adverse health effects of hydraulic fracturing, including loss of sleep).

assures that the local controversies that have broken out over energy projects will continue to grip communities and slow capital intensive energy projects.[4] In response to this problem, scholars have begun to consider how to incorporate some level of community participation in energy project planning.[5] These mechanisms for community participation are often referred to as "energy democracy."[6] There is urgency to the energy democracy conversation, for if some way to adequately incorporate community participation in the energy project approval process is not found, it seems likely that citizen trust in the relevant state and federal regulatory systems will continue to erode, and resistance to energy projects will continue to increase accordingly.[7]

However, it is not clear how citizen participation can or should be incorporated into existing regulatory processes like energy permitting. As discussed below, there have been calls for measures including turning over energy decisions to local control, involving communities in regulatory processes such as permitting, and more.[8] This Essay argues that private contracts between communities and energy companies should also be part of the energy democracy discussion. This is especially true for linear projects, including pipelines and electricity transmission lines used to connect solar and wind farms to the larger grid. Trying to allocate costs and benefits for these linear projects is especially challenging, since there are many more people who may be potentially impacted by the negative effects of these installations.

To make this case, this Essay considers the underpinnings of regulatory decision-making in the energy context, and identifies why relying on concepts like procedural justice to address community concerns is misplaced. Instead, what is needed is a system for resolving conflicts of interests among stakeholders in energy projects. To that end, while early and meaningful community participation could be used to restore democratic

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4. *See, e.g.*, Robbie Orvis, *America's Renewable Electricity Forecast Grows To 2050, Even Under Trump*, FORBES (May 10, 2017) https://www.forbes.com/sites/energyinnovation/2017/05/10/americas-renewable-electricity-forecast-grows-to-2050-even-under-trump/#497e3ea116e4; Tsvetana Paraskova, *Natural Gas Market is Set to Boom*, USA TODAY (Oct. 18, 2017) https://www.usatoday.com/story/money/energy/2017/10/18/natural-gas-market-set-boom/774770001/.

5. *See* BENJAMIN K. SOVACOOL & MICHAEL H. DWORKIN, GLOBAL ENERGY JUSTICE: PROBLEMS, PRINCIPLES, AND PRACTICES 1 (2014); Kristen van de Biezenbos, *Where Oil is King*, 85 FORDHAM L. REV. 1631 (2017); Joseph P. Tomain, *The Democratization of Energy*, 48 VAND. J. TRANSNAT'L L. 1125 (2015); Shelley Welton, *Grasping for Energy Democracy*, MICH. L. REV. (forthcoming 2018).

6. *See infra* Part II.

7. *See* Hari M. Osofsky & Jacqueline Peel, *Energy Partisanship*, 65 EMORY L.J. 695, 697–98 (2016) (describing the highly politicized and divisive nature of the controversies surrounding energy projects).

8. *See infra* Part III.

legitimacy and community confidence to decisions involving energy projects, the regulatory process itself is not well suited to such a solution. Unless and until a way to accomplish this is found by lawmakers and agencies, community contracts present a way to allow for direct negotiations between communities and energy companies and to allow the former to have their say.

II. THE NEED FOR COMMUNITY PARTICIPATION IN ENERGY PROJECTS

The recent pushback on energy projects by communities has not escaped the notice of energy scholars. In the not-too-distant past, communities seemed more accepting of nearby oil and gas wells and pipelines because of the economic benefits they brought, and many energy companies enjoyed, if not a warm relationship, at least a neutral relationship with the people living near their operations.[9] To the extent that there were points of contention between communities and energy companies that were not addressed by the regulatory process or some other law, concepts like social license developed to fill those gaps.[10]

Social license is the idea that companies sometimes go beyond what they are legally required to do in order to align themselves positively with the surrounding community's values.[11] Among the benefits of social license are its flexibility—because it isn't a legal requirement, it allows a company to adapt to the unique demands of different communities and groups—and its voluntary nature.[12] The voluntary aspect of social license means that companies can adapt to community pressures to the extent they consider

9. *See* Kate Galbraith, *A Backlash Against Drilling, in the Oil and Gas Heartland*, TEXAS TRIBUNE, Apr. 25, 2011, https://www.texastribune.org/2011/04/25/even-in-texas-concerns-grow-about-gas-drilling/ (looking at how communities in Texas, which in the past prided itself on being the home of the oil and gas industry, began turning against hydraulic fracturing).

10. *See* Neil Gunnigham, et al., *Social License & Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOC. INQUIRY 307, 308 (2004) (describing how, in advanced democracies, companies do not necessarily believe their obligations begin and end with what is legally required).

11. *See id.*; *see also* Kristi Disney Bruckner, *Community Development Agreements in Mining Projects,* 44 DENVER J. OF INT'L L. & POL'Y 413, 416 (2016) (describing how mining companies use the social license to operate—the acceptance of communities—to avoid costly and time-consuming conflicts).

12. *See* Gunningham et al., *supra* note 10, at 324–25.

economically feasible.[13] Contrast this with regulations, which companies often argue are expensive to comply with and reduce their competitiveness.[14]

But social license only goes so far.[15] Those same strengths of flexibility and voluntariness can also mean that companies may decide in some situations that it is simply not worth it to work with communities. This could be particularly true in the case of pipeline companies, which don't typically have a business presence along the path of their pipelines once construction is complete. It is easier to see why a well site or chemical plant might be more incentivized to work with a concerned community, because they are essentially dealing with their long-term neighbors.[16] By contrast, although the pipeline itself is present along its route, employees of the pipeline company are not once the project has been completed.

Further complicating matters is that the current energy push in the United States is largely attributable to the boom in hydraulic fracturing ("fracking").[17] The frustrations of communities living near fracking sites related to the perceived lack of transparency and/or good faith on the part of energy companies has led to fierce opposition to the practice and, in some cases, locally-enacted fracking bans.[18] Pipeline projects, which are needed to transport the oil and natural gas recovered from fracking, have also met sometimes-violent resistance.[19] At the same time, communities have not universally welcomed the increase in green energy projects. Indeed, almost every type of energy project—

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13. But this isn't to say that complying with social license has to be cheap—some measures meant to placate communities can easily cost millions of dollars. *See id.* at 321. But, since these measures are voluntary, the costs are presumably acceptable to the company incurring them.

14. *See, e.g.*, David Jacobs, *The Oil and Gas Industry Questions Whether New Regulations Will Make Drilling Safer or Just More Expensive*, BUS. INSIDER (June 8, 2016), https://www.businessreport.com/business/oil-gas-industry-questions-whether-new-regulations-will-make-drilling-safer-just-expensive.

15. Social license often comes under fire for being such a vague term as to be essentially meaningless. *See* Joel Gehman, Lianne M. Lefsrud & Stewart Fast, *Social License to Operate: Legitimacy By Another Name?* 60 NEW FRONTIERS 293, 293–94 (2017).

16. *See* Gunningham et al., *supra* note 10, at 324–25.

17. *See* Tom DiChristopher, *Fracking Boom: US Shale Oil Output to Top 6 Million Barrels a Day in August and September*, CNBC (Aug. 14, 2017, 3:39 PM), https://www.cnbc.com/2017/08/14/us-shale-oil-output-to-top-6-million-barrels-a-day.html.

18. *See, e.g.*, David B. Spence, *The Political Economy of Local Vetoes*, 93 TEX. L. REV. 351, 369–71 (2014).

19. *See, e.g., Dakota Pipeline: What's Behind the Controversy?*, BBC, Feb. 7, 2017, http://www.bbc.com/news/world-us-canada-37863955; Kalina Laframboise, *Quebec Politicians, Environmentalists Hail Demise of Controversial Energy East Pipeline*, CBC NEWS (Oct. 05, 2017), http://www.cbc.ca/news/canada/montreal/energy-east-pipeline-quebec-politicians-victory-1.4338579; Kate Sheppard, *What's All the Fuss About the Keystone KL Pipeline?*, MOTHER JONES (Aug. 24, 2011, 10:00 AM), http://www.motherjones.com/politics/2011/08/pipeline-protesters-keystone-xl-tar-sands/#.

including the transmission lines needed to connect wind and solar generation facilities to the larger grid, as well as the wind and solar generation facilities themselves—has been met with community pushback.[20]

Often, the natural focal point of the debates over fracking, pipelines, and other projects has tended to concern specific projects, like the Dakota Access Pipeline and the proposed fracking outside of Denton, Texas.[21] While it might seem more appropriate to demand bigger-picture legal or policy changes instead of targeting individual projects (which are a kind of symptom of the state and federal approaches to energy governance), it is not surprising that most of the attention is concentrated on particular projects. Decision-making in the energy sphere is complex, involving political leaders, energy regulators, energy companies, and interest groups.[22] This complexity does not leave much room for communities to have a meaningful voice, and although they undoubtedly need one, both the regulatory process and the underlying laws have been slow to allow space for community concerns.[23] Which brings us to the current push for increased energy democracy.

III. WHAT IS ENERGY DEMOCRACY?

Energy democracy is a sort of catchall term that refers to including non-industry and non-regulatory individuals and groups in various ways and in a variety of energy contexts.[24] The idea of applying democratic theories to planning and regulatory processes

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20. *See* Lincoln L. Davies & Sanya Carley, *Emerging Shadows in National Solar Policy? Nevada's Net Metering Transition in Context*, 30 ELEC. J. 33, 33–42 (2017) (examining the pushback against net metering and other smart grid upgrades in Nevada); Troy Rule, *Renewable Energy and the Neighbors*, 4 UTAH L. REV. 1223, 1234–42 (2010); *see also* ROBERT W. RIGHTER, WIND ENERGY IN AMERICA: A HISTORY 245 (University of Oklahoma 1996); Allison Pohle, *Sudbury Residents Vow to Battle Transmission Line Plan*, BOSTON GLOBE, Oct. 27, 2016, 4:45 PM, https://www.bostonglobe.com/metro/regionals/west/2016/10/27/sudbury-residents-express-outrage-over-transmission-lineplan/QK3uyjxtolY1LMDGZ6I9mK/story.html; *NC Town Rejects Solar Farm, Fearing it Would Suck up All the Energy From the Sun*, ABC11.COM (Dec. 14, 2015), http://abc11.com/news/nc-solar-farm-rejected-over-fear-it-will-suck-up-energy/1122081/.

21. *See* sources cited *supra* note 19.

22. *See, e.g.*, Hari M. Osofsky & Hannah J. Wiseman, *Dynamic Energy Federalism*, 72 MD. L. REV. 773, 778, 830, 832 (2013) (describing the regulatory picture of energy in the United States as fractured, noting "patterns of inadequate regulatory authority; simultaneous overlap and fragmentation; and entities in public regulatory roles enmeshed with, and at times partially made up of, the private actors that they ostensibly regulate across numerous types of energy law").

23. *See id.*; *see also* Welton, *supra* note 5, at 12 (although Welton is primarily focused on electricity, her observations on the "byzantine" nature of U.S. energy regulation are still relevant to the field as a whole).

24. *See* Welton, *supra* note 5, at 5.

is not unique to the energy sphere. Zoning boards often invite community comments before they rule on applications for zoning variances.[25] When the Department of Transportation considers expanding federal highways, there is a process in place for hearing from potentially impacted communities before final routes are made and approved.[26] Administrative agencies using notice and comment rulemaking are also soliciting the views of individuals before they finalize new agency rules.[27]

In urban planning, "participatory planning" incorporates the views of communities early in municipal expansion and management plans, with the goal being to head off disputes before they happen.[28] However, in all types of community and citizen participation, there is a concern over the "haves" being favored over the "have nots," whether this happens through the structure of the participation process itself or in the results.[29] There is also the near impossibility of including all community members in whatever process is chosen, which in turn can make the validity of such processes suspect.[30] This and other problems of inequity are inherent in nearly all participatory processes, including negotiating community contracts.[31]

Many groups are in favor of increased citizen participation in deciding energy issues, recognizing that there are complex new layers to energy choices that implicate both moral (especially

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25. Even so, there are plenty of criticisms of zoning as a way for communities to institutionalize their prejudices against certain types of people and businesses. *See* Eric R. Claeys, *Euclid Lives? The Uneasy Legacy of Progressivism in Zoning*, 73 FORDHAM L. REV. 731, 735 (2004); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 839 (1983).

26. *See* U.S. DEP'T OF TRANSP., A GUIDE TO TRANSPORTATION DECISIONMAKING (April 2015), https://www.planning.dot.gov/documents/GuidetoTransportationDecisionmaking.pdf.

27. *See* Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can't Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. 5, 13 (2009) (stating that notice-and-comment rulemaking has become "the default mode in the federal government for making 'binding' legislative rules"); Cass R. Sunstein, *Democratizing Regulation, Digitally*, 34 DEMOCRACY: J. OF IDEAS (Fall 2014), http://democracyjournal.org/magazine/34/democratizing-regulation-digitally/ (identifying how public participation can improve the quality and legitimacy of rules by making the rule makers accountable).

28. *See* ALEXANDER CLEMENT MOSHA, A REAPPRAISAL OF THE URBAN PLANNING PROCESS 175–76 (United Nations Humans Settlements Programme 1995).

29. *See* sources cited *supra* note 25; *see generally* Sherry Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. PLAN. ASSOC. 216 (1969) (creating a typology of citizen participation and discussing the downsides to each).

30. *See* sources cited *supra* notes 25. *See also* Arnstein, *supra* note 29.

31. In the context of Good Neighbor Agreements, for example, there have been criticisms that unless the community in question has enough leverage, it is possible the industry party will use the contract as little more than a PR tool. *See, e.g.*, Thalia González & Giovanni Saarman, *Regulating Pollutants, Negative Externalities, and Good Neighbor Agreements: Who Bears the Burden of Protecting Communities?* 41 ECOLOGY L.Q. 37, 77 (2014) ("Without significant leverage, codified in the regulatory scheme, communities may be forced to bargain away their rights in order to achieve incremental positive change.").

climate change) and quality of life issues that regulatory processes are not always equipped to address;[32] however, how that participation should take place changes depending on the party advocating for it.[33] Many of the measures being proposed to increase participation are designed to allow communities to argue for lower electricity prices or to argue environmental issues.[34] But what many of these measures don't adequately address is the perceived unfairness of living with the risks of energy projects while receiving no clear benefit—and securing benefits are one of the central advantages of contracts.[35] Further, and as discussed more fully below, most calls for energy democracy would require significant and difficult changes to regulatory processes to truly give community voices weight. That is why community contracts—though private instead of public law and not traditionally thought of as "democratic," since they involve direct party participation instead of voting for representation—should be included in the energy democracy discussion.

IV. ACHIEVING THE GOALS OF ENERGY DEMOCRACY THROUGH CONTRACT

Private contracts between energy companies and communities may be the best solution for many types of energy projects, and for linear projects in particular. While achieving a resolution that satisfies both parties is the entire goal of contract, trying to use existing legal regulations to reach a similar result would be difficult. From a legal perspective, the issue of unfairness or injustice is generally considered through either a procedural or substantive lens.[36] With respect to permitting and other types of energy regulation, the emphasis is usually on process, although it

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32. *See* Osofsky & Peel, *supra* note 7, at 718–719 (discussing how lawmakers are rarely able to factor in "big picture" issues like climate change into their political calculations).

33. *See id. See also* Welton, *supra* note 5, at 5–6 (dividing the calls for energy democracy into three categories: consumer choice, local control, and access to process).

34. *See, e.g.,* Welton, *supra* note 5, at 20–25.

35. *S*ee Rush Holt, *Keystone Pipeline All Risk and No Reward*, THE HILL (April. 8, 2013) http://thehill.com/blogs/congress-blog/energy-a-environment/292313-keystone-pipeline-all-risk-and-no-reward. In this opinion piece, Rep. Holt, D-N.J. argues that the United States will get no jobs and no revenue from the Keystone Pipeline, which would be built by a Canadian company. *Id.; see also Pipeline Approval Put Alberta's Needs Ahead of B.C.'s Oil-Spill Concerns*, NATIONAL POST, Oct. 5, 2017, http://www.nationalpost.com/pipeline+approval+alberta+needs+ahead+spill+concerns/15017080/story.html (noting British Columbia's argument that approval of a pipeline going from Alberta to the Pacific forces British Columbia to bear the environmental risk while Alberta, the home of the pipeline companies, receives the financial gain).

36. *See generally* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887 (1999); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004).

does not seem that this emphasis has actually resulted in procedural justice, which is another reason for the interest in energy democracy.[37]

The administrative process, including energy regulations, is intended to be apolitical, with an emphasis on process and objective criteria considered by experts in the regulated industry and an independence from popular opinion.[38] This independence is key, as what is fair to one person may seem the height of injustice to another, and there are many instances in which a fair result for one party necessitates that another party be put in a worse position. While individual people may feel that they should have the power to pursue their own conception of the good, a well-ordered society must struggle with how to implement rules that are intended to produce results that are in the common good.[39] The tension comes about when the pursuit of the good by groups of individuals is no longer compatible with the common good that regulatory processes are intended to promote.

This is what is happening in the context of energy projects, and given the distance that often exists between what communities want and what regulators are permitted to consider in approving these projects, it's hard to see how modifying existing regulatory processes to include community voices is going to result in decisions that are satisfactory to all stakeholders.[40] This is not to say that modifying regulations is impossible or shouldn't be pursued; it's only to say that simply adding community voices, without actually changing the priorities of regulators or the processes they use, is not likely to truly address the problem.[41] But, in the meantime, when energy companies are doing long-term work in a particular area, they have an incentive to cooperate with community concerns to earn the social license.[42]

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37. *See, e.g.,* SOVACOOL & DWORKIN, *supra* note 5, at 374–75 (noting that energy processes that are not accessible or adaptable to communities are a failure of procedural justice and are an international problem).

38. *See* James O. Freeman, *Crisis and Legitimacy in the Administrative Process*, 27 STANFORD L. REV. 1041, 1062–63 (1975); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1679 (1975).

39. This is just a restatement of the classic tragedy of the commons problem, which the law still has difficulty addressing. *See* Blake Hudson & Jonathan Rosenbloom, *Uncommon Approaches to Commons Problems: Nested Governance Commons and Climate Change*, 64 HASTINGS L. J. 1273, 1283 (2013); Amy Sinden, *The Tragedy of the Commons and the Myth of a Private Property Solution*, 78 COLO. L. REV. 533, 537–38 (2007).

40. Or that produce a "fair result." *See* sources cited *supra* note 25.

41. *See, e.g.*, Cynthia R. Farina et al., *Knowledge in the People: Rethinking "Value" in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 1185, 1189–91 (2012) (suggesting changes to address the fact that, among other things, public participation in rulemaking is hindered by the fact that the rulemaking process is not designed to adequately include or incorporate community concerns).

42. *See supra* note 16, and accompanying text.

With respect to linear energy projects, though, social license isn't likely to influence energy companies, since they are only in particular communities to build the pipeline or transmission line. Linear projects are also even less likely to successfully integrate community voices through the regulatory process—crude oil pipelines are not comprehensively regulated by any one federal or state agency,[43] natural gas pipeline approvals have been fast-tracked (partially in response to the shale boom),[44] and both pipelines and transmission lines are generally subject to state-level hearings on whether the developer of the project should be given the condemnation power.[45] And yet, pipelines (particularly crude oil pipelines) can be highly controversial, so some kind of solution is important.

Using contracts between communities and energy companies could allow the parties to resolve their conflicts of interest by leveling the playing field: The party who would otherwise be put in a worse position absent the contract (the community) can bargain for whatever concessions it sees fit to make this conflict of interests acceptable. And communities do have some bargaining power over energy companies, although how much leverage and how powerful that leverage may be changes depending on the particular circumstance. Community outrage over projects like the Keystone XL and Dakota Access pipelines cost the energy companies behind those contracts billions of dollars and considerable time in the form of construction delays.[46] They have also been sued over those projects and alleged defects in the regulatory processes surrounding them.[47] These projects are still going forward, but they illustrate the frustrations, lawsuits, and delays that community resistance can bring—which contract negotiations might help to avoid.

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43. For an overview of the patchwork of state and federal regulatory oversight of oil pipelines, see Alexandra B. Klass & Danielle Meinhardt, *Transporting Oil & Gas: Infrastructure Challenges*, 100 IOWA L. REV. 947, 982, 1015 (2015).

44. *See id.* at 1008.

45. *See* Alexandra B. Klass, *Takings and Transmission*, 91 N.C. L. REV. 1079, 1101–02 (2013) (explaining how states grant infrastructure developers, including pipeline and transmission lines developers, certificates of public convenience and necessity that allows them to exercise the condemnation power).

46. *See* Jason Schwartz, *If You're Resisting KXL and DAPL, You Also Need to Know About These 6 Pipelines*, GREENPEACE (Aug. 11, 2017) http://www.greenpeace.org/usa/if-youre-resisting-kxl-and-dapl-you-also-need-to-know-about-these-6-pipelines/ (detailing a number of pipeline projects, some of which have been delayed by community and activist resistance).

47. *See, e.g.*, Georgina Gustin, *Coastal Communities Sue 37 Oil, Gas and Coal Companies Over Climate Change*, INSIDE CLIMATE NEWS (July 18, 2017), https://insideclimatenews.org/news/18072017/oil-gas-coal-companies-exxon-shell-sued-coastal-california-city-counties-sea-level-rise.

Bargaining for community cooperation in lieu of community hostility might bring companies to the table. The benefit for communities is the chance to speak directly with the companies, determine what—if anything—they will accept in exchange for living with a pipeline or transmission line in their midst, and reach a deal that not only offers them some kind of compensation, but also includes them in the process. It is true that contracts don't necessarily provide a way to block a project, which might be what some people are looking for, but neither would most energy democracy frameworks.[48] In fact, contracts are becoming more and more common, with many communities in Colorado using memoranda of understanding with hydraulic fracturing companies, and wind farms entering into community benefits agreements.[49] Community contracts are therefore where much of the innovation in community relations with energy companies is taking place, and energy democracy scholars shouldn't overlook them.

There is another benefit to using contracts that is purely practical. Lawmakers are making decisions about the country's energy infrastructure,[50] which often involves much different considerations than the kinds of concerns that particular communities would usually have about a particular energy project. Contracts would allow for flexibility to address a wide range of issues that will vary from place to place and project to project, provide a way for citizen voices to be heard, and, at least, provide an avenue for addressing what many communities feel is a set of disastrous possibilities that they have no say in accepting or not. In this way, they are similar to social license, but are legally binding.

This is not to say that energy democracy is just an exercise in group psychology, but communities may derive real value from being part of the process of approving energy projects.[51] Current regulations, be they promulgated by state or federal agencies, are not always well suited to respond to the concerns of a community

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48. *See* Welton, *supra* note 5, at 5–6.

49. *See* Kristen van de Biezenbos, *Contracted Fracking*, 92 Tul L. Rev. (forthcoming 2018, on file with author); Austin Shaffer, Skylar Zilliox & Jessica Smith, *Memoranda of Understanding and the Social License to Operate in Colorado's Unconventional Energy Industry: A Study of Citizen Complaints*, 35 J. ENERGY & NAT. RES. L. 69, 71 (2016); LeRoy C. Paddock & Max Greenblum, *Community Benefits Agreements for Wind Farms in Context*, *in* SHARING THE COSTS AND BENEFITS OF ENERGY AND RESOURCE ACTIVITY 155–172 (2016).

50. George Cahlink & Nick Sobczyk, *6 Energy and Enviro Bills in Line for Infrastructure Package*, E&E NEWS (March 13, 2018), https://www.eenews.net/stories/1060076133; *see also* Timothy Cama, *Week Ahead: Lawmakers Put Spotlight on Energy Infrastructure*, THE HILL (Feb. 26, 2018, 06:00 AM EST) http://thehill.com/policy/energy-environment/375358-week-ahead-lawmakers-put-spotlight-on-energy-infrastructure.

51. Farina et al., *supra* note 41, at 1189–91.

while also adhering to long-standing priorities and processes.[52] Indeed, in many cases, the latter set of principles would often lead to the approval of energy projects that communities are resisting. By contrast, using contracts doesn't require that a winner be chosen. Rather, it allows communities and energy companies to come together to determine whether they can resolve their differences. There are, of course, concerns with using contracts in this way, but that should not prevent contracts from being part of the energy democracy conversation.

V. CONCLUSION

The calls for energy democracy are an important response to the growing public resistance to energy projects. But if the goal is giving substantive weight to community concerns, as opposed to just putting on a performance, the answer is not as simple as adding community hearings to permitting processes or holding town halls. Working on rethinking regulations to value community input is important, but in the meantime, community contracts should be on the table and should be included in the energy democracy conversation. Although not "democracy" in the traditional sense, contracts offer a way to resolve conflicts between communities and energy companies. Additionally, and perhaps more important in the energy democracy context, contracts provide a path to meaningful community participation without trying to shoehorn community input into existing regulatory processes or forcing communities to navigate the sometimes byzantine layers of energy regulatory bureaucracy. Although contracts come with their own set of problems and considerations, they are already in use in some areas, and should be part of the toolkit for communities concerned over energy projects in their midst.

52. *See id.*