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JOSEPH L. SAX: THE REALM OF THE LEGAL SCHOLAR

*Nina A. Mendelson**

It is one of my great regrets that I never really got to know Professor Joseph Sax personally. I joined the faculty at the University of Michigan Law School well over a decade after Sax departed our halls for the University of California at Berkeley's Boalt Hall School of Law. I met him on one occasion several years ago, when he gave an engaging workshop at Michigan on governance issues around Colorado River water allocation, complete with a detailed map of the watershed. I am exceptionally fortunate, however, to occupy a chair named for him. This is not only because of his major contributions to the creation of environmental law, but because—even viewed at a distance—his career, accomplishments, and legacy are a model of what it can mean to realize one's potential as a legal scholar.

The numerous achievements in environmental law that made Sax a giant in his field have been widely recited elsewhere: his scholarship on the public trust doctrine and on citizen suits was path-breaking,¹ and his scholarship on takings law was frequently cited in the Supreme Court.² He was awarded the Blue Planet Prize, sometimes called the Nobel Prize for the environmental sciences, was named a Distinguished University Professor here at Michigan, and wrote an influential environmental protection statute for the State of Michigan.³ His contributions to law and the environment are legion; later in life he expanded his focus to cultural treasures as well as environmental ones.⁴

But Professor Sax leaves behind a compelling and inspirational legacy not only in environmental law, but for all aspiring legal scholars. Sax's realm was not the realm of the pure theoretician, producing "abstract scholarship

* Joseph L. Sax Collegiate Professor of Law, University of Michigan Law School. I am indebted to Holly Doremus, Riyaz Kanji, and Joseph Vining for their comments.

1. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 509 (1970); JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT* (1970).

2. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964), cited in *Penn Central Transp. Co. v. N.Y.C.*, 438 U.S. 104, 133-34 (1978); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025 (1992); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); Joseph L. Sax, *Takings, Private Property, and Public Rights*, 81 YALE L.J. 149 (1971), cited in *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 199 n. 17 (1985) (also citing Sax's 1964 article on takings).

3. Mich. Comp. L. Act. §§ 324.1701 – 1706, the Michigan Environmental Protection Act, later also known as the "Sax Act."

4. JOSEPH L. SAX, *PLAYING DARTS WITH A REMBRANDT* (1999).

that has little relevance.”⁵ Sax’s scholarly insights certainly were meticulous, grounded broadly, and deeply analytical; in the words of Professor Holly Doremus, who now holds the chair formerly occupied by Sax at Boalt Hall, Sax was a “scholar’s scholar.”⁶ But beyond this, his incisive analyses were aimed squarely at addressing some of the most pressing issues of the day. In both his trailblazing article arguing that the public trust doctrine should be extended to function as a guiding principle and constraint on environmental decisionmaking⁷ and in his exploration of and advocacy for citizen litigation in his 1970 book, *Defending the Environment*,⁸ Sax developed strategies to give members of the public the ability to utilize the courts to “object to activities which threaten the environment,”⁹ and to prod the government to more actively and thoughtfully steward America’s heritage of natural resources on behalf of all citizens. Sax’s analyses verged on daring as he advocated quite explicitly for judicial “ingenuity”—even “cleverness”—in these areas.¹⁰

And as others have recounted, litigators, courts, and legislatures took up Sax’s strategies. Hundreds of citizen suits were filed,¹¹ and the public trust doctrine, as courts developed and applied it, increasingly reflected Sax’s ideas,¹² making a difference not just in many cases,¹³ but undoubtedly in how government decisionmakers considered potential environmental impacts. Sax also entered the ring himself. For just two examples, Sax wrote the first draft of the 1970 Michigan Environmental Protection Act, and in particular a citizen suit provision¹⁴ on which similar provisions of major

5. Harry Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992).

6. Holly Doremus, *In Memoriam: Joseph L. Sax*, LEGAL PLANET, Mar. 10, 2014, <http://legal-planet.org/2014/03/10/in-memoriam-joseph-l-sax-gentleman-scholar-giant-of-environmental-law/>.

7. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 509 (1970).

8. JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT* (1970).

9. A. Dan Tarlock, *Defending the Environment: A Strategy for Citizen Action*, by Joseph L. Sax, 47 IND. L.J. 406, 414 (1972) (book review).

10. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 509 (1970) (arguing that the public trust doctrine can serve as a “technique by which courts may mend perceived imperfections in the legislative and administrative process”).

11. RICHARD LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 82 (2004).

12. Alexandra Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 708 (2006).

13. *Id.* at 708-11 (cataloging cases, including California court decision regarding Mono Lake).

14. See Joseph L. Sax and Roger L. Conner, *Michigan’s Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1004, 1095-96 (1972) (reprinting the Thomas J.

federal environmental statutes, including the Clean Water Act and the Clean Air Act, later would be modeled.¹⁵ In the mid-1990s, he served as Counselor to Interior Secretary Bruce Babbitt, where he took on numerous policy issues from the inside—particularly the Endangered Species Act, a subject of especial controversy at the time. As attested by the outpouring of remembrances in so many settings since his passing in March 2014, Sax has inspired numerous environmental law scholars and advocates to both reflection and action.

Rather than hide away in the academy and focus on arcane topics,¹⁶ Sax used his prodigious talents to meaningfully engage legal issues. A legal scholar's most meaningful contributions, perhaps, may be not only in analysis, but in engagement. Sax's work represents a shining example of what this can mean: an active choice to use one's intellectual vision in concrete service to the community. The number of scholars, activists, and government decisionmakers who seek to follow the paths Sax laid out are a testament to how much he will be missed, as well as to the scale of the contributions he made both to environmental law and to legal scholarship.

Anderson, Gordon Rockwell Environmental Protection Act of 1970 as enacted). The Act's citizen suit provisions are now codified, as amended, at Mich. Comp. L. § 324.1701.

15. See Joseph L. Sax and Joseph F. DiMento, *Environmental Citizen Suits*, 4 *ECOLOGY L.Q.* 1, 2 (1974).

16. E.g., Harry Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 *MICH. L. REV.* 34 (1992) (criticizing legal scholarship on grounds of arcaneness and irrelevance); Chief Justice John G. Roberts, *Address to the Annual Fourth Circuit Court of Appeals Conference* (C-SPAN television broadcast June 25, 2011), available at <http://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts> (given current trends in legal scholarship, legal scholars "should not expect it would be of any particular help [or] interest to the practicing bar or judges").

