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## Economic Theory and Environmental Law

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# ECONOMIC THEORY AND ENVIRONMENTAL LAW

*Mark Sagoff\**

Many economists take the view that environmental problems are economic problems.<sup>1</sup> They believe that market failure causes these problems: private and social costs diverge; profit-maximizing decisions, therefore, are socially inefficient.<sup>2</sup> Economists would correct this market failure by requiring private decision makers to internalize externalities, that is, to make the price of goods reflect all the economic and social costs of producing them, including the pollution costs. When this is done, they argue, pollution will be controlled, endangered species will be saved, and pristine areas will be preserved, but only to the extent that the benefits therefrom exceed the costs.<sup>3</sup> Any increase in environmental protection from an "optimal"

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1. See, e.g., Ruff, *The Economic Common Sense of Pollution*, in MICROECONOMICS: SELECTED READINGS 498 (2d ed. E. Mansfield ed. 1975). Ruff states this thesis clearly: "We are going to make little real progress in solving the problem of pollution until we recognize it for what, primarily, it is: an economic problem, which must be understood in economic terms." *Id.* See generally W. BAUMOL & W. OATES, *THE THEORY OF ENVIRONMENTAL POLICY* (1975); J. DALES, *POLLUTION, PROPERTY, AND PRICES* (1968); A. FREEMAN, R. HAVEMAN & A. KNEESE, *THE ECONOMICS OF ENVIRONMENTAL POLICY* (1973). For a good annotated bibliography of the recent literature, see Fisher & Peterson, *The Environment in Economics: A Survey*, 14 J. ECON. LIT. 1 (1976).

2. Ruff, *supra* note 1, at 501. I shall not discuss here the familiar objection that economic marginal analysis cannot usefully apply to systems as complex as those found in nature. This objection has two sides. First, a marginal increment in pollution does not necessarily result in a corresponding marginal injury to the environment. For instance, a river may be able to absorb a continuous low-level flow of pollutants, as well as small increases in that flow. But there may be a tipping point beyond which the river can absorb no more pollution. Economic analysis, therefore, must respond to ecological considerations.

Second, we cannot always trace unwanted natural consequences to particular causes. Cancer, for example, has many causes, including smoking, stress, genetic disposition, pollution, and other conditions. To ask "how much" cancer is caused by "environmental" factors and "how much" by "genetic" factors may be to ask a meaningless or confused question — like asking "how much" of the area of a football field is due to its width and "how much" results from its length. For a discussion of this problem, see Lewontin, *The Analysis of Variance and the Analysis of Causes*, in THE I.Q. CONTROVERSY 179 (N. Block & G. Dworkin eds. 1976).

3. William Baxter has advocated this approach:

The first and most fundamental step toward solution of our environmental problems is a clear recognition that our objective is not pure air or water but rather some optimal state

level "would cost more than it is worth," while any decrease would "reduce benefits more than it would save in costs."<sup>4</sup>

Although this economic approach purports to allow us to choose the best among available policies, in fact it makes economic efficiency our only goal. Economic efficiency has traditionally been understood to require the maximum satisfaction of the preferences that markets reveal.<sup>5</sup> These are typically self-regarding or self-interested preferences, that is, preferences that reflect a person's idea of his or her individual welfare. Preferences of this sort may be contrasted with preferences that express what the individual believes is in the public interest or in the interest of a group or community to which he or she belongs.<sup>6</sup> Political activity is supposed, in theory at least, to provide a vehicle for airing, criticizing, and settling upon interests or opinions of this group-regarding kind.<sup>7</sup>

The search for economic efficiency might take us to the best public policies if we were a nation of individualists competing each for his or her own welfare with no regard for or conception of the collective good. Then an efficient market might lead us to satisfy as well as possible all of our interests. In such a situation, government might best be conceived as a prophylactic on markets, and public policies might be considered irrational if they could not be construed as reasonable responses to market failures.<sup>8</sup> But we are not simply a group of consumers, nor are we bent on satisfying only self-regarding preferences. Many of us advocate ideals and have a vision of what we should do or be like as a nation. And we would sacrifice some of our private interests for those public ends.

of pollution. That step immediately suggests the question: How do we define and attain the level that will yield the maximum possible amount of satisfaction?

W. BAXTER, *PEOPLE OR PENGUINS: THE CASE FOR OPTIMAL POLLUTION* 8-9 (1974).

4. See Ruff, *supra* note 1, at 500-01.

5. See, e.g., Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. LEGAL STUD. 103 (1979). Posner equates efficiency with wealth-maximization: "The only kind of preference that counts in a system of wealth maximization is thus one that is backed up by money — in other words, that is registered in a market." *Id.* at 119.

6. For an excellent presentation of this distinction, see Maass, *Benefit-Cost Analysis: Its Relevance to Public Investment Decisions*, 80 Q.J. ECON. 208, 213-19 (1966). See generally M. HOLLIS, *MODELS OF MAN* (1977); Benn, *Rationality and Political Behaviour*, in *RATIONALITY AND THE SOCIAL SCIENCES* 246 (G. Mortimore & S. Benn eds. 1976); Benn, *The Problematic Rationality of Political Participation*, in *PHILOSOPHY, POLITICS, AND SOCIETY* 291 (5th Ser. P. Laslett & J. Fishkin eds. 1979); Goodin, *Cross-Cutting Cleavages and Social Conflict*, 5 BRIT. J. POL. SCI. 516 (1975).

7. For a discussion of this theory and its analysis, see Banfield & Wilson, *Public-Regardingness as a Value Premise in Voting Behavior*, 58 AM. POL. SCI. REV. 876 (1964); Goodin & Roberts, *The Ethical Voter*, 69 AM. POL. SCI. REV. 926 (1975).

8. This appears to be the position of economists and philosophers in the classical liberal tradition. See note 96 *infra*.

There may be individuals who believe that our nation as a whole should dedicate itself entirely to the interests that individuals pursue as individuals.<sup>9</sup> This belief comes into question, however, when we distinguish what people want for themselves and what they think is best for the community.<sup>10</sup> Why should we believe that the right policy goal is the one that satisfies only the self-interested preferences of consumers? Why should we not take into account the community-regarding values that individuals seek through the political process as well?<sup>11</sup>

In Part I of this essay, I argue that environmental legislation, at least during the past twenty years, fails to make economic "common sense,"<sup>12</sup> that is, it fails to maximize the satisfaction of consumer de-

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9. Libertarians take this position. Friedrich Hayek, for example, writes that the activities of government are "part of its effort to provide a favorable framework for individual decisions; they supply means which individuals can use for their own purposes." F. HAYEK, *THE CONSTITUTION OF LIBERTY* 223 (1960). Individuals are free, of course, to engage in altruistic or other-regarding activities as individuals; for the libertarian, however, the state is not to be the vehicle for satisfying these public wants. Liberals in the classical tradition take this view. See M. FRIEDMAN, *CAPITALISM AND FREEDOM* 12 (1962) ("[A] major aim of the liberal is to leave the ethical problem to the individual to wrestle with."). Isaiah Berlin has observed:

Most modern liberals, at their most consistent, want a situation in which as many individuals as possible can realize as many of their ends as possible, without assessment of the value of these ends as such, save in so far as they may frustrate the purposes of others. They wish the frontiers between individuals or groups of men to be drawn solely with a view to preventing collisions between human purposes, all of which must be considered to be equally ultimate, uncriticizable ends in themselves.

I. BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 153 n.1 (1969). Barry has a good simile for this. "The state, in the liberal view, must be capable of fulfilling the same self-effacing function as a policeman on point-duty, who facilitates the motorists' getting to their several destinations without bumping into one another but does not have any power to influence those destinations." B. BARRY, *POLITICAL ARGUMENT* 74 (1965) (footnote omitted). Barry notes that this is not the same as *laissez-faire*. "The only thing on which it insists is that the state should be conceived as satisfying wants arising independently of its influence." *Id.* at 74 n.2.

10. Economists sometimes blur this with the distinction between efficiency goals and equality goals in public policy. See, e.g., A. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADEOFF* (1975). But it is plain that we pursue many goals in our role as citizens, e.g., the preservation of wilderness for its own sake, that have nothing to do with redistributive norms.

11. One answer to this question may be fear that the majority, guided by some moral fanaticism, will exercise tyranny over the minority. See generally H. ARENDT, *THE HUMAN CONDITION* (1958); K. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* (1966); L. STRAUSS, *NATURAL RIGHT AND HISTORY* (1953); L. STRAUSS, *ON TYRANNY* (1968). The threat of tyranny, however, does not justify the conclusion that the majority ought to have no power, through legislation, to make policy based on moral belief. It requires only that this power be constrained by a system of civil and political rights. For an important criticism of Popper and Arendt, see Holmes, *Aristippus In and Out of Athens*, 73 *AM. POL. SCI. REV.* 113 (1979). John Rawls has written on the extent to which justice gives political rights to the majority to make law based upon the principles that it thinks best and the extent to which justice would limit this power by assigning civil rights to individuals and minorities. See J. RAWLS, *A THEORY OF JUSTICE* 195-257, 356-62 (1971); Rawls, *Kantian Constructivism in Moral Theory*, 77 *J. PHIL.* 515, 519 (1980).

12. I derive this term from Ruff, *supra* note 1.

mand over the long run. Laws like the Endangered Species Act<sup>13</sup> flout this conception of economic efficiency. This is how most Americans would have it: most Americans reject the notion that the natural environment should be made over to serve the wants of the self-interested consumer. Part II describes the way that economists have attempted to take account of citizen or community-regarding preferences. I suggest that they do this primarily by giving these convictions and beliefs shadow or surrogate prices as if they were market externalities. In Part II, I argue briefly that this shadow pricing of political, moral, and cultural convictions vitiates cost-benefit analysis. Shadow pricing allows the analyst to justify virtually any policy by assigning the appropriate prices to the opinions of the political constituency that favors it. There is, then, no popular public policy that cannot then be justified on "economic" grounds.

In Part III of this essay, I extend my criticism of cost-benefit analysis to show that it confuses statements of principle or opinion with wants and interests of the kind that are properly revealed in and satisfied by markets. I argue that it is a mistake to treat views or convictions that merit the dignity of a hearing as if they were only wants or interests deserving of a price. I conclude that attempts to base environmental law on economic theory must fail.

## I

Anyone who believes that government ought to be primarily interested in correcting market failure must find puzzling much of our environmental legislation. Environmentalist groups, not famous for their economic "common sense," successfully backed much of this legislation in the 1970s. It is not surprising, therefore, that environmental protection goes beyond the mere correction of market deficiencies. Congress designed the Clean Air<sup>14</sup> and Clean Water Acts<sup>15</sup> to improve the quality of our air and water. It passed the Endangered Species Act<sup>16</sup> to protect threatened species, even if the eco-

13. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified at 16 U.S.C. §§ 1531-1543 (1976)), *as amended by* Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (codified at 16 U.S.C. §§ 1531-43 (Supp. III 1979)).

14. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676. The 1970 amendments so drastically changed the 1967 Air Quality Act, Pub. L. No. 90-148, 84 Stat. 485, that they are usually called the 1970 Clean Air Act. The Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, made further changes, and recodified the entire statute at 42 U.S.C. §§ 7401-7642 (Supp. II 1978).

15. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified at 33 U.S.C. §§ 1251-1375 (Supp. II 1978)).

16. *See* note 13 *supra*.

conomic costs of protection outweigh the benefits.<sup>17</sup> Similarly, the Occupational Safety and Health Act<sup>18</sup> seeks to make the workplace safe and healthful, a goal that is not always consistent with market efficiency. These laws attempt to correct perceived environmental, rather than economic, problems. Congress did not limit itself to providing economically optimal solutions.<sup>19</sup>

Consider, for example, the 1977 Clean Air Act Amendments, which designated all national parks and wilderness areas as Class I lands to protect them from significant deterioration of air quality.<sup>20</sup> This insistence upon preserving air quality in pristine areas does not rest upon an economic calculation. It is justified, rather, by a national sense of responsibility. What kind of nation would turn magnificent wilderness areas into polluted fens in order to make energy cheaper and therefore easier to waste? Questions like this have

17. See *TVA v. Hill*, 437 U.S. 153, 184 (1978).

18. 29 U.S.C. §§ 651-678 (1976 & Supp. III 1979).

19. In this Part, I discuss the economic implications of existing legislation under traditional economic doctrine. A few examples indicate that this legislation seeks to do much more than merely to correct market failure and to implement cost-beneficial programs. Sections 211(c)(2)(A) and (B) of the Clean Air Act authorize the Environmental Protection Agency to prohibit or regulate any additive that endangers public health after the agency has considered "other technologically or economically feasible means of achieving emission standards. . . ." This may be contrasted with the prohibition of additives that impair emission control devices, which is permitted only after consideration of cost-beneficiality. 42 U.S.C. § 7545(c)(2)(A)-(B) (Supp. III 1979). For a relevant historical view of air pollution control legislation, see J. DAVIES, *THE POLITICS OF POLLUTION* (1970); and THE RALPH NADER STUDY GROUP REPORT ON AIR POLLUTION, *VANISHING AIR* (1970).

Similarly, § 6(b)(5) of the Occupational Safety and Health Act, 29 U.S.C. § 655(b)(5) (1976), which governs standards for toxic substances, stipulates: "The Secretary . . . shall set the standard which most adequately assures, to the extent feasible, . . . that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the . . . [regulated toxic substance] for the period of his working life." Because "feasible" means something different than "efficient," Congress may not have intended that the agency set only standards that meet traditional cost-benefit tests. This matter has been litigated in important recent cases, including *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607 (1980) (plurality opinion), *affg. sub nom.*, *American Petroleum Inst. v. OSHA*, 581 F.2d 493 (5th Cir. 1978); and *American Textile Mfgs. Inst. v. Bingham*, 617 F.2d 636 (D.C. Cir. 1979), *affd. sub nom.*, *American Textile Mfgs. Inst., Inc. v. Donovan*, 101 S. Ct. 2478 (1981).

The judiciary has generally been receptive to legislation that is not justifiable in simple economic cost-benefit terms. For example, the Sixth Circuit, in *Hill v. TVA*, 549 F.2d 1064 (6th Cir. 1977), *affd.*, 437 U.S. 153 (1978) (which concerned the Tellico Dam and the snail darter), specifically rejected an interest-balancing approach in applications of the Endangered Species Act. The court concluded that "the welfare of an endangered species may weigh more heavily upon the public conscience, as expressed by the final will of Congress, than the writeoff of those millions of dollars already expended for Tellico . . ." 549 F.2d at 1074. The court added: "Economic exigencies . . . do not grant courts a license to rewrite a statute no matter how desirable the purpose or result might be." 549 F.2d at 1074 (quoting *West Virginia Div. of Izaak Walton League, Inc. v. Butz*, 522 F.2d 945, 955 (4th Cir. 1975)). The Supreme Court affirmed that Congress may enact environmental legislation for purposes other than to make markets efficient. *TVA v. Hill*, 437 U.S. 153, 187-88 (1978).

20. 42 U.S.C. § 7472 (Supp. II 1978).

led many Americans to believe that the preservation of wilderness from pollution is what national dignity and self-respect minimally require. This belief has little to do with economic "common sense." Those of us who approve of the amended Clean Air Act are not necessarily likely to use the wilderness areas that these laws protect. We are more likely to consume the energy that would be produced by polluting these lands. Cost-benefit analysis, insofar as it reflects what consumers buy rather than what citizens respect, would lead to a policy directly opposed to the Act.

The Federal Water Pollution Control Act Amendments of 1972<sup>21</sup> are similarly unresponsive to economic "common sense." These amendments required all industries to install the "best practicable [pollution] control technology currently available" by 1977.<sup>22</sup> By 1983, industries must install "the best available technology economically achievable."<sup>23</sup> The best technology that is economically *achievable* is likely to be considerably more expensive than the technology that is economically *efficient*. The law, therefore, will force industry to spend much more to prevent pollution than it would cost society as a whole to endure it. The amendments may require industry to invest millions in pollution control equipment merely to provide a few thousand dollars' worth of clean water. These requirements cannot be squared, in any ordinary way, with a market approach to sound regulatory policy.<sup>24</sup> They call for standards that are *not* economically efficient, standards that cannot be justified in terms of satisfaction of aggregate consumer demand.

One reason for these laws is that Americans have moral convictions about the environment that have nothing to do with economic "common sense." A majority of Americans strongly prefer environmental laws that are not economically efficient.<sup>25</sup> The Endangered Species Act remains popular, even though people must recognize

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21. Pub. L. No. 92-500 §§ 1-13, 86 Stat. 816 (1972).

22. 33 U.S.C. § 1311(b)(1)(A) (1976).

23. 33 U.S.C. § 1311(b)(2)(A) (1976).

24. See McKinnon, *The Federal Water Pollution Control Act — Industrial Challenges to Effluent Limitations*, 7 B.C. ENVTL. AFF. L. REV. 545 (1979).

25. If survey answers are any indication, most Americans believe that we ought not to trade environmental goals for economic ones. About half of the respondents in a 1980 National Opinion Research Center survey said that we are spending "too little" on environmental problems; only 15% said "too much." National Opinion Research Center, University of Chicago, 1980 survey, reported in U.S. COUNCIL ON ENVIRONMENTAL QUALITY, PUBLIC OPINION ON NATIONAL ENVIRONMENTAL ISSUES 2-3 (1980) [hereinafter cited as PUBLIC OPINION ON ENVIRONMENTAL ISSUES]. A plurality of respondents to a major Resources for the Future poll thought that environmental protection is too important to *consider* costs. Given three choices, 42% of those who answered felt that: "Protecting the environment is *so important* that requirements and standards cannot be too high, and continuing improvement must be made *regard-*

that the benefits of preserving Lange's metalmark,<sup>26</sup> the snail darter, or the furbish lousewort may not equal the costs.<sup>27</sup> We choose to save the metalmark to prove to ourselves that we are not motivated solely by economic self-interest. Rather, we act upon moral values and a sense of national responsibility to the land that we inhabit.

Our environmental laws illustrate that we are governed by legislatures, not by markets. There are currently before the courts a variety of cases in which industry has requested relief from economically burdensome regulations promulgated by administrative agencies.<sup>28</sup> Industry argues that regulations imposing costs far in excess of their benefits are unreasonable, and that courts interpreting these regulations should consider economic factors.<sup>29</sup> That benefits exceed costs, however, is not a constitutional requirement for congressional regulation of commerce. A legislative majority voted for the Clean

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less of cost." *Id.* at 3 (emphasis original). The results from this poll also appear in *RESOURCES*, Sept.-Nov. 1978, at 1.

These responses are typical. One question, used three times by the National Opinion Research Center between 1975 and 1978, asked: "Do you think that *now* it is more important to pay higher prices to protect the environment, or to pay lower prices but have more air and water pollution?" *PUBLIC OPINION ON ENVIRONMENTAL ISSUES*, *supra*, at 9, 11 (emphasis original). The percentage of people who were willing to pay higher prices for environmental protection was consistently about three times the percentage who "wanted to pay lower prices but have more air and water pollution." *Id.* at 11.

Harris polls have reached similar results. *See id.* at 4. One poll, conducted in October 1979, asked, "Would you enforce the toughest environmental standards possible, even if they increased the cost of things to both business and the consumer, or would you be satisfied with a somewhat lower level of environmental standards if this turned out to be less costly?" In reply, 45% chose the "toughest environmental standards possible," 36% chose "somewhat lower standards," and 12% replied "it depends." *Id.* at 11.

26. A few acres near Los Angeles, known as the Antioch dunes, are the habitat of several species of butterflies, including the endangered and beautiful Lange's metalmark, whose range has otherwise been replaced by golf courses, outdoor cinemas, and highways. U.S. Fish and Wildlife Service, *Antioch Dunes Acquired for Butterfly and Two Plant Species*, 5 *ENDANGERED SPECIES TECH. BULL.* 1, 6 (1980). The dunes are also a place where people can go on a Saturday afternoon to tear around on their dune buggies or dirt bikes. The economic "common sense" way to handle this situation would be to ask whether bikers will pay more to use the dunes than butterfly fanciers will pay to preserve them. The Endangered Species Act, however, prevented the Fish and Wildlife Service from asking any such question. *TVA v. Hill*, 437 U.S. 153, 187-88 (1978). The Service simply acquired the dunes to protect the metalmark. U.S. Fish and Wildlife Service, *supra*, at 6.

27. Respondents to one public opinion poll approved the Endangered Species Act by a 7-2 margin. *See PUBLIC OPINION ON ENVIRONMENTAL ISSUES*, *supra* note 25, at 18.

28. In the most famous of these cases, *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607 (1980) (plurality opinion), the Supreme Court narrowly set aside a benzene standard promulgated by OSHA. Other cases in which industry requested relief from regulation on cost-benefit grounds include *American Iron & Steel Inst. v. OSHA*, 577 F.2d 825 (3d Cir. 1978); *Aqua Slide 'N' Dive Corp. v. CPSC*, 569 F.2d 831 (5th Cir. 1978); *Reserve Mining Co. v. EPA*, 514 F.2d 492 (8th Cir. 1975); *Society of Plastics Indus., Inc. v. OSHA*, 509 F.2d 1301 (2d Cir.), *cert. denied*, 421 U.S. 922 (1975); *Industrial Union Dept. v. Hodgson*, 499 F.2d 467 (D.C. Cir. 1974).

29. The argument by industry lawyers that courts should consider economic costs when interpreting environmental legislation seems innocent enough, but it may represent a "foot in the door" strategy. The lawyer who argues that a cost-benefit analysis should *influence* judicial



Water and Clean Air Acts, the Endangered Species Act, and other environmental legislation. Courts should enforce regulations that conform to the statutes, even if consumers as a result have to pay more than they receive in benefits.<sup>30</sup>

To say that legislatures, not markets, govern and ought to govern us is, perhaps, to state the obvious. It may seem, however, to miss the economists' point. Some economists may believe that the legislature should act only as a prophylactic on consumer markets, for example, by taxing or creating markets in externalities.<sup>31</sup> Yet it is also possible for economists to argue that the political process is needed to elicit values that individuals cannot reveal in market transactions.<sup>32</sup> Such an economist may suggest that policy analysis could justify — and Congress should enact — environmental laws that maximize benefits for individuals in their role as consumers and in their role as citizens. Economists might then assist the legislature by assigning prices to the convictions, ideals, opinions, or arguments that citizens present in political forums and other nonmarket contexts. We cannot assume that cost-benefit analysis is irrelevant to community-regarding preferences. We may, indeed, have to use economic techniques in order to take into account opinions of this sort.<sup>33</sup>

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decisions, on winning that point in one case, may argue that it should be *dispositive* in the next.

The question is whether economic methods, such as cost-benefit analysis, should help to decide, for example, what is "feasible" under § 6(b)(5) of the Occupational Safety and Health Act or what is "reasonable" under the Federal Environmental Pesticide Control Act. See generally Berger & Riskin, *Economic and Technological Feasibility in Regulating Toxic Substances under the Occupational Safety and Health Act*, 7 *ECOLOGY L.Q.* 285 (1978); Spector, *Regulation of Pesticides by the Environmental Protection Agency*, 5 *ECOLOGY L.Q.* 233 (1976). An economically inefficient law is not necessarily an irrational one. See Bice, *Rationality Analysis in Constitutional Law*, 65 *MINN. L. REV.* 1 (1980); Delgado, *Active Rationality in Judicial Review*, 64 *MINN. L. REV.* 467 (1980).

30. See *L. TRIBE, AMERICAN CONSTITUTIONAL LAW* 450-55 (1978). Four Supreme Court Justices accepted such an argument in defense of OSHA's benzene standard in *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607 (1980) (plurality opinion). Justice Marshall, with whom three Justices joined, wrote in dissent:

If the statutory language and legislative intent are plain, the judicial inquiry is at an end. Under our jurisprudence, it is presumed the ill-considered or unwise legislation will be corrected through the democratic process; a court is not permitted to distort a statute's meaning in order to make it conform with the Justice's own views of sound policy. 448 U.S. at 688 (Marshall, J., dissenting).

31. This is the standard approach. See note 1 *supra*.

32. See, e.g., A. DASGUPTA & D. PEARCE, *COST-BENEFIT ANALYSIS* 139 (1972).

33. Arthur Maass writes: "Some day, I am confident, we shall be able to use institutions that elicit community oriented responses to measure all factors in a complex objective function — efficiency, income distribution, and others." Maass, *supra* note 6, at 217. Maass then envisions the possibility that policy analysts someday will be able to balance our willingness to pay for efficiency against our willingness to pay for equality and other (including environmental) nonefficiency goals. This is the strongest presentation of the view against which I argue in the

Although economic approaches to public policy may purport to weigh both consumer and citizen values,<sup>34</sup> we may, as citizens, believe that certain public values or collective goals (*e.g.*, that an innocent person not be convicted) supersede the values that we pursue as self-seeking individuals (*e.g.*, security from crime).<sup>35</sup> Moreover, we might decide to sacrifice economic optimality for cleaner air and water. Once legislatures, responding to political pressure, have made this choice, is it defensible for economists to insist that our policymaking process include the very consumer values that we have decided to sacrifice?<sup>36</sup> Shall economic analysts, rather than legislatures, determine the balance to be struck between our preferences as consumers and our opinions as citizens?<sup>37</sup> To ask the ques-

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third part of this Article. For a summary of the literature supporting this approach, see J. ROTHENBERG, *THE MEASUREMENT OF SOCIAL WELFARE* 296-97 (1961).

34. Robert Goodin provides the following illustration of the difficulty of balancing "public" and "private" wants.

One of the most compelling reasons for the individual to discount future costs and benefits relative to present ones is that, come the time, he may not be alive to experience them. How heavily he should discount depends upon how far they are in the future and, of course, on his own life expectancy. . . . From a purely individual point of view, he would be foolish not to discount future payoffs in this way. But risk-of-death discount rates have no relevance whatsoever for social decision-making. . . . Although individuals are mortal, society is not.

Goodin, *Laundering Preferences*, in *FOUNDATIONS OF SOCIAL CHOICE THEORY* (J. Elster ed.) (publication forthcoming). This example suggests either that social planners must disregard individuals' time preferences (and thus reject consumer sovereignty), or that the individuals themselves must put aside personal preferences and adopt a group perspective. There seems to be no way to combine or balance the two separate discount rates.

35. But this has a darker side. The group-regarding preferences of a "moral" majority may be held to outweigh the self-regarding preferences of individuals, for example, in the matter of the regulation of pornography. When are group-regarding preferences tied to a legitimate ideal and when are they merely meddling in the affairs of others? When can a group ideal legitimately override individual preference? When, in other words, may society legitimately prevent transactions that parties assent to and that violate no one's rights? For a classic statement of this problem, see Sen, *The Impossibility of a Paretian Liberal*, 78 *J. POL. ECON.* 152 (1970). For a review of the responding literature, see Sen, *Liberty, Unanimity and Rights*, 43 *ECONOMICA* (n.s.) 217 (1976). For an excellent rebuttal of Sen that describes the grounds for the legitimate assertion of group-regarding or moral over individual-regarding or consumer preferences, see Barry, *Lady Chatterly's Lover and Doctor Fischer's Bomb Party: Liberalism, Pareto Optimality and the Problem of Objectionable Preferences*, in *FOUNDATIONS OF SOCIAL CHOICE THEORY* (J. Elster ed.) (publication forthcoming).

36. President Reagan has, at least in part, adopted this economic "common sense" approach to regulation. See note 111 *infra*.

37. The question is whether we should base environmental policy, at least in part, on ideals that people hold and are willing to defend rather than solely on the preferences that they reveal in markets. These ideals may represent universal principles — principles that individuals attribute to themselves as Americans or as members of some other moral community. This is logically independent of what they prefer as consumers. Well-known statements of environmental ideals or ideology include S. BRUBAKER, *TO LIVE ON EARTH: MAN AND HIS ENVIRONMENT IN PERSPECTIVE* (1972); L. CALDWELL, *ENVIRONMENT: A CHALLENGE FOR MODERN SOCIETY* (1970); J. MCPHEE, *ENCOUNTERS WITH THE ARCHDRUID* (1971); W. OPHULS, *ECOLOGY AND THE POLITICS OF SCARCITY* (1977); *THE ECOLOGICAL CONSCIENCE: VALUES FOR SURVIVAL* (R. Disch ed. 1970); Ashby, *Towards an Environmental Ethic*, 262 *NA-*

tion in this fashion is to answer it. Before we draw any final conclusions, we should examine more closely the decision-making apparatus that the economists advocate. Part II attempts such an examination.

## II

Economists understand, of course, that environmental legislation may be founded on different values than consumers reveal in the marketplace. They recognize the importance of "public" as well as "private" wants.<sup>38</sup> Related distinctions are sometimes drawn between "ideal-regarding" and "want-regarding" preferences,<sup>39</sup> and between "external" and "personal" preferences.<sup>40</sup> In *The Theory of Public Finance*, Richard Musgrave observed that individuals are social creatures who depend "in their preferences and actions on their social environments, and their relations to others."<sup>41</sup> People rarely make choices merely for themselves, as though they were in a Robinson Crusoe setting; rather, "all sorts of social motivations enter, be it with regard to private or to public wants."<sup>42</sup> Musgrave concluded:

A person may favor expenditures for courts or for education, not only because they will improve his safety, increase his learning, give the pleasure of dealing with more educated neighbors, or because he expects them to think well of him if he appears socially minded; he may favor them simply because he feels that he should contribute to the good life of others.<sup>43</sup>

What Musgrave misses is this: it is not the individual but the situation — or the way that a question is put — that determines whether public or private wants enter materially into his or her re-

TURE 84 (1976); Boulding, *Commons and Community: The Idea of a Public*, in *MANAGING THE COMMONS* (G. Hardin & J. Baden eds. 1977).

38. See, e.g., Arrow, *Public and Private Values*, in *HUMAN VALUES AND ECONOMIC POLICY* 3 (S. Hook ed. 1967); Marglin, *The Social Rate of Discount and the Optimal Rate of Investment*, 77 Q.J. ECON. 94, 98 (1963).

39. B. BARRY, *supra* note 9, at 71-72, 81-83, 94-95, 287, 297-98.

40. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 234, 275 (1977). Dworkin's notion of "external" preference seems to include "public" wants or what I have called citizen or community-regarding preferences. Thus, in excluding external preferences from those that the policymaker should take into account, Dworkin seems to limit the role of government to that of policing consumer markets, to make them fair and, as a possible result, efficient. For discussion of Dworkin's view of external preference, see Raz, *Professor Dworkin's Theory of Rights*, 26 POL. STUD. 123, 131-32 (1978). Raz makes the point that the *content* of an external preference, rather than the mere fact that it is external or other-regarding, makes it worthy or unworthy of public consideration. Thus the question whether group-regarding preferences should or should not override self-regarding preferences, *see* note 6 *supra*, seems to depend on their substance rather than their form.

41. R. MUSGRAVE, *THE THEORY OF PUBLIC FINANCE* 11 (1959).

42. *Id.*

43. *Id.* at 11-12.

sponse. Does the individual act in a political context, for example, by answering a survey or casting a vote? If so, he or she is likely to express or reveal citizen preferences. If it is a market situation instead, then he or she will probably choose as a consumer. The role that the individual plays depends upon the way that the stage is set.<sup>44</sup> The question, then, is how can a neutral balance be struck between values revealed in market and in nonmarket transactions?

Since people usually find themselves making consumer choices, the preferences that they are likely to express will be self-regarding rather than group-regarding. An individual may buy a vacation home even if he or she disapproves of the vacation home industry because it destroys wilderness.<sup>45</sup> What we do as consumers — the choices that we make and may feel constrained to make within markets — may dismay us as citizens. How can we avoid these citizen “costs” unless we vote against our consumer interests? That we may reject consumer sovereignty in our role as citizens does not mean that all economic approaches to public policy are futile. It only implies that economists must develop a convincing way to take into account citizen “costs” or “externalities” (if that is what they are).

Economists typically accomplish this by assigning prices to public wants or citizen preferences.<sup>46</sup> These are swept together with “merit wants,”<sup>47</sup> and “ideal-regarding” preferences (which include ethical principles)<sup>48</sup> to form what economists generally refer to as “fragile,” “soft,” or “intangible” variables.<sup>49</sup> Once they are priced,

44. “An individual’s response depends, then, on the institutional environment in which the question is asked.” Maass, *supra* note 6, at 216.

45. See, e.g., Heller, *The Importance of Normative Decision-Making: The Limitations of Legal Economics as a Basis for a Liberal Jurisprudence — As Illustrated by the Regulation of Vacation Homes Development*, 1976 WIS. L. REV. 385, 399.

46. An easier way to do this — by insisting that an individual who has conflicting private and public preferences is irrational — merely begs the question. It does not seem irrational for a person to vote and speak his conscience but shop his self-interest. See J. MEADE, *THE THEORY OF ECONOMIC EXTERNALITIES* 51-52 (1973) (“In my view the ideal society would be one in which each citizen developed a real split personality, acting selfishly in the market place and altruistically at the ballot box.”).

47. For a discussion of merit wants in relation to conflicts between economic and political institutions of choice, see A. WILDAVSKY, *SPEAKING TRUTH TO POWER: THE ART AND CRAFT OF POLICY MAKING* 155-83 (1979). Wildavsky argues from premises similar to mine to the conclusion that “better a flawed economics than a bogus politics.” *Id.* at 156.

48. See B. BARRY, *supra* note 9.

49. By pricing these ethical concerns, cost-benefit analysis can favor the result reached in the political arena. “Soft” or “intangible” externalities function as fudge factors that are helpful in making cost-benefit analysis do political work. “So called intangibles like recreation values were credited with increasingly large shares of the benefits, thus representing a ‘finagle’ factor that could be enlarged almost at will to provide justification.” Wildavsky, *Aesthetic Power or the Triumph of the Sensitive Minority Over the Vulgar Mass: A Political Analysis of the New Economics*, 96 DAEDALUS 1115, 1116 (1967). See B. ACKERMAN, S. ROSE-ACKERMAN, J. SAWYER, JR. & D. HENDERSON, *THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY*

these values are integrated with ordinary self-interested consumer wants on a single social preference-schedule.<sup>50</sup>

Thus, economists may ask what you are willing to pay for the knowledge that your nation preserves beautiful environments and rare species.<sup>51</sup> What is it worth to you to have a clear conscience

141-42 (1974). The authors point out that "although a citizen may never himself engage in outdoor activities, he may well be willing to sacrifice a substantial amount of money simply to give himself the satisfaction of knowing that nature is preserved." *Id.* at 141. They caution, however, that "a rigorous assessment of the amount of money that 'naturalists' are willing to sacrifice to avoid personal pain at the thought of nature ravaged could easily elude the economist researcher." *Id.*

Of course, cost-benefit analysts could (but do not) price the views of the anti-environmental lobby. For a sense of these "intangibles" or anti-environmentalist "moralisms," see B. FRIEDEN, *THE ENVIRONMENTAL PROTECTION HUSTLE* (1979). For a discussion of the way that economists may compare "intangibles" by the measuring rod of money, see E. MISHAN, *COST-BENEFIT ANALYSIS* 406-08 (1976).

50. See N. COOMBER & A. BISWAS, *EVALUATION OF ENVIRONMENTAL INTANGIBLES* (1973); ELECTRIC POWER INSTITUTE, *PROCEEDINGS OF A WORKSHOP ON THE MEASURE OF INTANGIBLE ENVIRONMENTAL IMPACTS* (1977); A. FREEMAN, *THE BENEFITS OF ENVIRONMENTAL IMPROVEMENT* 85-107 (1979); D. SAVAGE, M. BURKE, J. COUPE, T. DUSCHESNEAU, D. WIHRY & J. WILSON, *THE ECONOMICS OF ENVIRONMENTAL IMPROVEMENT* 119-41 (1974); Brookshire, Ives & Schulze, *The Valuation of Aesthetic Preferences*, 3 J. ENVTL. ECON. & MANAGEMENT 325 (1976); McKean, *The Use of Shadow Prices*, in *PROBLEMS IN PUBLIC EXPENDITURE ANALYSIS* (S. Chase ed. 1968); Smith, *The Treatment of Intangibles in Cost-Benefit Analysis*, 4 ENVTL. CONTROL NEWSLETTER no. 5 (May 7, 1976).

Advocates of economic "common sense" could ignore these external or group-regarding preferences altogether. This approach is typified by Dworkin, *Liberalism*, in *PUBLIC AND PRIVATE MORALITY* 113, 134 (S. Hampshire ed. 1978). This is a consequence of his liberal program of advocating that government make decisions in a value-neutral way, by ridding its processes of any conception of the good life or of the values that enter that life. *Id.* at 134. This doctrine leaves environmental quality at the mercy of what Dworkin describes as a "self-fueling and irreversible" consumer economy. *Id.* at 141-42. Dworkin is uncomfortable with this result, and tries to avert it by arguing that we may protect parts of the environment to preserve the moral opportunities of future generations. *Id.* This result seems to sacrifice the neutrality that Dworkin claims to value, but since I have commented elsewhere on this problem, see Sagoff, *Efficiency, Equality, and the Environment* (unpublished manuscript) (on file with the *Michigan Law Review*), I shall not do so here.

Gerhard Colm offers a second suggestion. He argues that economists should accept the fact that a consumer, in market transactions, acts upon a different preference-schedule than the one that motivates him in political action and expression. G. COLM, *The Theory of Public Expenditures*, in *ESSAYS IN PUBLIC FINANCE AND FISCAL POLICY* 32-33 (1955). See R. MUSGRAVE, *supra* note 41, at 87-89. For an economist to concede this fact, however, is problematic, because terms like "efficiency" and "Pareto optimality" lose their meanings. See Marglin, *supra* note 38. Economic "common sense" requires that we solve problems so as to maximize the satisfaction of preferences over the long run. But if an individual has not one but two or more preference-maps that lead him to respond differently in market and nonmarket situations, we would not know what economic "common sense" recommends. Colm seems happy with this result, since he adopts a "common will," rather than an "aggregate interest," analysis of the public good. See Colm, *The Public Interest: Essential Key to Public Policy*, in *NOMOS V: THE PUBLIC INTEREST* 11 (C. Friedrich ed. 1962). It cannot be tolerated, however, by anyone who would preserve the conceptual foundations of normative economics. (Since I do not place myself in that group, I make this last point merely for academic reasons.)

51. The effort to "shadow" price "soft" externalities may best be understood as an attempt to save free-market economic theory from the objection that it leads to polluted rivers, congested highways, stinking air, and commercial blight. Economists have problems meeting this challenge because, even if all of the "tangible" externalities are internalized, market forces may still produce environmental exploitation that is morally and aesthetically perverse. Econ-

about these matters, insofar as you think of yourself as a responsible member of the national community? They may determine, by aggregating the individual amounts, that even the metalmark and the lousewort have considerable shadow prices.<sup>52</sup> In this way, economists argue that they have found a value-neutral mechanism that takes into account all of our values, and indicates the optimal decision.<sup>53</sup>

Economists have used this method<sup>54</sup> to justify seemingly ineffi-

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omists must demonstrate to their critics that this result is as distasteful to them economically as it is to us aesthetically: they must find a market failure. The tangible effects of commercial blight — for example, effects on health — may not be bad enough to demonstrate market failure; the “intangible” spillovers, however, may be sufficient.

By accounting for these “intangible” spillovers, economists can show that “perfect” competition produces environments of which right-thinking environmentalists would approve. In this vein, Wildavsky concluded:

If present modes of economic justification are used, there is no way of preserving the basic values . . . [economists as citizens] hold as users of the natural environment. To have personal values done in by professional values is no fun at all. Hence, a “new economics” has emerged to get around the old. If the old economics will not let you have what you know is right, it follows that a new economics is evidently needed. The term *new economics of natural resources* is used to designate an emerging trend and permits economists to avoid direct confrontation with political problems by bringing in aesthetic factors to make economic analysis come out “right.”

Wildavsky, *supra* note 49, at 1117-18 (emphasis original).

52. See, e.g., G. CALABRESI & P. BOBBITT, TRAGIC CHOICES 32-33, 86 (1978); Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111-12 (1972).

53. At this point we may ask how economists know when markets fail. They may easily identify market failure where there are physical spillover effects, such as pollution. Economists, however, do not always think in terms of causal chains; instead, they speculate about anything that an individual might pay to avoid. Thus the paradigm of market failure has changed from the physical spillover to the transaction cost. See Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960). While theorists before Coase spoke of a “trade-off” between efficiency and equality or justice, see, e.g., R. MUSGRAVE, *supra* note 41, it is more fashionable, after Coase, to think of injustice as a cost primarily to uninvolved third parties who suffer from mere knowledge that some wrong has been done. I have taken this idea from Duncan Kennedy, who pointed out that the conceptual shift from spillovers to transaction costs led theorists such as Heller and Calabresi to regard moral judgments as market externalities. See Kennedy, *Two Phases of the Fetishism of Commodities* (unpublished manuscript) (on file with the *Michigan Law Review*).

54. It becomes all too easy to show that a decision is “optimal.” The problem is that any outcome — market or nonmarket — might be shown to be “efficient” by an able economist schooled in the ideas of free riders, fragile values, and transaction costs. See, e.g., Markovits, *The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications*, 89 HARV. L. REV. 1815, 1833 (1976); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165 (1967).

The economist has an important and arguable thesis to defend — that fair and efficient markets reveal and balance our preferences in the best possible way. Markets, under certain constraints and conditions, then, are democratic institutions. It is all too easy to turn this thesis from an arguable empirical proposition, having limits and needing qualification, into an untestable metaphysical truism. As far as I can tell, any law may be justified as a rational response to a market failure. If a constituency exists for a law, many people support it. The rest is easy. An economist needs only to identify a “moral” externality, talk about “free rider” problems, and then say that the benefits of the legislation exceed the costs. The sort of “nonsense on stilts” that leads some people to see every ethical act and every emotion as an exter-

cient environmental legislation.<sup>55</sup> In 1975, the Environmental Protection Agency, implementing the Clean Air Act,<sup>56</sup> directed the states to "prevent significant deterioration" in areas where air quality exceeds national secondary standards.<sup>57</sup> The regulation, in other words, seeks to keep clean air clean. The "prevention of significant deterioration" (PSD) doctrine may appeal to us on aesthetic or on ethical grounds,<sup>58</sup> but its goal potentially conflicts with plans to locate a network of power plants in the Southwest, where both clean air and coal are abundant. Because PSD ignores many economic facts, the EPA's regulations appear to be inconsistent with economic "common sense." In a recent article, "An Experiment on the Economic Value of Visibility," three University of Wyoming economists attempt to explain and justify the PSD requirements in economic terms.<sup>59</sup> "Aesthetics," the authors said, "will play a major role. The PSD regulations amount to formal governmental admission that aesthetics, at least as embodied in atmospheric visibility, is a 'good' that

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nality has led Self to remark, wisely, that "[e]conomic measurement can only plausibly be extended to externalities at all in cases where the existence of a market can be predicated as possible and desirable in principle, and where its conditions can be specified." P. SELF, ECONOCRATS AND THE POLICY PROCESS: THE POLITICS AND PHILOSOPHY OF COST-BENEFIT ANALYSIS 47 (1975). See generally Kelman, *Cost-Benefit Analysis: An Ethical Critique*, REGULATION, Jan.-Feb. 1981, at 33.

55. See note 51 *supra*. The cost-benefit approach to public policy differs from the market approach. The market approach regulates only to price gross spillover effects where these physically affect health and property; thus even a regulated market may be insensitive to what people think and feel about decisions, when they are not otherwise affected by them. See A. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970). Markets, in other words, allow people to "enter" and "exit," but deny them a "voice." To correct for the fact that markets are not and cannot be political institutions, economists do cost-benefit analyses to bring their recommendations more in line with politically acceptable decisions. They would then impose this decision on markets to make them reach the "right" outcome. Thus, while economic theorists begin by saying that the outcome of a free and fair market is the "correct" outcome, they end by determining independently the "right" outcome, and arguing that regulation is appropriate to correct market "failures" that prevent the realization of that result.

56. See note 14 *supra*.

57. The air quality standards and reference methods were first published on April 30, 1971, 42 C.F.R. § 410 (1971) (recodified at 40 C.F.R. § 50 (1980)).

58. For the importance of aesthetic goals in Clean Air Act implementation, see *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972), *affid. sub nom. by an equally divided court per curiam*, *Fri v. Sierra Club*, 412 U.S. 541 (1973). This decision prompted the PSD regulations.

59. Rowe, d'Arge & Brookshire, *An Experiment on the Economic Value of Visibility*, 7 J. ENVTL. ECON. & MANAGEMENT 1 (1980). For other studies using a similar approach, see, e.g., J. HAMMACK & G. BROWN, WATERFOWL AND WETLANDS: TOWARD BIOECONOMIC ANALYSIS (1974); Bowen, *The interpretation of voting in the allocation of economic resources*, 58 Q.J. ECON. 27 (1943), reprinted in READINGS IN WELFARE ECONOMICS 115 (J. Arrow & T. Scitovsky eds. 1969); Brookshire, Ives & Schultze, *supra* note 50; Kurz, *Experimental Approach to the Determination of the Demand for Public Goods*, 3 J. PUB. ECON. 329 (1974); Portnoy, *Voting, Cost-Benefit Analysis and Water Pollution Policy*, in COST-BENEFIT ANALYSIS AND WATER POLLUTION POLICY 293 (H. Peskin & G. Seskin eds. 1975); Randall, Ives & Eastman, *Bidding Games for Evaluation of Aesthetic Environmental Improvement*, 1 J. ENVTL. ECON. & MANAGEMENT 132 (1974).

might have a positive value.”<sup>60</sup>

In order to put a price on aesthetic preferences for visibility, the authors showed a number of individuals photographs of scenes of the Southwest.<sup>61</sup> In some of the pictures, the visibility was better than in others. They then asked the participants how much they would pay to preserve the visibility portrayed in the clearer photographs. The answers allowed the economists to establish a surrogate market in which they could price aesthetic benefits.<sup>62</sup>

Other researchers could modify the Wyoming economists' strategy to determine the economic value of other aesthetic and moral benefits that currently have no fair market price.<sup>63</sup> In an instructive article on the burgeoning second-home and leisure-community industry, for example, Thomas Heller notes that commercial development of wilderness and shoreland areas produces many economic benefits. “It is to be expected,” he observes, “that landowners, laborers, development firms, suppliers of capital, and businesses which service leisure communities would benefit from development.”<sup>64</sup> Yet many Americans oppose the transformation of our most beautiful and expressive landscapes into trailer parks and Shangri-las. They base their opposition, which is sometimes fierce, not on an interest in using the areas in question but on a belief that certain areas should be preserved for their own sake. As Heller notes:

An important element of the demand for preservation, nowhere manifested in market prices, may derive less from its instrumental utility than from its symbolic meaning. For some, a serious loss of well-being at stake in the development of second homes results from a broadly held commitment to the normative position that nature is a source of value not because it is used but because it continues to exist.<sup>65</sup>

Supporters of this “normative” position argue that we ought to value

60. Rowe, d'Arge & Brookshire, *supra* note 59, at 1.

61. Rowe, d'Arge & Brookshire reject the idea that economists cannot measure intangibles such as aesthetic values:

Economists generally have shied away from attempting to quantify aesthetic phenomena because they are usually defined as intangible. However, the perspective that aesthetic phenomena are unquantifiable employing economic analysis may be unduly pessimistic. Beauty, or aesthetic phenomena, given that some physical measure is available which is perceivable with human senses, should be measurable in economic terms. Further, PSD regulations indirectly necessitate quantification.

*Id.* at 2.

62. *Id.* at 5.

63. See, e.g., Cicchetti, Freeman, Haveman & Knetsch, *On the Economics of Mass Demonstrations: A Case Study of the November 1969 March on Washington*, 61 AM. ECON. REV. 719 (1971). Since I have criticized this and similar cost-benefit analyses elsewhere, see Sagoff, *The Ethical Basis of Cost-Benefit Analysis* (unpublished manuscript) (on file with the *Michigan Law Review*), I shall not repeat myself here.

64. Heller, *supra* note 45, at 399.

65. *Id.* at 405 (footnote omitted).



magnificent environments as ends in themselves, rather than trade them "at the margin" as economic theory might insist.

Economists must reconcile this "normative" position with the economic approach. The validity of this approach rests on the idea that it allows policymakers to consider all the costs and benefits of a proposed course of action. It may be difficult to price such sentiments as Heller described; yet it need not lie beyond the sophisticated techniques of cost-benefit analysis. The problem is that no market exists to price the "intangible" or "symbolic-moralistic" utility that wilderness areas provide.<sup>66</sup> A full assessment of the costs of development, however, must take into account the reduction in this noninstrumental utility, which may be regarded as an externality of commercial exploitation.

The economist's solution is to internalize the externality by giving preservation benefits and other noninstrumental uses a fair market price. Heller suggests that we determine how much preservationists will pay for an "increase in the industry output of preservation services."<sup>67</sup> This would measure the economic surplus that preservationist policies produce. That surplus represents the "difference between what preservationists would be willing to pay and what they do pay for the preservation use of the resources."<sup>68</sup> This surplus could then be balanced, together with the other costs, against the benefits of vacation home development.<sup>69</sup>

The outcome of such a cost-benefit analysis will depend upon which views the analyst deems worthy of pricing.<sup>70</sup> If the analyst is an environmentalist, he or she may give the citizen preferences of environmentalists a high price; an economist working for industry may set a lower price. Other technical problems arise. How can the analyst tell whether an individual speaks the truth in response to a questionnaire when the individual knows that his response is likely

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66. *Id.*

67. *Id.* at 399.

68. *Id.* at 404 (footnote omitted).

69. See note 49 *supra*. Also, consider the following example. How much would the individual environmentalist pay for the satisfaction or peace of mind he finds in the knowledge that pelicans are protected, and that he has helped to protect them? Suppose the average environmentalist would pay one or two dollars to preserve pelicans. When you multiply this by the millions and millions of Americans who would pay that much, you come out with a large sum. This kind of economic reckoning might go a long way to justify even such seemingly diseconomic laws as the Endangered Species Act.

70. Shall the economist price "adaptive" preferences, that is, preferences inspired by advertising or otherwise foisted onto the individual rather than actively chosen by him? See Elster, *Utilitarianism and the Genesis of Wants*, in *BEYOND UTILITARIANISM* (A. Sen. & B. Williams eds.) (publication forthcoming); Peston, *Changing Utility Functions*, in *ESSAYS IN MATHEMATICAL ECONOMICS* 233 (M. Shubik ed. 1967).

to influence public policy? It would make more sense for the individual to overstate his willingness to pay for a policy that he approves since he will not be required actually to pay that much money.<sup>71</sup> Likewise, the individual may lie on a questionnaire because it threatens his or her "cherished illusion" that elected officials and not bureaucrats should make public policy.<sup>72</sup> These and other theoretical problems vex efforts to extend cost-benefit analysis beyond values for which markets exist and are appropriate.<sup>73</sup>

Cost-benefit analysis, nevertheless, may play a useful role in supplementing or informing political decision making.<sup>74</sup> Some economists go one step further, however, and suggest that their method<sup>75</sup> provides a better framework for decision making than can be found within the political process.<sup>76</sup> These economists argue that cost-benefit analysis provides a better measure of both our "private" and "public" wants than does political argument. The political process, they argue, is less precise and less able to take into account all of our relevant desires. Some economists may suggest, then, that they are

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71. Heller argues that the nonconsumption consumer surplus might be considerable, although he concedes that problems may arise in "the regulatory agency's attempt to discover a surrogate measure of the value of each of the components of preservation surplus." Heller, *supra* note 45, at 408. One might wonder, for example, whether support for legislation is a true indication of the consumer surplus or of willingness to pay. This is a difficult question, yet Heller finds it not insurmountable. The value of preservation, based on various measures, may be shown to exceed the threshold value of consumer surplus realized by development. "A widely shared environmental ethic, even if made up of a small willingness to pay per individual, could, in the aggregate, exceed this threshold value." *Id.*

72. Some critics have argued that whatever cost-benefit analysis contributes to public decision making is not worth the unhappiness experienced by citizens who believe that policy should be made on the basis of right or wrong and not on the basis of benefits and costs. See Cuyler, *The Quality of Life and the Limits of Cost-Benefit Analysis*, in PUBLIC ECONOMICS AND THE QUALITY OF LIFE 141 (L. Wingo & A. Evans eds. 1977); Tarasovsky, *Cost-Benefit Analysis, Cherished Illusion and Anxiety: An Aspect of the Hickey Effect*, in FRONTIERS IN ECONOMICS (G. Tullock ed. 1976); Williams, *Cost-Benefit Analysis: Bastard Science? And/or Insidious Poison in the Body Politick?*, 1 J. PUB. ECON. 199 (1972).

73. For a useful survey of these problems, see A. FREEMAN, THE BENEFITS OF ENVIRONMENTAL IMPROVEMENT 85-107 (1979); P. SELF, *supra* note 54, at 97-149; Nash, *The Theory of Social Cost Measurement*, in THE VALUATION OF SOCIAL COST 8 (D. Pearce ed. 1978).

74. Cost-benefit analysis should be seen as a response to *political* failure, not *market* failure. I have argued this thesis elsewhere, but it is implied by this discussion. See Sagoff, *Consumers, Citizens, and the Environment* (unpublished manuscript) (on file with the *Michigan Law Review*).

75. Economists have not yet perfected a theory of shadow pricing. A number of difficulties remain. First, who chooses the values worthy of being priced? It is likely that economists will price only the values that they consider worth weighing. A second difficulty arises in setting the dollar figure. One might wonder, for example, whether the dollar figure offered by an environmentalist in response to a hypothetical question is a true indication of the value of a policy. The values that economists are dealing with are so conjectural that they are easily manipulated. For a third criticism of the theory, see note 51 *supra*.

76. Some writers believe that political decisions should be limited to questions concerning the fair distribution of wealth; all other governmental problems relate to the efficiency of markets. See, e.g., A. OKUN, *supra* note 10, at 32-64.

better able than legislators to define the national will.<sup>77</sup>

I shall be concerned, in the rest of this essay, with the idea that economic analysis can replace political argument and decision. I shall be particularly concerned with the notion that economists can take account of "public" wants by pricing them. I argue that Congress, and not cost-benefit analysts, should reflect public values and convictions in legislation, and that environmental legislation must do something more than merely correct market deficiencies. My chief criticism of the attempts to measure public values by economic methods is that they purport to do something that is conceptually impossible. I argue in Part III that economists who attempt to price beliefs as if they were benefits and convictions as if they were costs commit a logical mistake.

### III

Economic methods cannot supply the information necessary to justify public policy. Economics can measure the intensity with which we hold our beliefs; it cannot evaluate those beliefs on their merits. Yet such evaluation is essential to political decision making. This is my greatest single criticism of cost-benefit analysis. The many problems involved in applying the concept of shadow pricing<sup>78</sup> are secondary, because the concept itself rests on a mistake.

To recognize this mistake, we must first understand what it is that economists attempt to measure. If they measure consumer interests, market data are appropriate and relevant. The pricing mechanism can suggest when resources used to satisfy certain wants might be more efficiently employed to satisfy others. When economists approach issues that concern us as citizens, however, they do not, as they should, abandon the pricing mechanism. They believe that they can account for citizen-preferences as well as consumer-preferences by determining their dollar value. They do this, for example, by asking citizens what they would pay for a certain level of environmental protection. But this attempt to measure the convictions or values of citizens by pricing them as market externalities confuses what the individual wants as an individual and what he or she, as a citizen, believes is best for the community.<sup>79</sup>

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77. For this suggestion in relation to environmental policy, see the literature cited in note 1 *supra*.

78. See, e.g., note 75 *supra*.

79. For literature describing this confusion and its consequences see P. SELF, *supra* note 54; Plamenatz, *Interests*, 2 POL. STUD. 1 (1954); Wildavsky, *The Political Economy of Efficiency: Cost-Benefit Analysis, Systems Analysis, and Program Budgeting*, 26 PUB. ADMIN. REV. 228 (1966).

This confusion involves what logicians call a category-mistake.<sup>80</sup> One makes a category-mistake by treating facts or concepts as if they belong to one logical type or category, when they actually belong to another.<sup>81</sup> Several examples are illustrative. It is logically correct to predicate whiteness of snow or even of coal. (It may not be true, but it is intelligible.) To say that the square root of four is white, however, makes no sense because it is impossible meaningfully to predicate color of a number. When two concepts are in different categories, one cannot measure the first by methods that are appropriate only to the second. Similarly, although the average American household may consist of 2.75 individuals,<sup>82</sup> this does not mean that such a household exists somewhere in America. A person who inquires about the address of the average American family asks an absurd question, and commits a category-mistake.

Private and public preferences also belong to different logical categories. Public "preferences" do not involve desires or wants, but opinions or beliefs. They state what a person believes is best or right for the community or group as a whole. These opinions or beliefs may be true or false, and we may meaningfully ask the individual for the reasons that he or she holds them. But an economist who asks how much citizens would pay for opinions that they advocate through political association commits a category-mistake. The economist asks of objective beliefs a question that is appropriate only to subjective wants.

When an environmentalist argues that we ought to preserve wilderness areas because of their cultural importance and symbolic meaning, he or she states a *conviction* and not a *desire*.<sup>83</sup> When an

80. For a technical explanation of the concept of a category-mistake, see Ryle, *Categories*, in *ESSAYS ON LOGIC AND LANGUAGE* 65 (A. Flew ed. 1953). For a less technical treatment, see G. RYLE, *THE CONCEPT OF MIND* 16-18 (1966).

81. See G. RYLE, *supra* note 80, at 16.

82. N.Y. Times, May 26, 1981, at 1, col. 2.

83. Society rests on shared convictions, which, like Plato's "good lie," hold it together as a society. See *PLATO'S REPUBLIC* 42-62 (G. Grube trans. 1974). Convictions about nature — about what is "pure" and what is "dangerous," what counts as "safe" and what as "pollution" — are shared beliefs of this sort. These convictions rest on meaning and symbol systems that constitute our common cultural heritage and distinguish it, say, from the Balinese or Lele cultures. Anthropologists have argued that it is impossible for a society to replace these meaning or symbol systems with a system of objective economic and scientific analysis:

We should be able to see that we can never ask for a future society in which we can only believe in real, scientifically proved pollution dangers. We *must* talk threateningly about time, money, God and nature if we hope to get anything done. We must believe in the limitations and boundaries of nature which our community projects.

M. DOUGLAS, *IMPLICIT MEANINGS* 245-46 (1975). I have argued elsewhere that one reason to preserve wilderness is that the distinction between it and civilization is crucial to our culture: that to destroy our remaining wilderness would be to destroy an important basis for this dis-

economist asserts that we ought to attain efficient levels of pollution, he or she, too, states a belief. Both beliefs are to be supported by arguments, not by money. One cannot establish the validity of these beliefs by pricing them, nor can that mechanism measure their importance to society as a whole. One can judge how strongly people hold their beliefs by asking how much they would pay to see them implemented, but that is not how we make policy decisions. Those who think that Creationism should be taught in the public schools, for example, are able to raise a lot of money. But the amount of money that partisans raise does not demonstrate the merit of their position. A person who wants his or her child taught a particular doctrine is free to pay for that; willingness to pay may correctly measure the strength of that desire. When a person advocates a policy as being right or appropriate for society as a whole, however, the intensity of the desire is no longer relevant. Rather, advocates must present arguments that convince the public or its representatives to adopt a policy.<sup>84</sup> Political decision makers judge ideas on their merits, and make decisions based on what is good for us all. These policymakers may consider economic factors, but they should not use the economic method to evaluate competing beliefs.

The distinction between public and private interests is indispensable to the study of political philosophy. "To abolish the distinction," as one commentator has written, "is to make a shambles of political science by treating things that are different as if they were alike."<sup>85</sup> Markets are the appropriate arena for the competition of private interests. This competition may best be understood and regulated in terms of individual willingness to pay. When one advocates not a special or private interest but what one describes as the public interest or the interest of all, however, the framework of debate completely changes. Public discussion must then be carried on in public terms.<sup>86</sup> The issue is no longer to measure the stake that the individual has in his proposal; indeed, the larger the individual's private

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tion and, therefore, an important basis of our common culture. See Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205 (1974).

84. For example, when Professor Friedman advocated a voucher system in education, see M. FRIEDMAN, *supra* note 9, at 85-107, no one asked him how much he would pay to see that policy implemented. The question would have been inappropriate because he was not expressing a consumer preference; a voucher system would probably not affect his children. Rather, he was proposing what he thought would be good for society. He was presenting an idea, to be judged on its merits, concerning what we should do about public education. It is my thesis that cost-benefit analysis has no plausible way of assessing ideas of this kind or taking them into account.

85. E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE* 27 (1960).

86. *Id.*

stake, the more suspect is his public pretension. What matters is whether the argument that he or she offers is sound.

This is not to say that economic data are irrelevant in public decision making. It is to argue that the satisfaction of revealed preferences is only one goal among others that policymakers must take into account. And willingness to pay, as opposed to ability to argue, is not a method for making this choice. Costs and benefits, of course, are important — there are economic constraints. But this does not show that cost-benefit analysis provides an appropriate framework for testing the legitimacy of law.

The blurring of the distinction between public and private interest — and, therefore, between the competition of preferences and the contradiction of ideas — produces results that we should do well to avoid. First, the policymaker, employing the willingness-to-pay criterion, attempts to remain neutral among contending positions. As a result, the analyst must grant equal credibility to every position, no matter how bizarre or preposterous. This approach, indeed, may favor the silliest views over the more sensible ones since extreme opinions often generate the most emotion.<sup>87</sup> An analyst can avoid this result only by abandoning neutrality, *e.g.*, by screening the political opinions to which he or she is willing to assign a price.<sup>88</sup>

Second, the willingness-to-pay approach to public policy removes the basis of legitimacy from the political process. I do not mean merely that it crushes the “cherished illusion” that policy comes from the minds of elected officials in Congress rather than from the computers of economists in the back room.<sup>89</sup> I refer, rather, to the fact that cost-benefit approaches deal only with values or preferences already extant in society. A political process — a process of debate and compromise — is supposed to be creative.<sup>90</sup> The ability of the political process to change values and to rise above self-inter-

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87. Advocates can find moral arguments to support each side of any controversial issue. If the analyst “prices” these views by willingness-to-pay criteria, he or she tests not the rightness of the view, nor the reason for it, but the intensity with which it is held. This would favor the worst views over the best in a world where “the best lack all conviction, while the worst are full of passionate intensity.” W.B. YEATS, “The Second Coming,” in *THE COLLECTED POEMS OF W.B. YEATS* 185 (1956).

88. See note 49 *supra*.

89. See note 72 *supra*.

90. This is especially true with respect to environmental policy since new ideas, options, and alternatives often play an essential role. The importance of coming up with new approaches and alternatives, rather than choosing among preexisting positions and preferences, has called forth a new profession of environmental mediation. For a description of this interesting mix of private and public approaches to conflict management, see Gladwin, *Patterns of Environmental Conflict Over Industrial Facilities in the United States, 1970-78*, 20 *NAT. RESOURCES J.* 243, 263 n.16 (1980), and sources cited therein.

est is crucial to its legitimacy. Political leaders are supposed to educate and elevate public opinion; they are not supposed merely to gratify preexisting desires.

A third likely consequence in public policy may be the most disastrous. Economic analysis limits conflict to those parties who have something at stake for which they are willing to pay. This approach would prevent the socialization of conflict that is crucial to the functioning of a democracy.<sup>91</sup> Consider an example. Suppose a corporation proposes and an environmentalist group opposes the building of a shopping center in a rural area just outside of town. An economist might make a recommendation based upon prices assigned to the various wants or preferences of relevant interest groups. This would effectively limit conflict to the immediate parties. The genius of democracy, however, is to let the conflict spread to a larger audience. The institutions of democratic government — legislatures, agencies, parties, courts, and the press — depend and thrive on the potential for conflicts of this kind to widen beyond their original bounds.<sup>92</sup> This happens when one side — usually the side that otherwise would be defeated — finds a public issue (*e.g.*, a “snail darter”) and moves the conflict into the press, the legislature, and the courts. The shopping center may then never be built because it takes so long to work through the resulting political process.

This might seem grossly inefficient to economists, and perhaps it is, but it is what democratic government is all about.<sup>93</sup> An alternative — technocracy — quarantines or localizes conflict so that it may be resolved by the application of some mechanical rule or decision procedure. Cost-benefit approaches to public policy, if taken to their extreme, would do this, and thus they would make useless the institutions of democratic government. Cost-benefit analysis localizes conflict among affected individuals and prevents it from breaking open into the public realm. This suggests that the reason that industry favors economic approaches to public policy is not necessarily the obvious one, namely, that cost-benefit analysis is sensitive to the

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91. See E. SCHATTSCHEIDER, *supra* note 85, at 1-19.

92. *Id.* at 13. Consider, for example, the role of the courts in a nation that makes economic efficiency the sole criterion for public policy. Conflict could arise only over the question whether some preference or view received a reasonable shadow price. This conflict itself, however, would reveal or involve preferences that would have to be priced. And so on. Thus a conflict might spread in such a regime to require an infinite regress of cost-benefit analyses.

93. Democratic institutions notoriously function in this way to expand the bounds of environmental conflicts. See L. CALDWELL, L. HAYES & I. MACWHIRTER, *CITIZENS AND THE ENVIRONMENT* (1976); H. FEIVSON, F. SINDEN & R. SOCOLOW, *BOUNDARIES OF ANALYSIS: AN INQUIRY INTO THE TOCKS ISLAND DAM CONTROVERSY* (1976); B. GIBBONS, *WYE ISLAND: OUTSIDERS, INSIDERS, AND THE RESISTANCE TO CHANGE* (1977).

costs of regulation. The deeper reason may be that cost-benefit analysis defines a framework for conflict that keeps the public *qua* public and the citizen *qua* citizen out.

Once we recognize the logical difference between wants and beliefs, it becomes clear that cost-benefit analysis can measure only the former. To conduct such an analysis, the economist asks how much we would pay for certain policies. How much would you pay to save Lange's metalmark? How much would you pay to preserve the quality of the air in the Southwest? Our responses indicate only the degree to which we care about the issues. If the analyst prices these views by willingness-to-pay criteria, or makes any similar economic trade-off, he tests neither the validity of the views nor the reasons for them, but only the intensity with which they are held.

Economic efficiency is usually defined in terms of the maximum satisfaction of the wants or preferences of individuals in the order that those individuals rank them.<sup>94</sup> A market in which competition is perfect, in theory, achieves this kind of efficiency.<sup>95</sup> Under this approach, the market would determine optimal policies, and the government would be concerned primarily with market failure.<sup>96</sup> Cost-benefit analysis, insofar as it reflects or shadows markets,<sup>97</sup> provides a technique by which society may attempt to determine policies that are economically efficient.<sup>98</sup> But why should we think economic effi-

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94. See C. SCHULTZE, *THE PUBLIC USE OF PRIVATE INTEREST* 1-2 (1977).

95. *Id.* at 16-27.

96. As Frank Michelman has written: "In the economic vision, it is only the prospect of overcoming the market's failure to capture gains from trade that can justify, from the individual's standpoint, the risks of exploitation inherent in majoritarian political institutions." Michelman, *Politics and Values or What's Really Wrong with Rationality Review?*, 13 CREIGHTON L. REV. 487, 498 (1979). Michelman draws from his argument the logical conclusion: "Would it not, then, make economic sense to include in the constitution a direction to the courts to nullify any majoritarian intervention which plainly cannot even make a pretense of being a solution to a market-failure problem?" *Id.* at 498-99. For a fuller treatment, see Michelman, *Constitutions, Statutes, and the Theory of Efficient Adjudication*, 9 J. LEGAL STUD. 431 (1980).

97. It is impossible to provide a mathematical function that is nondictatorial and logically consistent by which the transitive preference-maps of individuals can be transformed into a single ordering of social preferences. This is a theoretical reason that leads economists to appeal to markets, rather than to mathematics, to replace majoritarian political institutions as a methodology for arriving at and justifying collective choice. See K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963).

98. The fundamental assumption, when spelled out in detail, is this: when competition is perfect (*i.e.*, when there are no "unpriced" costs), markets are more representative and democratic institutions than any political arrangement. Government should, therefore, limit its role to that of "perfecting" competition by mitigating market failure. Thus, relations in the market are a form of unanimous-consent arrangement. When dealing with each other in a buy-sell transaction, individuals can act voluntarily on the basis of mutual advantage. Organizing large-scale social activity through the alternative open to a free society — democratic majoritarian politics — necessarily implies some minority who



ciency is an important goal?<sup>99</sup> Why should we take wants or preferences more seriously than beliefs and opinions?<sup>100</sup> Why should we base public policy on the model of a market transaction rather than the model of a political debate?<sup>101</sup>

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disapprove of each particular decision. Everything else being equal, unanimous-consent arrangements are much more attractive politically than any alternative.

C. Schultze, *supra* note 94, at 16-17 (footnote omitted). See M. FRIEDMAN, *supra* note 9, at 13, 14. It is an arguable point that a market, in theory, is a unanimous consent arrangement that leads to or assures an efficient distribution of whatever is marketed. This has led economists to believe that any social decision that is efficient is one that carries the consent of the public, whether that decision is reached through a market or by cost-benefit analysis "in the back room." This misses the important fact that the reason that markets are efficient is that people participate voluntarily in them, not the other way around. Thus the fact that consent leads to or assures efficiency (at least in principle) in free and fair markets does not imply that efficiency (however achieved, *e.g.*, by a dictator) has consent.

99. Two popular answers may be dismissed. Some people would argue that the satisfaction of preferences produces satisfaction in the sense of pleasure, well-being, or happiness, so that market approaches to public policy may be justified in relation to the ethical theory of utilitarianism. To argue this way, however, is only to be misled by an ambiguity in the term "satisfaction." Preferences are *satisfied* in the same sense that equations or conditions are *satisfied*; in other words, they are met. Whether this leads to satisfaction in the sense of happiness or well-being, however, is an empirical question upon which little research has been done. It is possible, on the contrary, that the satisfaction of preference leads to frustration or disillusion, while the *attempt* to fulfill desire, as long as it is unsuccessful, is satisfying. See J. KEATS, "Ode on a Grecian Urn," in *COMPLETE POEMS AND SELECTED LETTERS* 352 (C. Thorpe ed. 1935).

Second, one may argue that the satisfaction of preference, whether or not it contributes to happiness, adds to freedom, for freedom is getting what you want and doing as you like. This is true, however, only insofar as we act upon values that we believe, all things considered and upon reflection, are appropriate or right. A person is *not* free, in other words, when he acts upon a compulsion or an addiction, even if there is a market, *e.g.*, in heroin, alcohol, and cigarettes. The values that we consider after reflection to be right or appropriate, however, may be those that we pursue not in a market but through the political process. They may be — and often are — other-regarding or citizen preferences. See Watson, *Free Agency*, 72 J. PHIL. 205 (1975); Wolf, *Asymmetrical Freedom*, 77 J. PHIL. 151 (1980).

100. The literature of economics recognizes that institutions that encourage integration and discourage alienation in society may be more important than institutions that lead to efficiency. Thus, Tarasovsky points out that when individuals in a society know that cost-benefit analysis or some other "rational" decision-making procedure has replaced old fashioned politics as the source of collective choices, they are likely to experience alienation as their cherished illusions are exploded. See Tarasovsky, *supra* note 72. Economists might place a "shadow" price on the pain and alienation that individuals experience when they know that political representatives are taking their cue from the economists in the back room. This price might be sufficient to show that people hate cost-benefit analysis so much that its result is always inefficient. For further discussion of the issue of alienation and economics see P. SELF, *supra* note 54; R. TITMUSS, *THE GIFT RELATIONSHIP* (1971); R. TITMUSS, *CHOICE AND THE "WELFARE STATE"* (1967) (Fabian Socy. Tract No. 370).

101. Arrow and Hahn put the principle this way:

There is by now a long and fairly imposing line of economists from Adam Smith to the present who have sought to show that a decentralized economy motivated by self-interest and guided by price signals would be compatible with a coherent disposition of economic resources that could be regarded, in a well-defined sense, as superior to a large class of possible alternative dispositions.

K. ARROW & F. HAHN, *GENERAL COMPETITIVE ANALYSIS* vi-vii (1971). Duncan Kennedy notes three reasons for the conclusion that a freely functioning, decentralized economy motivated by self-interest is superior to centralized planning or direction by the state. First is the notion that the invisible hand will transform apparent selfishness into public benefit. Second is the "clenched teeth idea," *i.e.*, however bad the results of self-interested individualistic behav-

What many economists do not understand is that efficiency is one value among many and is not a meta-value that comprehends all others.<sup>102</sup> Economists as a rule do recognize one other value, namely, justice or equality, and they speak, therefore, of a "trade-off" between efficiency and equality.<sup>103</sup> They do not speak, as they should, however, about the trade-off between efficiency and our aesthetic and moral values. What about the trade-off between efficiency and dignity, efficiency and self-respect, efficiency and the magnificence of our natural heritage, efficiency and the quality of life? These are the trade-offs that are important in setting environmental policy.

If we were to pursue efficiency as our goal in environmental policy, I believe that we would quickly turn all of our natural beauty into commercial blight. This is what happens when self-fueling and irreversible consumer markets have their way.<sup>104</sup> To forestall this result by "pricing" beliefs, values, and ideals as if they were consumer benefits, I have argued, is to commit a category-mistake.<sup>105</sup> Cost-benefit analysis, at that point, disintegrates into storytelling; it becomes a bad exercise in *ad hoc* justification.

I do not pretend to assess the merits of the argument that I have made here. I only want to point out that it *is* an attempt at argument. I did not treat the position that economists defend as if it were

ior, a worse evil would result if the state attempted to suppress it. A third argument separates "law" from "morality," and insists that the state should remain neutral among competing conceptions of the good in order to respect the rights of individuals who live by these conceptions. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1716 (1976).

For a defense of these arguments, see 3 F. HAYEK, *LAW, LEGISLATION, AND LIBERTY* 65-97 (1979); F. HAYEK, *supra* note 9, at 220-33; F. HAYEK, *THE ROAD TO SERFDOM* 32-42, 56-71, 88-100 (1944). For criticism, see L. ROBBINS, *POLITICS AND ECONOMICS* 91-112 (1963). For useful discussions of these arguments as they appear in administrative law, see Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547 (1979); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

102. Schultze allows that economic analysts propose and advocate efficiency as a goal just as others might propose and advocate other goals. "Analysts . . . can and should play the role of . . . 'partisan efficiency advocates' — the champions of analysis and efficiency. They are indeed partisans, and the ultimate decision-maker has to balance their voice against the political, tactical, and other considerations . . ." C. SCHULTZE, *THE POLITICS AND ECONOMICS OF PUBLIC SPENDING* 96 (1968). Schultze's frank acknowledgment that efficiency is one value among others contrasts sharply with economists' usual view that efficiency is the result of maximizing the satisfaction of all present values. James Buchanan explains the usual view as follows: "This characteristic behavior of the political economist is, or should be, ethically neutral; the indicated results are influenced by his own value scale only insofar as this reflects his membership in the larger group." Buchanan, *Positive Economics, Welfare Economics, and Political Economy*, 2 J. L. & ECON. 124, 127 (1959).

103. See A. OKUN, *supra* note 10.

104. See generally P. BLAKE, *GOD'S OWN JUNKYARD* (1964).

105. See notes 80-82 *supra* and accompanying text.

merely their private preference. I did not survey economists to find out how much they were willing to pay to have their views implemented. Why, then, do economists survey environmentalists to find out how much they would pay to keep a vista clear or a river pure? Why do economists believe that opinions that oppose theirs deserve a price and not a reply?<sup>106</sup>

The environmental legislation of the last twenty years has consistently indicated our preference for national policies that respond to concerns other than economic efficiency. This legislation rejects markets as the indicator of the national will. There is nothing in this legislation or in the public debate on environmental protection that remotely suggests that most people regard pollution as a problem only because pollution is inefficient. Rather, we regard it as a problem because it is efficient.<sup>107</sup> The "gospel of efficiency"<sup>108</sup> is now as anachronistic as is the *Lochner*<sup>109</sup> decision that is its most typical expression.

#### CONCLUSION

Environmental law poses a severe test for economic approaches to public policy. "Disagreements over degrees of environmental protection," one writer has correctly surmised, "are not about relative costs and benefits but about the validity of economics itself as a form of interaction — its basis in exchange, costs, and cash — as a measure of the way we ought to relate to one another."<sup>110</sup> To notice that the Endangered Species Act is not cost-beneficial is to recognize the obvious. That is the *point* of the Act, and of much of our environmental legislation. These laws demonstrate that we are not consumers bent on satisfying every subjective preference. We are that, of course, but we are citizens as well. And, as citizens, we insist upon a model of government and a vision of political life that allow us to

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106. This criticism differs from Tribe's concern about the "dwarfing" of "soft" variables. See Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1318-19 (1974).

107. Compare child labor laws. The reason to oppose child labor is not that it is inefficient (a perfect market might encourage it), but that it uses children as a means to promote efficiency. It would be better to treat them as ends in themselves. This is the problem with policies based on the maximization of efficiency. They treat individuals as having equal worth because they treat them as having *no* worth: the individual becomes a mere factor in the overall production of utility, welfare, or wealth. See Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828, 830 (1979).

108. See S. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920* (1959).

109. *Lochner v. New York*, 198 U.S. 45 (1905).

110. A. WILDAVSKY, *supra* note 47, at 202.

posit collective values and to give effect to our common will.<sup>111</sup>

The role of the policymaker and of the legislature may be to balance what we believe in and stand for as a community with what we want and need as a functioning economy. We must devise some way to relate to each other as citizens in search of common ideals and, at the same time, to compete with each other in a market to satisfy individual interests. The future of environmental policy rests on the resolution of this conflict. A solution must do more than merely allow us to balance interests with interests; it must facilitate the balancing of interests with morality and one morality with another morality.<sup>112</sup> Economists would do well to show us how *this* sort of balancing is to be done.

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111. A brief examination of President Reagan's policy is appropriate here. By Executive Order, the President has forbidden federal agencies to undertake any regulatory action "unless the potential benefits to society from the regulation outweigh the potential costs to society . . ." Executive Order Number 12,291 is titled *Federal Regulation* and was issued in February. 46 Fed. Reg. 13,193 (1981).

The Order requires that every "major rule" be accompanied by a Regulatory Impact Analysis, which shall contain the following information:

- (1) A description of the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits;
- (2) A description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the costs

. . . .  
*Id.* at 13,194. This Order makes economic efficiency the overriding goal of regulatory policy. The laws that the agencies are supposed to enforce, however, set other priorities. Many of these laws are intended to improve air and water quality, the safety of the workplace, the reliability of consumer products, and to achieve other objectives that appeal to us as a nation. See note 37 *supra*. Most of us may agree with the President that agencies should be encouraged to choose among "approaches to any given regulatory objective, the alternative involving the least net cost to society . . ." *Id.* at 13,193. It does not follow from this, however, that the regulatory agencies should pursue economic efficiency instead of the goals or objectives that Congress has legislated. The Order may recognize this, for it directs agencies to conform to the Order "to the extent permitted by law." *Id.* at 13,194.

But the Order raises a second point. In theory, we are not precluded from democratically deciding that efficiency should be our overriding goal. We should be as free to disregard our noneconomic values as we are to override our economic ones. But we must make that choice ourselves; economists cannot make it for us.

For an excellent analysis of legal and normative issues raised by Executive Order 12,291, see M. Rosenberg, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues That May Be Raised By Executive Order 12,291 (1981)* (unpublished manuscript on file with the *Michigan Law Review*).

112. A similar point is made by Kennedy, *supra* note 101, at 1731.