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COMMENTARY

Environmental Inequities—Observations on Mandelker's *Environment and Equity*—A Regulatory Challenge

Douglas W. Kmiec*

In recent years, numerous commentators have asserted the importance of protecting the environment. Professor Sax argued that environmental protection was a "public right," yet neglected to explain who constituted the public.¹ Professor Stone found it inappropriate to protect the environment on the basis of human desires. Instead, he sought to confer certain rights, particularly legal standing, directly on trees, mountains, rivers and other parts of our national landscape.² Professor Stone assumed that if trees and mountains could talk, they would want to be preserved and represented by groups like the Sierra Club. Others pointed out that trees could just as easily be construed as yearning for the fireplace as for the forest.³ After all, might not the Sierra Nevadas prefer a Disney ski resort and communing with Mickey Mouse to being left alone?⁴

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1 Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971). Professor Sax indicated that the need to protect public rights precludes compensation except where the land use being regulated has no conflict-creating spillover effects. Since virtually every land use creates spillovers, little compensation is required under the theory.

2 Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

3 Professor Sagoff writes:

Environmentalists always assume that the interests of these objects are *opposed* to development. How do they know this? Why wouldn't Mineral King want to host a ski resort, after doing nothing for a billion years? . . . The Sequoia National Forest tells the developer that it wants a ski lift by a certain declivity of its hills and snowiness during the winter . . . The seashore, meanwhile, indicates its willingness to entertain poor people from Oakland by becoming covered with the great quantities of sand. Finally, it is reasonable to think that Old Man River might do something for change, like make electricity, and not just keep on rolling along. It is an incredible optimism which assumes the guardians appointed to represent nature would take an environmentalist position.

Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205, 222 (1974).

4 The Mineral King Valley faced this choice in *Sierra Club v. Morton*, 405 U.S. 727

The point, of course, is that environmental writers assume, without further justification, the need for environmental protection and fail to identify the interests served or the sacrifices required.

In *Environment and Equity—A Regulatory Challenge*, Professor Daniel R. Mandelker departs from the path chosen by these and other environmental advocates by frankly identifying his interest in the environment as a subjective value preference.⁵ It is not only a preference, but a value which, according to Professor Mandelker, should be accorded absolute protection against more mundane interests in energy, housing, industrial productivity and employment.⁶ Regrettably, those of us who value jobs and warm homes in the winter might take issue with Professor Mandelker. More importantly, his value preference is not a persuasive justification for forfeiting the individual liberty, economic efficiency and production, and at the extreme, the democratic processes to which we have become accustomed.⁷ While Professor Mandelker may recognize some of these possible consequences, his sketchy exposition of the "equity" aspects implicit in environmental conflicts suggests that he may not be fully aware of the results of his advocacy.

I. A Comparison of Traditional and Environmental Land Use Controls

The initial portion of Professor Mandelker's work attempts to distinguish traditional land use controls from environmental land use regulation.⁸ The distinction, as it turns out, is anything but sharp.

Professor Mandelker defines environmental land use controls as "coastal management programs, environmental impact statement requirements that affect land development, and little-known state constitutional provisions regarding environmental quality that can also

(1972). See generally Lundmark, Mester, Cordes & Sandals, *Mineral King Goes Downhill*, 5 *ECOLOGY L.Q.* 555 (1976).

5 D. MANDELKER, *ENVIRONMENT AND EQUITY: A REGULATORY CHALLENGE* at xi (1981) [hereinafter cited as *ENVIRONMENT*].

6 As the final pages of this review suggest, it is not totally clear that Professor Mandelker personally adopts this absolute position. Nevertheless, he suggests that: "The new environmental controls require subjective value judgments that give *priority* to environmental protection." *ENVIRONMENT* at xi (emphasis added). He later adds: "Environmentalists reject marginal analysis. They impose absolute limits on land use to protect environmental benefits whether or not the marginal gains of these restrictions exceed their costs. . . . The absolute values that underlie the environmental ethic have deep roots in American tradition." *Id.* at 22-23.

7 Professor Mandelker recognizes that a centralized form of government more easily accommodates an absolute environmental preference. *ENVIRONMENT* at 155.

8 See *ENVIRONMENT*, ch. 1.

affect land use."⁹ Environmental land use controls, as distinguished from traditional land use controls, are portrayed as subjective, non-localized, inter-generational claims to a fundamental environmental right. Yet traditional land use controls possess most of these same characteristics. For example, local zoning invariably reflects subjective values. That zoning is premised upon an exercise of state or local police power does not give it an objective base. Traditional land use practice indicates that so long as regulation can be justified by some real or imagined general welfare purpose, it is presumed valid.¹⁰ As a result, zoning has been used to do everything from promoting homogeneous development¹¹ (single family *uber alles*) to impeding challenges from unwanted competitors¹² (the central business district vs. the suburban shopping center). Thus, courts have upheld enormously restrictive density, use and aesthetic controls without any meaningfully objective health or safety justification. Since Professor Mandelker admits that environmental land use regulation is by its nature subjective, it should coexist easily with other land use controls. Yet it is not coexistence that Professor Mandelker seeks for the environment, but supremacy.

Do the other characteristics of environmental land use claims—nonlocal, intergenerational, and fundamental—distinguish them from the run-of-the-mill land use question? At first glance, the suggestion that environmental problems are nonlocal merely echoes the little disputed fact that such problems often originate with inefficiencies surrounding the use of some commonly owned resource, such as air, water or public land. That is, rational, economic decisionmaking fails to properly allocate common resources because the costs and benefits associated with their use are widespread and incapable of internalization.¹³

9 ENVIRONMENT at xi.

10 Professor Ellickson remarks that "the Supreme Court has itself abandoned the orthodox quarter" (the promotion of health, safety, morals or general welfare) by which zoning decisions were initially measured. R. ELICKSON & A.D. TARLOCK, *LAND-USE CONTROLS* 81 (1981).

11 In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), zoning was held constitutional. Justice Sutherland characterized an apartment house, hardly a noxious, dangerous or immoral use of land, as "a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others . . ." *Id.* at 394.

12 *Ensign Bickford Realty Corp. v. City Council of Livermore*, 68 Cal. App. 3d 467, 137 Cal. Rptr. 304 (1977); *Forte v. Borough of Tenafly*, 106 N.J. Super. 346, 255 A.2d 804 (1969). See generally Weaver & Duerksen, *Central Business District Planning and the Control of Outlying Shopping Centers*, 14 URB. L. ANN. 57 (1977).

13 Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

What is novel about Professor Mandelker's theory is the ascription of these common resource inefficiencies to some—but not all—privately-owned resources. For example, Professor Mandelker compares the regulation of privately-owned inland and coastal property. With inland property, he suggests that a traditional land use control, like zoning, is implemented after weighing the cost of any regulation restricting development to the landowner against the benefits received by adjacent landowners. However, with coastal property, Mandelker argues that the cost of the regulation must be weighed against "benefits [which] are diffused over a wide public."¹⁴ Thus, he concludes that since the benefits from coastal property are nonlocal, the regulation of private coastal property must necessarily be different from regulation of other private property.

Instead of supporting the need for separate treatment of environmental land use regulation, this analysis exposes the weak foundation of all public use regulation of privately-owned land. If traditional land use controls merely settle disputes among proximate neighbors, private bargaining might easily do as well or better, as Professor Mandelker virtually admits.¹⁵ Where bargaining fails to reach an optimum result because of transaction costs, inadequate knowledge, moral incentives or unequal bargaining resources,¹⁶ nui-

14 ENVIRONMENT at 39.

15 In commenting upon the harm-benefit theory associated with the taking clause, Professor Mandelker admits that a land use control that deals with side-by-side conflicts involves matters that "Coase type of bargaining can manage. Like bargaining, . . . governmental regulation of side-by-side conflicts . . . leads to gains in trade. Zoning is an example." ENVIRONMENT at 40. While Professor Mandelker does not subscribe to the harm-benefit theory, itself, because of the absence of a well-defined normalcy standard, his comments suggest that bargaining can handle the regulation of side-by-side conflicts.

16 While he may accept bargaining for the resolution of side-by-side conflicts, Professor Mandelker does not do so for environmental controversies. In this regard, Professor Mandelker reiterated the standard criticisms of Coasean analysis by suggesting that bargaining may result in undesirable distributive consequences or may not occur at all because of unequal bargaining ability or because the perceived benefits are so widespread that high transaction costs prevent bargaining. ENVIRONMENT at 10-13.

Professor Mandelker might have extended his criticism of Coasean bargaining to include Coase's failure to observe that shifts in legal entitlements also alter the wealth of the affected parties, thereby influencing how much the parties value particular entitlements. Consequently, Coase probably errs in suggesting that shifting legal entitlements does not affect the allocation of resources or the optimal result. See Demsetz, *Wealth Distribution and the Ownership of Rights*, 1 J. LEGAL STUD. 223, 228 (1972); Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979).

Although Coase assumed zero transaction costs, these costs, especially in environmental cases, are significant. For example, the cost of obtaining information, organizing affected parties, and negotiating an appropriate settlement are believed to be extremely high where benefits and costs are dispersed. However, the presence of transaction costs does not suggest

sance remedies can be pursued, obviating the need for public regulation. However, Professor Mandelker's characterization of conventional land use controls conflicts with commonly accepted land use doctrine. As noted earlier, zoning and other traditional land use controls are purportedly enacted to further the "general welfare," rather than to settle side-by-side or localized conflicts.¹⁷ In presuming zoning valid, courts assume that the legislature has considered the benefits to the entire community which accrue from regulation.¹⁸ Consequently, unless Professor Mandelker is willing to abandon the public purpose facade of traditional land use controls,¹⁹ it would be specious to suggest that environmental land use regulation is somehow less local or of greater public benefit.

Neither can the purpose of conventional land use control be construed as less important to future generations than that of their environmental counterparts. Indeed, that land use decisions have long-

in itself that government intervention is preferable to either nuisance remedies or leaving market imperfections where they fall. Government intervention may be both unfair and inefficient. *See generally* Komesar, *Housing, Zoning, and the Public Interest*, in PUBLIC INTEREST LAW 218, 219-21. (B. Weisbrod, J. Handler & N. Komesar eds. 1978).

17 That conventional land use controls like zoning were designed to apply to broad based areas can be gleaned from the Standard State Zoning Enabling Act, promulgated by the Department of Commerce in 1922, the model for many zoning ordinances. The Act provided for a few zone classifications with large quantities of land within each zone. With the exception of single family zones, zones were cumulative. Zoning architects believe that virtually any use could be accommodated within an existing zoning map. At most, the zoning architects thought that they could handle extraordinary cases or cases of particular hardship with a minimum of legislative or administrative discretion by a rare zone amendment or variance. Thus, zoning was designed not to resolve specific, localized conflicts, but as a self-administering system. *See* Krasnowiecki, *A Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control*, 114 U. PA. L. REV. 47, 63 (1963); Krasnowiecki, *The Basic System of Land Use Control: Legislative Preregulation v. Administrative Discretion*, in THE NEW ZONING: LEGAL, ADMINISTRATIVE, AND ECONOMIC CONCEPTS AND TECHNIQUES 3 (N. Marcus & M. Groves eds. 1970).

18 *See, e.g.*, *Cole-Collister Fire Protection Dist. v. City of Boise*, 93 Idaho 558, 468 P.2d 290, 300-01 (1970) (where the evidence is debatable, the presumption of validity requires a trial judge to render judgment in favor of the regulating government).

19 To some extent those courts which have found individual parcel rezonings to be an administrative, quasi-judicial determination, rather than a legislative one have abandoned this public purpose facade. *See, e.g.*, *Snyder v. City of Lakewood*, 542 P.2d 371 (Colo. 1975); *City of Colorado Springs v. District Court* 184 Col. 177, 519 P.2d 325 (1974); *Fasano v. Board of County Comm'rs*, 264 Ore. 574, 507 P.2d 23 (1973); *Aldom v. Borough of Roseland*, 42 N.J. Super. 495, 127 A.2d 190 (1956).

In addition, some scholars have determined that public land use control merely confirms the wishes of neighboring residents rather than implementing generalized policies. *See* R. NELSON, *ZONING AND PROPERTY RIGHTS* 16 (1977); Kmiec, *Private Control of Collective Property Rights* (reviewing R. NELSON, *ZONING AND PROPERTY RIGHTS*), 13 VAL. U.L. REV. 589 (1979). *See also* NATIONAL COMMISSION ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY* 206-08 (1968).

term effects upon a community is often cited as a principal reason for public regulation and planning.²⁰ Housing constructed today will require an expansion of schools, roads, sewers and utility systems tomorrow. Moreover, once a particular land use pattern is established, transition to some other development form is difficult and expensive. In addition, those who enact conventional and environmental land use controls for the benefit of future generations share the common shortcoming of simply not knowing the future. Although John Rawls' hypothetical "veil of ignorance" provides a mechanism for the formulation of a just savings schedule across generations,²¹ the problems in application are enormous.²² Furthermore, some may dispute the moral²³ and economic justifications for incurring present costs for future benefits in the face of immediate problems such as starvation, illiteracy and inadequate housing. Nevertheless, even assuming intergenerational considerations are ascertainable and appropriate, Professor Mandelker again fails to illustrate how the intergenerational effects of environmental land use decisions differ from those same effects in traditional land use decisions.

We are left, then, with the assertion that environmental land use claims are more fundamental than other land use claims. If environmental claims are fundamental or absolute, they are distinguishable from traditional land use questions which are not generally so characterized. A traditional land use control is presumed valid, but the presumption is rebutted upon a showing that the regulation: was enacted contrary to statutory authority; has no rational basis; has

20 That planning and land use regulation is future oriented is reflected in § 7 of the Standard City Planning Enabling Act, which states:

The plan shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted, and harmonious development of the municipality and its environs which will, in accordance with present and *future* needs best promote health, safety, morals, order, convenience, prosperity, and general welfare . . .

U.S. DEP'T OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT, tit. I, § 7 (rev. ed. 1928) (emphasis added). Professor Hagman describes conventional land use planning as "*future oriented*: . . . establish[ing] ends, goals, or objectives which have not yet been reached." D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 1 (1971).

21 J. RAWLS, A THEORY OF JUSTICE 284-93 (1971).

22 For example, if the discount rate applicable in the market is applied to the interest of future generations, future interests would invariably lose to present claims. See O. HERFINDAHL & A. KNEESE, ECONOMIC THEORY OF NATURAL RESOURCES 204-21 (1974).

23 According to St. Matthew: "Take therefore no thought for the morrow; for the morrow shall take thought for the things of itself. Sufficient unto the day is the evil thereof." Matthew 6:34. But cf. J. Passmore, Man's Responsibility for Nature 78-80 (1974), reprinted in R. STEWART & J. KRIER, ENVIRONMENTAL LAW AND POLICY 176 (2d ed. 1978) (even though it may be possible to rectify dissipation of natural resources through any current effort, it is nevertheless justifiable to be concerned about the future generations).

been applied in an irrational manner; or deprives a landowner of all reasonable use of his property.²⁴ Admittedly, these standards are almost impossible to meet in many jurisdictions.²⁵ Yet their existence suggests the possibility of circumstances under which a given public land use policy might not be carried out because it contravenes some more fundamental, often constitutional, requirement. Thus, for environmental land use controls to be deemed fundamental, they must originate from principles superior or equal to these constitutional constraints.

Western jurisprudence suggests that absolute environmental land use values do not originate with natural law. For example, one commentator has noted:

Especially in its Western form, Christianity is the most anthropocentric religion the world has seen. . . . Man shares, in great measure, God's transcendence of nature. Christianity, in absolute contrast to ancient paganism and Asia's religions . . . not only established a dualism of man and nature but also insisted that it is God's will that man exploit nature for his proper ends.²⁶

Nor are environmental values accorded absolute protection by the Constitution, as Professor Mandelker admits.²⁷ Surprisingly, Professor Mandelker expends little, if any, effort attempting to justify environmental values as fundamental under the Constitution. Theoretically, some justification might be extracted from the ninth or fifth amendments.²⁸ Although the judicial standard for characterizing a particular right as fundamental remains vague,²⁹ Mandelker's failure to address the task makes the fundamental quality of environmental land use controls a matter of assertion.

Mere assertion is not sufficient. For the Supreme Court of the United States even to contemplate characterizing environmental values as part of the liberty protected by the fifth amendment or as one of the unenumerated rights retained by the people under the ninth amendment, environmental rights must be compared with those

24 See generally R. ELLICKSON & A.D. TARLOCK, LAND-USE CONTROLS 62-63 (1981).

25 *Id.* at 75-76.

26 White, *The Historical Roots of our Ecologic Crisis*, 155 SCIENCE 1203, 1205 (1967).

27 ENVIRONMENT at 26.

28 Soper, *The Constitutional Framework of Environmental Law*, in FEDERAL ENVIRONMENTAL LAW 20, 108 (E. Dolgin & T. Guilbert eds. 1974).

29 In *Griswold v. Connecticut*, 381 U.S. 479 (1965), Justice Harlan suggested that to find that a right is constitutionally fundamental one must examine: "[T]he teachings of history, . . . the basic values that underlie our society, and . . . the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms." *Id.* at 501 (Harlan, J., concurring).

presently deemed fundamental by the Court. Because the Court has chosen to elevate civil, but not economic, liberties,³⁰ the environmentalists must explain why the environment is more like the former, rather than the latter.

Preliminary study suggests that the task of elevating environmental rights to a fundamental status under the constitution will be formidable. Civil liberties have been afforded greater protection than economic liberties on the assumption that they serve a more integral function in one's life and in the American system. While this assumption can be challenged by pointing out the intertwined nature of political and economic freedoms,³¹ the Court has shown little inclination to return to the intent of the framers or the substance of the Constitution where property and economic rights are concerned.³² A Court which disregards express constitutional provisions protecting economic rights is unlikely to afford that protection to the environment on the basis of an implication. Thus, one writer has concluded that there is little to "offer a persuasive case for placing environmental rights in the same category as personal or individual rights with respect to the appropriateness of resurrecting the due process approach abandoned in the case of economic rights."³³ The same au-

30 See B. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980).

31 See generally B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977); Glennon, *Constitutional Liberty and Property: Federal Common Law and Section 1983*, 51 S. CAL. L. REV. 355 (1978); Henely, *Property Rights and First Amendment Rights: Balance and Conflict*, 62 A.B.A.J. 77 (1976); Horowitz, *Transformation and the Conception of Property in American Law, 1780-1860*, 40 U. CHI. L. REV. 248 (1973); Pilon, *Ordering Rights Consistently: Or What We Do and Do Not Have Rights To*, 13 GA. L. REV. 1171 (1979); Pilon, *Corporations and Rights: On Treating Corporate People Justly*, 13 GA. L. REV. 1244 (1979); Powell, *The Relationship Between Property Rights and Civil Rights*, 15 HASTINGS L.J. 135 (1963).

32 Professor Siegan has argued that the framers expected the judiciary to exercise judicial review in matters involving civil liberties primarily to protect property and other economic rights from majoritarian invasion. By ignoring or misinterpreting certain express provisions of the constitution, current Supreme Court doctrine adversely affects a large number of people for whom the opportunity to engage freely in a business, trade or profession is the most important liberty. Specifically, Professor Siegan points to Article 1, § 10 of the Constitution which prohibits a state from passing *ex post facto* laws or impairing the obligation of contracts. In addition, the fourteenth amendment's due process clause in the 19th century was believed to "prevent the State from doing that which will operate" as a deprivation of the right to private property. *Munn v. Illinois*, 94 U.S. 113, 125 (1877). Also, Siegan indicates that "[f]rom the ratification of the Constitution through approximately the first quarter of the nineteenth century, [economic interests] might have had the benefit of natural rights-social compact doctrines employed by the United States Supreme Court to strike down state legislation that deprived individuals of property interests." B. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 5 (1980).

33 Soper, *The Constitutional Framework of Environmental Law*, in *FEDERAL ENVIRONMENTAL LAW* 20, 112 (E. Dolgin & T. Guilbert eds. 1974).

thor speculates, however, that a better case for judicial intervention might be made where an irreplaceable or unique environmental asset was at stake.³⁴ It would have been nice had an environmental advocate like Professor Mandelker made that case instead of relying upon his unexplored, and seemingly unchallengeable, subjective value preference to enshrine environmental protection as a fundamental right.

II. Equitable Conflicts with Environmental Protection

Even if one were to accept without question Professor Mandelker's assertions that environmental land use regulation differs from traditional land use controls and involves a fundamental right, his treatment of the equity issues raised by those assertions is unsatisfactory. First, Professor Mandelker identifies only two of the many consequences which follow from affording the environment absolute protection: (a) a decrease in the availability of housing for low and moderate income families and (b) the economic loss suffered by various landowners forced to donate their property as an environmental amenity without compensation. Virtually nothing is said about the food, clothing, energy and other consumer goods which will not be produced in order to protect the environment absolutely. The related losses in employment also go without serious attention. In short, Professor Mandelker appears oblivious to the opportunity costs associated with his proposal.³⁵ Professor M. Bruce Johnson has articulated the consequences of such an oversight.

³⁴ *Id.* at 112-13.

³⁵ For a discussion of the opportunity costs associated with environmental protection, see Davis & Kamien, *Externalities and The Quality of Air and Water*, in *ECONOMICS OF AIR AND WATER POLLUTION* 12-19 (W. Walker ed. 1969). With reference to this issue, Professor Bruce Johnson has stated:

It should be obvious to all that environmental goods and services must come at the expense of both other private goods and services and other public goods. Given the finite resources and the available technology in any one period of time, a better environment (public goods) must come at the expense of something else (private and other public goods).

Johnson, *Planning Without Prices: A Discussion of Land Use Regulation Without Compensation*, in *PLANNING WITHOUT PRICES* 63, 87-88 (B. Siegan ed. 1977).

By ignoring the opportunity costs associated with absolute environmental protection, Professor Mandelker fails to answer clearly two questions: *what* quantity of environmental or public goods should be produced? and *how* should these public goods be produced? With respect to the first question, according environmental values an absolute status overlooks the absence of any generally acceptable way of directly comparing the well-being of various individuals, and the resulting lack of a utility function which applies to society as a whole. See K. ARROW, *THE PROBLEM OF SOCIAL CHOICE* (1951). Cf. Sagoff, *Economic Theory and Environmen-*

[R]egulation without compensation will lead to over-production of environmental amenities . . . to the point where the bureaucrats' subjective valuation of the last unit is equal to its perceived zero cost. Free from the discipline of consumer demand via markets and the constraint of cost via compensation and budgets, central control of land use decisions degenerates to the planning without prices.³⁶

A. *Housing Production and the Environment*

Since the distortion of the economic system and the oversupply of public goods is ignored by Professor Mandelker, let us turn our attention to one problem which he does acknowledge—the undersupply of low income housing caused by environmental regulation favoring open space and preservation. Again, Professor Mandelker's focus on this problem of distributional equity is extremely narrow since protecting the environment absolutely redistributes wealth from lower to upper-income groups not just with respect to housing, but generally. The existing empirical evidence suggests that "environmental amenities are, from the viewpoint of economic analysis, luxury goods for the affluent."³⁷ An absolute preference for environmental quality must include the cost to various income groups of *all* foregone economic activity. However, Professor Mandelker does not consider these costs nor the resulting conflict between various income groups. The increased cost of food accompanying various programs of environmental land use preservation may be of little consequence to affluent environmentalists already enjoying haute cuisine, but it is of serious consequence to the less affluent.

tal Law, 79 MICH. L. REV. 1393 (1981) (arguing that the absence of a social utility function should not preclude the consideration of non-economic values in some manner).

Even if one assumes that a societal utility function can be devised and does favor the absolutist position, the second question must be addressed because different ways of implementing a social choice have different efficiencies. See generally R. STEWART & J. KRIER, ENVIRONMENTAL LAW AND POLICY 99-118 (2d ed. 1978). In particular, environmental goods may result from a redefinition of property rights, subsidies, coercive edicts or financial penalties. The method of intervention chosen will have a profound effect on the efficiency—and as discussed in the text, the fairness—of any given resource allocation. While Professor Mandelker addresses the fairness of some forms of government intervention, his absolute environmental preference seriously slights the efficiency questions.

36 M.B. Johnson, *Planning Without Prices: A Discussion of Land Use Regulation Without Compensation*, in PLANNING WITHOUT PRICES 63-65 (B. Siegan ed. 1977).

37 R. STEWART & J. KRIER, ENVIRONMENTAL LAW AND POLICY 172 (2d ed. 1978). According to Los Angeles Mayor Thomas Bradley, "to many of our nation's 20 million blacks, the conservation movement has about as much appeal as a segregated bus. . . . Blacks generally regard ecology as irrelevant to their most pressing needs—jobs, housing, health care, education." Bradley, *Minorities and Conservation*, 57 Sierra Club Bull. 21 (No. 4 Apr. 1972).

Initially, Professor Mandelker attempts to highlight not the conflict, but the common ground shared by environmentalists and low income families. Both groups, he argues, "politicize the courts to recognize environmental and equity values."³⁸ In other words, both environmental advocates and opponents of exclusionary land use controls (housing advocates)³⁹ seek to take the court beyond its role as neutral decision maker by petitioning the court to implement their respective social preferences.⁴⁰ However, to the extent that housing advocates seek to invalidate exclusionary land use regulation on equal protection grounds, any comparison to environmentalists promoting a subjective value is simply false.

Professor Mandelker recognizes that "the federal courts [have] concentrated on racially discriminatory, equal protection challenges to exclusionary zoning."⁴¹ However, the author attributes the greater judicial solicitude for housing claims not to the constitutional mandate but to the housing advocates' "assert[ion] of a minority, rather than a majority, interest."⁴² Professor Mandelker overlooks the fact that environmental protection is advocated by an affluent minority by claiming that environmental benefits are "widely enjoyed." Thus, the author asserts it is the majoritarian character of environmental interests which invites less judicial favor. The sleight-of-hand, however, neither explains the different judicial treatment of environmental and housing issues nor places them upon a common footing. The fact remains that equal protection is grounded in the constitution; the environment has not been granted constitutional significance, except by precatory federal legislation⁴³ and a small

38 ENVIRONMENT at 55.

39 Developers are the most frequent housing advocates; however, potential housing consumers have occasionally sought and been granted standing to challenge exclusionary land use controls. Federal decisions on consumer standing are more restrictive than those applied by most state courts. Compare *Warth v. Seldin*, 422 U.S. 490 (1975) (denial of standing to consumers and others without interest in specific project), with *Southern Burlington Council NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 423 U.S. 808 (1975) (standing conferred on non-resident housing consumers without specific project interests). The New Jersey courts have expressly declined to follow the federal standing position enunciated in *Warth*. *Home Builders League, Inc. v. Township of Berlin*, 81 N.J. 127, 405 A.2d 281 (1979).

40 ENVIRONMENT at 56.

41 *Id.* at 58.

42 *Id.*

43 See, e.g., National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (1970). For a strongly negative assessment of NEPA by a distinguished environmental scholar and advocate, see Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239 (1973). Professor Sax indicates that NEPA is rooted in legal sentimentality, rather than in behavioral realities, and suggests that environmentalists not "expect people to believe legislative declarations of

number of state constitutional provisions, both of which are subject to the supremacy clause.

Nevertheless, Professor Mandelker further strives to characterize the interests of environmentalists and housing advocates as coincident, rather than divergent. He next argues that both groups bypass the political process in favor of the judiciary because neither interest commands a political or social consensus.⁴⁴ This argument contradicts his claim that environmental protection is a widely-enjoyed majoritarian value.⁴⁵ Whatever Professor Mandelker means to say, the same refutation applies: Housing advocates do not seek to circumvent the legislative process; rather, they seek to keep that process within defined constitutional boundaries. Housing advocates do not challenge the ability of a municipality to enact a land use program so long as it is accomplished in a manner consistent with due process and equal protection. From Professor Mandelker's description, this clearly is not what environmentalists desire. The environmentalist turns to the court not for protection of established property or economic interests, or even for the fair treatment mandated by the fifth and fourteenth amendments; instead, the environmentalists want the court to create judicially what the legislature would not—some program of environmental protection.

A few state courts have sought, under concepts of state equal protection, to rewrite zoning provisions to provide for some undefined fair share of low and moderate income housing.⁴⁶ However, as

policy. The practical working rule is that what the legislature will fund is what the legislature's policy is." *Id.* at 248. For a comprehensive review of the impact of NEPA, see U.S. COUNSEL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL IMPACT STATEMENTS: AN ANALYSIS OF SIX YEARS EXPERIENCE BY SEVENTY FEDERAL AGENCIES (1976).

44 ENVIRONMENT at 57, 73.

45 On page 58, Professor Mandelker states: "The social interests asserted by litigants in environmental and exclusionary zoning litigation differ. Environmentalists assert a majoritarian interest in environmental protection." ENVIRONMENT at 58. However, Professor Mandelker later argues: "A reluctance to protect environmental and social values that are not widely supported may lead courts to exercise caution when asked to recognize these values in their decisions." *Id.* at 74.

46 In Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 423 U.S. 808 (1975), the court stated:

When it is shown that a developing municipality in its land use regulation has not made realistically possible a variety and choice of housing, including adequate provision to afford the opportunity for low and moderate income housing or has expressly prescribed requirements or restrictions which preclude or substantially hinder it, the facial showing of violation of substantive due process or equal protection under the state constitution has been made out and the burden, and it is a heavy one, shifts to the municipality to establish a valid basis for its action or non-action.

Professor Mandelker accurately reports, that effort has proved largely unworkable. The courts which undertook the task are now abandoning it.⁴⁷ Yet, it is important to stress what the author mentions only in passing—the federal courts⁴⁸ and many state jurisdictions have not chosen the path of judicial legislation to resolve land use disputes. Invalidating the offending regulation is the most common form of judicial relief supplied by the federal and most states courts in traditional land use matters. By contrast, Professor Mandelker seeks more expansive judicial relief for environmentalists. For example, when Professor Mandelker seeks review of a highway which may be environmentally harmful, he wants the court first to identify “polycentric variables”⁴⁹ and then to select the highway’s location based upon such factors as highway safety and wilderness

67 N.J. at 180-81, 336 A.2d at 728 (citation omitted). Once the burden shifts to the municipality under these state court decisions, it cannot be satisfied, as it can in the federal courts, by showing merely a permissible motivation or legislative policy objective. Rather, the municipality must demonstrate an overriding governmental interest and specific means aimed at achieving the overriding interest. For commentary on the “fair share” concept see Ackerman, *The Mount Laurel Decision: Expanding the Boundaries of Zoning Reform*, 1976 U. ILL. L.F. 1; Mallach, *Do Law Suits Build Housing?: The Implications of Exclusionary Zoning Litigation*, 6 RUT.-CAM. L.J. 653 (1975); Rose, *Exclusionary Zoning and Managed Growth: Some Unresolved Issues*, 6 RUT.-CAM. L.J. 689 (1975).

Much of the commentary criticizes the notion of “fair share” for its ambiguity. In particular, after *Mount Laurel*, the government was left to ponder the extent of its duty to provide housing for underserved population growths. See Blumstein, *A Prolegomenon to Growth Management and Exclusionary Zoning Issues*, 43 L. & CONTEMP. PROB. 5, 26 (Spring 1979).

47 ENVIRONMENT at 72. In *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 371 A.2d 1192 (1977), the New Jersey Supreme Court that developed the “fair share” concept stated:

[T]he governmental-sociological-economical enterprise of seeing to the provision and allocation throughout appropriate regions of adequate and suitable housing for all categories of the population is much more appropriately a legislative and administrative function rather than a judicial function to be exercised in the disposition of isolated cases.

72 N.J. at 534, 371 A.2d at 1218.

48 Under the Supreme Court’s holding in *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977), a plaintiff challenging a land use decision as exclusionary must demonstrate that a discriminatory purpose motivated it and that the governmental entity would not have reached the same decision absent the impermissible purpose. *Id.* at 270 & n.21.

However, lower federal courts have found that evidence of racial effect may constitute a prima facie case under the Fair Housing Act. See *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1288-89 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978); *United States v. City of Blackjack*, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1052 (1975); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146-48 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978).

49 See R. ELLICKSON & A.D. TARLOCK, *LAND-USE CONTROLS* 822 (1981).

preservation.⁵⁰ As Professor Mandelker knows, courts undertake such decisionmaking only if provided a clear legislative mandate or decisional rule in favor of the environment.⁵¹ While the arguments against this type of judicial behavior need not be made again here,⁵² it is sufficient to note that judicial legislation is a difficult and perhaps constitutionally improper role for the courts, and one which housing advocates do not share with environmentalists.

If, in fact, environmentalists and housing advocates cannot see eye-to-eye, how does Professor Mandelker mediate the conflict? He simply characterizes housing advocacy as erroneous and suggests that courts which respond to it are "one-sided."⁵³ For example, the author argues that opening up the suburbs separates low-income families from jobs, undercuts the revitalization of inner cities, and fails to increase significantly the housing stock available to low and moderate income families. All these points are debatable. The large number of day labor agencies in major metropolitan areas suggests that a substantial profit is made transporting unskilled labor to the suburbs for employment.⁵⁴ Second, the industrialization of the suburbs and the industrial decline of the inner city parallel the population growth of suburbs generally.⁵⁵ Moreover, even as Professor

50 ENVIRONMENT at 64.

51 *Id.* at 65-66.

52 Professor H.L.A. Hart describes judicial legislation as the "nightmare" view of the judiciary. See Hart, *American Jurisprudence through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 972 (1977).

53 ENVIRONMENT at 99.

54 In addition to the distance and difficulty of reaching job opportunities in the suburbs, suburban employment is often unavailable to low income or minority employees because of lack of information and the employer's fear of local resentment. See Weaver, *Housing and Associated Problems of Minorities*, in MODERNIZING URBAN LAND POLICY 49, 61 (M. Clawson ed. 1973). Weaver states: "An imposing body of literature asserts or documents that the current development of employment opportunities outside the central cities and the concurrent restriction of housing opportunities for most non-whites in the suburbs result in a significant reduction of non-white employment." *Id.* at 61.

55 Professor William Valente, a noted scholar of the local government process, states:

At present over half the SMSA [Standard Metropolitan Statistical Area] population lives in the suburbs, and by the end of this century, the majority of all Americans will reside in the suburbs. . . . The movement is not all one way. Typically the more affluent, mobile whites move to the suburbs while the aged, low income and non-white groups move to and remain in the city. . . . Thus although the black population group grew much faster than the white population in metropolitan areas between 1960-1970, the percentage of blacks residing in suburbia has little changed in recent years. The implications of such acute population disparities are all too evident in our daily life. They pose critical challenges to the legal system. . . .

Economic resources are no longer concentrated in the core city or even in its immediate suburb. They have been redistributed and deconcentrated throughout

Mandelker's sources indicate, there is no shortage of suburban, unskilled jobs.⁵⁶ Yet, without support, the author asserts that the "growth in service and government employment has more than offset the loss in industrial and retailing employment that has moved to the suburbs."⁵⁷ Does Professor Mandelker seriously suggest that government agencies, such as the EPA, are staffed by the unskilled workers who lost their jobs when industrial concerns fled to the suburbs in search of cheaper land, receptive zoning administrators, and assorted tax incentives? In short, even if Professor Mandelker's statement that losses in private, inner city employment are offset by increases in service or government employment can be supported, this fact is likely to be of little benefit to the low income, unskilled worker.

The revitalization of the inner city also probably benefits the more affluent, rather than the low income, family. The process of inner city neighborhood revitalization or "gentrification" displaces low income tenants and owners in favor of in-migrants with higher incomes sufficient to withstand the renovation cost needed to make an inner city dwelling economically viable. Professor Mandelker's comments in his well-edited volume on *Housing In America: Problems and Perspectives* demonstrate that he realizes the effects of gentrification:

Without substantial subsidies . . . , lower income households will be "assigned" to neighborhoods in which the quality of housing will be less than desirable. . . . The upfiltering of older dwellings . . . seems likely to continue. . . . It will generate conflicts among housing classes, particularly between low income and upper middle class households as they compete in the same housing market.⁵⁸

Thus, it is difficult to understand why opening up the suburbs to low income families will defeat inner city redevelopment for the middle class. If anything, the results should be precisely the opposite, since allowing low income households to relocate in the suburbs increases the supply of inner city structures available for revitalization.

Finally, purging the suburbs of exclusionary regulation should

the metropolitan region. Under new technologies the economic base for social growth widened. Housing, retail and service industries follow the suburban market. With convenient trucking and highways, more industries settle in dispersed locations. The consequent relocation of job opportunities and related housing in turn modify the tax base and service levels of each government unit.

W. VALENTE, *LOCAL GOVERNMENT LAW* 16-17 (2d ed. 1980).

56 *ENVIRONMENT* at 101 & n.11.

57 *Id.* at 81.

58 *HOUSING IN AMERICA: PROBLEMS AND PERSPECTIVES* 353 (R. Montgomery & D. Mandelker eds. 2d ed. 1979).

also increase the amount of affordable housing for low and moderate income households. This has been verified empirically by Professor Bernard Siegan's study of land use without zoning in Houston. The absence of zoning, and the artificial land scarcity zoning produces for certain uses, has resulted in increased apartment construction and lower rents.⁵⁹ Moreover, even when the resulting new construction directly benefits upper income families, an indirect benefit accrues to lower income families when families with higher incomes place existing premises on the market and move into new structures.

Professor Mandelker denigrates this "filtering process" as "a game of musical chairs"⁶⁰ and cautions that filtering will not work "unless the housing that filters down declines more rapidly in price than in quality."⁶¹ He also suggests, curiously, that the suburban housing made available "may not be better in quality than the housing they left."⁶² However, filtering has been studied extensively and found to have dramatic secondary effects which benefit low income families.⁶³ For example, one study of the Chicago housing market found that the construction of 482,000 new housing units between 1960 and 1970 resulted in "over 128,000 units [being] transferred from white to black occupancy, [and] 63,000 of the worst units in the city [being] demolished . . ."⁶⁴ Moreover, the study revealed that the increase in available housing and the resulting relocations produced a "substantial sag in demand in areas of traditional minority residence . . . [and that] by 1972, blacks and other minorities were paying less than the white majority for [like] housing . . ."⁶⁵

59 For the period 1966 to 1974, Professor Siegan estimated that Houston's rents were 15% lower than those in Dallas. B. Siegan, *Regulating The Use of Land*, in *THE INTERACTION OF ECONOMICS AND LAW* 159, 162-63 (B. Siegan ed. 1977). In 1980, a survey of apartment rentals found that Houston had the lowest rent levels and the highest vacancy rate in any of the country's most significant real estate markets. See 1 ETON, J. REAL EST. INVESTMENT 9 (Feb. - Mar. 1980).

60 ENVIRONMENT at 84.

61 *Id.*

62 *Id.*

63 See, e.g., W. GRISBY, *HOUSING MARKETS AND PUBLIC POLICY* (1963); J. LANSING, *NEW HOMES AND POOR PEOPLE* (1969).

64 Berry, *Ghetto Expansion and Single-Family Housing Prices; Chicago, 1968-72*, 3 J. URB. ECON. 397, 416 (1976).

65 *Id.* at 418. While Berry found that Chicago blacks were paying less than whites for comparable housing, other investigations have been contrary. See, e.g., Schafer, *Racial Discrimination in the Boston Housing Market*, 6 J. URB. ECON. 176 (1979); Yinger, *The Black-White Price Differential in Housing: Some Further Evidence*, 54 LAND ECON. 187 (1978). The amount paid may depend upon the size of the minority population in a given neighborhood. See J. McDONALD, *ECONOMIC ANALYSIS OF AN URBAN HOUSING MARKET* 54-61 (1979). Contrary to Professor Mandelker's assertion, however, nothing suggests that the quality of the housing

The conflict between environmental and housing interests is real; it cannot be dismissed by creating an artificial common ground based upon the procedural manner in which the issues are pursued or on a pretense, contrary to available evidence, that somehow low and moderate income families would be better off if the suburbs remained closed to them. Restrictions which preserve open space,⁶⁶ set artificial limits on growth,⁶⁷ create large minimum lot sizes,⁶⁸ exact park and other fees and place the cost of both new and existing public facilities upon the developer⁶⁹ are nothing more than exclusionary devices in environmental clothing.⁷⁰ To be concerned about the fair-

which "filters down" is less than the quality of housing which would be available to low income families if upper income construction did not occur.

66 See, e.g., *Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 447 U.S. 255 (1980). For a critical analysis of California's Open Space Land Act, see Lefcoe, *California's Land Planning Requirements: The Case for Deregulation*, 54 S. CAL. L. REV. 447 (1981).

67 See Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 430-35 (1977). Professor Ellickson states:

If demand for housing in Eden [a hypothetical suburb] is not perfectly elastic, that suburb's exclusionary devices will raise the price of both new and used housing. These price increases will reduce the surplus—i.e., impair the welfare of four distinct groups of housing consumers. The two groups worst affected (in dollar terms) will be: (1) current tenants who like Eden too much to want to move out (as they will have to pay higher rents when they renew their leases); and (2) all households that move into Eden in the future. These two groups will suffer a loss in surplus equal to the full housing price increase. The remaining groups will lose less surplus. They will consist of: (1) tenants who subsequently leave the municipality because their rents go up; and (2) potential immigrants to Eden who have decided not to buy or rent there simply because of the price increase caused by the antigrowth policies.

Id. at 402.

68 See generally NATIONAL COMMISSION ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY* 213-15 (1968).

69 See, e.g., *Associated Home Builders of The Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971). As the *Associated* case indicates, few courts recognize the implicit "double taxation." But see *West Park Ave., Inc. v. Township of Ocean*, 48 N.J. 122, 224 A.2d 1 (1966) in which the court stated:

But as to services which traditionally have been supported by general taxation, other considerations are evident. The dollar burden would likely be unequal if new homes were subjected to a charge in addition to the general tax rate. As to education, for example, the vacant land has contributed for years to the cost of existing educational facilities, and that land and the dwellings to be erected will continue to contribute with all other real property to the payments of bonds issued for the existing facilities and to the cost of renovating or replacing those facilities. Hence there would be an imbalance if new construction alone were to bear the capital cost of new schools while being also charged with the capital costs of schools serving other portions of the school district.

48 N.J. at 126-27, 224 A.2d at 3-4.

70 See Bosselman, *Can the Town of Ramapo Pass a Law to Bind the Rights of The Whole World?*,

ness to remote future generations of environmental degradation without fully recognizing the housing sacrifice which that concern requires of present generations, seems highly inequitable.

B. *Property Rights and Environmental Protection*

In light of Professor Mandelker's treatment of housing advocates, it is not surprising that he finds little merit in the compensation claims of landowners whose property values have been greatly diminished by environmental land use regulation. Professor Mandelker asserts, without substantial elaboration, that taking cases do not implement fairness values.⁷¹ In view of the substantial scholarship which the author expressly declines to consider,⁷² but which has found compensation to be central to a fair land use allocation system, the assertion is unsupportable.

In his groundbreaking work on the taking issue, Professor Michelman indicated that fairness considerations largely determine whether the opportunity costs accompanying economic regulation for the benefit of society should be imposed solely upon landowners or redistributed.⁷³ For example, Professor Michelman concluded that compensation should be paid whenever the cost of landowner demoralization, which might impede future investment and production, exceeds the cost of settling the compensation claim. Importantly, Professor Michelman recognized that fairness required compensation even though a given regulation may be deemed otherwise beneficial or efficient.⁷⁴ Others have reached similar conclusions—perhaps even the Supreme Court. Writing for four, and

1 FLA. ST. U.L. REV. 234 (1973); Blumstein, *A Prolegomenon To Growth Management and Exclusionary Zoning Issues*, 43 L. & CONTEMP. PROB. 5, 36 (1979).

71 ENVIRONMENT at 63.

72 Professor Mandelker expressly declines to consider the ethical view of the taking clause espoused by Professor Michelman with the unenlightening assertion that "it is unlikely that compensation systems are one of the basic structures of society . . ." ENVIRONMENT at 54 n.40. *Contra*, Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); see B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977); Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165 (1974); Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28 (1981); Sax, *Taking and the Police Power*, 74 YALE L.J. 36 (1964); Waite, *Governmental Power and Private Property*, 16 CATH. U.L. REV. 283 (1967).

73 Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

74 Professor Michelman states:

It follows that if, for any measure, both demoralization costs and settlement costs (whichever were chosen) would exceed efficiency gains, the measure is to be rejected; but that otherwise, since either demoralization costs or settlement costs must be paid, it is the lower of these two costs which should be paid. The compensation

possibly five, members of the Court in *San Diego Gas & Electric v. City of San Diego*,⁷⁵ Justice Brennan noted:

This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory—once there is a “taking,” compensation *must* be awarded . . . [The Just Compensation] guarantee was designed to bar the government from forcing some individuals to bear burdens which, in all fairness, should be borne by the public as a whole.⁷⁶

Justice Brennan’s opinion not only underscores the fairness concern in taking cases, but also reaffirms Professor Michelman’s observation that a given land use regulation may be found confiscatory even if it promotes efficiency or is deemed socially desirable. Modern land use text books also emphasize this general principle.⁷⁷ Nevertheless, Professor Mandelker reaches an opposite conclusion and states: “[courts] review the justification for the land-use control and uphold controls that impose an involuntary loss to accomplish an acceptable public purpose.”⁷⁸

Apart from the fairness issue, Professor Mandelker finds no reason to mitigate the wipeouts (regulatory losses) and recoup the windfalls (regulatory gains) associated with environmental, and perhaps

rule which then clearly emerges is that compensation is to be paid whenever settlement costs are lower than both demoralization costs and efficiency gains.

Id. at 1215. Demoralization costs include the dollar value necessary to offset disutilities which accrue to losers and sympathizers and the lost value of future production. Settlement costs are measured by the dollar value of time, effort and resources necessary to reach compensation settlements. Professor Michelman places his fairness test somewhat upon a utilitarian base. He states:

What we want to know, then, is whether a specific decision not to compensate is fair. By the very asking of the question we adopt the vantage point of a disappointed claimant and assume on his part a capacity (a) to appraise his treatment and calculate his advantage over a span of time (that is, he is not without patience) and (b) to view the particular decision in question as a specific manifestation of a general practice which will be applied consistently to situations involving other people.

. . . .
A decision not to compensate is not unfair as long as the disappointed claimant ought to be able to appreciate how such decisions might fit into a consistent practice which holds forth a lesser long-run risk to people like him than would any consistent practice which is naturally suggested by the opposite decision.

Id. at 1221-23.

⁷⁵ 101 S. Ct. 1287 (1981).

⁷⁶ *Id.* at 1305-06 (Brennan, J., dissenting).

⁷⁷ R. C. ELLICKSON & A. D. TARLOCK, *LAND USE CONTROLS* 98 (1981). Professor Ellickson states: “An important feature of suits involving confiscatory zoning is this: a landowner may be entitled to prevail on a claim that a zoning classification is unconstitutionally confiscatory even though the court is convinced that the classification is efficient.” *Id.*

⁷⁸ ENVIRONMENT at 15.

all, land use regulation. First, he suggests that windfalls will not necessarily equal wipeouts and that "the transaction costs of determining their incidence and levying a windfall tax are substantial."⁷⁹ In addition, Mandelker argues, the prospect of a windfall or wipeout is factored into land prices, and hence, need not concern government regulators.⁸⁰ Finally, he suggests that indifference to losses and gains in the land market may be the position of the Supreme Court based upon its *Penn Central* decision.⁸¹

Mandelker's theory appears to be an attempted refutation of Professor Hagman's comprehensive analysis of land value capture and compensation.⁸² Professor Hagman advocates windfall recapture and wipeout mitigation because he recognizes that the existing land use system is not a rationally planned, predictable system capable of reasonable valuation in land prices.⁸³ The large number of zone amendments and variances granted annually without standards or adherence to announced standards speaks for itself.⁸⁴ Professor Hagman rightly argues that the existing system is no more than a lottery, where "who gets the goodies and who gets deprived will be perceived as arbitrary and capricious."⁸⁵ Additionally, a system which has the capacity for conferring enormous windfalls and equally staggering wipeouts invites corruption and bribery, whether in the form of illegal "under the table" payments or legal campaign contributions.⁸⁶ Furthermore, it transforms the land development process into a high risk enterprise with fewer individuals willing to invest or undertake long-term, high quality projects in fear of unre-

79 *Id.* at 49.

80 *Id.* at 50-51.

81 *Id.* at 51. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

82 WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION (D. Hagman & D. Misczynski eds. 1978) [hereinafter cited as HAGMAN & MISCZYNSKI].

83 Hagman, *Windfalls for Wipeouts*, in HAGMAN & MISCZYNSKI, *supra* note 82, at 20-21.

84 See, e.g., Dukeminier & Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273 (1962); Shapiro, *The Zoning Variance Power - Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3 (1969); Note, *The Effect of Statutory Prerequisites on Decisions of Boards of Zoning Appeals*, 1 IND. LEGAL F. 398 (1968).

85 Hagman, *Windfalls for Wipeouts*, in HAGMAN & MISCZYNSKI, *supra* note 82, at 20, 21.

86 See generally J. GARDINER & T. LYMAN, DECISIONS FOR SALE: CORRUPTION AND REFORM IN LAND-USE AND BUILDING REGULATION (1978). A recently completed two-year study sponsored by the National Institute of Law Enforcement and Criminal Justice found local government corruption in land use and building regulation to be a significant problem in many areas of the United States. The study found that land use decisions were particularly susceptible to corruption because of the significant financial losses and gains imposed as a consequence of zoning. See SRI INT'L, CORRUPTION IN LAND USE AND BUILDING REGULATIONS AND AN ANALYSIS OF ZONING REFORMS: MINIMIZING THE INCENTIVE FOR CORRUPTION (Dept. of Justice, 1979).

dictable regulatory changes.⁸⁷

As to Professor Mandelker's specific objections, Professor Hagman would be the first to admit that the recapture of windfalls may be costly when the windfalls are dispersed. As part of his omnibus proposal, Professor Hagman states that "small windfalls should not be recaptured to save administrative costs . . . because it is hard to measure them very precisely."⁸⁸ Thus, Hagman suggests that windfalls and wipeouts below a flat sum or less than 10 percent of the property's base value be accumulated until they exceed a *de minimis* amount.

That a particular land use regulation may produce a greater wipeout than windfall or vice versa hardly comes as a surprise, and it suggests that the efficiency claims (i.e., purported economic benefits) for much land use regulation are overstated. Professor Hagman never assumed that these amounts would be equal.⁸⁹ Hagman proposes a comprehensive recapture of publicly and privately produced windfalls and wipeouts; the proposal is not regulation-specific as is Professor Mandelker's criticism. Therefore, an imbalance between the particular windfalls and wipeouts created by a given coastal zone regulation does not, as Mandelker proclaims, indicate that "the capture of windfall gains to compensate wipeout losses cannot solve the taking problem."⁹⁰ After all, that Peter robs Paul and wastes the money does not mean that either Peter should go unpunished or Paul uncompensated.

Professor Mandelker's use of coastal zone regulation to illustrate

87 Professor Hagman recommends that we "stop imposing great risk on landownership and its development, as if it were the most free of enterprises, and instead neutralize the risk somewhat by minimizing downside losses and socializing upside gains." Hagman, *supra* note 83, at 20, 24.

88 Hagman & Mischynski, *Recommendations*, in HAGMAN & MISCHYNSKI, *supra* note 82, at 59-60.

89 Professor Hagman remarks:

Under a rational system of land use controls, . . . [w]indfalls might roughly equal wipeouts on the theory that the price of land is largely determined by the demand for it. If land use controls prohibit a demand from finding a supply in a particular place, the demand is shunted elsewhere. . . .

However, under the "byzantine" . . . system of land use control in America, wipeouts may exceed windfalls. Developers must spend money learning the ropes and shepherding their projects through the chambers. Windfalls (which might otherwise be recaptured) are whittled away by administrative costs. Similarly, because of the bubbling cacophony of multitudinous edicts, it is unclear where the supply is. The demand goes around searching for it, the search being another high administrative cost.

Hagman, *Windfalls for Wipeouts*, in HAGMAN & MISCHYNSKI, *supra* note 82, at 20.

90 ENVIRONMENT at 49.

the "dynamic view of windfalls and wipeouts"⁹¹ and to justify society's indifference to them is ironic in view of the significant economic waste imposed by such regulation in practice. For example, in *Avco Community Developers, Inc. v. South Coast Regional Commission*,⁹² a landowner was denied a coastal permit to complete a residential development in a California coastal zone after it had installed over two million dollars in improvements in reliance upon other permits issued pursuant to zoning, subdivision and other traditional land use controls. As one scholar commented, such results leave no one better off since land is left in a partially developed state, neither environmentally nor economically viable.⁹³

Professor Mandelker inadequately deals with the question of when a right to develop "vests." He concentrates solely on losses in land value due to coastal regulation, not losses of the *Avco* variety associated with landowner improvement. By focusing upon land value losses which he maintains are "created by speculation against the coastal land-use regulation program,"⁹⁴ he is able to conclude that "[r]ational buyers in land markets should internalize the effect of land-use regulation in their pricing decisions."⁹⁵ Professor Mandelker does not reveal whether he would recognize losses where improvements are constructed prior to a change or implementation of environmental land use regulation. If environmental protection is the absolute value he suggests, perhaps landowners must come to expect—if they have not already—that a governmental agency may regulate at will and impose almost any loss it pleases.

In discussing Professor Mandelker's conclusion that landowners should not be compensated for regulatory losses, we must not lose sight of the effect a noncompensatory regulatory policy has on housing consumers and the exclusionary issues referred to previously. While the economic incidence of regulatory burdens is difficult to trace, some evidence suggests that the cost of regulation is passed on to consumers in the form of higher prices, especially where demand is relatively inelastic.⁹⁶

91 *Id.*

92 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976).

93 Hagman, *The Vesting Issue: The Rights of Fetal Development vis-a-vis The Abortions of Public Whimsey*, 7 ENVIRONMENTAL L. 519, 532 (1977).

94 ENVIRONMENT at 50, 51.

95 *Id.* at 54 & n.44.

96 See generally U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, FINAL REPORT OF THE TAX FORCE ON HOUSING COSTS 35 (May 1978). But see Misczynski, *The Question of Incidence*, in HAGMAN & MISCZYNSKI, *supra* note 82, at 127-28.

In addition, some environmental land use controls may not only be exclusionary, but also anti-environmental. For example, regulation which promotes preservation may prevent the dispersion of auto and stationary source pollution that results in net air quality benefits over concentrated development.⁹⁷ Thus, Professor George Lefcoe has concluded that the California Open Space Lands Act,⁹⁸ which requires the preparation of an open space element within a general plan, results only in making homesites with better air quality "more expensive, thus placing them even farther from the reach of people whose means are limited"⁹⁹ But pollution is another problem which Professor Mandelker sets aside to proclaim the need for absolute environmental protection. Although the author suggests that controlling environmental pollution "presents conceptual problems similar to the land-use control problems [he does] consider,"¹⁰⁰ he fails to elaborate. I suspect that the pollution problem involves equitable conflicts similar to those raised by housing advocates and landowners, whose concerns have been characterized as inferior to the subjective environmental ethic—the fundamental nature of which has not been established. I seriously doubt whether a book which leaves these equitable conflicts undiscussed and unresolved, and fosters others by advocating resource choices that impede economic productivity to the deprivation of all—but especially the less well-off—can rightly be entitled *Environment and Equity*. I vote for striking the last two words.

The votes of the Supreme Court in its recent consideration of the taking issue in *San Diego* also indicate that the Court will likely come down on the side of equity.¹⁰¹ Contrary to Professor Mandelker's representation, the Court can reasonably be construed

97 Keyes, *Channeling Metropolitan Growth: In What Direction, Toward Which End?* 43 L. & CONTEMP. PROB. 239, 247-48 (Spring 1979).

98 CAL. GOV'T CODE §§ 65560-65570 (West Supp. 1980).

99 Lefcoe, *California's Land Planning Requirements: The Case for Deregulation*, 54 S. CAL. L. REV. 447, 471-72 (1981). Pollution is thereby concentrated in areas inhabited primarily by lower income groups, decreasing the air quality enjoyed by these people.

100 ENVIRONMENT at xii.

101 While the supposed absence of a final judgment in the decision below prevented the Court from reaching a decision, Justice Brennan's dissent for himself and three members of the Court strongly favored the payment of compensation upon the finding of a regulatory taking. In addition, while Justice Rehnquist concurred in the majority opinion which found the absence of a final judgment, he stated that had there been a final judgment, he "would have little difficulty agreeing with much of what is said in the dissenting opinion of Justice Brennan." *San Diego Gas & Elec. Co. v. City of San Diego*, 101 S. Ct. 1287, 1294 (1981). See Kmiec, *Regulatory Takings: The Supreme Court Runs Out of Gas in San Diego*, 57 IND. L.J. — (1982).

as having already recognized the need for compensation for overzealous regulation in *Penn Central*. Admittedly, the Court's terminology is uncertain,¹⁰² and hardly generous to the landowner, insofar as it makes diminutions in value due to contemplated uses virtually non-compensable. Nevertheless, the decision constitutionally secures the economic viability of some existing use. In contrast, even though Professor Mandelker is not totally clear on his treatment of existing uses destroyed by environmental regulation, he appears to argue that all losses due to regulation be disregarded. A position of total noncompensation goes beyond the meager property protection supplied by the Court's compensation of reasonable "investment backed expectations."¹⁰³ In fact, it effectively repeals the just compensation clause of the fifth amendment.

III. The Conflict Between Absolute Environmental Protection and Democratic Government

Finally, a good portion of Professor Mandelker's book criticizes state constitutional or statutory enactments designed to protect the environment and the manner in which these pronouncements have been interpreted by the courts and implemented by administrative agencies.¹⁰⁴ Professor Mandelker observes:

The polycentric nature of environmental land-use controversies complicates the ability of courts and legislatures to apply environmental priorities to land-use conflicts. Policy making for polycentric controversies requires a compromise of competing values. Courts recognize that this compromise requires a policy decision best left to the legislature. Legislative bodies, in turn, avoid policymaking by decentralizing the land-use decision-making process.¹⁰⁵

This observation is well-documented by Professor Mandelker's examination of the coastal zone management process and the judicial review of environmental impact statements.

The impetus for management of the coastal zone derived from federal legislation¹⁰⁶ that established a grant program to assist states in developing and operating management programs for their land

102 Blumstein, *A Prolegomenon to Growth Management and Exclusionary Zoning Issues*, 43 L. & CONTEMP. PROB. 5, 88-89 & n.606 (1979). See also, Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28 (1981).

103 *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

104 ENVIRONMENT at 107-57.

105 *Id.* at 155-56.

106 16 U.S.C. §§ 1451-1464 (1976).

and water resources. With a federal grant, states were expected to survey coastal areas, define permitted uses in their coastal zones and identify how the state proposed to exert control over coastal land and water uses—matters which are normally regulated locally.

As Mandelker notes, the coastal act reveals the environmentalist's distrust of local land-use planning and control.¹⁰⁷ The distrust results largely from local decisionmakers' failure to give the environment an absolute priority. The coastal act was designed partially to circumvent competing local interests by requiring coastal management programs directly or indirectly enforceable on the state level.

Unfortunately for the absolutists, few states mandated specific coastal protections. Instead, state legislatures enacted coastal dependency policies, which required that any development within a coastal zone depend upon that location. While such policies might be construed strictly in favor of the environment, neither the federal act nor state guidelines mandated explicit favoritism. Consequently, the coastal dependency issue became a modified cost-benefit test, under which state and local decisionmakers conducted "a comparative evaluation of economic costs and benefits of a coastal, as compared with an inland, location."¹⁰⁸ That evaluation seldom resulted in preservation of the coast. At best, it resulted in the shifting of some coastal development inland, which may or may not be environmentally beneficial.¹⁰⁹ At worst, the evaluation resulted in a significant "dead weight" administrative cost which netted neither housing nor industry nor preservation.

Professor Mandelker also finds the congressional declaration in the National Environmental Policy Act (NEPA) that "each person should enjoy a healthful environment"¹¹⁰ to be something less than absolute environmental protection. The requirement that all major

107 ENVIRONMENT at 156.

108 *Id.* at 141.

109 Professor Hagman observes:

There may be less saving of environmental degradation than first meets the eye [associated with coastal regulation and a late vesting rule]. For example, suppose a developer was considering a coastal development but was unwilling to risk failure to vest. Demand not being reduced, the developer would shift the provision of a supply of development elsewhere. While that elsewhere would not be on the coast, it might well be on other environmentally sensitive lands—lake frontages, mountains, agricultural plains, forested areas, areas rich in natural resources that cannot then be mined.

Hagman, *The Vesting Issue: The Rights of Fetal Development vis-a-vis the Abortions of Public Whimsy*, 7 ENVIRONMENTAL L. 520, 531-32 (1977).

110 ENVIRONMENT at 107 (citing § 101(c) of the National Environmental Policy Act, 42 U.S.C. § 4331 (1976)).

federal actions significantly affecting the environment be accompanied by an environmental impact statement (EIS) originates with NEPA. However, the EIS requirement, like the coastal-dependency inquiry, is just another cost-benefit test which requires that agencies consider the environment, but not accord it priority.¹¹¹ Moreover, judicial precedent concerning the adequacy of the environmental alternatives presented by a given EIS suggests that development opponents have some burden to show that "sufficient [evidence] requires reasonable minds to inquire further."¹¹² Professor Mandelker bemoans this judicial interpretation as one which "weakens an agency's obligation to consider alternatives."¹¹³ Again, this observation is consistent with Mandelker's central thesis that environmental values are subjective and incapable of objective proof. Apparently, requiring environmental absolutists to justify their demands for prolonged administrative review of "every possible alternative, no matter how uncommon or unknown" is too "restrictive"¹¹⁴ for Professor Mandelker.

Professor Mandelker echoes these same themes in his examination of state constitutional provisions that favor the environment. Generally, state court decisions have interpreted these provisions as procedural, calling for a balancing of environmental interests with the competing concerns of housing or employment. That these constitutional provisions have been interpreted as requiring in part that "any development demonstrate a reasonable effort to reduce the environmental invasion to a minimum,"¹¹⁵ is simply not enough for an absolutist because it means that the environment is not always favored; and even when it is, it is not favored absolutely.

Not surprisingly, Professor Mandelker concludes from his study that the American "legal system does not accept the subjective environmental priorities implicit in protective environmental controls."¹¹⁶ What is surprising is his recognition that the demand for absolute environmental protection "cut[s] against the grain of Ameri-

111 *Id.* at 119.

112 *Id.* at 122 (discussing *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978) (the Supreme Court upheld the decision of the NRDC not to reopen a nuclear power plant licensing proceeding to consider an energy conservation alternative which had not been urged until the licensing process had been completed)). See generally Rogers, *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 GEO. L.J. 699 (1979).

113 ENVIRONMENT at 125.

114 *Id.* at 122.

115 *Id.* at 115.

116 *Id.* at 154.

can governmental tradition.”¹¹⁷ He acknowledges that our government is one of limited powers designed to maximize individual freedom and accommodate more than “one-dimensional values, like environmental protection, that do not enjoy full public support.”¹¹⁸ I agree totally, but find this conclusion rather curious coming from a commentator who previously was indifferent to the competing claims for employment and economic productivity, the importance of opening up the suburbs to low income families, and the regulatory losses of landowners. Suddenly, the environmentalists for Professor Mandelker become “they” not “we”. He suggests that “*they* must overcome political resistance and convince policymakers that the values *they* hold deserve the legal protection *they* claim.”¹¹⁹ This is rather like Tonto telling the Lone Ranger in the final scene, and in the face of impending attack, that he supported the Indians all along.

Well, no matter. Environmental protection is not an absolute, fundamental priority, and I seriously doubt whether Professor Mandelker’s luke-warm advocacy will make it so. In any case where social and economic claims conflict, environmental protection will be only as important as the scientific, moral, and legal arguments made in its behalf. Environmental benefits must be tangible and clearly demonstrated; they cannot be assumed to be fundamental. After all, to accord animal and plant life absolute protection would be too much to expect of a society which has yet to do the same for human life.¹²⁰

117 *Id.* at 157.

118 *Id.* at 155.

119 *Id.* at 158 (emphasis added).

120 *Roe v. Wade*, 410 U.S. 113 (1973).