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Environment and Equity: A Regulatory Challenge. By Daniel R. Mandelker

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Book Review

Environment and Equity: A Regulatory Challenge. By Daniel R. Mandelker.* New York: McGraw-Hill Book Co. 1981. Pp. 162. $24.95.

I. INTRODUCTION

As its title suggests, *Environment and Equity: A Regulatory Challenge* by Professor Daniel R. Mandelker is an examination of several issues involved in the use of the regulatory power of government to preserve environmental resources. Professor Mandelker addresses five major problems in the book. He begins by considering why marketplace allocations of the burdens and benefits created by individuals living in a society may not always be acceptable. He contends that, because the marketplace may not accommodate a sufficiently broad range of affected interests, government may properly intervene from time to time to bring about a different distribution of such burdens and benefits.[1]

When government does intervene and uses its regulatory power to restrict the use of land, several problems of fairness or equity may arise. One such problem addressed by Professor Mandelker is that of compensable takings—the point at which a regulation becomes so onerous that it may not constitutionally be imposed in the absence of some form of compensation. The other fairness problem involves the possible adverse effects a regulation may have on third parties. Using exclusionary zoning as an example,[2] Professor Mandelker demonstrates how the burdens of governmental restrictions on certain persons' behavior may also indirectly impose significant burdens on others. A zoning ordinance restricting all residential development to single family dwellings on large lots will necessarily re-

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1. D. MANDELKER, ENVIRONMENT AND EQUITY: A REGULATORY CHALLENGE 6 (1981). *See* Community Communications Co. v. City of Boulder, 102 S. Ct. 835, 848 (1982) (Rehnquist, J., dissenting) ("Competition simply does not and cannot further the interests that lie behind most social welfare legislation.").

2. D. MANDELKER, *supra* note 1, at 29-31, 79-84.

duce the availability of housing for people with modest resources.

The author also considers the limited role the courts have been willing to assume in implementing various federal and state statutes[3] and state constitutional amendments designed to protect environmental resources. Although his focus is primarily on forms of governmental intervention designed to preserve features of the natural environment, such as open space, wetlands, seashores, and wild life habitats, he also considers some aspects of the man-made environment, for example, historic and archaeological sites. He concludes that the courts have generally been disinclined to protect these resources as fully as environmentalists might have liked.[4]

Professor Mandelker devotes the final section of his book to a description of the development and implementation of the Federal Coastal Zone Management Act of 1972.[5] He also uses this material to illustrate the general preference of both Congress and state legislatures for a decentralized development of the rules and policies governing environmental preservation by delegating, with little substantive guidance, the basic lawmaking authority to courts, administrative agencies, or local government. He suggests that this legislative preference for decentralized lawmaking is a result of the highly controversial and political nature of many of the issues, the general preference in land use regulation for localized decision making, and the lack of a broad-based consensus supporting environmental resources and values.[6]

The book provides a good factual description of what courts and legislatures have been doing in the area of environmental preservation. Professor Mandelker fails, however, to identify clearly and to develop adequately the fundamental policy issues and assumptions that underlie the problems he considers. As a result, his discussions lack the in-depth critical analysis one would expect.

Two related policy issues underlie the regulatory problems raised by the book. Because people may deem a given marketplace distribution of benefits and burdens as inappropriate, the principles for deciding when and to what extent governmental

3. *E.g.*, MINN. STAT. §§ 116B.01-.13 (1977), in particular, §§ 116B.03 and 116B.04.

4. D. MANDELKER, *supra* note 1, at 108.

5. Pub. L. No. 92-583, 86 Stat. 1280; *see also* Coastal Zone Management Act Amendments of 1976, Pub. L. No. 94-370, 90 Stat. 1013.

6. D. MANDELKER, *supra* note 1, at 156-57.

regulations should be preferred over market allocations are exceedingly important. In addition, when government is used to seek a different distribution, the principles for determining which branch and level of government is best suited to that task should be clearly identified. Common to both policy issues are the assumptions that widespread participation by community members in the making of these allocative decisions is desirable, and that, in a democratic society operating under an open, competitive economic system, widespread participation can only be had by individuals casting their votes in either the marketplace or the voting booth.

II. CHOOSING THE MARKETPLACE OR GOVERNMENTAL REGULATION

Most human activities generate extended consequences that affect, or are perceived as affecting, other people—what economists refer to as externalities.[7] Such activities may relate fairly directly to participation in the marketplace itself or may be far removed from it. In either case, no one can seriously doubt the importance of the marketplace as a social institution for shifting or reallocating such burdens and benefits. Those engaged in marketplace or other activities do so, however, in light of their individual value systems. Their decisions therefore are not expected to, and do not, take full account of all these externalities.

Because of the time, effort, and other resources needed to enter into marketplace transactions, those who may feel burdened by the activities of others may not succeed in having their values recognized in the marketplace. The costs of preparing oneself to get others to recognize these values, when added to to the cost of the bargain itself, may exceed the value of any benefit that might be gained.[8] Moreover, those who feel themselves burdened by the activity of another may see no justice in the notion that, to rid themselves of the preceived burden, they must be willing to transfer some of their resources.[9] In such circumstances, people may seek to use their legal insti-

7. For an economist's perspective of the ideas discussed in this section, see G. BJORK, LIFE, LIBERTY, AND PROPERTY: THE ECONOMICS AND POLITICS OF LAND-USE PLANNING AND ENVIRONMENTAL CONTROLS 21-44 (1980).

8. The leading article on transaction costs is Coase, *The Problem of Social Cost,* 3 J. L. & ECON. 1 (1960).

9. *Cf.* Epstein, *A Theory of Strict Liability,* 2 J. LEGAL STUD. 151, 163-71 (1973) (discussing the relevance of "but for" or actual cause as an essential element of liability in tort law).

tutions to have their interests or values recognized, by urging the creation and implementation of legal rules that will result in a different distribution of perceived burdens and benefits.

In the first section of his book, Professor Mandelker appears to suggest as a basic principle that it is proper for the government to intervene if there are values involved that the marketplace fails fully to recognize because of high transaction costs.[10] That condition alone, I would suggest, is not sufficient. Simply because several neighbors might encounter high transaction costs in trying to induce another neighbor to paint his or her house a different color should not alone justify the law's intervention. High transaction costs may warrant the government's considering intervention, but other criteria or standards seem essential for deciding whether intervention should occur, and, if so, what kind. Using some basic governing principle, some legal institution must decide whether the burden complained about, and the values on which it is based, justify the countervailing burdens governmental intervention will impose on others.

Such a decision presents a cost-benefit problem. Some writers seem to suggest, though probably unintentionally, that account should be taken only of those burdens and benefits for which a price can be determined by reference to the marketplace.[11] Professor Mandelker, to his credit, recognizes that there are human values that cannot easily be monetized, but which may nonetheless deserve recognition, including some values associated with environmental resources.[12] Although he makes a fairly persuasive case as to why the marketplace alone cannot adequately protect these values,[13] he does not suggest

10. D. MANDELKER, *supra* note 1, at 5-17.

11. *See, e.g.,* Demsetz, *When Does the Rule of Liability Matter?,* 1 J. LEGAL STUD. 13, 25-28 (1972). *But see* Posner, *A Theory of Negligence,* 1 J. LEGAL STUD. 29, 46-47 (1972).

12. D. MANDELKER, *supra* note 1, at 12-14. The law does recognize values which cannot easily be monetized by reference to the marketplace. Common law courts have long awarded damages for physical pain and emotional distress. Similarly, courts have frequently used their equitable powers, as in specific performance and specific restitution cases, because the legal remedy of damages as measured by the marketplace would be inadequate.

Professor Mandelker, however, has erred in his conclusion that most environmental values cannot be monetized. Many governmental entities regularly spend public tax dollars in the marketplace to buy parks or open space for the explicit purpose of preserving such values.

13. *Id.* at 8-15. Environmental values can be monetized, and to the extent Professor Mandelker relies on the difficulty of monetizing such values as a reason for governmental intervention, he is incorrect. *See supra* note 12. To the extent that he relies on high transaction costs, he is correct. The more relevant

any clear governing principle for determining when the legal system should give environmental values priority over other social values.[14]

Developing adequate principles for deciding when government should intervene to preserve environmental resources, and whether it should do so by an exercise of the regulatory power or the power of eminent domain, is complicated by the uniqueness of the social values involved. Generally, when government intervenes, for example, through the tort or criminal law, it does so by restricting one person's freedom—imposing a burden—for the purpose of bestowing a primary benefit on another person by protecting that person's resources—his or her body or property. Further benefits are secondarily conferred on society's members by maintaining the productive capacity of the protected resources. Such environmental legislation as the Clean Air[15] and Clean Water Acts[16] share these policy objec-

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question is whether governmental intervention should take the form of a police power regulation or an action in condemnation. I believe Professor Mandelker's concern about monetizing environmental values is more a concern about what form governmental intervention should take, rather than whether governmental intervention can be justified at all. His views on the takings problem support this conclusion. *See* D. MANDELKER, supra note 1, at 47-51; *infra* note 17 and accompanying text.

14. He does suggest the general criterion of economic efficiency—the use of a cost-benefit analysis, D. MANDELKER, *supra* note 1, at 14, 15,—which he considers further in chapter 3, at 24-33. He does not, however, seem to be willing to disown entirely what he characterizes as the "absolute set of values" of environmentalists. *Id.* at 21-24. Many instances of governmental intervention can be justified under the principle that they are necessary to preserve the proper functioning of the marketplace itself, for example, the law of property, contract, antitrust, and unfair competition. *See, e.g.*, G. BJORK, *supra* note 7, at 22-23, 25. Much of tort law can be justified under the principle that the ordinary expectations on which people count in living their everyday lives should be protected because the result is a more efficient use of limited resources. Klemme, *The Enterprise Liability of Torts,* 47 U. COLO. L. REV. 153, 180-82, 215-22 (1976). No comparable governing principle, however, is explicitly proposed by Professor Mandelker for deciding when governmental intervention may be warranted to protect environmental values.

It can be argued that conducting a direct cost-benefit analysis in each case, as Professor Mandelker seems to suggest, provides an adequate standard. Interestingly, courts seldom, if ever, are willing to use a cost-benefit analysis for that purpose. Instead, courts prefer to use some other standard which will usually be easier to apply in particular cases, while also achieving in most, if not all cases, an economically efficient solution. For example, in negligence law, reference is made to the reasonably prudent person. In nuisance law, references are typically made to the character of the locality and to the sensibilities of ordinary persons. *See, e.g.,* Morgan v. High Penn Oil Co., 238 N.C. 185, 194-95, 77 S.E.2d 682, 689 (1953). The elaborate, and generally futile, treatment of nuisance law by the RESTATEMENT (SECOND) OF TORTS §§ 821A-831 (1979), which essentially calls for a direct cost-benefit analysis, suggests the wisdom of the courts' abjuring this approach.

15. Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963); Clean Air Act

tives. Government intervenes to keep one person from using his or her person or property in a way that reduces other people's freedom or capacity to use their resources. Legislation designed to preserve historic sites or natural environmental features, however, has a different goal. Government intervenes in these areas because a person who seeks to change the use of his or her property will take away a perceived benefit previously enjoyed in that property by neighbors or the public at large. There is, for example, a difference between a landowner who operates a factory which, because of its noise and smoke, impairs the neighbors' enjoyment of their land, and another landowner who, by building houses, will destroy the scenic value the land previously provided the neighbors. Professor Mandelker acknowledges this distinction in his discussion of the takings problem, but rejects it as not significant.[17]

Amendments of 1966, Pub. L. No. 89-675, 80 Stat. 954; Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676; Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685.

16. Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246; Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566.

17. D. MANDELKER, *supra* note 1, at 40-44. Professor Joseph Sax thought the distinction significant enough to revise substantially his thinking about the takings problem. *Compare* Sax, *Takings, Private Property and Public Rights*, 81 YALE L. J. 149, 150 n.5 (1971) *with* Sax, *Takings and the Police Power*, 74 YALE L. J. 36 (1964). As an economist, Bjork views the distinction as critical. G. BJORK, *supra* note 7, at 111-122.

Professor Mandelker suggests that the takings problem can be solved by looking at events over a period of time. D. MANDELKER, *supra* note 1, at 47-51. He argues that as persons buy and sell real property they "internalize" costs arising from land use regulations, including regulations designed to preserve environmental resources:

> Landowners suffer losses in regulated land markets only when they speculate against the land-use regulation system. Speculation is voluntary, and losses voluntarily incurred should not provide reason to find a taking. . . . Speculators are not legitimately entitled to the "expectation" that the system will reward speculation by modifying land-use restrictions to allow development on their land.

Id. at 51.

Under this dubious analysis, every land use regulation apparently would in time become immune from any claim of unconstitutional taking. This analysis also overlooks, as did the Supreme Court's opinion in Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), claims that the withdrawal of a previously enjoyed benefit is a burden against which the law can protect without payment of just compensation. How should the law of takings apply if a person buys property at a price based on a proposed plan of redevelopment, which at the time would have been legal, but, as a result of subsequent legislation, is prohibited or severely curtailed? It is one thing if, because of a change in policy, such curtailment is reasonably thought to be necessary to protect, or protect better, the physical health or safety of others. *See, e.g.,* Goldblatt v. Town of Hempstead, 369 U.S. 590, 595 (1962); Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 82-83 (1946). It is quite another to curtail redevelopment because others now find certain values in the historic or natural features of the land which they would

III. CHOOSING LEGAL INSTITUTIONS TO CREATE RULES OF GOVERNMENTAL INTERVENTION

A. SEPARATION OF POWERS

The diverse and uncertain attitudes of many state courts toward the concept of separation of powers is well-illustrated by Professor Mandelker's discussion of exclusionary zoning and his discussion of judicial implementation of environmental preservation legislation. Some courts have been willing to engage in substantial lawmaking when dealing with problems of exclusionary zoning.[18] In contrast, most courts have declined to assume a similar role when asked to implement statutory or constitutional provisions designed to preserve environmental resources.

Professor Mandelker's several references to separation of powers are almost always oblique.[19] He does not clearly articulate the significance of the concept and the values it represents in his discussion of the role that courts may properly assume in developing legal rules and policies. Sometimes he indicates that the legislature should perform these tasks.[20] At other times he appears to contend that courts should play the dominant role,[21] arguing[22] that courts should assume a prominent lawmaking role if there is or may be any "law to apply."[23]

Suitable deference to the doctrine of separation of powers on the part of courts is, however, essential to the preservation

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like to see preserved for their beneficial enjoyment. I would suggest that Professor Sax's original analysis, which would require compensation in these circumstances, provides the soundest reasoning. Sax, *Takings and the Police Power*, 74 YALE L. J. 36, 67-76 (1964); *see also* G. BJORK, *supra* note 7, at 112, 122 (argument for compensation).

18. *See* Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975); Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970).

19. D. MANDELKER, *supra* note 1, at 2, 55, 72, 126.

20. D. MANDELKER, *supra* note 1, at 5; *see also id.* at 133-49.

21. *Id.* at 2; *see also id.* at 55-74, 107-26.

22. "[J]udicial policymaking, in environmental and exclusionary zoning cases finds support in the moral force of statutory and constitutional mandates." *Id.* at 55. "The broad and open-ended command of the equal-protection clause arguably provides a moral force to judicial decisions that invalidate exclusionary zoning. Environmental legislation implements environmental values that likewise support judicial policymaking in environmental cases." *Id.* at 72-73.

23. *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410, 413 (1971). The fact that a court may engage in judicial review because there is law to be applied does not mean a court may disregard statutory (nor implicit constitutional) limitations on the scope of such review. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978).

of a democratic, representative form of government. Too much reliance on courts for the development of legal policy is likely to sap both the electorate and their representatives of their basic confidence in the political system. Professor Mandelker's book would have been significantly enhanced had he been willing to offer an analysis that might help to identify those lawmaking decisions so clearly legislative or executive that a court may not make them without acting unconstitutionally.[24]

Professor Mandelker does adopt[25] Professor Lon Fuller's concept of polycentric decision making[26] and suggests that it may be useful when trying to distinguish legislative from judicial decisions. He does not, however, explain the basis for this suggestion. Nonetheless, he frequently implies that the more polycentric a problem is, the more likely a court will view it as being within the province of the legislature or the executive, rather than the judiciary.[27] In such a case, he suggests, a court will either refuse to resolve the problem, or seek to avoid addressing it directly by using various procedural devices[28] that can result in a decision being made by default.

The polycentric nature of lawmaking does provide some clues as to why, if government is going to intervene, it is generally preferable to have the legislature rather than the judiciary create the legal rules. Legislatures are simply better equipped to make such decisions. Whenever a court makes legal rules, there is the problem of the opportunity to be heard and to participate in the lawmaking process. This problem arises because the primary function of courts is not to create rules of law, but rather to receive evidence and, based on that evidence, to determine specific historic facts as they relate to the parties

24. For example, *compare* Eastside Baptist Church v. Klein, 175 Colo. 168, 478 P.2d 549 (1971) (court used independent judgment in reviewing determination of board of zoning adjustment that "accessory use" includes storage of church buses in parking lot) *with* Monte Vista Professional Bldg. v. City of Monte Vista, 35 Colo. App. 235, 531 P.2d 400 (1975) (court used only an "abuse of discretion" standard in reviewing definition of hardship established by same board under authority to grant variances).

25. D. MANDELKER, *supra* note 1, at 64-65.

26. Fuller, *The Forms and Limits of Adjudication,* 92 HARV. L. REV. 353, 394-404 (1978).

A polycentric problem, for Professor Fuller, is one in which there are many factors—burdens and benefits—which must be weighed and balanced in the decision making process. Because the factors are interrelated, the ultimate decision involves the establishment of a hierarchy of values. The ideal balance will inevitably be somewhat uncertain and intuitive, and will depend upon the individual value system of the decision maker. *Id.*

27. D. MANDELKER, *supra* note 1, at 55, 63-67, 85, 108, 111, 117, 155-56.

28. *Id.* at 68-71, 109.

before the court.[29] In turn, these findings will determine whether the sanction provided by a relevant rule of law is to be applied. Because the truth or falsity of the claimed historic facts will determine the allocation of burdens and benefits among the litigants, the law of parties—standing, real party in interest, and intervention—generally limits participation in the lawsuit to those persons in whose favor and against whom the sanction provided by the rule of law may be imposed. Even though other people, such as family members of a losing plaintiff or defendant, are also likely to incur an extended benefit or burden, courts usually assume that the litigants' protection of their interests will be sufficient to protect any legitimate interests of such other people.

Traditionally, of course, courts have frequently decided questions of law as part of the adjudicative process. Under our system of stare decisis, judge-made law is likely to affect the behavior of people who are not parties to the suit; their behavior will in turn create a further extended series of burdens and benefits for additional nonparties. Any person admitted to a lawsuit as a litigant, therefore, necessarily stands as a representative of others—all those who may feel some benefit or burden, depending not only on how the historic facts may be determined, but, more importantly, on the content of any new rule of law the court may create.

The law of standing generally assumes that any person with a sufficiently strong interest in the disputed historic facts will also advocate the creation of the best rule of law, should any question of law arise.[30] Unfortunately, judicial law creation, like the marketplace, tends to be overly self-centered,[31]

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29. *See* Boomer v. Atlantic Cement Co., 26 N.Y. 2d 219, 222, 257 N.E.2d 870, 871, 309 N.Y.S.2d 312, 314 (1970).

> A court performs its essential function when it decides the rights of parties before it. Its decision of private controversies may sometimes greatly affect public issues. Large questions of law are often resolved by the manner in which private litigation is decided. But this is normally incident to the court's main function to settle controversy. It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court.

Id.

30. Professor Mandelker's discussion of standing, D. MANDELKER, *supra* note 1, at 59-63, is largely descriptive, though he hints at the relationship between standing and separation of powers. *See id.* at 62.

31. Under the view of standing most recently announced by the United States Supreme Court, a litigant's interest must be strongly self-centered. Valley Forge Christian College v. Americans United For Separation of Church and State, 102 S. Ct. 752 (1982). The Court also details how strongly the doctrines of

because not all those who may incur an externality from a decision will have had a meaningful opportunity to participate. The parties to a lawsuit have an interest in influencing the creation of any new law to accord with their value systems, which may not be congruous with the values of other people who will be affected.[32] Although judges creating a rule of law can consider the interests of others, they are likely to consider only those burdens, benefits, and values that the parties call to the court's attention and include in their arguments.

In addition, courts often lack the fact finding capacities essential to the creation of sound rules of law. The rules of judicial fact finding are designed for determining the truth or falsity of historic facts as they relate to the particular parties. When the facts to be determined are what Professor Kenneth Davis has characterized as "legislative facts,"[33] the formal fact finding rules of the courts are rarely, if ever, appropriate. Indeed, the courts themselves seldom use them. The formal rules of evidence are more likely to hinder than to enhance the accuracy of factual determinations about the consequences of a proposed rule of law.

Fair, intelligent law creation requires conscientious lawmakers to seek a clear, complete understanding of all the extended burdens and benefits that may flow from their decisions. How those burdens and benefits will be perceived and be assessed will depend on the decision makers' value systems, their perceptions of how the real world functions, and the extent to which those who may be affected have been able and willing to participate in the decision making process. In these terms, when compared to the legislative process, judicial lawmaking is generally more closed, less democratic, more costly, and less thorough.[34]

These basic differences between judicial and legislative

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standing are grounded, by way of the "cases or controversies" requirement, in the concept of separation of powers.

32. In cases involving environmental litigation and exclusionary zoning, Professor Mandelker acknowledges the extraordinarily broad range of interests a court must consider. D. MANDELKER, *supra* note 1, at 65.

33. "Legislative facts do not usually concern the immediate parties [unlike adjudicative, i.e., historic facts] but are general facts which help the tribunal decide questions of law and policy and discretion." 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 12.3 (2d ed. 1978). Professor Mandelker refers to these as "social facts." D. MANDELKER, *supra* note 1, at 67-68.

34. "Courts do not have the capability for gathering information that legislatures possess. . . . Even third parties may not present all the relevant information. They represent a point of view and are likely to offer expert evidence that supports their advocacy position." D. MANDELKER, *supra* note 1, at 68.

lawmaking are at the heart of the separation of powers problem, and help to explain some of Professor Mandelker's principle observations, for example, why in environmental litigation the courts have been reluctant to take a more prominent role developing more precise, concrete rules of decision.[35] These differences also explain why many courts feel uncomfortable trying to decide environmental preservation cases on an individual basis, using a cost-benefit analysis.[36] The values at stake in these cases are too uncertain, the consequences too diffuse, and the procedural rules for developing essential information too inadequate for any court not to recognize, implicitly or explicitly, the risks of acting unconstitutionally.

B. Decentralized Decision Making

In the final section of Professor Mandelker's book, he describes[37] the development and implementation of the Federal Coastal Zoning Management Act of 1972.[38] He laments Congress's choice of a decentralized model for developing the more specific legal policies and rules required for implementing the Act.[39] Because the legislative process is the preferred mode of lawmaking in a democratic representative form of government, Professor Mandelker's criticism raises two additional separation of powers questions—what justifies the delegation of so much lawmaking authority downward from the national to the local level, and why is so much reliance placed on the development of subordinate legal rules through adjudicative processes?

Questions involving the allocation of lawmaking powers among the national, state, and local governments involve an assessment of the extended burdens and benefits that may or may not result from whatever developments are permitted along our nation's seacoasts. Coastal management necessarily affects interests that can fairly be characterized as local, regional, and national. Moreover, people are likely to regard the benefits and burdens of regulation differently, depending on

35. *Id.* at 126, 155-56.

36. *See, e.g.,* Union Oil Co. v. Oppen, 501 F.2d 558, 569-70 (9th Cir. 1974); SST, Inc. v. City of Minneapolis, 288 N.W.2d 225, 231 (Minn. 1979).

37. D. Mandelker, *supra* note 1, at 133-52.

38. *See supra* note 5.

39. D. Mandelker, *supra* note 1, at 147-48, 156. This decentralized lawmaking process resulted from Congress's delegation of substantial lawmaking authority to state and local governments, limiting that authority by only a few, very broadly worded policy guidelines.

whether they live in the immediate coastal area, another part of a coastal state, or an inland state. To the extent that legal decision making processes should seek to accommodate this broad spectrum of interests, some congressional delegation of lawmaking authority is obviously warranted.

Decentralized decision making also requires a choice between the two basic methods of law creation—legislative or adjudicative, whether the adjudication is to be judicial or administrative.[40] This choice involves an evaluation of whether the advantages of creating law on a case-by-case, after-the-fact basis justify the dilution of democratic representative governmental values which is likely to occur. Reliance on an adjudicative process for creating specific rules reduces the opportunities for participation in the decision making process by those who will incur extended burdens and benefits. Such reliance also increases the risk of arbitrary decisions in particular cases. In addition, the retroactive nature of adjudicative lawmaking may result in economic waste, because, had the relevant law been known in advance, resources, both public and private, might have been committed differently. On the other hand, adjudicative lawmaking may permit greater flexibility, on an ongoing basis, in the shaping and reshaping of the legal rules. Such reshaping, occurring in the context of more concrete facts, may also be done with a clearer understanding of the impacts any particular rule may have.

Whatever may be the legitimate reasons for a legislature's choice of a decentralized system for the development of subordinate legal rules, Professor Mandelker is doubtlessly correct in his conclusion[41] that this choice should not be made simply to avoid the political controversy that the legislative creation of such rules might otherwise generate. Delegation of broad lawmaking authority to others for this reason clearly cuts against the basic values of democratic representative government.

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40. There are also many policy considerations involved in deciding whether to choose courts or administrative agencies as the primary adjudicators. For an early and now classic discussion of some of these considerations, see LANDIS, THE ADMINISTRATIVE PROCESS 6-46, 89-98 (1938). Two common differences between courts and administrative adjudicators are: (1) an administrative adjudicator usually has an independent staff to assist in developing "legislative facts," and (2) the opportunities and procedures for interested persons to participate are usually greater and less formal in administrative proceedings. For a discussion strongly favoring legislative-like lawmaking, see 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 6.13-6.15 (2d ed. 1978).

41. D. MANDELKER, *supra* note 1, at 133, 136, 155, 157.

IV. CONCLUSION

Professor Mandelker's book is essentially about how we ought to determine which of our institutions should make the decisions that will distribute the burdens and benefits created by our living together as a society. The book thus deals with some of the most fundamental ideas about society, government, and the legal system. Because Professor Mandelker addresses such fundamental concepts, one would have expected a more thoughtful articulation and analysis of these ideas, particularly as they relate to, or are illustrated by, the five major problems he discusses. His descriptions of the problems themselves and how they have been dealt with are informative. His explanations of their treatment, however, only hint at the significance of the underlying principles and processes of government involved. Professor Mandelker's book would have served its purposes better had he given those principles and processes more consideration. Nonetheless, his book does convey to the reader some sense of the complexity of the issues and problems he does discuss, and the difficulty of identifying principled bases for resolving them.

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