THE FALLACIES OF FREE MARKET ENVIRONMENTALISM

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Dissatisfaction with government runs deep in the America of the 1990s. As Eastern Europeans rush to adopt American-style democracy, the United States embraces deregulation of the workplace and the business enterprise in general. The Reagan Administration's central domestic agenda succeeded in deregulating and privatizing vast amounts of the communications, transportation, and banking fields. The Reaganites had less success (and more than a few embarrassments) with their efforts to dismantle environmental regulatory problems.[1]

But it seems that others are prepared to carry on the fight to dismantle environmental regulatory programs and free allocation of environmental resources to the workings of the marketplace. Notable among these "Privateers" are Terry Anderson and Donald Leal,[2] the Pacific Research Institute,[3] and my colleague, Jim Huffman.[4]

The Privateers distrust democracy deeply. They believe that the public interest is simply the accumulation of individual costs and benefits, no more. Thus, they advocate marketplace exchanges, measured by willingness to pay money, as the best barometer of the social will. The Privateers insist that public values do not exist apart from the aggregation of individual values, and the individuals who count for the Privateers are property owners alone. This atomistic view of society glorifies market exchanges, discounts market failure, and decries gov-

* Professor of Law, Lewis and Clark Law School. Adapted from remarks delivered at the Federalist Society's Symposium on Free Market Environmentalism, held on April 13, 1991 in Portland, Oregon. Thanks are owed to the Pacific Research Institute, Coca-Cola Foods, Willamette Industries, Philips Petroleum, Adolph Coors, and Safety-Kleen, Inc. for supporting the conference, and to my colleague, Jim Huffman, for organizing it. Thanks also to the Lewis and Clark Summer Research Fund for supporting this essay, and especially to Dan Farber and Carol Rose for their helpful comments.

1. *See, e.g.*, JONATHAN LASH ET AL., A SEASON OF SPOILS (1984).

2. *See* TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM (1991).

3. The Pacific Research Institute published FREE MARKET ENVIRONMENTALISM, *supra* note 2, helped to sponsor this Symposium, and is responsible for more than two dozen other books singing the praises of market allocation of resources while denouncing governmental intervention. *See infra* note 17.

4. *See* James L. Huffman, *Protecting the Environment from Orthodox Environmentalism*, 15 HARV. J.L. & PUB. POL'Y 349 (1992).

ernmental intervention. The Privateers indict the democratic process as dominated by special, self-serving interest groups engaging in "rent-seeking",[5] and deny that public dialogue can ever subsume private preferences.

The Privateers' argument appeals to the libertarian in all of us. No one likes to be the subject of some government regulation that a faceless bureaucrat enforces.[6] We all know of horror stories informed by dealings with the local police or city hall. There are situations in which laissez faire is the best policy. As privatization sweeps across Eastern Europe, the Andersons and Huffmans argue that it is also the key to improved environmental quality in the U.S.

The prescriptions of the Privateers are, unfortunately, oversimplistic, misleading, and hyperbolic. They fail to respond to a central premise of modern environmental regulation: the failure of markets to allocate effectively environmental resources because of information costs, externalities, public goods, and strategic behavior.[7] Moreover, setting environmental policy is fundamentally about arriving at collective values—how much economic growth must be sacrificed for a clean airshed, for example. While markets may accurately measure individual consumer preferences, they are incapable of reflecting collective environmental values because most environmental resources are incapable of being accurately priced.[8] The Privateer literature, as exemplified by Anderson and Leal's *Free Market Environmentalism*, virtually ignores these limitations. The book thus exhibits an air of unreality: How many of us know only rational, wealth-maximizing, rent-seeking individuals; know no

5. Rent-seeking behavior employs the political process to produce governmental intervention in the market to further individual or group interests. The rewards are "economic rents"—payments for use of an economic asset in excess of the market price. *See* Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 879-880 (1991); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 224 n.6 (1986).

6. In comments on a draft of this essay, Dan Farber reminded me that, of course, the market is even more faceless than the bureaucrat. The Andersons and Huffmans view the market as the embodiment of freedom, but in a very real sense it is the antithesis, because it looses forces beyond the control of any individual.

7. Nor do markets produce a fair distribution of environmental resources, because markets assume that the existing distribution of wealth is just. *See generally* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 39-46 (1990).

8. *See generally* MARK SAGOFF, THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT 27, 50-51, 69, 94, 171 (1988) (distinguishing between private preferences and public values).

individuals whose moral compass includes non-economic values?[9]

The fact that the Privateers write about people we do not know, coupled with their absolutist perspective on markets and regulation, makes it tempting to dismiss them as extreme right-wingers, anarchists, or both—and some indeed are. But it would be a mistake to think that the widespread dissatisfaction with government regulation should not affect environmental decisionmaking. Especially in their focus on individual incentives to produce desired collective action, the Privateers have an important message for the modern regulatory state. This is particularly true as the 1990s witness increases in the numbers of individuals subject to environmental regulation—farmers, ranchers, and small business people, for example—who previously have been unregulated. To minimize transaction costs and conserve limited administrative resources, environmental regulators must examine their programs to maximize individual incentives. This may well include versions of privatization, such as transferable emission rights, but will hardly include a wholesale substitution of the environmental regulatory system, as *Free Market Environmentalism* advocates.

Part I of this essay supplies background on markets and environmental protection, showing why market failure makes regulation necessary and explaining the new environmental Privateers as intellectual descendants of Ronald Coase and the half-brothers of what has become known as Public Choice theory. Part II criticizes *Free Market Environmentalism* for its failure to see the inadequacies inherent in marketplace ordering of environmental resources and for its misunderstanding of the reasons underlying governmental intervention. Part III explores some of the costs of privatizing environmental decisionmaking that Anderson and Leal fail to recognize. Part IV concludes by suggesting that the future role of privatization techniques will lie as a means to supplement, rather than substitute for, modern environmental regulation.

9. *See, e.g.*, Mark Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393, 1394 (1981) ("[W]e are not simply a group of consumers, nor are we bent on satisfying only self-regarding preferences. Many of us advocate ideals and have a vision of what we should do or be like as a nation. And we would sacrifice some of our private interests for those public ends.").

I. MARKET FAILURE, ENVIRONMENTAL PROTECTION, AND THE PRIVATEERS

The new environmental Privateers are the intellectual progeny of Ronald Coase, father of the law and economics movement.[10] According to the Coase Theorem, absent transaction costs, the market will produce efficient results through private bargains.[11] The Theorem suggests that government regulation, on the other hand, is unlikely to produce efficiency because resources will be allocated by fallible administrators subject to political pressures, and because general regulations are likely to be inappropriately applied to specific situations.[12] Coase thus added consideration of "government failure" to the concept of market failure in deciding whether to regulate.[13] Coase himself recognized that his Theorem might break down in the presence of transaction costs.[14] Subsequent studies challenge Coasian assumptions about the capability of bargaining to produce efficient results,[15] and the irrelevance of the initial assignment of rights to efficiency.[16] Nevertheless, Coasian disciples like the Privateers overlook these market limitations, while extolling the virtues of free markets and denouncing the vices of government regulation.[17]

Environmental Privateers may be willing to overlook the

10. *See, e.g.*, Warren J. Samuels, *The Coase Theorem and the Study of Law and Economics*, 14 NAT. RESOURCES J. 1 (1974).

11. *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

12. *See id.* at 18.

13. Coase did not, however, suggest that marketplace allocation was inevitably superior to government allocation. *Id.* at 18. ("[T]here is no reason why on occasion, governmental administrative regulation should not lead to an improvement in economic efficiency . . . .").

14. *See id.* at 15-19. Transaction costs include the costs of organizing, negotiating, and enforcing agreements. *See* RICHARD B. STEWART & JAMES E. KRIER, ENVIRONMENTAL LAW AND POLICY 107 (2d ed. 1978).

15. *See, e.g.*, John J. Donahue III, *Diverting the Coasian River: Incentive Schemes to Reduce Unemployment Spells*, 99 YALE L.J. 549 (1989).

16. *See, e.g.*, JOHN V. KRUTILLA & ANTHONY C. FISHER, THE ECONOMICS OF NATURAL ENVIRONMENTS 29-36 (1975); Thomas O. McGarity, *Media-Quality, Technology and Cost-Benefit Balancing Strategies for Health and Environmental Regulation*, 46 LAW & CONTEMP. PROBS. 159, 187-88, 193 (Summer 1983) ("efficient" outcomes vary depending on whether unpriced resources are valued under "willingness to pay" or "willingness to sell" criteria).

17. The Pacific Research Institute, a co-sponsor of the conference at which this paper initially was delivered, has produced some two dozen studies that inevitably praise and call for marketplace ordering. A list of titles is appended to Anderson and Leal's book. ANDERSON & LEAL, *supra* note 2, at 193-196. For a detailed examination of how right-wing law and economics scholars have misunderstood and misappropriated Coase's insights, *see* Pierre Schlag, *An Appreciative Comment on Coase's* THE PROBLEM OF SOCIAL COST: *A View From the Left*, 1986 WISC. L. REV. 919, 933-45.

market's shortcomings because of their conviction regarding the pernicious consequences of regulation. A new group of scholars, subscribing to what has become known as Public Choice theory, shares their skepticism of governmental solutions.[18] Public Choice theorists bring economic theory to political science through models that view the political process as a system by which individuals and groups may further their own interests. Their assumption is that political participants use government intervention in the economy to further the welfare of the politically influential. This essentially selfish, "rent-seeking" view of the political process (and human nature) views legislators as corrupt, available to the highest bidding interest group, a vision that corresponds with the Coasian perspective that resources ought to flow to the highest bidder. The Privateers may be the descendants of Coase, but they are surely siblings of Public Choice theorists.

The fusion of Coasian principles and Public Choice theory in environmental thought produces books, like *Free Market Environmentalism*, which completely ignore the failures of the marketplace; failures that produced the environmental regulatory scheme they find objectionable. Market failure is not a seldom-seen phenomenon in the environmental area—it is pervasive. A number of critical assumptions of an efficiently functioning free market invariably are absent in environmental decisionmaking, such as complete information, fully internalized prices, and rational, wealth-maximizing bargaining. The pervasive failure of markets to produce reliable information about risks, costs, and benefits of alternative courses of action makes efficiency at least as unlikely in marketplace ordering of environmental resources as in public decisionmaking.

Even if there were perfect environmental information, markets would fail to allocate environmental resources efficiently because of external cost and collective goods problems.[19] The market does not ensure that resource developers bear the full costs of air pollution, old growth forest liquidation, or water diversions. Developers do not pay these "external" costs, which means that the marketplace overvalues polluting activities and resource consumption, producing economic ineffi-

18. *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991).

19. *See generally* STEWART & KRIER, *supra* note 14, at 107-14.

ciency. The inefficient market may be corrected by government regulation or taxation, or by liability rules if good environmental information were not so persistently unavailable. But, unfortunately for the libertarian-minded, the market is not able to correct itself.[20]

Markets also fail to produce efficient results because of collective goods problems.[21] A clean airshed, a free-flowing river, and a spectacular view are collective goods.[22] The benefits from these goods are impossible to price accurately because they are shared by all; they cannot be effectively fenced. "Free riders" may share in these goods as well as the developers who pay their cost. Developers as a result undervalue them, and therefore will not produce them. Moreover, some collective goods need to be experienced to be desired; a lack of demand for a resource today may not be a reflection of its value tomorrow. Yet today's decisions may foreclose tomorrow's options.[23]

All of this means that markets are not necessarily efficient and, in the environmental area, are extremely unlikely to be so. Marketplace allocation of environmental resources is also offensive on grounds of equity.[24] Efficiency's "willingness to pay" criterion is objectionable to those who do not believe that the existing distribution of wealth is fair. Transforming dollars into votes ensures a monopoly by the wealthy and the few. Markets are also preference-shaping.[25] All preferences are a function of experience. And the cultural consequences of preference-shaping by markets include acquisitiveness, selfishness, and quick response. We may justifiably reject the intrusion of 1980s Wall Street upon the culture of the Twenty-First Century.

Further, markets require enforcement; they are not self-executing. A system of environmental protection based exclusively on markets would be an expensive system to enforce.[26] The

20. *See* SUNSTEIN, *supra* note 7, at 42.

21. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1967); James E. Krier, *Environmental Watchdogs: Some Lessons from a "Study" Council*, 23 STAN. L. REV. 623, 662-63 (1971).

22. *See generally* KRUTILLA & FISHER, *supra* note 16, at 23-25.

23. *See id.* at 14-15, 70-72, 123, 268 (discussing the "option value" of resources whose loss would be irretrievable).

24. *See* SUNSTEIN, *supra* note 7, at 45.

25. *See* Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy*, 87 MICH. L. REV. 936 (1991).

26. *See* Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1, 29, 36-37.

market relies on common law liability rules like nuisance to enforce private rights. Nuisance showed itself to be a spectacular failure in confronting the environmental problems of the Nineteenth and Twentieth Centuries.[27] An argument premised on the belief that the Twenty-First Century will be different ought to explain with some precision how the pertinent causation, burden of proof, and remedy problems can be overcome. The Privateers proffer none of this. They substitute an analysis of "how it is going to be different this time" with narratives about how the government failed to regulate a particular resource in an optimal manner. Because optimal markets are not readily identifiable, it is not enough to show that a particular regulation is suboptimal.

The market's track record in environmental resource allocation is one that shows high costs involuntarily imposed on receptors of air and water pollution and hazardous waste generation. If the Privateers' argument is premised on the idea that markets will perform differently in the future than they have in the past, they ought to endeavor to explain how and why. At the least, they ought to explain what about markets has changed over the years. Sadly, they do not, or at least Anderson and Leal did not in *Free Market Environmentalism*.

II. The Romance of Markets versus The Tyranny of the Government

Terry Anderson and Donald Leal's *Free Market Environmentalism* is likely to sell well. It is attractively packaged, has all the right corporate endorsements, and spends a good deal of effort attacking an easy prey, the government. Unfortunately, as Jim Krier explains,[28] it fails to confront, let alone answer, its central question of *why* markets might work better than regulation in certain contexts. This is a book written for the true believers only.

Free Market Environmentalism does not have a complex or subtle thesis. The authors state their premise succinctly:

27. *See, e.g.*, Morton J. Horwitz, The Transformation of American Law 1780-1860, 74-78, 102 (1977); Robert G. Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920*, 59 S. Cal. L. Rev. 1101 (1986); Joel Franklin Brennen, *Nuisance Law and the Industrial Revolution*, 3 J. Legal Stud. 403 (1974).

28. *See* James E. Krier, *The Tragedy of the Commons, Part Two*, 15 Harv. J.L. & Pub. Pol'y 325 (1992).

> At the heart of free market environmentalism is [advocacy of] a system of well-specified property rights to natural resources. Whether these rights are held by individuals, corporations, non-profit environmental groups, or communal groups, a discipline is imposed on resource users because the wealth of the owner of the property right is at stake if bad decisions are made. Of course, the farther a decision maker is removed from this discipline—as he is when there is political control—the less likely it is that good resource stewardship will result. Moreover, if well-specified property rights are transferable, owners must not only consider their own values, they must also consider what others are willing to pay.[29]

Thus, according to Anderson and Leal, good environmental decisionmaking is a function of the amount of bargaining among private property owners.[30] Public property, they assert, produces poor environmental decisionmaking because it lacks the discipline of the market.[31] Markets mirror ecology because they produce varied, site-specific results—unlike regulation, which must rely on the existence of omniscient, centrally located, ecologically-minded bureaucrats who are unconstrained by prices and the discipline of the market.[32]

A. *Fantasizing About Markets*

Although they disclaim an intent to supply answers to all environmental controversies,[33] Anderson and Leal invariably find that market mechanisms produce superior results to regulation. Allocating grazing, timber, water, and ocean fishing rights, developing energy resources, and managing waste are all better left to market forces than to public controls, they assert.[34] Although they ultimately admit there are no guarantees that the market will produce improved environmental quality,[35] they claim that the market will produce better ecological information through pricing and market incentives, greater prospects for environmental awareness through individual wealth created by economic growth, and enhanced liberty through

29. ANDERSON & LEAL, *supra* note 2, at 3.
30. *See id.* at 167.
31. *See id.* at 16.
32. *See id.* at 9, 169.
33. *See id.* at 3.
34. *See id.* at 24-36 (grazing); *id.* at 52-54 (timber); *id.* at 97-118 (water); *id.* at 14-32 (fishing rights); *id.* at 80-98 (energy); *id.* at 135-153 (waste).
35. *See id.* at 167, 171.

market exchanges.[36]

All of these assertions are extremely controversial, and a book that sought to compare markets and regulation rigorously in terms of ecological information, environmental protection, and individual liberty would be a welcome addition to the field and required reading for all of its students. Anderson and Leal's is not such a book, however; it merely asserts the superiority of markets because it assumes that the "individualistic process" of bargaining will produce better information and increased liberty.[37]

The authors overlook the fact that environmental regulation was a response to inadequate ecological information and protection provided by the market in the pre-regulatory era prior to 1970.[38] Markets persistently fail to yield efficient or fair allocations of environmental resources, because in large measure they produce poor information on the costs that those breathing polluted air, drinking contaminated water, or threatened by toxic exposures bear.[39] Anderson and Leal's claim that markets better reflect ecological principles because they are capable of accounting for individual variations in circumstances overlooks the enormous costs of developing information on health costs and risk associated with various environmental pollutants. Ascertaining these costs and obtaining redress proved impossible in the era in which markets and liability rules dominated environmental resource allocation.[40] *Free Market Environmentalism* offers no indication of how the situation would be different if environmental regulation were supplanted by a return to marketplace decisionmaking.

Anderson and Leal's allegation that environmental regulation sacrifices individual liberty is also contentious. Market

36. *See id.* at 167, 170-172.

37. *See id.* at 4-6, 14, 170-172.

38. *See, e.g.*, N. William Hines, *Nor Any Drop To Drink: Public Regulation of Water Quality*, 52 IOWA L. REV. 186, 197-201 (1966).

39. *See, e.g.*, Marcia Gelpe, *Organizing Themes of Environmental Law*, 16 WM. MITCHELL L. REV. 897, 899 (1990) (tort system designed to deal with single event accidents, not long-term, subtle effects; tort liability dependent on a high level of information to satisfy the preponderance of evidence standard); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 864 (1984) ("[R]ules of procedure and evidence are often inconsistent with eliciting or ensuring rational consideration of the most reliable scientific information.").

40. *See* JAMES E. KRIER & EDMUND URSIN, POLLUTION AND POLICY: A CASE ESSAY ON THE CALIFORNIA AND FEDERAL EXPERIENCE WITH MOTOR VEHICLE AIR POLLUTION, 1940-75 at 33-34 (1977).

principles cannot support this claim because liberty is difficult to price and infeasible to aggregate. Unfortunately, *Free Market Environmentalism* offers no illumination on the liberty issue, just a bald assertion that liberty would be enhanced with market allocation of environmental resources.[41] The liberty of those who emit air pollutants, discharge water contaminants, or dispose of hazardous waste materials may well be increased. But those exposed to environmental degradation lose liberty. And the numbers of liberty-losers typically outnumber considerably the liberty-gainers. Whether aggregate liberty is gained from market transactions is difficult to ascertain, but it is clear that some of the liberty-losers pay enormous health costs.[42] Anderson and Leal ignore these issues and, in so doing, undermine the usefulness of their effort.

Free Market Environmentalism also suffers from a number of rather preposterous statements the authors proffer for various environmental problems, such as: (1) Protection of grizzly bear habitat should be a function of how much people are willing to pay to camp nearby;[43] (2) Wetland preservation should be left to landowners who can sell hunting rights for more than they would gain by filling or draining wetlands for development;[44] (3) Privatizing fishing rights can serve as a substitution for water pollution control regulation;[45] (4) Hazardous waste cleanup at so-called "orphan" sites should be the responsibility only of those who choose to purchase title of the sites from the government;[46] (5) Price deregulation solved the nation's energy problems;[47] and (6) Control of auto emissions would improve if ownership of highways were privatized.[48] The authors do admit that some of these prescriptions may not in fact enhance environmental quality.[49] Nevertheless, on the theory that "a thousand points of light" will be produced, they maintain that the experimentation will be therapeutic.[50] Those bearing

41. ANDERSON & LEAL, *supra* note 2, at 171.

42. *See, e.g.*, SAMUEL S. EPSTEIN, THE POLITICS OF CANCER (1978); FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 498-519 (2d ed. 1990).

43. *See* ANDERSON & LEAL, *supra* note 2, at 11.

44. *See id.* at 66.

45. *See id.* at 148.

46. *See id.* at 151.

47. *See id.* at 162.

48. *See id.* at 165.

49. *See id.* at 23.

50. *See id.* at 5-6.

the health costs and risks may be less sanguine about the benefits of experimentation.

B. *Trashing Government Intervention*

If Anderson and Leal are unreasonably optimistic about the results their market experimentation would produce, they are misleading and pejorative in their description of government intervention. They assume that the government's response to market failure is limited to Kremlin-like "centralized planning."[51] Actually, government intervention may take a number of forms in addition to regulation, including taxes, subsidies, and changed liability rules. Non-regulatory mechanisms are increasingly married to regulatory techniques in modern environmental legislation.[52] This marriage will almost certainly be solidified in the future, because as environmental controls affect a wider segment of the population, the costs of regulation and its enforcement become prohibitive.

Strangely, especially for a book whose central contribution is that incentives matter,[53] *Free Market Environmentalism* does not enthusiastically endorse the marriage, because marketable pollution permits, for example, "still require a political determination of the level of pollution that will be allowed."[54] Anderson and Leal want the amount of permissible pollution to be left exclusively to individual bargains between polluters and receptors. Thus, they object to transferable pollution rights where the level of environmental quality is left to the government. In their marketplace, environmental improvements would be a function, not of evolving government standards, but of the wealth of those who wished to purchase those rights and devote them to non-polluting uses.[55] Presumably, the authors' aversion to government intervention forecloses pollution taxes, subsidies for development of resources undervalued by the current market, and transferable land development rights as

51. *Id.* at 9 ("To counter market failures, centralized planning is seen as a way of aggregating information about social costs and social benefits in order to maximize the value of natural resources. Decisions based on this aggregated information are to be made by disinterested resource managers whose goal is to maximize social welfare.").

52. *See, e.g.*, Title IV of the Clean Air Act Amendments of 1990, 42 U.S.C.A. §§ 7651-7651o (Supp. 1991) (regarding acid rain); ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW 375-377 (3d ed. 1991).

53. *See* ANDERSON & LEAL, *supra* note 2, at 10.

54. *Id.* at 147.

55. *Id.* at 93-95.

variances from zoning controls. This sort of "market purity" disables *Free Market Environmentalism* and prevents it from exploring how market incentives might serve to increase regulatory effectiveness.[56]

Not unexpectedly, Anderson and Leal disapprove of federal ownership of public lands. They initially cannot quite bring themselves to advocate selling off the public land "for reasons of political feasibility."[57] But later, sounding like latter-day Sagebrush disciples of James Watt,[58] they suggest it as the only solution to solve the nation's energy problems.[59] They blame "massive reservations of land as public domain" for halting the privatization of land and for "often subsidiz[ing] environmental destruction."[60] There is of course some truth in the latter proposition, but just as much in its converse: Public land management undeniably (if somewhat unpredictably) produces environmental protection.[61] For example, nearly all of the remaining Northern Spotted Owl habitat in the Pacific Northwest is on federal lands where the last vestige of the Pacific forest's old growth timber endures.[62] Virtually all of the old growth on private lands has been logged because the market attributed no value to preservation of old growth ecosystems.

Multiple use is a particularly difficult concept for *Free Market Environmentalism*, for it requires that "decisionmakers have information on the value of alternative uses," which is not possible for the government because of "the absence of market information."[63] The authors' solution is to create a market by selling the public lands to the highest bidders, which, they are careful to point out, might include environmental groups, al-

56. *See generally* FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL IMPROVEMENT THROUGH ECONOMIC INCENTIVES (1977); JOHN H. DALES, POLLUTION, PROPERTY, AND PRICES (1968); Robert W. Hahn & Robert N. Stavins, *Incentive-Based Environmental Regulation: A New Era From An Old Idea?*, 18 ECOLOGY L.Q. 1 (1991).

57. ANDERSON & LEAL, *supra* note 2, at 75.

58. *See* John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C. DAVIS L. REV. 317 (1980).

59. ANDERSON & LEAL, *supra* note 2, at 80-81, 90-96. For a contrary view, see Joseph L. Sax, *The Claim for Retention of the Public Lands*, *in* RETHINKING THE FEDERAL LANDS 125 (Sterling Brubaker ed., 1984).

60. ANDERSON & LEAL, *supra* note 2, at 7.

61. *See generally* GEORGE C. COGGINS, PUBLIC NATURAL RESOURCES LAW (1990).

62. *See* Michael C. Blumm, *Ancient Forests, Spotted Owls, and Modern Public Land Law*, 18 B.C. ENVTL. AFF. L. REV. 605 (1991).

63. ANDERSON & LEAL, *supra* note 2, at 92.

leged by Anderson and Leal to be quite wealthy.[64]

Such an auction would create fragmented land management on a myriad of dominant-use parcels, increased spillover costs from incompatible parcels, inestimable difficulties in managing transboundary resources, and would leave ultimate decision-making authority in the hands of members of various boards of directors of oil, timber, and mining companies and environmental groups alike. This was, of course, the chief intellectual contribution of the Sagebrush Rebellion that helped usher Secretary Watt to office.[65] The authors of *Free Market Environmentalism* mean to keep the old Sagebrush Rebels agitated.

Anderson and Leal indict government controls for failing to produce information necessary for efficient resource use. Their criticisms of government techniques of supplying prices for unpriced commodities, such as shadow pricing and economic models based on adequate marginal analysis, are on the mark, but they fail to acknowledge that the same information problems disable markets as well. There is almost never good information on health costs, let alone risks, so the market has no way of rationally producing efficient results, of internalizing costs.[66] Anderson and Leal make an unconvincing attempt to explain how cost internalization is possible based on some obscure reasoning about the benefits of pricing, the costs of monitoring and measurement, and the availability of alternative suppliers in a market system.[67] None of this responds effectively to the charge that markets persistently fail to ensure that private bargains internalize environmental costs, risks, and benefits. Moreover, markets measure only existing preferences,[68] objectionable to those who cling to the traditional American belief in progress.[69]

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64. *See id.* at 93-96. The authors list thirteen national environmental groups with a total annual revenue in excess of $400 million. *See id.* at 94.

65. *See* George C. Coggins & Doris K. Nagel, *Nothing Beside Remains: The Legal Legacy of James G. Watt's Tenure as Secretary of the Interior on Federal Land Law and Policy*, 17 B.C. ENVTL. AFF. L. REV. 473 (1990).

66. *See generally* Michael S. Baram, *Cost Benefit Analysis: An Inadequate Basis for Health, Safety, and Environmental Regulatory Decisionmaking*, 8 ECOLOGY L.Q. 473 (1980); William R. Ginsberg & Lois Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 HOFSTRA L.J. 859 (1981); Rosenberg, *supra* note 44.

67. *See* ANDERSON & LEAL, *supra* note 2, at 18-20.

68. *See* Pildes, *supra* note 25.

69. *See, e.g.*, R.H. GABRIEL, THE COURSE OF AMERICAN DEMOCRATIC THOUGHT 22-24 (2d ed. 1956).

C. *Assuming Efficiency As Paramount*

Even if markets could overcome information problems and allocate environmental resources efficiently, it is far from clear that efficient resource allocation should be our only social goal.[70] Anderson and Leal assume that efficiency is the chief goal,[71] but no statute or constitutional provision mandates resource decisionmaking based on ability to pay, perhaps because such a criterion would allocate resources predominantly to the wealthy. On the other hand, there are numerous constitutional and statutory commands calling for fairness, due process, equality, open decisionmaking, public participation, compensation for past damages, and risk minimization.[72]

Efficiency is attractive to Privateers like Anderson and Leal because it is easy to measure in profit and loss statements.[73] Through markets and prices, subjective values seemingly can be transformed into objective measurements.[74] Privateers are searching for such simplified decisionmaking criteria to replace administrative discretion. It is a fool's gold they seek, however. Even if efficiency were the primary goal of environmental policy, many environmental goods are incapable of being priced, and there is conflicting evidence as to whether privatization in fact produces increased efficiency. For example, although not noted in *Free Market Environmentalism*, in 1980 nearly twice as much public rangeland was in excellent condition as private rangeland.[75] There is also some evidence that some forms of public property have been maintained precisely because privatizing them would be inefficient.[76]

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70. *See* Daniel A. Farber, *Environmentalism, Economics, and the Public Interest*, 41 STAN. L. REV. 1021, 1023-31 (1989). Even Richard Posner now admits that efficiency is not the only social value. *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 25-26 (3d ed. 1986).

71. ANDERSON & LEAL, *supra* note 2, at 12, 14, 16.

72. *See, e.g.*, U.S. CONST. amends. V, XIV (due process); Administrative Procedure Act, 5 U.S.C. §§ 553-58 (1988) (fair administrative process); U.S. CONST. amend. XIV (equal protection); Government in the Sunshine Act, 5 U.S.C. § 552(b) (1988); National Environmental Policy Act, 42 U.S.C. § 4321 (1988) (open decisionmaking and public participation); Comprehensive Environmental Compensation, Response and Liability Act § 107(f), 42 U.S.C. § 9607(f) (1988) (compensation for natural resource damages); Clean Air Act § 109(b), 42 U.S.C. § 7409(a) (1988) (air quality standards premised on public health protection plus a margin of safety).

73. ANDERSON & LEAL, *supra* note 2, at 16, 19.

74. *Id.* at 18.

75. Perry R. Hagenstein, *The Federal Lands Today: Uses and Limits*, *in* RETHINKING THE FEDERAL LANDS 74, 87 (Sterling Brubaker ed., 1984) (stating that 21% of federal rangeland and only 11% of nonfederal rangeland was in the highest of four categories).

76. *See* Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public*

Although Anderson and Leal claim that replacing government intervention with marketplace ordering will increase environmental quality,[77] they worry that the former frequency produces "too much" wildlife habitat,[78] clean water,[79] and other environmental goods. What is "too much" is not clearly stated, but apparently the authors view it as more of an environmental good than the market would produce if environmental resources could be effectively priced and bought and sold. A more analytic treatment of environmental decisionmaking might explain instances of environmental "overprotection" (as measured by inaccurate market techniques), as a reflection of the influence of non-economic goals.[80] Regrettably, Anderson and Leal's marketplace fanaticism does not permit them to see risk minimization, species preservation, or ecosystem stability as legitimate social goals unless and until the market places a high dollar value on them.

III. The Hidden Costs of Privatization

In addition to overestimating the benefits of markets and misunderstanding the premises of governmental intervention, Anderson and Leal fail to examine all the costs associated with privatizing environmental decisionmaking.[81] Private rights are expensive to define and enforce, requiring individual case-by-case adjudications under common law liability rules. The modern regulatory state abandoned heavy reliance on adjudications in favor of notice and comment rulemaking to lower transaction costs and promote expeditious action. A resort to heavy reliance on common law liability rules would drastically increase transaction costs. The result might augment business for lawyers, but increasing billable hours hardly seems to be an intention of Anderson and Leal (neither of whom are attorneys).

There is a further, hidden cost of abandoning regulation in

Property, 53 U. Chic. L. Rev. 711, 749-61, 774-77 (1986) (stating that public rights in roadways, navigable waters, and submerged lands foster commerce by protecting returns of scale and eliminate costs associated with privatization such as holdouts and monopolies).

77. Anderson & Leal, *supra* note 2, at 8, 172.

78. *See id.* at 15.

79. *See id.* at 22.

80. *See* Christopher H. Schroeder, *In the Regulation of Manmade Carcinogens, If Feasibility is the Answer, What is the Question?*, 88 Mich. L. Rev. 1483, 1496-1504 (1990); Daniel A. Farber, *Playing the Baseline: Civil Rights, Environmental Law and Statutory Interpretation*, 91 Colum. L. Rev. 676, 688-89 (1991).

81. *See generally* Rose, *supra* note 26, at 29-38.

favor of marketplace ordering of environmental resources. Regulation carries with it what Carol Rose has referred to as a "rhetoric of responsibility," a kind of moral suasion or exhortation that appeals to the public's sense of good will or duty.[82] This normative component is diminished in property rights regimes whose message is that environmental degradation is an entitlement if it is in an individual's self-interest. While exhortation alone may be an ineffective response to most environmental problems,[83] when combined with the rhetoric of responsibility employed by the regulatory state, exhortation may be an important (and relatively cheap) means of establishing norms and influencing behavior.[84]

Anderson and Leal do advocate a change from traditional fault-based liability schemes like nuisance: They suggest that strict liability rules should enforce private rights.[85] Strict liability would eliminate the "reasonableness" defense afforded landowners in nuisance, meaning that a defendant could no longer defeat a liability claim by showing that the utility of his conduct outweighed harm to the plaintiff, and therefore was a reasonable activity.[86] But strict liability would not overcome other shortcomings of relying on common law rules, such as the pervasive difficulty of proving causation when multiple sources or low level, toxic exposures are involved.[87] Defendants can easily defeat plaintiffs' burden of proof by raising causation questions, as the authors themselves attempt to do in discounting the threats posed by acid rain and global warm-

82. Rose, *supra* note 26, at 30; *see also* McGarity, *supra* note 16, at 230-33 (defending the use of absolutist, apparently unattainable goals in environmental regulation because "[a] society does not always achieve all the goals it sets for itself. But reaching El Dorado is not always as important as the attempt.").

83. *See generally* John Dwyer, *The Pathology of Symbolic Legislation* 17 ECOLOGY L.Q. 233 (1990); James A. Henderson & Richard N. Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands*, 78 COLUM. L. REV. 1429 (1978).

84. *See* Rose, *supra* note 26, at 29-38. Rose concludes that:

> "Our laws are not just our controllers, but our teachers. For better or worse, normative or hortatory lessons are embedded in our laws, and we need to think about the education they import when we adopt legal institutions to manage resources for ourselves, our neighbors, and our children."

Id. at 38.

85. *See* ANDERSON & LEAL, *supra* note 2, at 3, 87, 165.

86. *See* RESTATEMENT (SECOND) OF TORTS § 821F (1977) (stating that intentional nuisance is a substantial and unreasonable interference); § 826(a) (stating that unreasonable interference is where gravity of the harm caused outweighs the utility of the conduct); § 827 (listing factors relevant to gravity of the harm); and § 828 (listing factors relevant to utility of the conduct).

87. *See* Daniel A. Farber, *Toxic Causation*, 71 MINN. L. REV. 1219 (1987).

ing.[88] Furthermore, strict liability generally provides no prospective relief from environmental risks, only after-the-fact compensation for injuries sustained.[89] Where the magnitude of the consequences is extremely high, as in the case of cancer, exclusive reliance on *ex post* remedies may be objectionable.

Common law liability rules aim to protect only those parties that bring their disputes to court, and not the public at large. They aim at "the average person of ordinary sensibilities," not the peculiarly sensitive, like asthmatics or fetuses.[90] They also give ultimate power to allocate resources to the least representative branch of government, the judiciary. Dissatisfaction with cumbersome, time-consuming judicial procedures and belated, haphazard judicial remedies led to the statutory schemes that Anderson and Leal find so inefficient. There is, moreover, no guarantee that judges will employ the efficiency paradigm that *Free Market Environmentalism* trumpets, and little likelihood that efficiency will produce better information on environmental costs and risks than regulatory intervention.[91] Increased reliance on unrepresentative judges to make difficult environmental tradeoffs would be a costly, slow, and inefficient way to make social policy.

IV. Markets, Montana, and Myopia

It is surely no coincidence that Anderson, Leal, and my colleague, Huffman,[92] are all Montanans. Up in the Big Sky country, it may be possible to believe that environmental quality is a function of land ownership, fences, and wise stewardship by individual profit-seekers who develop and act on sophisticated ecological information.[93] There is, it is true, an attractiveness

88. Anderson & Leal, *supra* note 2, at 166-167.

89. *See* Restatement (Second) of Torts § 533 (1977). *See generally* Frederick R. Anderson et al., Environmental Protection: Law and Policy 519-29 (2d ed. 1990).

90. *See* Anderson et al., *supra* note 95, at 164.

91. *See* Farber, *supra* note 75, at 1036-38 (discussing environmental risk).

92. Because I recently set forth my differences with Huffman in some detail, *see* Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 Envtl. L. 573, 597-604 (1989), I will restrain myself here. I do, however, wish to note that Huffman's description of the "Orthodox Environmental Believer"—like the Privateers' notion of the rational, knowledgeable bargainer with a long-term perspective of wealth-maximizing alternatives—sounds like no one I know. *See* Huffman, *supra* note 4, at 357-58.

93. Terry Anderson once co-authored an insightful study of the evolution of Western water law toward private rights. Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & Econ. 163 (1975). Unfortunately, Anderson's extrapolation of the experience of Western water into a theory of environ-

in the notion that the rural way of life offers a means to transform individual selfishness and acquisitiveness into collective goods like environmental quality without the unpleasantness associated with government intervention.[94]

Unfortunately, it is a fantastic myth. Markets persistently fail to produce the ecological and health information necessary to allocate efficiently environmental resources. By focusing exclusively on "willingness to pay," markets assume the wisdom of current preferences and the fairness of existing wealth distribution. They also carve out a significant role for the judiciary, the least representative branch of government, to allocate environmental resources. For these reasons, markets cannot supplant government intervention to correct environmental market failure.

Anderson and Leal's *Free Market Environmentalism* fails primarily because its odd conglomeration of Coasian bargains, Sagebrush values, and Public Choice political theory prevents the authors from seeing the frequency with which environmental decisions are a function of social values. The market is a poor place to determine environmental values. Unfortunately, most of the environmental issues discussed by Anderson and Leal—from public land management to endangered species protection to setting allowable pollution levels—involve value choices. Values are best identified through the dialogue of democracy, through public hearings and legislative deliberation, through participation of both the landed and the landless.[95]

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mental protection resembles the simplistic (and erroneous) predictions of Sir Henry Maine, who saw in the Social Darwinism of the Nineteenth Century an inevitable evolution from status rights to contract rights. *See* HENRY MAINE, ANCIENT LAW 180-82 (F. Pollack ed., 1930).

94. *See generally* Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986) (finding that rural landowners settled disputes over liability for damages resulting from unintentional cattle trespass on unfenced land according to informal norms of neighborliness that ignored formal animal trespass rules). Ellickson's study, however, was confined to bilateral conflcits with little or no information costs, strategic behavior, or causation problems—and where the parties shared the same "ranch" values. Under such exceptional circumstances, they were able to allocate "fault" without regard to formal legal rules.

95. *See* Michael C. Blumm, *Liberty, the New Property, and Environmental Law*, 24 U.S.F. L. REV. 385, 398 (1990):

> [P]articipatory rights assure access of individuals to decision-makers, which not only serves to democratize the decision-making process, but also promotes dialogue among diverse interests that can change conventional views of the public interest. Thus, the public hearing is the modern equivalent of the old town square, nurturing the exchange of ideas and serving educative and socializing functions. Liberty rights are often thought to foster an individualis-

The public interest is not simply the aggregate of the existing preferences and wealth of this generation's property owners.[96] The Privateers' prescription will promote an unattractive, atomistic, hierarchial society out of step with the complexities of life in the Twenty-First Century.

The book Anderson and Leal *should* have written is a study of how markets can be used to *implement* environmental policy, not establish it.[97] They correctly focus on the fact that environmental regulation is frequently insensitive to the reality that incentives matter. As the regulatory net expands to include those who have not been subject previously to regulation, marketplace principles may help to reduce both the fiscal and the psychic costs of regulation. Pollution taxes, transferable discharge permits, and fungible development rights all warrant study as alternatives to traditional "command-and-control" approaches.[98]

Unfortunately, Anderson and Leal fail to explain when market implementation of social policy is superior to regulatory implementation. For this reason, and because they fail to see the inappropriateness of allowing markets to define environmental values,[99] the book does not make a significant contribution to understanding the proper role for government intervention and markets in setting and implementing environmental policy.

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tic, atomistic society, but the libertarian impulse at the root of both new property and environmental rights indicates that the result can be informed dialogue, democratic decision making, and changed visions of the public interest as well.

96. Consider Farber, *supra* note 75, at 1042:

> [T]he public interest . . . is not something that exists independently of the political process itself. Rather, in a democracy, the political process creates the public interest in the process of searching for itself. The public interest can best emerge from a political processing of the liberal virtues of broad participation, tolerance, and intelligent deliberation.

97. *See* Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577 (1990) (arguing that the growing scarcity of land warrants a coexistence between private property rights and governmental regulation).

98. *See* ANDERSON ET AL., *supra* note 56; DALES, *supra* note 56; Hahn & Stavins, *supra* note 56.

99. *See* SAGOFF, *supra* note 8.