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Daniel R. Mandelker
Washington University School of Law

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A SPECIAL TRIBUTE FOR DAN TARLOCK

DANIEL R. MANDELKER*

About fifty years ago, I received a telephone call from a young law professor who had just started teaching at the University of Kentucky. I had just started the urban law program at my law school, and Dan Tarlock wanted to come and visit to get ideas about what he could do at his school. He arrived with a colleague, we had a very good visit, and that began a long friendship I treasure to this day.

Dan's writing is special. It has a cadence all its own that carries you gracefully along on his prose as he captures you with ideas that are always thoughtful and enduring. An article on land-use planning that Dan wrote years ago based on his Kentucky experience is a classic example. Comprehensive land-use planning has always been a contested process, and Dan's article states his critical conclusions about what land-use planning can do. In it, he identifies problems in carrying out the planning function in language that has meaning even today, and that can help point the way to reforms in the planning system.¹ We thought so much of it that excerpts from the article have always been included in our land-use law casebook.²

Soon after the Kentucky article, I approached Dan in the early 1980s about doing a law school casebook on environmental law. Rudimentary casebooks existed, but there was no comprehensive casebook at the time, even though teaching interest in environmental law was increasing. I had been teaching the course from my own materials, and I wanted to bring Dan in to help turn them into a published product. We met in Saint Louis with the late Fred Anderson and put together an outline for the book, which we produced and published.³

This was no small task. What I remember from our discussions is the knowledge, intelligence, and insight Dan brought in helping us see how the book should be put together. For example, I was assigned the chapter on

* Stamper Professor of Law, Washington University in Saint Louis.

1. A. Dan Tarlock, *Consistency with Adopted Land Use Plans as a Standard of Review: The Case Against*, 9 URB. L. ANN. 69 (1975).

2. DANIEL R. MANDELKER ET AL., *PLANNING AND CONTROL OF LAND DEVELOPMENT* 34–35 (9th ed. 2016).

3. The present edition is ROBERT L. GLICKSMAN ET AL., *ENVIRONMENTAL PROTECTION: LAW AND POLICY* (7th ed. 2015).

the National Environmental Policy Act. I had thought about how it should be done but had not worked out a satisfactory solution. I asked Dan what he would recommend. He thought just a moment and then verbally created an imaginative outline for the chapter that I used in the casebook and again in my treatise on the statute.⁴ Amazing. The environmental law casebook was published and has gone through several editions, most with Dan's help.

Dan and I collaborated later on an article I have always liked, where we argued for shifting the presumption of constitutionality in land-use law.⁵ Judicial deference to land-use legislation had been dominant, and we felt that reversal of that deference was needed for some types of regulation. Dan took on the task of explaining the background for our proposal, elaborating the historic and conceptual foundation for our argument. The article attracted attention and a rebuttal.⁶ Dan authored a spirited response, which I joined.⁷

Dan's contribution to environmental law is encyclopedic and commanding. He is the author of a leading treatise, the *Law of Water Rights and Resources*.⁸ His law school casebook, *Water Resource Management*, now done with others, is in its seventh edition.⁹ At one time, he wrote a series of articles on environmental topics that was so good that I tried to get him to publish them in a book as "The Tarlock Trilogy."¹⁰ He didn't do it, but maybe he will do something like this now that he has the time.

A few years ago, we held a conference at our law school on "New Directions in Environmental Law." Dan helped organize it and contributed an introductory article for the published conference symposium. The article is a critical review of the environmental movement and environmental law.¹¹ I discuss it here as an example of Dan's insights on this important topic.

Dan first details the history of the environmental movement, exploring what occurred to create it in "The Rational and Radical or Mythic 1960s." As Dan points out, modern environmentalism is a byproduct both of the

4. DANIEL R. MANDELKER ET AL., NEPA LAW AND LITIGATION (2017 ed.).

5. Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1 (1992).

6. Robert J. Hopperton, *The Presumption of Validity in American Land-Use Law: A Substitute for Analysis, a Source of Significant Confusion*, 23 B.C. ENVTL. AFF. L. REV. 301 (1996).

7. Daniel R. Mandelker & A. Dan Tarlock, *Two Cheers for Shifting the Presumption of Validity: A Reply to Professor Hopperton*, 24 B.C. ENVTL. AFF. L. REV. 103 (1996).

8. A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES (2017 ed.).

9. A. DAN TARLOCK ET AL., WATER RESOURCE MANAGEMENT (7th ed. 2013).

10. A. Dan Tarlock, *The Nonequilibrium Paradigm in Ecology and the Partial Unraveling of Environmental Law*, 27 LOY. L.A. L. REV. 1121 (1994); A. Dan Tarlock, *Local Government Protection of Biodiversity: What Is Its Niche?*, 60 U. CHI. L. REV. 555 (1993); A. Dan Tarlock, *Environmental Protection: The Potential Misfit Between Equity and Efficiency*, 63 U. COLO. L. REV. 871 (1992).

11. A. Dan Tarlock, *Environmental Law: Then and Now*, 32 WASH. U. J.L. & POL'Y 1 (2010).

rational first half of the 1960s, and its more familiar radical part.¹² He then explains the problems with the basic assumptions that environmental law makes. These include the “crucial assumption underlying modern environmental law . . . that ecosystem protection was a transcendent, value-neutral, unifying public policy objective.”¹³ Next he examines “[t]he ecosystem stability hypothesis [that] reflects the broader, progressive assumption that science could tell us both why and how we should act to preserve the environment.”¹⁴ He concludes that “[i]n retrospect, the 1960s were the twilight of the progressive vision that science and rationality applied by a strong regulatory state could produce a ‘good society.’”¹⁵ Dan completes his article by discussing the role of technology, rational planning, federalism, and the need for extreme risk protection. The symposium is being translated into Chinese.¹⁶

All the best to you, Dan. You still have much to teach us.

12. *Id.* at 3.

13. *Id.* at 9.

14. *Id.* at 14.

15. *Id.*

16. While scrolling through Dan’s extensive bibliography, I came across an early article I remember reading at one time in which he applied economic theory to neighbor consent ordinances and voter referenda in zoning. A. Dan Tarlock, *An Economic Analysis of Direct Voter Participation in Zoning Change*, 1 *UCLA J. ENVTL. L. & POL’Y* 31 (1980), <https://escholarship.org/uc/item/95r9z886> [<https://perma.cc/L39D-TJ2L>]. As I read it again, I remembered that in it, Dan finally explained for me the meaning of important Supreme Court decisions on the neighbor consent issue. I don’t know whether Dan still holds these views, but the article is an excellent example of how Dan applies his analytic skills to legal and social problems.