

1983

# When Incommensurable Values Conflict -- Thoughts on Mandelker's Environment and Equity: A Regulatory Challenge

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## Recommended Citation

49 Brook. L. Rev. 245 (1983)

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# COMMENTARY

WHEN INCOMMENSURABLE VALUES  
CONFLICT—THOUGHTS ON Mandelker's  
ENVIRONMENT AND EQUITY: A REGULATORY CHALLENGE.  
Daniel R. Mandelker. New York: McGraw-Hill Book Co. 1981.  
Pp. 162.

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## I.

Governmental regulation of an activity implies a certain balance of values. Although the worth of governmental regulation has become politically controversial, discussion has generally focused on its economic benefits and costs and little attempt is made to particularize and judge other underlying values. This incomplete assessment is clearly apparent in the areas of environmental and land use control. This commentary analyzes this phenomenon in the context of Daniel R. Mandelker's recent book *Environment and Equity: A Regulatory Challenge*.

In this book, Mandelker objectively examines the ethical, legal and practical problems of environment and land use controls. He describes the broad conflicts that these problems create in the legislatures, courts, and marketplace. The author's endeavor to introduce the reader to these areas of governmental activity is generally successful.

As vehicles for his discussion, Mandelker uses two models: exclusionary zoning<sup>1</sup> as an illustration of land use controls and coastal management<sup>2</sup> as an example of newer environmental reg-

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<sup>1</sup> Exclusionary zoning is described by Mandelker as "a tightening of customary residential land-use regulations to exclude housing for lower-income groups," by restricting the division of land to very large lots, or by restricting residential use of land to single family dwellings. D. R. Mandelker, ENVIRONMENT AND EQUITY p. 80 (1981) [hereinafter cited by page number only].

<sup>2</sup> According to Mandelker, coastal management regulations are designed to "prevent the destruction of coastal existence value by diverting land development to inland loca-

ulations. The selection of these two examples presents a formidable challenge since they elicit many disputed values. An objective look at governmental intervention is even more difficult in view of the book's probable readership — putative policymakers concerned with business and industry.<sup>3</sup> Beliefs commonly associated with business and industry are not generally thought to include a sensitivity to delicate coastlines and a concern for special opportunities for homeownership by the disadvantaged. The book's intended readers are thus less likely to be receptive to more settled regulation if they see these two models as typical. Other governmental controls are less problematic. A more balanced view might have resulted had Mandelker included less debatable examples of regulation such as pollution legislation or ordinary conflicting use zoning. These are grounded on more widely shared values and established regulatory systems.

Pollution regulation, for example, is more amenable to the economic analysis considered in the second chapter of Mandelker's book and would have served as the focus of an informative study. Unlike the models chosen by Mandelker, pollution controls can be forcefully supported by the acceptance of only a few axiological or value judgments which are centered within the constellation of values identified with the business community. Modern economic theory, which is based upon the rational person, the ideal marketplace, cost internalization, non-subsidization and optimal resource allocation, theoretically disfavors pollution externalities. When in practice industries resist pollution controls, they typically avoid confrontation with the basic values and rationalize their reluctance by: (1) denying the significance of pollution-related injuries; (2) emphasizing the urgent domestic need for lower costs to maintain viable competitive industries; and (3) expostulating on the evils and inefficiencies of governmental regulation. The first point can be hollow sounding rhetoric, as is evident by the tobacco industry's endeavors.<sup>4</sup> The second point ignores the virtues of a minimized

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tions where it will not be environmentally harmful." p. 14.

<sup>3</sup> The book's dust jacket states that this book is aimed at a broad range of "policy-makers" including "lawyers, economists, political scientists, financiers and administrators."

<sup>4</sup> In 1969, the Tobacco Institute published, in an advertisement, a Tobacco Research Council release citing Dr. C.C. Little's finding that "there is no demonstrated causal relationship between smoking and any disease." N.Y. Times, Feb. 28, 1969, at 23. As part of

subsidy of industry rationally legislated by direct knowledge of its true costs and benefits and paid for equitably rather than by haphazard taxation of employees, consumers and neighbors. The political and bureaucratic foibles criticized in the third point are concerns worthy of continual vigilance, and are indeed an anathema to an efficient marketplace. Intervention for minor disutilities is, therefore, not worthwhile. Pollution must pass a threshold before governmental intervention is merited.<sup>5</sup>

The full thrust of the economic analysis in the second chapter is diminished for those readers who lack some knowledge of microeconomics. Further elaboration of basic economic theory as it relates to modern governmental regulatory policy would have been worthwhile. For instance, the economic theory of "Pareto optimality" draws upon basic notions of rationality, *i.e.*, what we expect rational persons to do in a free market, and points to the conclusion that an ideal free market is precluded if one can freely pollute.<sup>6</sup> In accordance with the Pareto theory, the optimal allocation of resources follows from choices by purchasers who fully incorporate into their decisions the private and social costs of goods. Market trading theoretically will be facilitated until "no one can be made better off without another's being made worse off." (p. 6). As an illustration, remaining within the context of pollution controls, more buyers would choose clothing made of cotton and wool, instead of synthetic fibers, if they included in their purchasing determination the additional costs of longterm atmospheric deterioration, disease,

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the industry's \$48,000, six week advertising campaign, the Tobacco Institute ran a full page advertisement to this effect. *Id.* at Mar. 5, 1969, at 29, col. 1.

<sup>5</sup> See STEWART & KRIER, *ENVIRONMENTAL LAW AND POLICY* 113 (1978); Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 549 (1979).

<sup>6</sup> Mandelker defines Pareto optimality (he refers to it as "Pareto Rule") in the following manner: "When only the participants in the trade benefit or bear costs, and when benefits and costs are defined by the participants' value structure, the outcome is efficient in the sense that no one can be made better off without another's being made worse off." p. 6. The theory is also defined as follows: "Outcome A is defined as Pareto-optimal if it is impossible to move to any other state without making at least one person worse off in this new social state than he was under A." B. ACKERMAN, *ECONOMIC FOUNDATIONS OF PROPERTY LAW* xii (1975). Many analyses now use the Pareto Superiority or Kaldor-Hicks test for determining efficient transactions. It "requires not that no one be made worse off by a change in allocation of resources but only that the increase in value be sufficiently large that the losers can be fully compensated." R. POSNER, *THE ECONOMICS OF JUSTICE* 91 (1981).

building damage, and cleaning bills caused by petro-chemical pollution. These factors raise the recognized cost of synthetic fibers and made natural cloth appear relatively cheaper.

A manufacturer that dumps its garbage (pollution) without restriction upon its neighbors creates an "external diseconomy"<sup>7</sup> because it need not include the cost of garbage collection (pollution control) in the price of its products.<sup>8</sup> Other goods will be underproduced while this one is overproduced, resulting in the misallocation of resources. The manufacturer is, in effect, receiving a public or neighborhood subsidy for his product and although such a subsidy might well be socially desirable, an informed political decision in this regard is not possible without accurate cost information. Mandatory internalization of the external cost will require the manufacturer to increase prices accordingly, thereby permitting the price mechanism of the market and political processes to operate more efficiently.<sup>9</sup>

<sup>7</sup> An economic "externality" exists "whenever the activities of one person affect the welfares or production functions of other people who have no direct control over that activity." R. DORFMAN & N. DORFMAN, *ECONOMICS OF THE ENVIRONMENT: SELECTED READINGS* xvi (1972) [hereinafter cited as *Dorfman*]. The effect may be an "external diseconomy," which exists "when an action taken by an economic unit results in uncompensated costs to others." E. MANSFIELD, *MICROECONOMICS: THEORY & APPLICATIONS* 373 (Shorter 3d ed. 1979).

<sup>8</sup> Theoretically, the neighbors could bargain with the manufacturer to eliminate the external costs and purchase the manufacturer's entitlement to pollute. This is the thesis of the famous Coase Theorem. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON 1, 6-9 (1960). With the purchase price, the manufacturer could install pollution-control devices. As long as the value of preventing pollution is greater than the value of polluting, the parties will reach an agreement beneficial to all. *Id.* at 9.

However, the Coase theory fails to consider the transaction costs of the bargaining process. Organizing an entire neighborhood exposed to pollution clearly will be costly especially where the polluted area is large. Such costs may also include "freeloader expenses," which occur when certain neighbors withhold their shares of the purchase price in the expectation that others will pay enough to make up the difference. These secondary costs might prevent effective bargaining. For a discussion of these transaction costs, see R. POSNER, *ECONOMIC ANALYSIS OF LAW* 44-46 (2d ed. 1977) (sources of high transaction costs include the number of parties and possible alternatives to bargaining). See also M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* 2 (2d ed. 1971) (whereas self-interested individuals in a group will act to further their individual interests, without coercion or separate incentive, they will not act to achieve a common or group objective); Regan, *The Problem of Social Cost Revisited*, 15 J. LAW & ECON. 427, 437 (1972) (assumption of zero transaction costs is an unrealistic and simplified notion).

<sup>9</sup> An externality may have an inverse effect and create an external economy. The industry's presence might rise surrounding property values if related industries move into the vicinity. Internalization of this benefit will allow the enterprise to lower its prices resulting in more accurate costs to its customers. See E. MANSFIELD, *supra* note 7,

Resolution of conflicting land uses by means of nuisance law and ordinary zoning enactments is generally subject to an analysis of externalities more readily than the topics chosen by Mandelker. The smoke pollution of a factory, if found to be a substantial, unreasonable interference with the use and enjoyment of a neighbor's land, gives rise to legal liability in nuisance<sup>10</sup> and to constitutionally permissible grounds for zoning regulations.<sup>11</sup> Many other disruptions of the neighborhood, however, are less well recognized by either courts or legislatures and demonstrate some of the nuances of the analysis. For instance, traffic interference and damage to roadbeds caused by a manufacturer's trucks may realistically be considered part of the cost of the final product. Courts ordinarily will not grant nuisance relief for such indirect injuries and zoning will not be an effective remedy once the plant's initial construction has begun.<sup>12</sup> Moreover, in a complex, inter-related economic community, it becomes as hard to characterize indirect costs as to qualify them. An examination of the external costs incurred by the introduction of industrial development to a residential neighborhood fails to reveal which costs are rightfully attributable to the manufacturer. The depression of residential real estate values by the *situs* of a manufacturing plant, without more, may either be a cost imposed on the neighborhood or the restriction of such industrial development may be a cost imposed by the neighborhood.<sup>13</sup> A similar indeterminacy arises from an analysis of

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at 372 ("an external economy occurs when an action taken by an economic unit results in uncompensated benefits to others.").

<sup>10</sup> See generally W. PROSSER, *LAW OF TORTS* §§ 86-91 (4th ed. 1971); *RESTATEMENT (SECOND) TORTS* §§ 822, 824, 827-830 (1977).

<sup>11</sup> See R. ANDERSON, *AMERICAN LAW OF ZONING* § 7.26, at 597 (2d ed. 1977) (courts have upheld zoning regulations that protect landowners from noise, dirt, smoke, and machinery).

<sup>12</sup> See generally 58 *AM. JUR. 2d Nuisance* § 638 (1971) (citing *Coon v. Utah Constr. Co.*, 119 Utah 446, 228 P.2d 997 (1951)). *But cf.* *Gribbon v. Interstate Motor Freight Sys.*, 18 Ill. App. 2d 96, 151 N.E.2d 443 (1958).

<sup>13</sup> Some commentators argue that all costs of land use conflicts are indifferently reciprocal and theoretically cannot be blamed upon one user or the other. See Kennedy, *Cost Benefit Analysis of Entitlement Problems*, 33 *STAN. L. REV.* 387, 395-96, 398 (1981) (land use costs are joint costs); Coase, *supra* note 8, at 2, 27-28 (reciprocal costs). For a detailed outline of cost attribution, see G. CALABRESI, *THE COSTS OF ACCIDENTS* 131-97 (1971).

Despite the aforementioned approach, most citizens, judges, and legislators have little difficulty attributing the conflict costs to one party: the manufacturer is at fault for pollution of the neighborhood. This occurs because our social choices are based, generally

Mandelker's exclusionary zoning model: does the introduction of low-cost housing impose external costs on pre-existing middle and upper-income neighborhood housing or does the protection of the more expensive housing impose external costs on potential low-cost housing.<sup>14</sup> The ordinary observer would generally find the low-cost housing to create the external diseconomy. Then the issues arise whether the costs ought to be imposed upon the more expensive neighborhood and, if so, by whom and how is it to be paid.

The economic perspective is not the only consideration. Governmental intervention to resolve conflicts over resources involves the implementation of other value judgments as well. The propriety of such intervention, as Mandelker suggests, may be suspect. (p. 1). To glimpse the weight these other values have in the public decision for regulation, it is useful to consider the basic choices of society.

Citizens must make fundamental value choices to determine the broad goals of the government. This necessitates, according to one analysis,<sup>15</sup> the balancing of two basic polarities: collectivism and equalitarianism; egoism and altruism. The Western democracies usually favor equalitarianism and altruism.<sup>16</sup> From this orientation flow our laws and social customs. Equalitarianism infers individualism; each individual is entitled to the same freedoms and benefits under the law.<sup>17</sup> Civil and political rights are formulated in theories of liberal democracy.<sup>18</sup> Property rights are idealized by the liberties of the free market, reaching a limit in *laissez-faire* capitalism. One should not be compelled to subsidize the goods of another by being subjected to higher

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speaking, on the value judgment of ordinary persons not scientific policymakers. See B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 25-29, 97-100 (1977) (distinction between ordinary views and scientific theory).

<sup>14</sup> See text following note 38 *infra*.

<sup>15</sup> The basic goals examined here are from K. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 99-105 (2d rev. ed. 1950).

<sup>16</sup> *Id.* at 101.

<sup>17</sup> Mandelker defines this principle as horizontal equity, that is, "individuals in the same position [are] to receive the same benefits." p. 27. See Patterson, in *MY PHILOSOPHY OF LAW* 231, 240 (1941) (resolution of conflicts should be by methods that are impartial and equal); Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 623-24 (1958).

<sup>18</sup> See H. KELSEN, *GENERAL THEORY OF LAW AND STATE* 87-90 (1949).

prices from misallocation resources.<sup>19</sup>

Equality is the underpinning of the liberties of democracy. Economic equality connotes freedom of contract. Social equality suggests freedom of action. This liberty obviously is not unlimited, but involves a reciprocal relationship: one's liberty to act counterbalances another's liberty to be free from that action.<sup>20</sup> Government is the instrumentality through which the reciprocal liberties are delineated. The classical liberty expression of the line is J.S. Mill's "harm" principle.<sup>21</sup> This measures the exercise of the police power in regulating society's health, safety, morals and general welfare. When a government exercises its power against material harms, such as injury to person (assault) or property (burglary), intervention is deemed proper. As the harms are more attenuated, the desirability of governmental intervention is debatable. The nebulosity of the harm principle is particularly evident in defining the morality within the police power. A well-known standard is whether the practice is immoral in the eyes of all "rights-minded members of society" regardless of "whence the community of thought comes."<sup>22</sup> History demonstrates the dangers of this standard.<sup>23</sup> In the determination of the less immediate harms, other values often weigh in the final balance.

## II.

Unlike the easily defended regulation of pollution, the

<sup>19</sup> See R. DWORKIN, PUBLIC & PRIVATE MORALITY 131-32 (1978).

<sup>20</sup> See M. COHEN, REASON AND LAW 5 (1950); J. FEINBERG, RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY 31 (1980); H. KELSEN, *supra* note 18, at 75-76. See generally I. BERLIN, FOUR ESSAYS ON LIBERTY (1969). Grimke, in 1848, put it as well as anyone:

The exercise of unrestricted freedom by all, when all are free, is a self contradiction. It supposes a power in each to invade the rights of others, in which case liberty would fall to the ground and no one be free . . . . My liberty of action is an habitual restraint upon the conduct of others when they attempt to invade my rights, and their liberty is in circumstances a restraint upon me.

F. GRIMKE, THE NATURE AND TENDENCY OF FREE INSTITUTIONS 192 (J. Ward ed. 1968).

<sup>21</sup> J. S. MILL, UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT 95-96 (1951) ("the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others").

<sup>22</sup> P. DEVLIN, THE ENFORCEMENT OF MORALS 22-23 (1965).

<sup>23</sup> See Hart, *Immorality and Treason*, in MORALITY AND THE LAW 49, 53 (R. A. Wasserstrom ed. 1971) (the argument that public harms are those which are considered immoral by right-minded citizens may justify "burning of old women for witch craft or . . . punishing people for associating with those of a different race or colour").



greater analytical and normative complexities of coastal management are evident from Mandelker's discussion. It is arguable whether the diminution of natural resources and the destruction of the ecology ought to be legally remediable. If such exploitation of the environment were to be redressed, appropriate relief must be fashioned by the courts and legislatures. Classical economic analysis depreciates many of the considerations favoring a remedy. Mandelker states, furthermore, that when environmentalists try to justify environmental protection with factual evidence of benefits to society, they take the risk that the "scientific evidence may not support their assertion, and unregulated land development may not impair environmental areas" (p. 24) and, therefore, he asserts there is a "necessity for the implicit value judgments that underlie environmental land-use regulation" (p. 24).

Some of the arguments advanced to provide needed support for environmentalism are problematic. One is that the psychological harm to environmental sympathizers is worthy of protection.<sup>24</sup> This point seems to bring with it the same risks as delineating immoral practices by the eyes of "right minded members of society."<sup>25</sup> Another contention is that irreversible ecological damage will impinge upon future generations, which for reasons often unspecified,<sup>26</sup> is held to be unfair. But many have denied that future generations have such a claim.<sup>27</sup>

Other arguments in support of controls urge consideration of additional social values that are normally not subject to marketplace evaluation. Aesthetic and existential values are espoused, perhaps as absolutes, in language both poetic and mystical. They appear in an invocation of an anonymous Hawaiian

<sup>24</sup> See B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 178 (1980) (there is considerable debate as to whether psychological harm qualifies as harmful); Kennedy, *supra* note 13, at 398 (adverse psychological reaction is harm suitable to environmental issues).

<sup>25</sup> See note 22 and accompanying text *supra*.

<sup>26</sup> Some academicians have reasoned that one generation must consider the impact that its use of environmental resources will have on future generations. See B. ACKERMAN, *supra* note 24, at 212-17 (present generations are obliged to refrain from placing members of the next generation in a worse position); J. RAWLS, *THEORY OF JUSTICE* 284-93 (1971) (proper rate of saving for future generations will result in justice between generations).

<sup>27</sup> See 2 W. BLACKSTONE, *COMMENTARIES* 710-11 (God gave man dominion over the earth to use as he sees fit).

poet quoted by Mandelker.<sup>28</sup> Price tags cannot be applied to these goods.<sup>29</sup> Legislators are wary of such ephemeral arguments. For them the most persuasive test of the unworthiness of governmental controls is a monetized cost-benefit analysis.<sup>30</sup> The efficacy of this criterion is reduced, however, when the imperfections of the marketplace, including prohibitive transaction costs, induce the government to hypothesize the market with shadow prices.<sup>31</sup> The most questionable use of the cost-benefit analysis arises when incommensurable, noneconomic values must be balanced against the hard dollar claims of development. Fairness and beauty will often be discarded in deference to such shibboleths as "Big Brother," "paternalism" and "freedom from government intervention."<sup>32</sup>

The author's discussion of coastal management also identifies other axiological considerations that are distinct from the above. First, Mandelker brings in horizontal equity<sup>33</sup> and concludes that restraint on one developer, whose land falls within the protected coastal area, creates horizontal inequity with respect to unrestrained developers. The government impinges upon its "liberty" in comparison to others. The land becomes

<sup>28</sup> The author quotes the poet:

A golden coast  
In moonlight's star,  
Forever ours!

P. 22.

<sup>29</sup> *But see* Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. LEGAL STUD. 103, 119 (1979). Professor Posner postulates that everything can be monetized. He states: "Wealth is the value in dollars or dollar equivalents . . . of everything in society. It is measured by what people are willing to pay for something or, if they already own it, what they demand in money to give it up." *Id.*

<sup>30</sup> The cost benefit analysis is "a method of collecting information, processing it, and providing a systematic approach to choosing between alternatives." Davidson, *The Valuation of Public Goods in Dorfman, supra note 7*, at 345. Some theorists do not agree that the cost-benefit analysis is the most convincing test. *See* Kennedy, *supra note 13*, at 407, 429.

<sup>31</sup> *See* Davidson, *supra note 30*, at 355. *See also* Meyers, *An Introduction to Environmental Thought: Some Sources of Criticism*, 50 IND. L. J. 426, 449 (1975) (shadow prices by effluent charges on property interest in pollution rights); Sagoff, *Do We Need a Land Use Ethic*, 3 ENVIRONMENTAL ETHICS 293, 306 (1981) (shadow pricing of principles and beliefs).

<sup>32</sup> Professor Zygmunt Plater, the plaintiff's attorney in the snail darter-endangered suit, stated to this author: "Environmental activists rarely can make arguments based upon the real and ecological values. They must often look for arguments in terms of market costs."

<sup>33</sup> Pp. 16, 27-29.

less valuable. Property value is "taken" for the benefit of society, yet society need not pay for the gain. The due process clause of the Constitution does not encompass such attenuated losses and, absent extreme deprivation, the government has no duty to compensate.<sup>34</sup> A more extensive interpretation of constitutional rights would reduce the horizontal inequity; compensation, ultimately derived from taxation, would more fairly distribute the costs. The government, nevertheless, has balked at such a position if for no other reason than to keep down the costs of improvements.

Another axiological factor is vertical equity. Mandelker espouses the claims of the economically disadvantaged to a share of the coastal housing.<sup>35</sup> Is it "fair" to curtail their opportunity by environmental regulations that increase the cost of housing? The "harm" principle doesn't assist in the analysis: it isn't a property harm, as traditionally viewed, to be deprived of housing owing to impecuniousness. Although one might urge a theory of moral harm, it differs widely from the morality usually considered relevant.<sup>36</sup>

Vertical equity is more easily derived from society's value balancing of egoism and altruism rather than between the equalitarian and collectivist polarity that leads to the harm principle.<sup>37</sup> The Western democratic preference for altruism supposes that one ought to provide a compensatory advantage to the disadvantaged.<sup>38</sup> While vertical equity urges society to aid the disadvantaged, horizontal equity requires the costs not to be imposed disproportionately.

Mandelker's other model, exclusionary zoning, that is designed to exclude certain economic, racial or ethnic groups from a neighborhood, is also axiologically complex, although less so than is coastal management. One need not confront in this instance the incipient rights of future generations or nonhuman

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<sup>34</sup> See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 9-3 (1978).

<sup>35</sup> pp. 16, 27, 29-33.

<sup>36</sup> The morality of sexual acts, abortion, suicide, and euthanasia has drawn most of the attention. See, e.g., P. DEVLIN, *supra* note 22, at 22-23; B. MITCHELL, *LAW, MORALITY, AND RELIGION IN A SECULAR SOCIETY* (1967); Hart, *supra* note 23, at 49, 53.

<sup>37</sup> See notes 15-23 and accompanying text *supra*.

<sup>38</sup> See B. ACKERMAN, *supra* note 24, at 246-49; C. FRIED, *RIGHT AND WRONG* 108-31 (1978); J. RAWLS, *supra* note 26, at 14-15; Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1717-22 (1976).

life forms that are involved in coastal management controls. Vertical equity is the primary defense here; horizontal equity is the primary hurdle. Although the choices inherent in the regulation of exclusionary zoning are less intricate than those found in the regulation of coastal management, the intricacies surrounding pollution controls are even more conducive to finding support in traditional economic theory. The result is that even with the exclusionary zoning model, Mandelker's readership is likely to be left with a misimpression as to the general defensibility of governmental intervention in the marketplace.

### III.

It is difficult to see clearly the value of land use and environmental controls. Even if one gains a proper perspective of the range of reasons for regulation, the fact remains that many of the rationales for the political decisions are nebulous, controversial, and untranslatable into the economic language usually spoken. As Mandelker indicates, his examples raise complex questions of justice (pp. 21-33). The elimination of exclusionary zoning would probably be paid for primarily by the neighbors and the housing developer in the forms of depressed property values and reduced returns. Coastal regulations, as outlined by Mandelker, will also effectively exact a tax from the neighbors, the developer, and its wealthier customers. Is this fair? Can anything be done about it? If not, how much is that to count?

To gain better insight into the value of these controls, the underlying arguments need to be further explicated. Each of the arguments entails one or more axiological judgments. The conclusions are not derived deductively from self-evident premises.<sup>39</sup> Instead, they are based upon aesthetic and ethical judgments that are unsettled. Although there is substantial harmony among members of American society as to essential values,<sup>40</sup> the political scene reveals deep discord as well.

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<sup>39</sup> See M. COHEN, *supra* note 20, at 70-74 (1950) (reliance on maxims is misleading); FRANKENA, *ETHICS* 105 (2d ed. 1973) ("belief in self-evident ethical truths, and all that goes with it, is so difficult to defend . . .").

<sup>40</sup> See E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 79-80 (1933) (there exists a common collective conscience, i.e., beliefs and sentiments "common to average citizens of the same society"); R. UNGER, *KNOWLEDGE AND POLITICS* 220-22, 241-48 (1975) (to extent society constitutes a community, it is "held together by an allegiance to common purposes").

Once the axiological choices inherent to a public policy are similarly identified, related, and balanced (if not absolute), a consensus among rational people should form. When the values at stake are settled, the decision consists primarily of logical and empirical processes; disagreement over the facts surrounding the policy, both as they exist at the time of the adoption and as they will develop thereafter, can be ameliorated by scientific techniques (surveys, social sciences, etc.). This is not the case where the value choices are disputed.

The following postulate may be drawn from this analysis: the greater the number of axiological options involved in a policy decision, and the greater their unrelatedness, the more debatable is the proposition. There are, of course, constellations of values that tend to be aggregated. Those who identify themselves as political conservatives, for example, typically share a range of values with others of the same persuasion. But even then there is no complete agreement although their differences are relatively narrow. Just as certain, people at opposite ends of the spectrum share at least some values.<sup>41</sup> Furthermore, for disparate reasons, those with divergent values might agree upon a specific policy by means of different axiological pathways: one person might vote to protect an endangered species because of "animal rights," the claims of future generations, and the desire to maintain the balance of nature, while another person might vote for the same proposal merely as an expedient for building a suitable population for hunting. Although there is more than one axiological chain of reasoning leading to a public policy, generally, the greater the number and dissimilarity of links, the more likely are there to be incommensurable values to create unresolved controversy.

## CONCLUSION

Mandelker has done a fine job mapping the broad contours of environmental and land use controls. Some of the difficult detail work remains uncharted. The reader, consequently, might underestimate the virtues of some regulations and overestimate

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<sup>41</sup> See Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 623 (1958) (commonality may be slight). For an analytic framework of values, see H. LASSWELL & A. KAPLAN, *POWER AND SOCIETY* 55-62 (1950); J. RAWLS, *supra* note 26, at 40-45 (1971).

others. Yet one message clearly comes through: "environment and equity" are indeed regulatory challenges. They are fraught with unresolved conflicts which will doubtlessly get worse. We must get on with solving them.

