NATURAL RESOURCES JOURNAL

Volume 12
Issue 1 *Winter 1972*

Winter 1972

Sax—Defending the Environment: A Strategy for Citizen Action

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BOOK REVIEW

Defending the Environment: A Strategy for Citizen Action

By
JOSEPH L. SAX
New York: Alfred A. Knopft. 1971.
Pp. xix, 252, $6.95.

Professor Joseph L. Sax, generally acknowledged as the nation's foremost expert on environmental law,[1] has written a direct, straight-forward, hard-hitting, and entertaining book about environmental litigation. Less scholarly and less closely reasoned and documented than his truly outstanding work on *Water Law, Planning and Policy*,[2] the present volume is clearly intended for a more general readership of laymen as well as lawyers; it is, however, an exceptionally well-written and sprightly work. The author has chosen a few deserving targets, and has loosed quite an impressive barrage, scoring quite a few hits. His well-researched accounts of official indifference or misjudgment, as well as his blow-by-blow descriptions of some of the most important recent environmental litigations captivated this reader like a well-done "who-done-it"—in spite of the fact that, like other environmentally informed readers, he already knew. In a number of instances, Professor Sax has relied not only on official publications and records to make his point, but has implemented generally available sources by recourse to interviews with some of the principal actors in the decision-making process.

It is the author's major thesis that administrative agencies—more particularly agencies concerned with the protection of environmental, natural or scenic resources—fail to act in the public interest, in part because they have been coopted by the interests or industries they are supposed to regulate, and in part, because the agency process is too highly politicized and too involved with purely self-protective institutional concerns. In consequence, decisions are being made which result in irreversibly squandering scenic and environmental resources, an irreversible damage to the biosphere, and in limiting our choices for the future. Since administrative agencies were initally created to protect the public interest, and since, in Professor Sax's view, they have failed to do so, he finds a need for a

1. *See* Sax, Defending the Environment: A Strategy for Citizen Action, front flap (1971).
2. Sax, Water Law, Planning and Policy (1968).

more direct assertion of the public interest. In his view, the public interest is most effectively vindicated in lawsuits brought by so-called public interest groups—*i.e.*, groups or organizations of private persons joined together for the express purpose of protecting the public interest—as they see it.

Professor Sax argues persuasively that such "public interest" plaintiffs should be given recognition as proper parties to bring, or to intervene in, lawsuits to protect the people's interest in a clean and protected environment. Since such plaintiffs have all but won the "standing to sue" issue,[3] his work in this instance covers familiar procedural ground. Once a public interest plaintiff has secured his right to get into the litigation, he will face the inevitable question of the precise nature of the substantive rights to vindicate. In some instances, there is express statutory law providing the substantive grounds, though sometimes these grounds may have little to do with environmental protection—as in the instance, properly criticized by the author, when a substantive conservation issue was decided in favor of the public interest plaintiff because the particular dredge-and-fill operation, preparatory to the construction of a highway that adversely affected the ecology of the Hudson River, was halted because it involved the construction of a "dike" that, under applicable law, required Congressional approval.[4] Good litigator that he is, Professor Sax dislikes the right decision for the wrong reason as much as does this reviewer. In the absence of available statutory grounds for environmental protection, the author urges the further advancement and development of the "public trust" theory, an interesting relic of Roman law, which he had previously exhumed in a well-supported and scholarly article.[5] Perhaps the courts will seize upon this doctrine as a useful and flexible instrument for environmental protection. If they do, the credit will be entirely Professor Sax's, who has done everything possible to pour new wine into that aged receptacle. But the potential flexibility of the doctrine is a function of its vagueness. It relies on the irrefutable assertion that public property, particularly public lands, are to be used only for the public good. But the mere fact that the trust concept is used does not aid in defining *what* public good. In modern times, as the author points out, the doctrine has been used in only a few cases to undo particularly flagrant giveaways of public resources by turn-of-the-century state

3. *See, e.g.*, Pennsylvania Environmental Council v. Bartlett, 315 F. Supp 238 (M.D. Pa. 1970); Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970).

4. Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970).

5. Sax, *The Public Trust Doctrine in Natural Resource Law*, 68 Mich. L. Rev. 471 (1970).

legislatures.[6] Other expressions of the doctrine may be found in holdings of the courts in Massachusetts, which follow the sensible doctrine that public property which is already being used for a particular purpose pursuant to state legislation cannot be turned to another public purpose without clear legislative authorization—*i.e.*, a piece of land used as a public park cannot be used for a public housing project unless there is a clear legislative pronouncement preferring the latter purpose.[7] There have also been some "public trust" allusions in a recent Supreme Court decision that construed provisions of the Federal Highway Act that parkland could not be taken for highway purposes if there is a "feasible and prudent alternative."[8] On the whole, these are slim pickings. Unlike some of his more enthusiastic public trust disciples,[9] Sax does not claim that private owners hold land under a public trust, but even without this further extension, the public trust doctrine leaves much to be desired as a solid foundation for environmental law making. What are the terms of the trust? Who is "the public," the beneficiary for whom the trust is held? Who determines "the public good," *i.e.*, the purposes of the trust? Are all of these questions to be answered *ad hoc* by the courts, as specific issues are presented to them?

Professor Sax is not naive and it is evident that he is well aware of the problem. It is apparent that, given the choice, he, too, would prefer to rely on specific legislative directions rather than on the public trust doctrine. But as a public interest plaintiff in search of a substantive cause of action, he occasionally overstates his case. It is true that too many agencies have been coopted by the interests they ought to regulate. It is true also, as the author amply demonstrates, that there is too much political carrying-of-water-on-both-shoulders. But there is no assurance that reliance on litigation and on the unguided policy judgment of the courts will fairly resolve all environmental issues that involve a determination of the public interest. In Sax's book, the "public interest" is referred to frequently and feelingly, but it remains undefined. The author seems to regard "the public interest" as a given, as something that, in the old Victorian phrase, will be agreed upon by all right-minded and virtuous men. But is it really that simple? Do conservation organizations and en-

6. *E.g.*, Illinois Cen. R.R. v. Illinois, 146 U.S. 387 (1892); Priewe v. Wisconsin State Land and Imp. Co., 93 Wis. 534, 67 N.W. 918 (1896); Kimball v. MacPherson, 46 Cal. 104 (1873).

7. Gould v. Greylock Reservation Comm'n, 350 Mass. 410, 215 N.E.2d 114 (1966).

8. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

9. Berlin, Roisman & Kessler, *Law in Action: The Trust Doctrine*, in Law and the Environment 166, 174 et seq. (Baldwin ed. 1970).

vironmental defense groups necessarily represent "the" public interest? In any given situation, is "the" public interest that of the trout fisherman or that of the employees in a local paper mill whose plant finds it difficult to meet effluent standards? Perhaps administrative agencies, properly instructed by the legislature, properly constituted, non-coopted, and properly subject to judicial review, are as capable guardians in the first instance of the public interest as the courts—and perhaps even better because of their continuing involvement in, and responsibility for the subject matter and their greater expertise, if not in the making of general public policy judgments, then in the particular technical or scientific area regulated.

In the author's view, courts are better suited to dispute resolution than administrative agencies. Courts are said to have the following advantages: they are outsiders to the dispute. Their membership is selected with non-environmental considerations in mind. Thus, they need not balance the interests of constituencies, as the author contends is the case with administrative agencies. And they provide an opportunity for citizen initiative through litigation—which is provided for only to a lesser extent by administrative agencies. Peculiarly, Sax even views the courts' technical "lack of expertise" as an advantage.[10] The point has been made that although administrative agencies may be expert in their respective technical areas, they are not necessarily expert in making public policy judgments. Thus, a highway commission is expert in determining that one route will cost $20 million less than another, but it is not expert in determining whether the scenic preservation resulting from the more expensive route is worth it.[11] But this does not quite support the notion that the courts' lack of technical expertise is an advantage!

In emphasizing litigation as a major weapon in the defense of the environment, the author makes a number of valid points. The use of the preliminary injunction, for instance, has indubitably had outstanding success in delaying, and ultimately preventing a number of major and irreversible insults to the environment, such as, for instance, in the case of the Alaska pipeline.[12] He is right, too, in denying the old saw that the judicial process is necessarily replete with delay and procrastination. In those instances where injunctive processes are appropriate, and where the matter may be dealt with by a preliminary injunction, judicial processes are demonstrably prompt and decisive—though they may work, sometimes, to delay

10. Sax, *supra* note 1, at 107-10.

11. Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 Colum. L. Rev. 612 (1970).

12. Wilderness Society v. Hickel, 325 F.Supp. 422 (D.D.C. 1970).

needed public works for a long time. He is clearly right in asserting that the courts' hands need to be strengthened to deal promptly with official actions that, unguided and unchecked, may cause irreversible damage. On the other hand, the need for effective judicial devices to check administrative action before its consequences become irreversible does not in and of itself argue for the downgrading of administrative agencies that Sax implies. He would, for instance, give the courts a far greater scope of administrative review than they presently have. This is articulated, too, in the Michigan Environmental Protection Bill[13] which he has authored, and which has been used as "model" legislation in many states. Indeed, the Hart-McGovern bill presently pending in Congress[14] springs from the same source. In Sax's view, the usual formulation of judicial review—that administrative judgments will not be set aside unless they are "arbitrary, capricious and contrary to law"—is far too narrow to allow the courts to exercise a full range of public policy judgments. Under the Michigan law, for instance, when a public interest plaintiff brings an action against a paper mill for excessive emissions of sulphur dioxide, evidence on behalf of the defendant that the paper mill complies with administratively set standards would not protect him against a finding by the court that his activities cast an undue burden on the environment.[15] It is submitted that this would deny administrative agencies a primary role even in the areas of their special, technical competence. This would indeed result in the court substituting its judgment for that of the agency in the very technical fields where, by legislative definition, the agency judgment is better qualified. It would undo the entire field of administrative law. When courts are free to substitute their judgment for the technical judgments of administrative agencies, then we shall witness a return to the long-dead notions of substantive due process, when courts undid legislative and administrative standards simply because they did not agree with their underlying political philosophy. It is perhaps worth mentioning, as a curious historical footnote, that it was dissatisfaction with judicial meddling under such substantive due process notions that gave major impetus to the development of adminis-

13. Environmental Protection Act of 1970, Pub. Act. No. 127, Mich. Comp. Laws Ann. (1970).

14. S. 1032, 91st Cong., 2d Sess. (1971).

15. Environmental Protection Act of 1970, Pub. Act. No. 127, Mich. Comp. Laws Ann. § 5(2) (1970), states: "... any alleged pollution, impairment or destruction of the air, water or other natural resources or the public trust therein, shall be determined, and no conduct shall be authorized or approved which does, or is likely to have such effect so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public, health, safety and welfare."

trative agencies in the 1930's! Such a broad delegation of power to courts is more than a mere invitation to make some environmental common law—it may well be an unconstitutional delegation.[16] It may be void first on due process grounds because it is a delegation without ascertainable standards, and second, because it may violate state constitutional separation of power requirements.

It might be added that the "administrative-review syndrome of crabbed inquiries" which the author postulates[17] is a fiction rather than a fact. The "arbitrary, capricious and contrary to law" formulation, administrative lawyers agree, has never stood in the way of judicial reversal of clearly erroneous and wrongful administrative decisions.

In the author's view, litigation operates as a catalyst to legislative action in pointing up existing needs. This is probably the area in which environmental litigation has done its best service. Sax, however, views the litigation process also as a device to "make democracy work." He would employ litigation to serve as a "technique of legislative remand."[18] In this view, litigation would serve to stop administrative action having environmental impact whenever the legislative intent was unclear, thereby compelling the proponent of such action to return to the legislature for specific authorization—if he can get it. It is an interesting notion, which overlooks some of the established relationships between legislative and administrative action. In many instances, the legislative intent in creating a program is clear—to provide general policy guidelines to an administrative agency and to let the administrative agency determine particular guidelines which may be in disagreement with the specific determination of a properly delegated agency?

Sax is right in asserting that litigation can provide a necessary moratorium on hasty action, an opportunity to stand still and review the environmental impact, particularly administrative decisions. Such a moratorium may be useful, but there ought to be self-restraint in calling for it. The moratorium can turn into a dead end for a needed project. Thus, there are many recent instances when "moratoria" caused by litigation relating to power plant siting may ultimately cause harmful delays.[19] There would seem to be a real risk that such

16. A lower Michigan court has so held. Roberts v. Michigan, No. 12428-C (Cir. Ct., Ingham County, Mich., May 4, 1971).

17. Sax, *supra* note 1 at 148.

18. *Id.* at 192.

19. A recent decision requiring a revision of the Atomic Energy Commission's procedures has delayed indefinitely the construction of 112 atomic facilities, many of which had already been licensed. Calvert Cliffs' Coordinating Committee, Inc. v. AEC, No. 24,839 (D.C. Cir., July 23, 1971); N.Y. Times, Oct. 21, 1971, at 23.

prolonged moratoria may result in an anti-environmental protection backlash which will serve nobody's interest.

One aspect of environmental protection receives hardly any mention in the book at all, and that is the continuing surveillance and control of pollution, which is primarily an urban problem. Litigation has worked best in checking the environmental impact of specific newly proposed projects, be they roads, power plants, dikes, or canals. Litigation—and particularly the preliminary injunction—can stop the bulldozer or the construction crew and can put off a project until proper measures to protect the environment have been taken. Public interest litigation thus far has not been used successfully to protect against the continuing emission of air pollutants and the continuing discharge of effluents from industrial production. That happens to be an area in which a one-shot preliminary injunction will not serve. It happens to be an area where continuous standard-setting, continuous surveillance, and continuous enforcement are needed to accomplish the purpose. In brief, it is an area for the continuous efforts of administrative agencies, well staffed, well equipped, and with adequate legal enforcement powers. It is an area of at least as great importance as conservation, recreation, and scenic preservation. Administrative agencies must not be denigrated in importance, because, whatever their faults—and they are many and need to be corrected—they are needed to do the one major continuing job that private interest litigation is least equipped to accomplish.

The protection of the environment is a major and continuing function of government. It is *public* business. Environmental litigation by private "public interest" plaintiffs can help call attention to that important phase of public business, but it should not be made to appear as a substitute for it.

Instead of placing major reliance on private citizen action, important though it may be, we must gear our governmental machinery to accept responsibility for and the full costs of long-range environmental management, just as we do in the case of other major social problems. Just as social welfare is likely to remain a continuing problem of our society, so will environmental protection. In each instance, citizen action in the courts can call attention to the needs. The fulfillment of the needs remains a government function, best carried out in the only way we know—through the legislature—and through properly constituted and properly equipped administrative agencies.

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