Environment and Equity: A Regulatory Challenge by Daniel Mandelker

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Reviewed by Alan Weinstein*

Daniel Mandelker, Stamper Professor of Law at Washington University in St. Louis, has written extensively on environmental and land-use problems. In this new work, Mandelker seeks to develop a comprehensive view of the problems raised when the legal system makes distributive judgments affecting land-use opportunities. Thus, rather than the broad inquiry into environmental policy which its title suggests, this volume looks more deeply at a narrower issue: "... the distinctive legal and conceptual problems raised by environmental land-use controls."1

Environment and Equity explores how the legal system has reacted to these new controls and attempts to explain the direction taken by the courts and legislatures when reviewing or applying them. The book's nine chapters may be grouped into three major sections. The first three chapters introduce the reader to the operation of private land markets, indicate how traditional land-use regulation alters the operation of these markets, and examine why neither private bargaining nor traditional regulations can deal with the subjective values explicit in environmentalist legislation. Next, in four

chapters that form the most accessible and satisfying part of the book, Mandelker carefully analyzes how the courts have treated environmental land-use controls and the charges of exclusionary zoning that often accompany implementation of such controls. This section also contains a thorough consideration of the impact of state constitutional guarantees of environmental quality on land-use decisions by state courts. The book concludes with a chapter on legislative land-use policymaking, devoted entirely to a discussion of coastal zone management programs, and a final chapter that reviews the author’s conclusions and states his forecasts for future developments in the field.

Mandelker argues that all the attention to the fight against environmental pollution obscures the transformation in land-use regulation achieved by the environmental movement. In his view, this transformation consists of new land-use controls that give priority to one set of values—environmental protection. These new controls represent a sharp break with traditional land-use planning and regulation which do not favor any particular set of priorities. As a result of this transformation, the legal system is now required to make distributive judgments that allocate economic opportunity in land markets; for example, coastal zone management programs that restrict development on one stretch of coast but permit another to be developed. Further, these new land-use controls raise a second set of distributive problems: they create the potential for exclusionary zoning if they are excessively prohibitive. The problems raised by the potential for exclusionary zoning will also fall to the courts for resolution.

In Mandelker’s opinion, the legal system is not well suited to make the distributive judgments necessitated by this transformation in land-use regulation. Mandelker says that the legal system will not readily accept the distributive role required by environmental land-use control and the judicial correction of exclusionary zoning. In his view, both the courts and legislatures shy away from making these distributive judgments. Mandelker concludes that if environmentalists are dissatisfied with the legal system’s reaction to the new environmental land-use controls, they should return to the political arena and try to convince a majority that environmental protection should be a transcendent value.

2. Courts and legislatures make distributive judgments when their decisions impose losses on some landowners by prohibiting or limiting the opportunity to develop land, and create gains for other landowners by explicitly permitting certain types of development.
I do not disagree with either of the arguments set out. Nor do I disagree with the basic conclusions drawn by Professor Mandelker. Courts and legislatures do shy away from making distributive judgments and the political arena is the proper forum for arguing transcendency of environmental values. Furthermore, I agree with Mandelker’s conclusion that environmental protection is the transcendent value in land-use regulation. Nevertheless, except for the middle four chapters, I found too many parts of this book poorly focused and, as a result, potentially misleading. In short, the book presents a supportable thesis but does not always adequately support it.

Chapter Two, titled “The Case for Environmental Land-Use Regulation” exemplifies my concerns. In this chapter, Mandelker challenges economists’ claims that markets, i.e., private bargaining, can produce socially optimal outcomes when they consider environmental cost problems. Essentially, Mandelker argues that governmental regulation is preferable to bargaining in the presence of environmental costs for two reasons. First, bargaining cannot consider the distributive impacts bargains impose. Second, bargaining cannot consider diffused environmental costs because the transaction costs are too high. Thus, while Mandelker acknowledges the efficiency in the sense of movement towards pareto optimality inherent in markets, in his view bargaining is incapable of valuing diffused environmental costs and disregards the distributive consequences of market transactions. Mandelker argues that government intervention is necessary because these shortcomings are inherent in the bargaining process.

Mandelker’s treatment of the basic concepts central to this argument is quite competent. He introduces the reader to the notion of pareto optimality,\(^3\) shows how bargaining can achieve efficient outcomes, and explores the problem of market failure. His argument is

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3. Pareto optimality is one definition of economic efficiency in a society. Whenever resources can be reallocated in a manner that makes at least one person better off without making anyone else worse off, we can increase the total welfare of society at no cost. When we have reallocated all resources according to the above rule, we will have achieved maximum social welfare and will be using our resources in the most efficient manner possible: i.e., any further reallocation would make at least one person worse off. This condition of maximum efficiency is termed Pareto optimality.

Vilfredo Pareto, an Italian sociologist (1848-1923), first formulated the mathematical rules underlying the above analysis. The classic exposition of the rule is found in Arrow and Debreu, *Existence of an Equilibrium for a Competitive Economy*, *Econometrica* vol. 22 no. 3 (1954). A good introductory discussion may be found in B. Ackerman, *Economic Foundations of Property Law* (1975).
far less satisfying, however, when he moves to a consideration of whether external costs can be internalized in markets by nuisance law and bargaining. In this part of his argument, Mandelker seeks to refute the argument that nuisance law or bargaining, rather than government intervention, can solve the external cost problem. In the course of this refutation Mandelker introduces the reader to Ronald Coase's ideas concerning the interactions among judically imposed nuisance rules, bargaining, and efficiency. In my view, Mandelker's treatment of Coase is self-serving and misleads the reader who is unfamiliar with Coase's work. It is worth examining Mandelker's treatment of Coase's views in some detail.

Mandelker seeks to refute the argument that nuisance law or bargaining, rather than government intervention, can solve the external cost problem. Mandelker first notes the economists' claim that "with the appropriate definition of property rights, bargaining can include external as well as private costs to provide efficient land-use solutions." He then cites Coase's seminal article, "The Problem of Social Cost," for the proposition that bargaining to eliminate external costs will, under appropriate conditions, be independent of the initial assignment of property rights. Mandelker writes:

Coase's bargaining avoids the value judgments necessary in an initial assignment of property rights because Coase claimed that the bargaining outcome is indifferent to the initial assignment. The difficulty is that the initial assignment of property rights does affect Coase's bargaining. Coase assumed in his example that neither farming nor cattle ranching has an initial claim as a preferred land-use. This assumption is not correct. Property ownership does not exist in a vacuum, but is legally defined by society even when it does not decide between competing land uses.

Society may later decide that agricultural resources are limited and entitled to a proper claim in any conflict with competing uses. British planning law makes this assumption. Because it accepts the present allocation of priorities among competing land uses, the Coase approach reinforces the status quo in land-use allocations. It provides a method for changing these priorities to achieve an efficient land-use solution, but it ignores the distributive impacts this solution creates. Coase's starting point is the present assignment of land-use priorities, and he assumes this assignment is "socially" correct.

6. D. MANDELKER, supra note 1 at 10-11 (footnotes omitted).
These two paragraphs contain several statements about Coase's article that are misleading. Mandelker suggests that Coase did not consider how assignment of property rights would affect bargaining; that Coase assumed that the present assignment of land-use priorities is "socially" correct, and implicitly, that Coase is unconcerned with distributive impacts. Further, Mandelker fails to clarify the "appropriate conditions" under which bargaining would solve the external cost problem, so that the reader without training in economics is left wholly to his own resources to understand Coase's assumptions.

What really is Coase's argument? Essentially, Coase argues that cost-free bargaining, that is, bargaining with no transaction costs, will always achieve an economically efficient result. In fact, where bargaining is costless, Coase shows that neither legal rules nor an initial assignment of land-use priorities will affect bargaining outcomes. But Coase then acknowledges that bargaining is not cost-free in the real world and considers the effect of an initial assignment of rights when transaction costs are greater than zero. He concludes that the assignment of legal and property rights does have an effect on economic efficiency. This conclusion leads to a prescription for the legal system when it considers any given arrangement of property rights: courts should understand the economic consequences of their decisions and take these consequences into account when making their decisions. Thus, rather than assuming that current property assignments are correct, Coase is arguing that they very well may be incorrect, i.e., inefficient, and that courts should consider economic consequences when called upon to assign property rights, for example, in nuisance litigation. Further, Coase notes that government regulation may, at times, be the correct solution to certain external cost problems in the presence of transaction costs. Finally, Coase is not unaware of the distributive effects of his proposals, as he writes: "But it is, of course, desirable that the choice between different social arrangements for the solution of economic problems should be carried out in broader terms than this and that the total effect of these arrangements in all spheres of life should be taken into account."

Mandelker, I believe, has oversimplified Coase, and thereby erected a straw man whose weak opposition he readily confutes. A fuller reading of Coase, however, reveals that he and Mandelker ac-

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7. Coase, supra note 5 at 43.
tually agree on the basic proposition that private markets and bargaining will often fail in the real world, and, when such failures occur, government intervention may be well-advised. For example, Coase, after noting the problems inherent in government regulation, concludes:

But equally, there is no reason why, on occasion, such governmental administrative regulation should not lead to an improvement in economic efficiency. This would seem particularly likely when, as is normally the case with the smoke nuisance, a large number of people are involved and in which therefore the costs of handling the problem through the market or the firm may be high. 8

This problem with the author’s treatment of Coase stems, I believe, from Mandelker’s failure to acknowledge that Coase treats the private bargaining question in both its theoretical and pragmatic aspects. Without exposure to both these aspects, the reader fails to grasp a key element in Coase’s theorem: private bargaining will not produce efficient outcomes in the presence of transaction costs.

It is fruitless to speculate on the author’s reasons for this omission, but consider what it means in terms of this book’s intended audience. The uninitiated reader is led to believe that “economists” maintain a position on the role of private bargaining that is quite absolute. This belief will prove, at best, confusing, and could well mislead the reader with no background in microeconomics. For anyone already conversant with the literature, on the other hand, the author’s views are merely provocative. Unfortunately, the chapter on economics is not the only one where the reader’s background is of concern.

Although the legal analysis found in the middle four chapters is generally quite well done, I question what criterion the author used when choosing to omit any discussion of the “growth management” cases from chapter six, entitled “The Judicial Attack on Exclusionary Zoning.” 9 That choice is puzzling when other authors find the most vexing problem with exclusionary zoning litigation to be distinguishing between good-faith planning efforts aimed at regulating growth—which may also have incidental exclusionary impacts—and growth management “schemes” that speak in planning terms but whose purpose is exclusion. 10 The novice reader of

8. Id. at 18. The “smoke nuisance” referred to above may be read to exemplify the class of diffuse environmental pollution problems in which high transaction costs will prevent private bargaining from achieving a socially optimal solution.
10. See D. Godschalk, Constitutional Issues of Growth Management (1979); Blumstein, A Prolegomenon to Growth Management and Exclusionary Zoning Issues, 43 LAW &
Environment and Equity would remain ignorant of this critical debate. Similarly, the chapter on legislative policymaking deals almost exclusively with coastal zone management programs, with no adequate treatment of other legislative land-use programs.\textsuperscript{11} Omissions of this sort suggest caution in recommending this book to anyone not already familiar with basic microeconomic theory and the judicial and legislative development of land-use controls in the past decade.

Despite its faults, Environment and Equity is a welcome addition to the literature. Professor Mandelker is a major academic figure in his field and this effort clearly shows why. Mandelker’s focus on the tensions between competing values is illuminating and the forthrightness of the author’s opinions forces the knowledgeable reader to call his own preconceptions into question. If Environment and Equity lacks focus, the reason may be that the scope of the author’s concerns dictates that some subjects emerge from the discussion a bit blurred and indistinct.