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Book Review. For Whom the National Parks?

A. Dan Tarlock
Indiana University School of Law

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MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS. By Joseph L. Sax. Ann Arbor, Michigan: University of Michigan Press. 1980. 152 pp. $10.00 hardbound, $5.95 paperbound.

Modern environmentalism has its roots in the late nineteenth- and early twentieth-century reaction to the scientific conservation movement.[1] Scientific conservation was in turn a reaction to the then-prevailing ethic that natural resources should be exploited as rapidly as possible.[2] The conservation movement did not challenge the need to exploit natural resources, but argued that the rate of exploitation should be slowed to achieve a maximum return over time. From this movement came this century's prevailing management ethic: Resources should be exploited for multiple-use objectives to promote efficient allocation.[3] The forerunners of the modern environmental movement were, by contrast, primarily concerned with one goal: preserving large areas of the public lands in their natural state. This single-use philosophy, based on appeals to higher spiritual values and loose notions of the moral imperatives of ecology,[4] was an appealing if ambiguous model for the environmental move-

* A.B. 1962; LL.B. 1965, Stanford University. Professor of Law, Illinois Institute of Technology, Chicago-Kent School of Law.

1. "The contradictions that beset modern environmentalism reflect the divergent evolution of two ideological themes which arose at the birth of the conservation movement . . . . One line of thought can be identified as the *ecocentric mode* . . . [which rests] 'upon the supposition of a natural order in which all things [move] according to natural law, in which the most delicate and perfect balance was maintained up to the point at which man entered with all his ignorance and presumption.' The other viewpoint is the *technocentric mode* characterized . . . as the application of rational and 'value free' scientific and managerial techniques by a professional elite, who regarded the natural environment as 'neutral stuff' from which man could profitably shape his destiny." T. O'RIORDAN, ENVIRONMENTALISM 1 (1976).

2. The leading analysis of this movement is S. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY (1959).

3. For a lucid statement of the theory of multiple-use management, see Krutilla & Haigh, *An Integrated Approach to National Forest Management*, 8 ENVTL. L. 373 (1978).

4. The most influential statement of the view that ecology can teach man how to manage his resources is A. LEOPOLD, A SAND COUNTY ALMANAC (1949).

ment when it gained prominence on the political agenda of the late 1960s.[5]

Modern environmentalists tried to translate the preservation ethic into a general management prescription for all life support system resources: air, land, and water.[6] Lawyers, eager to adapt the common law to changing social preferences, began to argue that courts and administrative agencies should recognize ecosystem alteration *per se* as a legally cognizable injury.[7] Before this era the common law protected only demonstrated injuries to human health and to resources put to beneficial use by humans.[8] And even in this era the common law has proven quite resistant to a significant expansion of the category of protected interests, though environmentalists have successfully persuaded Congress to replace conservation principles, which generally seek to minimize the known social costs of unrestrained exploitation, with preservation principles in much of the environmental legislation of the 1970s.[9] However, preservation remains an ambiguous moral and scientific principle, and its merits are still the subject of intense debate.

In *Mountains Without Handrails: Reflections on the National Parks*, the leading environmental law scholar, Professor Joseph L. Sax, considers the preservation ethic in the context of our national parks system. *Mountains Without Handrails* examines the growing problem of over-

5. *See* Andrews, *Class Politics or Democratic Reform: Environmentalism and American Political Institutions*, 20 NAT. RESOURCES J. 221 (1980).

6. This "new conservation" or "new preservation" goes beyond the original preservation ethic because it is premised on the belief that "saving the environment is impossible without changes in the economic, social, and ideological fabric of the modern world." Hart, *The Environmental Movement: Fulfillment of the Renaissance Prophecy?*, 20 NAT. RESOURCES J. 501, 519 (1980). J. PASSMORE, MAN'S RESPONSIBILITY FOR NATURE 3–40 (1974) identifies and traces two distinct traditions in man's attitude toward nature: the desire to dominate nature and the willingness to cooperate with it.

7. One of the first cases to consider this argument was Reserve Mining Co. v. Minnesota Pollution Control Agency, 2 Env't Rep. Cas. (BNA) 1135 (Dist. Ct. Minn. 1970). The story of this epic litigation is told in R. BARTLETT, THE RESERVE MINING CONTROVERSY (1980).

8. Tarlock, *A Comment on Meyers'* Introduction to Environmental Thought, 50 IND. L.J. 454 (1975).

9. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1251(a)(1) (1976) (declaration of goals and policies); Clean Air Act, 42 U.S.C. § 7409 (Supp. III 1979) (primary and secondary air quality standards); *id.* § 7491 (prevention of significant deterioration). Preservation principles, unlike management principles, demand that environmental damage be avoided without regard to cost. Thus, 33 U.S.C. § 1251 has been interpreted as precluding consideration of the cost of compliance where variances are sought from the standards of the Clean Water Act. EPA v. National Crushed Stone Ass'n, 449 U.S. 64 (1980). Similarly, 42 U.S.C. § 7409 has been interpreted as allowing the EPA to set public health standards without regard to economic cost and technological feasibility. Lead Industries Ass'n v. EPA, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980).

crowding of the national parks and discusses how our national parks ought to be managed, which to its author means asking who should be encouraged to use them. The basic purpose of a park reservation or creation is to preserve something special, and thus the management philosophy has always been one of single, as opposed to multiple, use. However, as the stock of unique areas on the original retained public lands has been exhausted, the Park Service, like all good government firms, has sought to expand its product lines to attract congressional support. But the growing demand on limited park resources has forced the Park Service to make difficult decisions about the proper level of park "enhancement" and use and has embroiled the Service in the single- versus multiple-purpose debate. Although the special mission of the national parks limits Professor Sax's argument primarily to its immediate context, it has some relevance for other resource conflicts, where intensity of use is the issue.

Despite its narrow focus, *Mountains Without Handrails* is well worth reading. Professor Sax has written an elegant, concise, well-researched, and tightly reasoned argument in favor of severely limiting park access and development. The book begs Congress not "to make national parks all things to all people in every location,"[10] and urges the Park Service to interpret its broad statutory mandate in the preservationist tradition.[11] Whether a court could order the Department of the Interior to conform to Professor Sax's vision of proper park management policy is not directly addressed.

However, Park Service discretion is not unlimited,[12] and Professor Sax's book will undoubtedly be cited in the increasing flow of litigation challenging Park Service discretion. Such increased litigation seems inevitable under the administration of the current Secretary of the Interior, James G. Watt. Secretary Watt wants to follow park management policies that are diametrically opposed to the historic preservationist vision of the parks. Specifically, he wants to halt the acquisition of new land for the system, dispose of inferior, newer units of the system near urban areas, increase the role of private concessioners, and "err on the side of public use versus preservation."[13]

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10. P. 105.

11. P. 106.

12. *See* Sierra Club v. Andrus, 487 F. Supp. 443, 448–49 (D.D.C. 1980) (interpreting 16 U.S.C. § 1a-1 (Supp. III 1979)). A fine collection of materials on the law of the Park Service and related issues can be found in G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW (1981).

13. Secretary Watt's thinking on national park policy to date was most fully spelled out in a speech delivered to the Conference of National Park Concessioners on March 9, 1981

To add insult to injury, the Secretary counters the moral basis of preservation with a theological argument. In his now-celebrated statement before Congress, Secretary Watt expressed doubts about the need for increased preservation efforts because "I do not know how many future generations we can count on before the Lord returns."[14]

Thus, Professor Sax's book is more timely than he thought when he set out to prod a basically friendly Park Service to further limited use and development efforts. This review discusses the book's policy argument and then examines the legal implications of preservationist policy by discussing some management strategies that Professor Sax primarily developed in two law review articles.

I. PRESERVATION AS POLICY

Mountains Without Handrails argues that access to the national parks should be limited to those who have the sensitivity and willingness to encounter nature on its own terms. This is a tough, even harsh policy, much like France declaring that the Louvre will only be open to persons with a demonstrated capability to appreciate art. The core of Sax's argument is captured in his criticism of a Park Service plan to build a tramway to the top of a mountain in Guadalupe National Park in Texas to allow people to look down into a wilderness area. In a classic example of bureaucratic hyperbole, the Service justified the plan as necessary to allow park visitors "truly a wilderness threshold experience." This will not do for Professor Sax. "Peering at a wilderness from a tramway station . . . is *not* a wilderness experience; the sense of wilderness is not achieved by standing at its threshold, but by engaging it from within."[15] Likewise Professor Sax would restrict the right to float the inner Canyon of the Colorado to those who come in the spirit of Major John Wesley Powell.[16] "The inner Canyon stretch of the river should . . . be limited to those who are willing to make their own schedule, to en-

(mimeo copy on file with author). *See generally James G. Watt Nomination, Hearings Before the Senate Comm. on Energy and Natural Resources*, 97th Cong., 1st Sess. (1981); Shabecoff, *Administration Seeks Greater Role For Entrepreneurs at Federal Parks*, N.Y. Times, Mar. 29, 1981, at 1, col. 1.

14. The quotation is explained as a Christian version of scientific conservation in NEWSWEEK, June 29, 1981, at 29.

15. P. 63 (emphasis in original).

16. Major Powell was the first known person to descend the Colorado River. *See* J.W. POWELL, THE EXPLORATION OF THE COLORADO RIVER AND ITS CANYONS (Dover ed. 1961), and Wallace Stegner's great biography of this fascinating scientist and Western visionary, W. STEGNER, BEYOND THE HUNDREDTH MERIDIAN (1954).

counter snakes, and to prepare their own meals."[17]

Although Professor Sax is not the first to make it, this is a hard argument to make for two reasons. First, the theory—although not the practice—of American public land policy has been to distribute land and access as widely as possible.[18] This philosophy has been carried over from the disposition era to the modern era of retention and management. In fact, the Park Service has long used increased use of the national parks to justify increased appropriations. Hence, there is an element of estoppel working against a limited access policy. Second, the argument cuts against the deeply held view in American society that individual choice, no matter how silly or crass, is valued. The person who comes to view the Grand Canyon in the spirit of Emerson or John Wesley Powell is no better than one who comes in a recreation vehicle with a locker full of beer and a portable television set.

A. *Preservation and Paternalism*

Mountains Without Handrails surpasses much of the previous preservation literature by its candid admission of elitism and its willingness to grapple with the hard questions that lie beneath the surface of the traditional pro-preservation arguments. Professor Sax frankly admits that many management choices advocated by preservationists must be justified on moral rather than scientific grounds.[19] "Right or wrong, persuasive or not, his [the preservationist's] claim is that he knows something about what other people *ought* to want and how they can go about getting it . . . ."[20] He urges preservationists to frankly admit their paternalism and take the chance, which they must in a free society, that their ideas will be accepted as a matter of grace, not of right.[21]

Professor Sax's argument for limiting parks to those willing to

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17. P. 96.

18. *See generally* P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968).

19. "[P]arks are not self-justifying . . . . Your [the preservationist] vision is not necessarily one that will commend itself to the majority. It rests on a set of moral and aesthetic attitudes whose force is not strengthened either by contemptuous disdain of those who question your conception of what a national park should be, or by taking refuge in claims of ecological necessity." Pp. 108–09.

20. P. 59 (emphasis in original).

21. Professor Sax wisely does not argue that park preservation, as he defines it, is a constitutionally protected right. *See* p. 104. The preservationists have had unlimited access to the political process and are a richly rewarded minority, not an oppressed one. Those wishing to consult an argument of sorts for minority rights may read the late Mr. Justice Douglas's book. W. DOUGLAS, A WILDERNESS BILL OF RIGHTS (1965).

rough it is a post-Freudian version of the mystic legacy of Emerson, Thoreau, and Saint John (Muir) of the Mountains that raw nature, if properly experienced, purifies the soul.[22] Sax believes that one should go into the wilderness, as Moses did, to find God.[23] Parks provide an opportunity for self-fulfillment not offered elsewhere in modern society. They also help to counter the excessive urge to consume that is fostered by a mass, technological society.

Americans have always had an ambivalent attitude toward nature. Of necessity, we have had to subdue it, and we have been frightened by the scale and bleakness of the land. We have also been inspired and awed by the magnificent legacy that we discovered and have instinctively felt that it was wrong to "civilize" such grandeur.[24] The current intense debate over what types of recreation are proper in natural areas reflects these attitudes. To some, natural areas provide a chance to test one's ability to dominate nature through technology. The oil driller and the off-road vehicle driver are the modern miner and frontiersman. For others, natural areas are places for calm reflection.

Preservationist park and wilderness users consist of hard-driving mountain climbers and backpackers as well as gentler nature observers. Professor Sax finds both these activities praiseworthy (the latter more than the former) because both rely on *individual* physical and mental skills. This self-reliance enables the participants to achieve higher levels of experience than can be achieved in activities supported by motorized power. Professor Sax feels that park policy should only promote activities that rely on individual skill. He ar-

22. Professor Sax's argument is an extension of the transcendentalist attempt to use a vision of nature to reconcile the tension between unrestrained individualism and obligation toward the community. "Their rudimentary understanding of the ecosystem led the transcendentalists to believe that democracy could only be attained by imitating what they understood as the lesson of nature—the pursuit of self-actualization and creative diversity within mutually sustaining communities." T. O'RIORDAN, *supra* note 1, at 3. O'Riordan's summary is based on an interesting book too little known to environmental lawyers: W. BURCH, DAYDREAMS AND NIGHTMARES: A SOCIOLOGICAL ESSAY ON THE AMERICAN ENVIRONMENT (1971).

23. *See* p. 46.

24. *See* Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205, 226–44 (1974) (intellectual history of the transformation of the idea that nature should be conquered to the idea that it should be respected). Willa Cather captures our ambivalence well in describing the impact of virgin Nebraska on a young immigrant: "But the great fact was the land itself, which seemed to overwhelm the little beginnings of human society that struggled in its sombre wastes. It was from facing this vast hardness that the boy's mouth had become so bitter; because he felt that men were too weak to make any mark here, that the land wanted to be let alone, to preserve its own fierce strength, its peculiar, savage kind of beauty, its uninterrupted mournfulness." W. CATHER, O PIONEERS! 15 (1913).

gues that power-based recreationists must moderate their appetities for "junk" recreation.[25] Parks should encourage recreation that "draws on intensiveness of experience" in contrast to "intensiveness of impact":[26] "[W]e should develop a taste for [reflective recreation] and . . . stimulating the appetite should be a primary function of national parks."[27]

To support its thesis that parks should be managed for those willing to engage in active but contemplative recreation, *Mountains Without Handrails* draws on a wide variety of sources, in addition to the traditional park histories and nature literature. Professor Sax credits a previously obscure report on the Yosemite Valley, prepared by Frederick Law Olmsted in 1865, as the foundation of modern preservationist management philosophies.[28] A detailed discussion of the report is followed by an intensely personal and creative meditation on the literature of sport. He concludes that individual sport, broadly defined, can provide a means of spiritual fulfillment otherwise denied man in a mass society. From this vision a clear park policy emerges in the last three chapters: Automobile and other power access to scenic sights should be minimized;[29] lodging should be rustic, not luxurious, so that a park visit will be an end in and of itself;[30] and access should be rationed to provide the few who can enter with a high-quality recreation experience.[31]

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25. *See* p. 75. The term is mine. Professor Sax writes that "the will to power is ultimately self-defeating, and that the preservationists' moralistic stance may be a practical solution as well, even for those who can only see the problem as one of perpetually insufficient physical resources." P. 76.

26. P. 76.

27. P. 61.

28. Frederick Law Olmsted is best remembered today as a landscape architect, but he had an amazing range of experiences. His contact with California began in 1863 when he came West to manage the Mariposa Estate for the group that took the property from General Fremont after he went bankrupt. Olmsted was subsequently appointed to the Commission created by California to administer Yosemite Park. His major intellectual concern at that time was to justify the nonaristocratic nature of American society to European aristocrats. *See* L. ROPER, FLO: A BIOGRAPHY OF FREDERICK LAW OLMSTED 247 (1973). Consistent with his intense faith in the American experiment, he stressed the importance of reserving parks for all the people. Professor Sax gives full due to Olmsted's faith in the progress of the common man, but confines that faith to its historical context, preferring instead to emphasize Olmsted's vision of individual self-realization. Pp. 24–26. This restatement of Olmsted is, of course, more consistent with a limited access policy than is a literal reading of Olmsted's nineteenth-century vision. The tension between democracy as a theory of individual fulfillment and as one of societal fulfillment has important ramifications for park management policy. *See* notes 32–49 *infra* and accompanying text.

29. P. 81.

30. P. 88.

31. P. 94.

B. *The Merits of Preservation as Policy*

Ultimately, the merits of Professor Sax's policy prescriptions can only be confessed; they cannot be proved. I agree with his prescription for the older (and some newer) parks, although for different reasons. Yellowstone, Yosemite, the Grand Canyon, Glacier, the Grand Tetons, and the Canyonlands in Utah are part of our civilized heritage. Like Mozart's operas, Milton's poems, and ancient Jerusalem, areas of awesome scenic grandeur are treasures of Western civilization that must be passed on as intact as possible from generation to generation. Literature and music can protect themselves since interpretation is reversible, but architecture and the natural landscape cannot, and therefore man's policy toward them must be based on respect for the original conception.[32] Just as *The Marriage of Figaro* is not *Shampoo*, neither should the Grand Teton National Park be treated as a full-service resort. In short, a park is a living museum.[33] Professor Sax's argument for preservation draws on the most optimistic strain in Judeo-Christian thinking, faith in man's progress.[34] For me, however, it is enough that certain national parks are irreplaceable and have occupied an important role in shaping this nation's perception of itself.[35] Thus, there is a case for preventing people from harming the parks, regardless of whether those who visit them are somehow better off from the experience.

This justification is more limited than that Professor Sax offers because it does not apply with equal force to all units of the park system. Although the Park Service is a single-purpose agency with a duty to maximize the value of the resources under its jurisdiction,[36] the vision of a democratic public lands policy insures that the Service is not free from the single- versus multiple-use debate. The Park

32. *See* pp. 105–06. In fact, management plans currently being considered for the Grand Canyon, Yellowstone, and Yosemite would severely limit visitor access and park enhancement projects in an attempt to preserve the original vision of these parks.

33. Professor Sax frankly admits that parks belong to everyone. P. 103.

34. *See also* Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974).

35. Professor Mark Sagoff has presented a sophisticated non-utilitarian argument for the preservation of natural environments which asserts that "[t]he obligation to preserve nature . . . is an obligation to our cultural tradition, to the values which we have cherished and in terms of which nature and this nation are still to be described." Sagoff, *supra* note 24, at 265. Professor Sagoff, a philosopher, concludes that park preservation is a constitutional right. *Id.* at 266–67. As Professor Sax and others have shown, this is bad constitutional law. *E.g.*, Tribe, *From Environmental Foundations to Constitutional Structures: Learning From Nature's Future*, 84 YALE L.J. 545 (1975). Sagoff's argument, however, is a rationale for preservation management *policies*.

36. *See* notes 59–63 *infra* and accompanying text.

Service has always had to promote its product aggressively to persuade Congress to appropriate money, has always been attacked by both commodity users and preservationists over each balance that it struck between purity and access,[37] and has generally responded to increased public demand for access with requests for more funds for personnel and facilities. Many of the newer additions to the system are National Recreation Areas,[38] located near metropolitan areas in the effort to "get parks to the people."[39] Thus, one can argue that the democratic ethic in public land policy requires that the Service accept some park development, and therefore that strict preservationist policies in some parks must be compensated by more intensive (but not unlimited) development in other parts of the system.

Mountains Without Handrails denies both the philosophical and practical justifications for such a balancing policy. Professor Sax, of course, acknowledges that the park setting determines intensity of experience, but nonetheless insists that strict preservation should be applied not only to Yosemite and Yellowstone, but also to Gateway National Recreation Area in the middle of New York City.[40] He refuses to concede that the preservationist vision is undemocratic. As I understand him, he argues that it is not undemocratic to impose limited park access on a majority that wants unlimited access for two not completely integrated reasons. The first is a denial of "[t]he notion that commitment to democratic principles compels the assumption of unlimited abundance and a rejection of the possibility of scarcity."[41] Second, his suggested sacrifices, it is asserted, are democratic because they are voluntarily assumed in the name of self-paternalism. Professor Sax makes the dubious assumption that because we frequently coerce ourselves into making private choices that we do not enjoy in the hope of improving ourselves, we will also welcome, or at least tolerate, uplifting public choices.[42]

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37. This struggle between purists and promoters is seen as an almost Miltonic struggle between good and evil in the standard park service history. J. ISE, OUR NATIONAL PARK POLICY: A CRITICAL HISTORY (1961).

38. *See, e.g.*, 16 U.S.C. §§ 460n-1, 460kk (1976 & Supp. III 1979).

39. Statement of Walter Hickel, Secretary, Dep't of Interior, U.S. Dep't of Interior News Release (Sept. 14, 1970), *quoted in* Futrell, *Parks to the People: New Directions for the National Park System*, 25 EMORY L.J. 255, 264 (1976).

40. Pp. 83–85.

41. P. 83.

42. Pp. 50–55. This argument is developed more explicitly in a lecture that Professor Sax gave at Creighton University School of Law, published as Sax, *Fashioning a Recreation Policy for our National Parklands: The Philosophy of Choice and the Choice of Philosophy*, 12 CREIGHTON L. REV. 973, 976–85 (1979).

Professor Sax argues his case well, but I am not persuaded that one can move from examples of individual sacrifice—devoting a month to *War and Peace*—to collective sacrifice. Nor am I alone in my doubts. Many thoughtful scholars have questioned whether environmental values are consistent with the liberal democratic tradition.[43] These criticisms aside, *Mountains Without Handrails* is a more powerful argument for limited access to national parks than the previous literature. One issue that Professor Sax does not adequately address, however, is how access should be limited.[44] The tension between the "tragedy of the commons"[45] problem and democratic values can, at least for parks, be partly reconciled by fair methods of access limitation. The Park Service and others concerned with the deterioration of the national parks usually recommend limiting access by first come, first served rationing. By contrast, economists generally recommend that once the level of use of a resource is determined through the political process, the most efficient way to implement the decision is to price the right to use the resource.[46]

Studies such as the Public Land Law Review Commission's have rejected pricing as nonegalitarian,[47] but this is a weak reason. Indeed, pricing would seem an ideal way to allocate entry to the more remote national parks. The immediate benefits of park use are highly concentrated both by percentages of the population and by income levels.[48] National park access would not be listed by many as a basic public service "owed" by government to any citizen who wants it. And at all levels of government, user charges, rather than across the board taxes, are an increasingly accepted means of financing certain public services.[49] Users of remote parks are a small, largely well-to-do group. Therefore, charging for use of national parks will not interfere with whatever income redistribution policies this country

43. *See, e.g.*, W. OPHULS, ECOLOGY AND THE POLITICS OF SCARCITY 184–99 (1977).

44. For example, Professor Sax approves of rationing, p. 83, but he does not discuss the different means of rationing.

45. *See* Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

46. *See, e.g.*, J. DALES, POLLUTION, PROPERTY & PRICES (1968).

47. *See* Johnson, *Recreation, Fish, Wildlife and the Public Land Law Review Commission*, 6 LAND & WATER L. REV. 283, 289 (1970).

48. A widely cited rationale for park preservation is the concept of option demand. *See, e.g.*, Krutilla, *Conservation Reconsidered*, 57 AM. ECON. REV. 777, 780–82 (1967). In brief, option demand is used to explain why the market fails to reveal the preferences of both those living and those yet to be born to value future visits to a park. Access pricing is consistent with the theory of option demand because it provides a means by which present generations can exercise their option in a manner that is consistent with the hypothetical values placed on the park by future users and future generations.

49. *See* R. ELLICKSON & A. TARLOCK, LAND-USE CONTROLS 705–84 (1981).

follows. Within legislative and administrative ceilings to limit park access, however, some subsidies may be appropriate to temper the perceived inequities of price rationing.

II. Legal Implications of Preservation Policy

A limited access policy has important legal implications for management of both the parks themselves and surrounding land. Development around parks has long concerned Park Service officials. But they have been reluctant for legal and political reasons to assert much power over land development outside park boundaries, except where Congress has expressly included extraterritorial duties in enabling legislation. Professor Sax's essay poses three major legal questions: (A) Does the Park Service have adequate enabling authority to implement a limited access, high-intensity-of-experience policy? (B) Is the Park Service under a legal duty—statutory, constitutional, or common law—to tilt its decisions toward the vision articulated in *Mountains Without Handrails*? and (C) Does the Park Service have the constitutional power to prevent harmful developments on the perimeter of the system and to impose federal land use controls on privately owned buffer areas?

A. *Enabling Authority*

Professor Sax wants park facilities to be developed only to the extent necessary to cater to adventurous visitors. If necessary, park access would be rationed to heighten the intensity of experience for those who enter. Existing Park Service enabling legislation appears to grant the Department of the Interior authority to implement both parts of this policy, although severe access limitation may be challenged in the courts. First of all, the Service is directed "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."[50] This preservation mandate was reaffirmed by Congress in 1978.[51] Secondly, in drafting Park Service enabling legislation, Congress has generally been content to define grandly the purpose of the park system and to delegate to the Secretary of Interior the power to make "such rules and regulations as he may deem necessary or proper for the use and management of the parks, monu-

50. 16 U.S.C. § 1 (1976).

51. *Id.* § 1a-1 (Supp. III 1979); *see* text accompanying note 66 *infra*.

ments, and reservations under the jurisdiction of the National Park Service."[52]

Park Service management decisions are informal administrative actions. Such actions are reviewable,[53] but the Secretary's decision can only be set aside if it is arbitrary. Furthermore, many of Professor Sax's proposals call for nonaction and are therefore effectively isolated from judicial review. Decisions not to enhance the park to accommodate the less strenuous would seem to fall well within the Secretary's discretion. The cumulative effect of these decisions will, of course, be to limit access, but the impact will be felt only gradually.

More direct decisions to withdraw part of a park from use and to ration access can be challenged on the ground that the Service's basic mandate is to preserve park land for general public enjoyment. But here too, the Secretary's broad mandate makes his management decisions largely immune from review unless they involve an issue that Congress has specifically addressed. Consequently, there are few cases interpreting the Secretary's management discretion. Further, it will be difficult for courts to find sufficient standards in the statute against which to test the arbitrariness of a park allocation choice.

The issue of direct access limitation has only reached the courts once, in *Wilderness Public Rights Fund v. Kleppe*,[54] and the result was favorable to the Park Service. *Wilderness Public Rights Fund* involved a challenge to a 1972 decision of the Secretary limiting use of the Colorado River in the Grand Canyon to 96,600 user days per year and allocating 92% of the user days to commercial river runners holding Park Service concessions. In upholding the decision, the Ninth Circuit concluded: "If the over-all use of the river must, for the river's protection, be limited, and if the rights of all are to be recognized, then the 'free access' of any user must be limited to the extent necessary to accommodate the access rights of others."[55] The favoritism

52. 16 U.S.C. § 3 (1976). Some recent enabling legislation for new parks, however, contains more specific management directives. *See, e.g.*, 16 U.S.C. § 396d(d)(4) (Supp. III 1979) (Secretary of the Interior shall use "the traditional native Hawaiian Ahupua's concept of land and water management" in protecting lands around the Kaloko-Honokohau National Historical Park).

53. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971).

54. 608 F.2d 1250 (9th Cir. 1979), *cert. denied*, 446 U.S. 982 (1980).

55. *Id.* at 1253. In another recent case, litigation challenging restrictions on backcountry use in Mount Rainier National Park was dismissed after the Park Service agreed to liberalize the regulations. Penberthy v. Tobin, No. 75-574 (D. Wash. Jan. 11, 1978) (order dismissing complaint filed), *discussed in* Suniville, *The National Park Idea: A Perspective on Use and Preservation*, 6 J. CONTEMP. L. 75, 84–87 (1979).

shown to concessioners was justified because they performed a public function in providing "services that the [Park Service] deems desirable for those visiting the area."[56] *Wilderness Public Rights Fund* is an important precedent for implementing Professor Sax's policies, although it suggests that some level of access must be maintained,[57] and does not foreclose arguments that the Park Service should have used a less restrictive means of preserving the park.[58]

B. *Legal Duty*

Because of the substantial discretion delegated to the Park Service, some park management decisions are bound to accommodate the pressures for greater access opportunities. The discretion of the Secretary then can lead to user encouragement policies.[59] Judicial challenges to such decisions will proceed on the theory that the Service has a duty to restrict access in order to preserve the quality of the experience for those park users allowed in. In the 1970s environmentalists argued that such a duty could be found in the theory that the national park system was subject to a public trust. The trust theory derives from the doctrine that the sovereign holds navigable waters in trust for all citizens. With respect to navigable waters the trust is a source of public use rights and, in extraordinary situations, of limitations on the power of the state to alienate submerged lands.[60] In an influential 1970 article, Professor Sax argued that the major lessons of the public trust doctrine are procedural rather than substantive.[61] He read the cases to require courts to strictly construe legislation au-

56. 608 F.2d at 1254.

57. *See id.* at 1253.

58. *Cf.* Sim v. State Parks & Recreation Comm'n, 94 Wash. 2d 552, 617 P.2d 1028 (1980) (state commission order closing ocean beach highways held invalid).

Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 3099 (1981), also suggests that access limitations might be successfully challenged. On free exercise of religion grounds, members of the Navajo tribe sued to enjoin the Department of the Interior from inundating the area surrounding Rainbow Bridge National Monument and allowing tourists to desecrate a sacred site. *Id.* at 175–76. Concerning the limitation of public access, the court noted that "[u]nquestionably the government has a strong interest in assuring public access to this natural wonder." *Id.* at 178. The court, finding Park Service regulations on visitor conduct adequate to protect the plaintiffs' interests, concluded that a complete ban on tourists to aid plaintiffs in conducting their religious ceremonies would violate the first amendment's establishment of religion clause. *Id.* at 179–80.

59. *See, e.g.*, Friends of Yosemite v. Frizzell, 420 F. Supp. 390, 393 (N.D. Cal. 1976) (holding that the promotion of tourist travel in the parks is within the scope of the enabling act).

60. *E.g.*, Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 457–59 (1892).

61. *See* Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 557–65 (1970).

thorizing resource development or transfer in order to promote democratic decisionmaking through remands to the legislature. Other commentators enthusiastically pushed the public trust doctrine beyond the limits articulated by Professor Sax by arguing that all public resources were held in trust and that courts should recognize public rights in public property when resolving conflicts among different proposed uses.[62]

But apart from the special case of navigable waters, the Supreme Court has used the concept of the public trust over federal land for a purpose opposite to that urged by environmentalists. The Court has said that Congress holds the public lands in trust for all citizens only for the purpose of confirming Congress's unreviewable discretion over public land allocation choices.[63] The trust is thus standardless. Further, since the trust concept cannot restrain congressional decisions, it cannot be read as an invitation to the courts to fashion a common law of environmental duties on Congress's delegates.

Despite the lack of substantive standards in the trust concept, in 1974 the Sierra Club convinced a district court to rely partially on the public trust to require the Secretary of the Interior to buffer Redwood National Park in Northern California.[64] After this success, the Sierra Club tried to convince Congress to incorporate the trust notion into park system enabling legislation. Congress, however, balked at using the term because of the uncertainties surrounding its

62. *See* Note, *Proprietary Duties of the Federal Government Under the Public Land Trust*, 75 MICH. L. REV. 586 (1977); *see also* Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases About the Environment*, 64 CORNELL L. REV. 761 (1979). Professor Sax seems to be moving in this direction himself in his most recent statement on the role of the public trust doctrine in natural resources allocation. In addition to the procedural role that he has always advocated, he now argues that "the courts can reduce the pressures that claims of ownership put on public trust resources by looking to the history of common rights. The courts should recognize that mere unutilized title, however ancient, does not generate the sort of expectations central to the justness of property claims, and that long standing public uses have an important place in the analysis." Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C.D. L. REV. 185, 194 (1980).

63. Light v. United States, 220 U.S. 523, 537 (1911).

64. Sierra Club v. Department of Interior, 376 F. Supp. 90, 95 (N.D. Cal. 1974); *see also* Sierra Club v. Department of Interior, 398 F. Supp. 284, 287 (N.D. Cal. 1975) (general trust duty imposed upon the National Park Service "to conserve scenery and natural and historic objects and wildlife" in national parks). Although the court imposed a duty on the Secretary to protect the park by regulating, pursuant to statute, timber harvesting outside the park, 376 F. Supp. at 95-96, in the final round of litigation it relieved the Secretary of this duty after concluding that he had made a good faith effort to perform and that the real remedy was acquisition of a buffer zone. Sierra Club v. Department of Interior, 424 F. Supp. 172 (N.D. Cal. 1976). Congress authorized the acquisition two years later. *See* 16 U.S.C. §§ 79c, 79c-1, 79n (Supp. III 1979).

meaning.[65] Instead, in 1978 it passed legislation reaffirming existing law and providing that park management "shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress."[66]

This section was first construed in *Sierra Club v. Andrus*,[67] a case brought by the Sierra Club to force the Department of the Interior to implement its trust duty to claim reserved water rights in scenic southern Utah because of the threat to federal interests from energy development. In *Andrus*, Judge Richey held that the issue was not ripe for review and in dictum decided that the 1978 Act formally "eliminated 'trust' notions in National Park System Management."[68] The 1978 law was found to represent "*all* the responsibilities which defendants must faithfully discharge," and the decision was found to have a rational basis.[69]

On the other hand, Judge Richey also concluded that the 1978 legislation was intended to place *some* limits on the Secretary's discretion.[70] What those limits might be, he did not say, but Congress may have given courts a sufficient mandate to require the Service to give high priority to preservation in management decisions. Nevertheless, the courts can only overturn a Park Service decision if it is arbitrary. So, the parks are likely to correspond to Professor Sax's vision only if Congress and the Park Service want them that way.

C. *Park Service Power*

The most difficult management problem that the Service faces is controlling inconsistent development adjacent to the park. Buffer

65. *See* S. REP. NO. 95-528, 95th Cong., 1st Sess. 14 (1977).

66. 16 U.S.C. § 1a-1 (Supp. III 1979).

67. 487 F. Supp. 443 (D.D.C. 1980).

68. *Id.* at 449. A leading public lands scholar, Professor Charles Wilkinson, has recently argued that it is appropriate for courts to construe the "public trust" as a limitation on agency discretion as a means of enforcing the shift in public land policy from disposition to retention and intensive management. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C.D. L. REV. 269 (1980). Wilkinson finds Judge Richey's reading in *Andrus* of the legislative history of the 1978 amendments to the National Park Service Organic Act "difficult to support." *Id.* at 292. He argues further that the Act is a sufficient basis for judicial implication of trust duties because it "expressly create[s] high duties that set standards not dissimilar to those imposed on private trustees." *Id.* at 293–94.

69. 487 F. Supp. at 449 (emphasis in original).

70. *Id.* at 448–49.

protection is simply part of the larger question of the Park Service's power to manage federal property. Although no clear precedent exists, it seems clear that the federal government may acquire new lands for parks.[71] However, the Service's power to implement internal management choices and assert jurisdiction over private land is not settled.

There are two basic separate constitutional sources of power over national parks. The scope of federal power under either source is not completely settled, in large part because until recently, disposition of the public domain was the norm and acquisition, if contemplated at all, the exception.[72] Since 1934,[73] the federal government has been committed to a retention and acquisition policy, and this still relatively unexplored corner of constitutional law is slowly adjusting to this change in policy.

Units of the national park system may either be carved from retained federal lands or acquired from the states or private parties. The Department of the Interior has jurisdiction over retained lands under the property clause,[74] but jurisdiction over enclaves—acquired lands—is governed by individual state laws ceding jurisdiction to the federal government.[75] The law of enclaves is a patchwork of statutes tied together by loose principles of federal-state relations. The Supreme Court has interpreted acts of cession strictly against the states,[76] and thus the federal government generally has exclusive jurisdiction over enclaves unless a state expressly retains jurisdiction. Some nice problems arise over torts,[77] crimes, and the taxing power, but the law of enclave jurisdiction has not unduly hampered Park Service internal management.

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71. *See* Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 530 (1938) (dictum) (quoting James v. Dravo Contracting Co., 302 U.S. 134, 147 (1937)).

72. *See generally* E. PEFFER, THE CLOSING OF THE PUBLIC DOMAIN (1951) (history of the transition from disposition to retention and management).

73. The passage of the Taylor Grazing Act, ch. 865, 48 Stat. 1269 (1934) (current version at 43 U.S.C. §§ 315-315m, 315n, 315o-1 (1976)), is usually cited as the formal end of the disposition era. See G. COGGINS & C. WILKINSON, *supra* note 12, for a full collection of materials on this transition.

74. U.S. CONST. art. IV, § 3, cl. 2.

75. Jurisdiction is exercised pursuant to the jurisdiction clause, U.S. CONST. art. I, § 8, cl. 17.

76. *See, e.g.*, Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 224 (1845); G. COGGINS & C. WILKINSON, *supra* note 12, at 60.

77. *See* Sylvane v. Whelan, 506 F. Supp. 1355 (1981) (since no federal common law of nuisance for national recreation area exists where state retains concurrent jurisdiction, irate residents of area cannot prevent nude sunbathing where state law does not prohibit the conduct).

Control of inconsistent land development and related activities on the perimeter of parks is a more difficult issue. As Professor Sax has demonstrated, the federal government has always had the power to enjoin activities that create nuisances on federal lands.[78] The Service has recently used this power more aggressively.[79] But the right to prevent nuisances is of limited value because the common law does not protect aesthetic interests and because nuisance law does not reach the general problem of regulating intense development around parks such as the Grand Teton and the Great Smoky Mountains. What is needed is some form of federal land use control.

Until recently the Service did not assert extraterritorial jurisdiction unless jurisdiction was expressly granted by Congress, following instead the traditional understanding that the federal government's powers over public lands were only proprietary, not sovereign.[80] The property clause was thought only to confirm the federal government's rights as proprietor of the public lands; sovereignty still rested with the states. As a result the Service followed a policy of negotiation and deference to local interests, with condemnation as a last resort. Many, including Professor Sax, believed there was too much deference. In 1976 he wrote an article arguing that Congress has the power to confer extraterritorial jurisdiction on the Park Service *and* that the Department of the Interior has some inherent power to control activities on the perimeter of parks.[81]

Traditionally, federal land use controls were considered to be politically unpopular and of doubtful constitutional validity. But in the important case of *Kleppe v. New Mexico*,[82] the Supreme Court read the property clause expansively. In upholding the constitutionality of a law granting the federal government the right to control wild horses on public lands, it held that the property clause conferred both sovereign and proprietary powers on the federal government,[83] and suggested in dictum that the property clause reached activities

78. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 251 n.61 (1976). The leading case is Camfield v. United States, 167 U.S. 518 (1897).

79. *See, e.g.*, United States v. County Bd., 487 F. Supp. 137 (E.D. Va. 1979) (unsuccessful effort to prevent high-rises across the Potomac River in Virginia from destroying view of national monuments in District of Columbia).

80. *See* Sax, *supra* note 78, at 245–50. The leading article on the classical theory of federal power under the property clause is Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283 (1976).

81. Sax, *supra* note 78, at 250–58.

82. 426 U.S. 529 (1976).

83. *Id.* at 542–43.

off of federal lands that adversely affected federal management objectives.[84]

Kleppe is not, however, a complete answer to whether Congress has the power to adopt extraterritorial land use controls. Federal land use controls can be attacked on a number of grounds. First, the legal basis of the Sagebrush rebellion—which seeks state control over federal public lands—is a combination of arguments, the most extreme of which is that there is no constitutional basis for federal retention of public lands.[85] Second is a stronger argument that asserts that federal power over nonfederal lands is limited by the tenth amendment. This argument was revived by the Supreme Court's Delphic opinion in *National League of Cities v. Usery*.[86] In his 1976 article, Professor Sax called the opinion "a single distinctive exception" to expansive readings of federal power,[87] but this underestimates the complexity of the issue. In *Usery*, the Court held that states could not be required to obey a federal minimum wage law because the law impaired a state's "integrity" and its "ability to function effectively in a federal system."[88] If *Usery* is read as only preventing Congress from forcing state legislatures to implement federal programs and thus depriving them of any choice over budget matters, then the *Usery* decision does not bar federal regulation of private conduct. Courts have generally upheld the constitutionality of federal environmental and land use programs in the face of challenges based on *Usery*, at least where state participation is optional.[89]

Federal land use regulation was strongly endorsed in two recent unanimous Supreme Court opinions upholding the major land use controls mandated by the Surface Mining Control and Reclamation

84. *Id.* at 546 (citing Camfield v. United States, 167 U.S. 518 (1897)).

85. Wilkinson, *The Field of Public Land Law: Some Connecting Threads and Future Directions*, 1 PUB. LAND L. REV. 1, 7–10 (1980), summarizes the arguments being advanced by the western states. The most detailed analysis of the issues is Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C.D. L. REV. 317 (1980).

86. 426 U.S. 833 (1976).

87. Sax, *supra* note 78, at 256.

88. 426 U.S. at 852.

89. *See, e.g.*, Concerned Citizens of Appalachia, Inc. v. Andrus, 494 F. Supp. 679 (E.D. Tenn. 1980) (federal regulation of private conduct with optional state participation); Pacific Legal Foundation v. Costle, 14 Env't Rep. Cas. (BNA) 2121, 2127–28 (E.D. Cal. 1980) (threatened elimination of flow of federal funds used as "carrot and stick" program to encourage compliance), *aff'd*, 627 F.2d 917 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 1354 (1981). *But cf.* Walker Field v. Adams, 606 F.2d 290, 300 (10th Cir. 1979) (McKay, J., dissenting) ("[T]he spending power itself obligates responsible dispursal of funds collected through federal power.").

Act[90] against tenth amendment challenges.[91] Surface mining controls are imposed on the states through "cooperative" federalism under the commerce power, so the issue of the federal government's power to impose extraterritorial land use controls under the property power remains theoretically open. However, the Court also limited *Usery* so as to apply to a very narrow range of federal intrusions on state sovereignty,[92] and its analysis suggests that federal control of private land use choices to carry out a constitutional objective will be valid under the tenth amendment.

How much extraterritorial regulation is desirable is a sensitive problem, but Congress should be free to solve it, with appropriate deference to local interests, free from tenth amendment constraints. Professor Sax has concluded that the competing interests of local control, individual choice, and federal protection of public lands can be accommodated by legislation that gives the Park Service the power to define "very broadly" what adjoining activities create nuisance-like conditions.[93] This proposal stops short of conferring on the Service general authority to control land use, but allows the Department of the Interior to correct the major defects, as far as the national parks are concerned, in the common law of nuisance. Courts are slow to expand existing grounds for nuisance claims, so the Service needs the power to define nuisance-like activity for itself in light of the distinctive needs of the national park system.

In the long run, a wide variety of controls may have to be used to buffer the park system from inconsistent development. Increased land acquisition supplemented by regulatory decisions under the prevention of significant deterioration provision of the Clean Air Act[94] and the withdrawal of lands from coal mining pursuant to section 522 of the Surface Mining Control and Reclamation Act[95] will be the

90. 30 U.S.C. §§ 1201–1328 (Supp. III 1979).

91. *See* Hodel v. Indiana, 101 S. Ct. 2376 (1981); Hodel v. Virginia Mining & Reclamation Ass'n, 101 S. Ct. 2352 (1981).

92. In *Hodel v. Virginia Mining & Reclamation Association*, the Court held that an *Usery* challenge must satisfy each of the following three requirements: "First, there must be a showing that the challenged statute regulates the 'States as States.' Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty.' And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.' " 101 S. Ct. at 2366 (citations omitted).

93. Sax, *supra* note 78, at 266.

94. 42 U.S.C. § 7491 (Supp. III 1979).

95. 30 U.S.C. § 1272 (Supp. III 1979). Section 522 of the Act allows the Secretary of the Interior to designate federal lands as unsuitable for strip mining. A similar process exists for state and private lands. This procedure, which could become a general federal and state

primary means of protecting the parks. Professor Sax has begun to address this problem in his study of the costs of the Park Service's refusal to make advance land acquisitions,[96] but a full agenda of land use issues awaits Professor Sax and others.

CONCLUSION

In his book and related law review articles, Professor Sax has outlined an aggressive park preservation policy and a means to achieve it. *Mountains Without Handrails* is an important contribution to the public lands literature and deserves to be widely read and debated. Although I would not follow fully his recommendations for all units of the system, and find the problems of perimeter protection even more complex than he does, I share his passion for the national parks and what they represent to this country. To many his vision will be static and elegiac. At a time when people ask whether travel is still possible in an age of tourism, one can legitimately ask whether Professor Sax has described a role for the parks for which there is little demand and therefore little possibility of realization. Be that as it may, in my judgment, Professor Sax's vision of the national parks is the right one. It should be honored by Congress, the Department of the Interior, and, when appropriate, the courts.

land use planning process, was used to protect Bryce Canyon National Park from noise and dust from proposed mines in southwestern Utah. The Secretary of the Interior's designation of certain coal lands close to the park as unsuitable for surface mining is now in litigation. Sierra Club v. Watt, No. 81-0172 (D. Utah, filed Mar. 13, 1981); Utah v. Watt, No. 81-0093 (D. Utah, filed Feb. 13, 1981); Utah Int'l v. Department of Interior, No. 81-0090 (D. Utah, filed Feb. 12, 1981).

96. Sax, *Buying Scenery: Land Acquisitions For the National Park Service*, 1980 DUKE L.J. 709. In brief, Professor Sax urges a policy of advance acquisitions and, for those who prefer to stay, the purchase of development rights with a limited recapture of the value of living near a park.