DEBUNKING WHOLESALE PRIVATE ENFORCEMENT OF ENVIRONMENTAL RIGHTS

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In *Free Market Environmentalism*, Terry Anderson and Donald Leal argue for a privatized model of environmental protection.[1] Their recipe is seductively simple: the creation of clear private property and contract rights with regard to the environment and the judicial enforcement of these rights by private individuals and firms.[2] The two-part thesis would replace the existing "administrative" or regulatory model of environmental protection with a private enforcement model.

Inherent in Anderson and Leal's proposal is a preference for individuals to act independently in their own enlightened self-interest. The theme "incentives matter"[3] resounds throughout *Free Market Environmentalism* and forms the foundation supporting a shift to a system of private rather than public environmental regulation. A legal scheme of contract and property rights—combined with tort liability for the inevitable intrusions upon those rights—would force parties to internalize the costs of their actions and avoid misallocative external costs.

This article focuses on the procedural implications of the second part of Anderson and Leal's substantive proposal, by analyzing the workability of environmental protection through reliance on private judicial enforcement of common law rights. The essay ultimately concludes that the courts are unlikely to enforce environmental rights in the effective manner essential for the Anderson and Leal proposal. *Free Market Environmentalism* relies too heavily on the idealistic but somewhat unrealistic expectation that our procedural system of dispute resolution can efficiently apply the common law rights necessary for a system of private enforcement.

While *Free Market Environmentalism* is good news for lawyers,

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1. TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM (1991).

2. *Id.* at 15 (stating that "[a]t the heart of free market environmentalism is a system of well-specified property rights to natural resources").

3. *Id.* (arguing that "traditional thinking about natural resource and environmental policy ignores the most basic economic tenet: *incentives matter*").

the book's message will have, at best, mixed success in the courts. By choosing to shift from bureaucratic to private enforcement of common law rights, Anderson and Leal posit a system highly dependent on attorney skills and completely reliant on our present system of dispute resolution. *Free Market Environmentalism* seems premised on an almost romantic vision of the individual's ability to achieve virtually anything, including effective use of the legal system.

Detailed legal transactional work, however, will be required to articulate private property rights in air, water, and other components of the environment. Such transactions will ultimately necessitate more lawyer-drafted deeds and documents of title. Moreover, this property must be transferable in an open market so as to take advantage of the price system's ability to value property accurately. The resulting property sales will create increased transactional work for the bar. Once the environment is segmented into units of private property, "trespass" violations of these property rights will undoubtedly occur, thereby forcing the contract owner to police her legal rights by initiating or threatening suit. The need to police rights through litigation—with its considerable transaction costs—appears unavoidable.[4] Anderson and Leal give far too little thought to the difficulties likely to plague private enforcement of environmental rights. In fact, the enforcement costs make their proposal unworkable. Anderson and Leal have simply given inadequate attention to the complex procedural implications of their proposals.

It is ironic that increased reliance upon lawyers and lawsuits forms an essential part of the Anderson and Leal thesis. At points throughout *Free Market Environmentalism*, the authors adopt a negative approach toward litigation. For example, they generally criticize litigation concerning federal oil and gas leasing programs and seem particularly troubled by court challenges to required environmental impact statements that result in "lawsuits, lengthy delays and judicial set-asides."[5] Yet Anderson and Leal must have understood the central role litigation would play in their proposal, for they envision "an important role for government in the enforcement of property rights" and advocate "adjudication of disputed . . . rights in

4. *See generally* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).
5. ANDERSON & LEAL, *supra* note 1, at 85.

courts."[6] While *Free Market Environmentalism* says very little about lawyers and courts, its very foundation rests on citizens' ability to use the courts effectively to redress environmental wrongs. Unfortunately, numerous roadblocks will frustrate environmental suits initiated by private parties.

I. The Solo Enforcement Suit for Breach of Environmental Rights

A shift to a scheme of private enforcement of environmental rights in property, tort, or contract will face a number of obstacles. This section highlights the practical and legitimate problems that will hinder the private "enforceability" of rights, the concept so critical to *Free Market Environmentalism*. Anderson and Leal assume that private enforcement suits alleging a breach of the environment will be an effective means of natural resource protection. Examining the nature of such reliance on the courts, however, suggests great cause for skepticism.

The high transaction costs of individual suits will often prevent necessary enforcement. Many environmental breaches of property and contract rights are likely to be modest property damage injuries, above the threshold of a small claims court but not large enough to interest a plaintiffs' attorney seeking a contingent fee. Such claims may cost more to enforce than damages or injunctive recovery would warrant. The lack of a sufficient stake will deter contingent-fee attorneys from "investing" in such suits by agreeing to represent the injured party seeking judicial enforcement of an environmental right.[7] The private individuals Anderson and Leal posit will thus incur the costs of litigating their environmental rights themselves. Consequently, small injuries may go unremedied, because "individual plaintiffs would not themselves have a sufficient economic stake in the litigation to incur the litigation costs."[8] While a few injured parties may opt to hire an attorney charging an hourly fee, such altruistic behavior—which amounts to

6. *Id.* at 3; *see also id.* at 65 (describing the task of the legal system to enforce an environmental protection claim brought by a landowner).

7. *See* Richard A. Posner, Economic Analysis of Law 534-535 (3d ed. 1986) (describing contingent fee contracts as a loan in which an attorney loans services to a client in return for a high percentage of the recovery because of the great risk of the loan's default).

8. Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 8 (1991).

losing money voluntarily on principle—is unlikely to occur often.

Furthermore, even *de minimis* environmental claims will often raise complex issues of causation. It may be clear that fish in a private property owner's stream have been killed, but at the same time there may be uncertainty over the identity of the cause or water polluter. Resolution of such causation issues is complex and expensive. Differences between legal and scientific definitions of causation will inhibit a fair resolution of individual toxic-tort suits.[9]

Ambiguous causation issues frustrate enforcement in various ways. Judges may flatly refuse enforcement as a matter of law by requiring crystal clear proof of causation.[10] Other courts may require expert testimony on the critical causation question. The inevitable participation of expert witnesses in environmental litigation raises the costs of discovery and trial.[11] These and other attendant costs have characterized and frustrated privately-funded toxic tort litigation—itself a species of environmental litigation with perceived problems.[12]

Private litigants funding their own environmental enforcement actions are likely to have difficulty proving that defendants have violated established substantive standards of environmental conduct. The necessity of proving "on going, site-specific violations of environmental standards is ordinarily very difficult and costly [because] it often requires the alleged or suspected violator's cooperation, which is rarely forthcom-

9. *See* Troyen A. Brennan, *Causal Chains and Statistical Links: The Role of Scientific Uncertainty in Hazardous Substance Litigation*, 73 CORNELL L. REV. 469 (1988); Fred Harris, Jr., *Toxic Tort Litigation and the Causation Element: Is There Any Hope of Reconciliation?*, 40 SW. L.J. 909 (1986).

10. *See, e.g.*, Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988) (reversing in part district court's judgment for plaintiffs because evidence was insufficient for district court to attribute all of plaintiffs' injuries to water contaminated by corporation's waste burial site); Rohrbough v. Wyeth Labs., Inc., 916 F.2d 970 (4th Cir. 1990) (affirming trial court's grant of defendant's summary judgment motion because expert testimony by doctors in pediatrics, toxicology, and pathology was not sufficient to establish reasonable probability that vaccines caused child's injuries); *In re* "Agent Orange" Product Liab. Litig., 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd on other grounds*, 818 F.2d 187 (2nd Cir. 1987) (holding that plaintiffs—who opted out of class action and brought a separate suit against Agent Orange manufacturers alleging various injuries caused by their exposure to Agent Orange—failed to establish causation).

11. *See* Edward Brunet, *Experts in Summary Judgment Motions*, LITIGATION, Spring 1990, at 36.

12. *See, e.g.*, Jeannette L. Austin, *The Rise of Citizen Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General*, 81 NW. U. L. REV. 220, 232 (1987) (describing the difficulties encountered by citizen-suit plaintiffs in detecting violations).

ing."[13] Private citizens who suffer some type of environmental injury but lack litigation experience or resources will have difficulty overcoming these obstacles.[14]

Private environmental suits will also involve complex issues of injury. The information costs associated with identifying the nature and scope of potentially diffuse injuries are likely to be substantial. Like causation issues, injury issues may require expensive expert witnesses and the accompanying extension of discovery and trial times. These costs will often prevent enforcement because they can increase the total transaction costs of recovery to levels that exceed the discounted value of the judicial remedy available. The costs of enforcement will be greater than the benefit received. For numerous private property-holders, the concept of "free market" enforcement so zealously advocated by Anderson and Leal is, in reality, no enforcement at all.

Admittedly, a shift to private environmental enforcement will place incentives to proceed in the hands of those personally affected.[15] In theory, this is desirable and efficient. In situations where individual plaintiffs suffer a substantial environmental injury, the significant stake should create an attractive opportunity for the contingent-fee attorney to enforce the breach of environmental rights. In addition, the high-stakes claimant could provide direct access to the information relating to the environmental problem at issue, thereby reducing the transaction costs associated with prosecuting the environmental breach.[16] The type of complex and costly issues of causation and injury that small-stake property damage claims present may also characterize larger environmental tort claims. The potential size of damage recovery, however, should attract a con-

13. Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 352 (1990).

14. *See id.* at 369-70 (arguing that, as a result of the obstacles confronted by individuals, "the predominant force in private environmental law enforcement has always been, and will always be, highly organized, professional advocacy and litigation groups" who are "more professional and knowledgeable" than "ad hoc citizen groups [who] may lack the capacity to litigate complex environmental cases").

15. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962).

16. *See, e.g.*, WILLIAM H. RODGERS, JR., HANDBOOK ON ENVIRONMENTAL LAW § 1.13, at 76 (1977) (observing that injuries to the environment may be more obvious to the local citizen than the government); Austin, *supra* note 12, at 235 n.92 (noting that suits by private citizens are efficient "because citizens may be physically closer to a particular environmental problem").

tingent-fee attorney familiar with the complexities of causation and injury inherent in these types of disputes.

Nevertheless, there are reasons to be skeptical of systematic use of even high-stakes personal injury suits as a means of environmental enforcement. After all, the existing scheme of private enforcement of product liability claims hardly presents an encouraging analogy. First, individual suits bring highly inconsistent judgments. Whether one recovers is quite dependent on the assignment of judge or the skill of counsel.[17] The only certainty about jury verdicts is that they are sure to be inconsistent. Second, a high percentage of damage recovery goes to attorneys rather than to victims. The high transaction costs and contingent fees associated with environmental litigation will consume a significant percentage of any damage awards or settlements.[18] Third, those fortunate enough to sue early often recover more than those unfortunate enough to suffer belated damages. A few early punitive and general damage awards may well exhaust an available insurance fund or put a firm on the edge of bankruptcy.[19] If product liability suits are any lesson, punitive damage awards will be awarded inequitably.[20] It is hard to imagine that Anderson and Leal would welcome this ironic result of their embryonic scheme of private environmental enforcement.

The experience of the environmental "citizen suit" as a form of private environmental enforcement is also sobering and similarly fails to support the Anderson and Leal thesis. Various environmental statutes enable the private citizen to file a private attorney general suit.[21] Anderson and Leal might point to the

17. *See* Roger H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69.

18. *See* Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 100-03 (tracing the literature on percentage of economic loss actually recovered by successful plaintiffs after payment of attorney fees).

19. *See* Linda S. Mullenix, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, 32 WM. & MARY L. REV. 475 (1991) (describing novel procedures used to litigate asbestos claims in the context of defendant firms that are in or near bankruptcy).

20. *See id.*

21. *See, e.g.*, Federal Water Pollution Control Act, 33 U.S.C. § 1365 (1988); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 7002 (1982 & Supp. V 1987); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9659 (1982 & Supp. V 1987); Clean Air Act, § 304, 42 U.S.C. § 7604 (1982); Toxic Substances Control Act, § 20, 15 U.S.C. § 2619 (1988); Noise Control Act, § 12, 42 U.S.C. § 4911 (1982); Safe Drinking Water Act, § 1449, 42 U.S.C. § 300j-8 (1982); Endangered Species Act, § 11(g), 16 U.S.C. § 1540(g) (1988); Deepwater Ports Act, § 16, 33 U.S.C. § 1515 (1988); Outer Continental Shelf Lands Act, § 23, 43

success of "citizen suits" as supportive of their optimistic vision of actions that injured individuals bring to police the environment. Most commentators consider the environmental citizen suit to be an important enforcement device in the package of litigation rights that federal environmental legislation created.[22] The notion of a private attorney general system of enforcement meshes well with the need to protect the environment, since some variety of private enforcement mechanisms may be essential because of the sheer magnitude of enforcement suits necessary to force private and public polluters to become cognizant of substantive environmental standards. In a world full of pollution problems, a great deal of environmental enforcement will be needed to implement the rule of law.

Nonetheless, few citizen suits are filed by the paradigm "free market" private individuals, whom Anderson and Leal romantically hypothesized. Only occasionally do individual plaintiffs file "citizen suits" as a means to redress their own injury. Instead, the environmental enforcement engendered by citizen-suit legislation has been initiated by public interest group plaintiffs.[23] These private plaintiffs are bureaucratic institutions able to select and finance complex and expensive litigation.[24] Having amassed substantial professional litigation experience, these groups assess risks with accuracy and possess the resources to access valuable government agency information. Such suits do not constitute an appropriate analogy to the truly "private" suits envisioned by Anderson and Leal.

Empirical data confirms that national public interest groups,

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U.S.C. § 1349(a) (1982); Surface Mine Control and Reclamation Act, § 520, 30 U.S.C. § 1270 (1988); Marine Protection, Research and Sanctuaries Act, § 105(g), 33 U.S.C. § 1415(g) (1988).

22. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975); Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws (Part 3)*, 14 ENVTL. L. REP. NEWS & ANALYSIS 10,407 (1984); Austin, *supra* note 12.

23. *See generally* Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833 (1985) (claiming that a typical citizen suit does not make damaged parties whole but is brought by environmental public interest groups seeking a form of judicial review of agency action); Greve, *supra* note 13, at 340-41 (arguing that groups suing under citizen suit provisions "have sustained no injury or, at most, a minimal injury in fact" and are not "victims who redress a wrong done to them").

24. *See, e.g.*, Greve, *supra* note 13, at 351-53, 392-94 (noting that the bulk of complex Clean Water Act litigation is filed by national or regional environmental public interest groups, such as the Sierra Club Legal Defense Fund, the Natural Resources Defense Council, and the Atlantic States Legal Foundation).

not private plaintiffs, bring the bulk of "citizen suits." The Environmental Law Institute study of private enforcement of the Clean Water Act revealed that six public interest groups filed over 160 of the 214 notices of intent to sue between 1982 and April 1984.[25] Michael Greve's collection of EPA data between May 1984 and September 1988 concurred, indicating that notices of intent to sue filed with the EPA during this period were rarely brought by either local public interest groups or private individuals.[26] Instead, national or regional public interest groups initiated 532 of the 806 claims commenced during this time frame.[27] Such data confirms that the availability and "success" of the citizen suit can hardly enhance optimism for private enforcement by individuals suffering environmental harm.

In short, there is great reason to be skeptical of the viability of using system-wide individual suits to recover for environmental damage. While large-stake claims might attract either the contingent-fee attorney or the occasional environmental public interest group, many injuries are likely to go unredressed. Unfortunately, serious problems also burden the obvious alternative—using the class action to aggregate small-injury private claims.

II. The Unlikely Prospect of Using the Class Action to Aggregate Private Environmental Claims

Proceduralists look to aggregation whenever the high transaction costs of individual suits inhibit civil enforcement.[28] After all, one of the chief purposes of the class action is to take advantage of economies of scale in adjudication.[29] Reliance on the class action as an efficient enforcement device might cure

25. Environmental Law Inst., Citizen Suits: An Analysis of Citizen Enforcement Actions Under EPA-Administered Statutes, III-iv (1984).

26. *See* Greve, *supra* note 13, at 352-54.

27. *Id.* at 353. The Senate Committee on the Environment and Public Works confirmed this conclusion, asserting that the quantity of citizen suit enforcement actions under the Clean Water Act "has surged so much that such suits now constitute a substantial portion of all enforcement actions filed in Federal Court." S. Rep. No. 50, 99th Cong., 1st Sess. 28 (1985).

28. *See generally* Note, *The Cost-Internalization Case for Class Actions*, 21 Stan. L. Rev. 383 (1969) (analyzing the economics of modern enforcement of legal rights through class actions).

29. *See* Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence and Conflict of Interest*, 4 J. Legal Stud. 47 (1975) (describing reductions in the transaction costs of enforcing legal rights as one of the primary purposes of class action litigation).

the main procedural defect inherent in the individual private enforcement suit—high transaction costs.

Existing scholarship on the class action does not support reliance on this aggregation tool as a means to achieve private environmental enforcement. Professor John Coffee of Columbia theorizes that plaintiffs' class attorneys are entrepreneurs who invest in cases with a profit-maximization goal.[30] With some exceptions, they enter into contingent-fee contracts with class representatives who have little litigation experience and who are generally unable to monitor attorney performance. The typical agency relationship between attorney and client—in which the attorney is an agent of the principal-client—does not exist in many class actions.[31] Instead, the entrepreneurial class attorney dominates and ultimately controls major litigation decisions regarding investment and settlement.

The negative aspects of entrepreneurial class suits might be reduced if the incentives of the contingent-fee contract were able to work freely. Courts regulate attorney-fee awards, however, with the result that contingent awards are often depressed into hourly fees.[32] Professor Coffee has argued persuasively that depressed hourly fee awards for plaintiffs' class attorneys create an inefficiency of asymmetric stakes, because a defendant opposing a class will have the incentive to outspend an entrepreneurial plaintiffs' attorney.[33] The defendant, often a business facing huge potential damages, can have tremendous amounts at stake in the class suit, amounts that may dwarf the total potential hourly fee award to a plaintiffs' attorney.[34] Under such conditions, it comes as no surprise that those defending class actions often outspend plaintiffs' attorneys, who are prone to settle for less than that to which they, and their clients, would be entitled.

Will these theoretical problems that make class actions inefficient also exist in the environmental enforcement venue? Most likely the answer is yes. There is every reason to suspect that

30. *See generally* John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625 (1987) (hereinafter "*Rethinking the Class Action*"). *See also* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economics Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986).

31. *See* John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, LAW & CONTEMP. PROBS., Summer 1985, at 5.

32. *See* Coffee, *Rethinking the Class Action*, *supra* note 31, at 635-36.

33. *Id.* at 635-39.

34. *Id.* at 635.

the "structural" deficiencies that prevent the current class action device from achieving efficiency and deterrence will similarly undermine the effectiveness of environmental class suits. It is naive to expect that sources other than the victims will fund the massive number of enforcement actions that *Free Market Environmentalism* contemplates will prevent ongoing breaches of air, water, or property rights. Yet most of these injured parties will have no prior litigation experience and will lack the scientific background necessary to monitor their attorneys.

As a result, the agency problems of the class action entrepreneur should pervade environmental litigation. Although the class action plaintiffs' attorney may operate under a contingent fee contract, the customary regulation of fees will likely cause an hourly "lodestar" fee to dominate the private enforcement of the environmental class suit. Pollution disputes, moreover, will likely involve defendant business firms with a great deal at stake. Well-financed opponents of the class should have great incentive to outspend class attorneys. The result will be underinvestment in the litigation by the plaintiffs' counsel, creating the classic inefficiency of asymmetric stakes and raising the potential for inappropriate settlements.

The inability to monitor the plaintiffs' attorney's performance may be less problematic in environmental class suits by victims who have suffered substantial injuries and damages. In such cases, absentee class members and their attorneys may intervene into class suits, or class members who have received notice of a related pending suit may opt out. Attorneys contacted by absent class members will often undertake the monitoring role, evaluating and critiquing the quality of work done by the "lead counsel" representing the class.[35] An attorney representing a high-stakes victim within a class may play a particularly effective monitoring role. An attorney for such an intervenor is likely to be equipped with the skills and information necessary to evaluate the performance of the class counsel. Moreover, rivalry among attorneys representing high-stakes plaintiffs can be a positive force in effective claim enforcement. Finally, some injured class members are likely to be businesses with some sophistication and experience in litigation. These

35. *Cf.* Coffee, *supra* note 31, at 634.

entities may be able to monitor the performance of counsel in a risk-neutral and systematic fashion.

Professor Coffee worries that a few class attorneys with similar skills, backgrounds, and clients might effectively maximize revenue through "cartel-like" behavior.[36] Such concerns, however, may not be applicable in large, complex environmental class suits. The attorneys bringing and intervening into class action suits are not part of a coherent and closely knit group of specialists, as are securities litigants or antitrust plaintiffs' lawyers.[37] Instead, they are likely to be isolated and independent members of the bar, capable of assuming the monitoring role necessary to police the work of lead counsel and thereby mitigate the asymmetric stake problems.

III. The Unrealistic and Problematic Substitution of Private Enforcement Suits for Administrative Agency Prosecutions

An understated but seemingly essential part of Anderson and Leal's proposal involves the substitution of private environmental enforcement suits in place of the prosecutions currently undertaken by administrative agencies. In effect, *Free Market Environmentalism* contemplates a private "free market" in environmental enforcement. Such a proposal leaves no room for agency suits to protect the environment. This aspect of Anderson and Leal's proposal is unrealistic and ignores historic lessons concerning the formation of agencies.

One of the main reasons for the birth of the modern administrative agency was the inability of private individuals to protect themselves effectively when in conflict with more powerful and experienced opponents in the business world. Examination of the origin of New Deal agencies reveals that agency prosecution was partially premised on the notion that the vigorously managed, fully equipped, and experienced litigation unit of an administrative agency was a far superior litigant than victimized private individuals.[38]

36. *Id.* (theorizing that collusion is more likely in antitrust suits, where a relatively small number of attorneys know and trust one another, than in tort class suits involving a large number of attorneys who neither trust nor know one another).

37. *See id.*

38. *See, e.g.*, Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 260 (1986) (arguing that the New Deal and its aftermath were founded on the assumption of competent and zealous regulatory prosecution). *But see*

Anderson and Leal completely ignore the litigation and investigation expertise possessed by the administrative state. Modern agencies have vast arsenals of regulatory laws enabling them to identify and analyze data essential to effective management of the environment.[39] It is naive to think that the heroic efforts of private individuals could match either the expertise or information that the Environmental Protection Agency possesses. Administrative agencies are experts in the suits they routinely initiate. Once the legislative branch delegates complicated enforcement capabilities to a government agency, a specialization often emerges and that agency "may come to be credited with a special competence."[40]

It is hard to imagine how private individuals could be as efficient as administrative agencies in prosecuting major cases involving significant harm to the environment. The vast amounts of information that agencies collect provide them with a real efficiency edge that translates into reduced information costs associated with dispute evaluation and subsequent prosecution.[41] Economies of scale exist in the provision of litigation services. Administrative agencies have major economy advantages because of their size, specialization, and information-accumulation edge. Sadly, private individuals cannot hope to prosecute cutting-edge environmental enforcement actions as expertly as government agencies, which are repeat players in the litigation game. In complex environmental suits, repeat players can advance cases confidently and employ particularly skillful and experienced expert witnesses.

The agency-initiated enforcement suit is an efficient tool that aids private individuals by deterring future wrongful acts of pollution. Agencies select their public enforcement suits with

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Cass R. Sunstein, *Factions, Self-Interest & the A.P.A.: Four Lessons Since 1946*, 72 VA. L. REV. 271, 278 (1986) (discussing the modern criticism that agencies have failed to enforce laws protecting the environment, civil rights, and unions); Morrison, *supra* at 261 (detailing the new type of suit in which citizens claim agencies are "doing too little").

39. *See* LOUIS L. JAFFE & NATHANIEL NATHANSON, ADMINISTRATIVE LAW: CASES AND MATERIALS 722 (3d ed. 1968) (stating that the "life blood of the administrative process is the flow of fact, the gathering, the organization, and the analysis of evidence").

40. *Id.* at 17.

41. *See, e.g.*, John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 224-25 (1983) (describing the public agency's comparative advantage over private litigants because of superior resources for investigation, and recommending that agencies focus on detecting violations of substantive standards to best exploit this advantage); Boyer & Meidinger, *supra* note 23, at 917-918 (detailing the Clean Water Act system of data collection and analysis through required permits, periodic compliance reports, and evaluative monitoring).

skill and care, because their limited resources prevent all but the most serious cases from being prosecuted. Careful selection of the optimal enforcement actions should deter other polluters from harming private individuals and thereby reduce the need to bring the type of private enforcement suit that Anderson and Leal contemplate.

IV. Conclusion

A proceduralist necessarily worries about the inability of the courts to process cases that raise complicated issues. Anderson and Leal's call for private adjudicatory enforcement of environmental violations overlooks some important procedural concerns. Indeed, the authors have assumed that environmental rights will be self-enforcing in a cost-free, frictionless world. But "small" environmental cases are not economical to litigate, because breaches of environmental rights carry high transaction costs. The proof needed to establish a claim is likely to present cutting-edge, scientific issues that are expensive to litigate, difficult to judge, and therefore risky to privately-paid attorneys. If the "small" cases cannot be litigated, "small" breaches of environmental rights cannot be enforced unless some aggregate treatment is provided.

Unfortunately, the class action device is not a particularly good vehicle for mass enforcement of environmental standards. Conventional thought on class action theory provides little optimism for successful aggregate treatment of "small" injuries to the environment. Prospects for the privately-initiated, large class action claim are somewhat better, because such injuries should attract attorney investment and provide a means to monitor the performance of the lead counsel. Nonetheless, reliance on private, high-stakes individual and class actions to police our environment, as well as to substitute for administrative agency enforcement, appears ill-advised. The authors of *Free Market Environmentalism* ignore the benefits provided by efficiently and professionally-prosecuted agency enforcement. Ultimately, Anderson and Leal's proposal for litigation-based "free-market" enforcement of environmental rights fails because of the high transaction costs associated with such litigation. The authors have ignored the dangers of the free market they so zealously glorify. By giving scant attention

to the unavoidable transaction costs of applying legal rules, they have set forth a proposal with little chance of real success.