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## Casting Light on Cultural Property (Book Review)

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# CASTING LIGHT ON CULTURAL PROPERTY

*John J. Costonis\**

PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES. By *Joseph L. Sax*. Ann Arbor: The University of Michigan Press. 1999. Pp. xiv, 245. \$32.50.

## I. INTRODUCTION

Theorists of private property invite comparison to theorists of light.

For centuries, the latter have debated whether light is best understood as a wave or as a photon. The rivalry has been intense because each hypothesis explains some characteristics of light very well, but others very poorly. Wave theory outstrips photon theory in explaining such phenomena as light's frequencies and diffraction patterns. But photon theory, which reduces light to a succession of particles, more effectively explains such subatomic phenomena as changes in an atom's orbital shell produced by the interaction of photons and electrons.

Property theorists too can be viewed as occupying different positions on a spectrum. On one end are those supporting a conception of property as a self-contained and bounded photon; on the other, those favoring a model of property as a wave registering, indeed incorporating, the tensions and values of the social ether through which the wave moves.

### A. *Property as Photon*

The property-as-photon model undergirds United States Supreme Court opinions labeling as "per se takings" public restrictions that license a permanent physical occupation of private property or that deprive the owner of its entire economic value. These opinions deem irrelevant the public purposes underlying these restrictions — the social "ether," if you will, within which they are intended to function. Like a self-contained photon, private property stands separate and apart from its claimed links to larger social purposes. Uncompensated incursions upon it are deemed per se takings, no matter how compelling the governmental purpose or, in the case of permanent physical

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occupations, how marginal the encroachment. These opinions, moreover, tend to identify the “property” in question as much with the physical entity itself (typically real estate) as with the relations the physical entity bears to its owner and to the community beyond.

The two leading per se takings opinions illustrate these features. *Loretto v. Teleprompter Manhattan CATV Company*,<sup>1</sup> a permanent physical occupation case, examined a New York statute that authorized cable television companies to install 4”x 4”x 4” control boxes atop New York City apartment buildings without securing their owners’ permission. The statute’s purpose was to facilitate the diffusion of cable TV’s educational and social benefits by reducing viewer costs that had been inflated by fees charged by building owners for the space atop their roofs.<sup>2</sup>

Whether or not the public interest in increasing viewer access should prevail over the owners’ claim is certainly debatable. But the Court’s per se rule prevented the question from being raised at all. Distressed that the cable companies’ “property” (their cable boxes) would be affixed, unconsented, to the building owner’s “property” (the space atop the building), the Court confined its analysis to an evaluation of the character of the physical encroachment alone.<sup>3</sup> Predictably, it concluded that the statute’s grant of uncompensated access violated the Fifth Amendment’s takings ban.<sup>4</sup>

*Lucas v. South Carolina Coastal Council*,<sup>5</sup> a total economic deprivation case, likewise focused on a public restriction’s impact on private property while proscribing inquiry into the consequences beyond a landowner’s lot lines of his exercise of dominion over his property. As defined by the South Carolina legislature, the restriction sought, among other purposes, to prevent coastal erosion by barring construction within a prescribed distance from a shoreward line.<sup>6</sup> To be effective, such programs must address regulated areas as comprehensive ecological networks — such as shorelines, basins, or estuaries — not as discrete ownership parcels isolated from these networks.

The coastal plan, which placed Lucas’s two lots in the non-buildable shoreward zone, was comprehensive. But it failed to provide him with a financial offset for the total loss of development rights that its comprehensiveness dictated. For the Court, the loss of these

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1. 458 U.S. 419 (1982).

2. *See id.* at 425.

3. *See id.* at 439, 441.

4. *See id.* at 441. The Fifth Amendment states, “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

5. 505 U.S. 1003 (1992).

6. *See id.* at 1007-09.

rights alone determined *Lucas's* outcome. Unless the restriction inheres in the owner's title by virtue of the state's prior property or nuisance principles, reasoned Justice Scalia in his majority opinion, the statute's public purposes must be ignored in the takings calculus.<sup>7</sup>

This is property-as-photon theory with a double vengeance. It segregates individual private lots from their inclusion in larger ecological units. It also dismisses from the takings calculus consideration of the off-site community advantages these restrictions are designed to serve.

The photon model, like that of light, explains, or at least rationalizes, a variety of issues associated with its subject. One is the structure of the Fifth Amendment's syntax that "*private property* [may not] be taken for *public use*."<sup>8</sup> The Amendment's independent treatment of the terms "property" and "public use" arguably supports the view that an owner's proprietary interest is not diminished by the "publicness" of the property in question.<sup>9</sup> On the contrary, the text could be read to reflect that the more "public" the benefits conferred on the larger community by the contested private property restrictions, the stronger the claim that these restrictions require compensation as a matter of constitutional right.<sup>10</sup>

The model also comports with the common understanding that property implicates autonomy and personality values as well as economic values. Autonomy fits hand in glove with the conception of property as a barrier against, not as an opening for, state curtailment of the owner's dominion. As William Pitt declared long ago:

[t]he poorest man in his cottage may bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter it; but *the King of England cannot enter it!* All his power dares not cross the threshold of that ruined tenement!<sup>11</sup>

The property-as-photon model is further distinguished by its roots in, and congruence with, the preference of America's mixed economic system for private ordering absent evident market failure or injury to others stemming from proprietor primacy. This preference derives from a wariness of public regulations imposed in the name of communitarian values. Its adherents, which include many of the last quarter century's law and economics and public choice scholars, believe that the private marketplace is typically the most efficient resource allocator and that private ordering best safeguards individual freedom by

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7. See *id.* at 1027-28.

8. U.S. CONST. amend. V (emphasis added).

9. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

10. See Jed Rubenfeld, *Usings*, 102 *YALE L.J.* 1077 (1993).

11. CHAUNCEY A. GOODRICH, *SELECT BRITISH ELOQUENCE* 65 (1870).

linking property and personality.<sup>12</sup> Some even believe they have the mathematical equations to prove these contentions.

Paralleling the communitarians' fear of market failure, is the photon theorists' obsession with government failure. Their reasoning is familiar. Government may regulate inefficiently or inequitably due to insufficient information, excessive administrative costs, or simply, inept management. Values masquerading as communitarian are often those of private factions more astute at manipulating the political process than are their adversaries or an indifferent or acquiescent public in whose name these values are asserted.

Photon model adherents also question legislators' capacity to anticipate or describe the activities a particular measure seeks to regulate with sufficient precision to achieve the purposes at hand or to cabin the risks associated with the strategic behavior of factions or, for that matter, of governmental officials themselves. They believe that dangers of such governmental failure outweigh the risk that a private ordering system may overlook goals valued by elites or, perhaps, by many others in the community.

The property-as-photon model reinforces the private ordering preference in multiple ways. It warns that public regulation that too easily dismisses the preference may fail in a system in which the institution of property remains solidly linked to private initiative despite government's increasing role as a creator and regulator of wealth. The private sector may eschew or obscure from governmental attention the creation, ownership, preservation or donation of property valued by the public if government shifts to itself the owner's proprietary entitlements. The model, which is premised on the wide diffusion of property and property owners throughout the private sector, also explains why high administrative and enforcement costs inevitably accompany governmental efforts to regulate property or its owners.<sup>13</sup>

The model also rationalizes a legal regime that invests presumptive dominion over property with its private owner, and allows this presumption to be overridden only if government can justify the regulation under its police or eminent domain powers. The presumption favors the economic interest of individual property owners, of course. No less important to adherents of private ordering, it also hinders the imposition of these controls by requiring government to generate political support for the exercise of either power and, in the case of the eminent domain power, to drain the public treasury as well.

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12. See W. Van Alstyne, *The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court*, 43 LAW & CONTEMP. PROBS., Summer 1980, at 66 (discussing the revival of legal interest in how property protects non-economic values).

13. See Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569 (1984).

### B. *Property as Wave*

Property's wave theorists portray the bounds of proprietary entitlement as dependent in any given context upon the clash of pertinent social and proprietor interests.<sup>14</sup> Theirs is a secular, not a sacred, conception of property rights, which they are more inclined to view as expectations subject to diminution by superceding public interests. Illustrative of this viewpoint, and worthy of contrast with the United States Constitution's Fifth Amendment, is Article 42(2) of the Italian Constitution, which, under the title of "Property" states:

Private ownership is recognized and guaranteed by laws which prescribe the manner in which it may be acquired and enjoyed and its *limitations, with the object of ensuring its social function and of rendering it accessible to all.*<sup>15</sup>

Unlike the Fifth Amendment, Article 42(2) expressly validates the "social function" of property ownership as an intrinsic limitation on private dominion.

In consequence, the wave model reinforces many of the political and social constraints that its theorists believe should cabin proprietor entitlements. Chief among them is the subordination of proprietor entitlements to communitarian values in those instances in which private enjoyment of the property in question is deemed offensive to these societal values.<sup>16</sup>

This starting point implies a variety of corollaries. The wealth and autonomy expectations of individual proprietors receive less solicitude under the wave model, which supports more ample scope for government's police power and a less generous takings calculus for severe intrusions on proprietary values. The model is likewise distrustful of private ordering and the marketplace when competing public values are at stake. Wave theorists do not assume that individual private choice or the aggregation of wealth- or autonomy-biased preferences will honor these values. They believe instead that the public interest in such cases will more likely be vindicated by a public participatory process in which the perspectives not only of proprietors, but of other groups with a stake in the impacted community values, are taken into account.<sup>17</sup>

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14. See Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1688 (1988).

15. See Costituzione [CONSTITUTION][ITALY] art. 42(2) (emphasis added).

16. See, e.g., Gregory S. Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 CONST. COMMENTARY 259 (1992).

17. The work of Joseph Singer, starting from Hohfeld's insights, in viewing property as social relations, is prominent here. See, e.g., Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 751 (1988).

Necessarily, therefore, wave theorists must subscribe (or, at least, claim to subscribe) to a view of public process and government oversight demanding a level of optimism that photon theorists are inclined to view as naive, inefficient, or worse. For example, in establishing a property-limiting regime, government must have the capability to identify values that truly are communitarian, rather than simple aggregations of the preferences of elites and other groups eager to manipulate the political process for private ends. It must formulate standards and procedures that are accurately targeted to the program's needs, parsimonious of private or public resources, and immune to capture by these factions. Finally, it must at least acknowledge property's root entitlements, however more malleably defined under the wave model. Otherwise, the program may not withstand legal challenge. Even if it does, it may prove unworkable as a practical matter in those instances in which private initiative and private dominion are essential ingredients for the program's success.

The differences between the photon and wave models of property and the efforts of the models' respective champions to extol the virtues of one over the other have largely defined the battleground for property scholars over the last half century, if not before. There have been occasional forays seeking to bridge the gap both in theory and in practice between the two models. As one who has shattered lances in assaults on this windmill,<sup>18</sup> I have become increasingly doubtful that, on the theoretical level at least, accommodation can be achieved. In their opposition, the legal and more important economic and political starting points of the two approaches rise to a level as contentious as the beliefs of warring religious cults.

Yet life goes on, takings jurisprudence shifts but marginally toward one or the other model (and sometimes both simultaneously), and the nation's political economy retains its centrist cast. The reasons for this tense but undeniable equilibrium are undoubtedly many and complex, but helpful clues to important dimensions of the apparent paradox can be found in Professor Joseph L. Sax's *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures*.<sup>19</sup>

On its face, *Playing Darts* seems an unlikely venue for these clues, and Professor Sax an unlikely author to reveal them. *Playing Darts* seeks to make the case for an Italianate "social function" in privately owned property imbued with cultural significance. It de-sacrilizes property ownership by demoting it to "just a fact," asking "what consequences should follow from such facts, where there is some significant public stake on the other side," and responding with a thesis

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18. See John J. Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021 (1975).

Joseph L. Sax is a Professor of Law at the University of California at Berkeley.

calling for “recognition of a species of qualified ownership founded on the recognition that some objects . . . are constituent of a community, and that ordinary private dominion over them insufficiently accounts for the community’s rightful stake in them” (pp. 36, 37, 197).

More broadly, *Playing Darts* is but the latest installment of a distinguished and prolific body of scholarship extending over more than four decades in which Professor Sax has established himself as the nation’s most thoughtful and articulate property-as-wave theorist.<sup>20</sup> One might anticipate that *Playing Darts* would present a scorching indictment of the property-as-photon model because the latter embraces the “conventional notions of ownership” which Sax condemns as offensive to the community’s cultural heritage (p. 9).

Paradoxically, this reader left *Playing Darts* with greater respect for private dominion. Under Sax’s own account, private ownership and private ordering prove so essential to the creation and preservation of this heritage that the actual reforms Sax proposes are far milder than dogmatic commitment to this “qualified property” thesis would suggest.

*Playing Darts* also engages Sax’s view of the entitlement of the community and its chroniclers to access information embedded in heritage artifacts and sites — his version of the public’s right to know about and participate in its cultural heritage. Sax reasons as though this view were an integral element of his private dominion inquiry. Partially, it is an integral element when private dominion, as conventionally understood, impedes the community’s access or preservation interests. It is also an integral element in Sax’s responding proposal of shifting dominion entitlements to government to secure these interests.

But conflating the two issues is misplaced in two contexts, the discussion of which consumes a substantial portion of the volume. The first embraces such cultural resources as archeological sites that are originally owned by public agencies, not private individuals. Sax’s discussion of these resources targets the extent to which *governmental* schemes allocating public access to them respect the public’s right to know (pp. 153-96).

The second embodies privately owned cultural resources — principally the papers of notable governmental and private figures — that either devolve to private sector successors or are donated to museums, libraries, and similar public depositories. Sax’s target, again, is not private owner entitlements — which, in fact, he leaves essentially un-

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20. See, e.g., Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbe Gregoire and the Origins of an Idea*, 88 MICH. L. REV. 1142 (1990); Joseph L. Sax, *The Legitimacy of Collective Values: The Case of the Public Lands*, 56 U. COLO. L. REV. 537 (1985); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Joseph L. Sax, *Taking and the Police Power*, 74 YALE L.J. 36 (1964) [hereinafter Sax, *Taking*].



disturbed — but the practices or professional codes of recipient museums, libraries, and executors or successors that frustrate the public's right to know.<sup>21</sup>

Sax's conflation of these issues is problematic because his treatment of the public's right to know supports two conclusions that run counter to his generally unsympathetic view of private dominion. The first, which appears in examples where dominion is publicly held, is that government may be no more protective of public access than may private owners. The second, which is reflected in instances when private dominion remains undisturbed, is that private dominion may either be preferable to public control, particularly when privacy values are at stake, or it may be the sole practical alternative, however threatening to public values.

Photon theorists would applaud both conclusions.

## II. *PLAYING DARTS WITH A REMBRANDT*

*Playing Darts* commences with Sax's statement of the problem: "[m]any of the greatest artifacts of our civilization can be owned by anyone who has the money to buy them, or the luck to find them, and their owners can then treat the objects however their fancy or their eccentricity dictates" (p. 1). Hence the volume's arresting title. The category of artifacts selected for discussion in the succeeding chapters includes paintings and other exemplars of fine art; architecture; the papers of American presidents, of United States Supreme Court justices, and of artists, writers and other private notables; and objects of paleontological or archeological distinction.

Sax's examples are as provocative and culturally informed as they are apt. They horrify, intrigue, educate, and, for many readers undoubtedly, persuade. The balance of this Part utilizes selected examples to recount the book's property rights and right-to-know themes, stopping here and there to quibble or to lay a basis for the appreciation of *Playing Darts* offered in the essay's final section.

### A. *Fine Art*

A Diego Rivera mural for the Rockefeller Center's RCA Building serves to test the issue whether patrons may be precluded from destroying or altering art that they own or have commissioned. The Rockefellers elected to raze the mural, which embarrassed them with its likeness of Lenin and celebration of communist themes. Sax agrees

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21. Sax devotes Chapters Five through Nine to these subjects. See pp. 60-150. An example of such a professional code is ASSOCIATION OF COLLEGE AND RESEARCH LIBRARY. STANDARDS FOR ETHICAL CONDUCT FOR RARE BOOK, MANUSCRIPT, AND SPECIAL COLLECTIONS LIBRARIANS (2d ed. 1994). See p. 120.

with those who deemed the razing an act of cultural vandalism (p. 18), and proposes a legal regime in which the public's interest in the preservation of fine art should override its patron's entitlement to destroy or alter it (pp. 21-34).

He comments favorably on a California statute<sup>22</sup> that rearranges property entitlements in this manner by going beyond the artist's *droit moral*, first, to locate a distinguishable preservation interest in the public, and second, to obligate the disenchanted owner to provide the artist or public prior notice so that the work of art can be removed and protected. Chicago's Daley Plaza Picasso sculpture and Manhattan's Richard Serra *Tilted Arc* are featured in a related discussion in which Sax opposes artists' claims that their works must be retained indefinitely in the outdoor setting for which they were commissioned despite the public's opposition to these works (pp. 26-32).

A Graham Sutherland portrait of Winston Churchill, commissioned by Parliament as a gift to the aging Prime Minister, and Georges Rouault's torching of 315 of his own incomplete paintings are among the examples employed by Sax to explore whether private dominion should be diminished to prevent owner/subjects like Churchill or self-critical artists like Rouault from concealing or destroying fine art (pp. 37-42, 43). Churchill and his wife detested the painting, which they never displayed in his lifetime and which she burned before his death. Rouault destroyed his own works because he feared he would be unable to complete them to his satisfaction.

Sax would rearrange property rights in the Churchill situation, aligning them to withdraw the owner-subject's entitlement to deny public access to or destroy the painting. In Sax's calculus, the fact that Churchill was both owner and subject while Rockefeller, in the previous example, was owner alone does not outweigh the public's preservation interest. He would allow disgruntled patron/subjects (and, in the Churchill example, spouses of patrons as well) to embargo the painting during their lifetimes, but require public display of the preserved painting at some non-remote period following the subject's death (p. 41).

Sax approves Rouault's action, asserting that the entitlement of a creator "to implement his own judgment about what is worthy of him" outweighs the evident value of the destroyed material to the public and to the historians and critics who broker the public's right to know (p. 42). I am puzzled by Sax's line drawing. So long as artists are free to display what they regard as their best work, why should not what they regard as their lesser work also be subject to Sax's cultural heritage claim in view of its undeniable value in enhancing public understanding of the work they prize? The "lesser" work, moreover, may

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22. California Art Preservation Act, CAL. CIVIL CODE § 987 (West 1999).

be received as the “greater” by present or future audiences since, as Sax constantly reminds us, the judgment of history is often at odds with that of self-interested parties (p. 201). Tolstoy, for example, condemned his prior writing as worthless following his spiritual transformation. Should he have been free to destroy the manuscript of *War and Peace* if it had been written, but not published, prior to this experience?

### B. *Architecture*

Controversies triggered by proposed additions to Louis Kahn’s Salk Institute in La Jolla, California, and McKim, Meade and White’s Grand Central Terminal in Manhattan are featured in Sax’s treatment of great architecture. In the preservationists’ view, a new building proposed for the Salk complex, which did not enjoy protected landmark status, ought to have been distanced from the complex rather than integrated into it. In Manhattan, the 55-story modern office tower proposed by Marcel Breuer as an addition atop the Beaux Arts Grand Central Terminal was dismissed as an “aesthetic joke” by the New York City Landmarks Preservation Commission (p. 56). The Salk addition was built. But New York City’s denial of a permit for the Breuer tower resulted in the United States Supreme Court opinion, *Penn Central Transportation Company v. City of New York*.<sup>23</sup>

The architecture chapter differs from those preceding it because Sax’s thesis favoring qualified ownership for cultural heritage property is well-established in the landmark/urban design field, albeit more recently for non-landmarked structures than for those subject to such regimes. Its novelty for this reviewer is Sax’s effort to address the “seeming paradox” that, “unlike an ordinary owner of an ordinary building, [the landmark owner] bears a special burden as his reward for having endowed us with a magnificent structure” (p. 55).

The paradox was the centerpiece of Justice Rehnquist’s dissent to Justice Brennan’s majority opinion in *Penn Central* sustaining the city’s uncompensated ban of the Terminal tower. Sax criticizes Justice Brennan’s reasoning for its question-begging merger of landmark regulation with more conventional forms of land use regulation (p. 57). A restriction from which particular property owners suffer under the latter is premised either on a harm the restriction seeks to prevent or some benefit deriving from the restriction and mutually enjoyed by this and other owners impacted by the restriction. But neither condition would apply to a tower-topped Grand Central Terminal. Its impact on its environs would be no more or less harmful than that of fully developed properties nearby. Under the landmark ban, morco-

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23. 438 U.S. 104 (1978).

ver, Penn Central was not itself the beneficiary of restrictions applying to other properties and itself as members of a regulated class. Instead, Penn Central had been singled out to provide a community benefit at enormous cost to itself, a result that clashes with the harm/benefit rationale.

Sax, one would think, should have little trouble with Justice Brennan's reasoning. It fits effortlessly with *Playing Darts*' thesis that owners of cultural heritage property are stewards whose dominion is limited by conditions safeguarding the property's heritage values. The plight of being singled out for burdens on dominion is shared, after all, by owners of every legally constrained category of cultural property reviewed in *Playing Darts*, all of whom confer an unreciprocated benefit on the community by bearing these burdens.

Even more to the point, Sax advocated *rejection* of the harm/benefit rule in a 1964 article<sup>24</sup> that Justice Brennan expressly cited in support of his rejection of the rule.<sup>25</sup> Surprisingly, Sax feels it necessary to go further, settling the landmark owner's duty on the "impact on others *generated by an individual's choice to engage creators and to take dominion over potent cultural icons . . .*" (p. 58; emphasis added). But why the need to go beyond the phrase "impact on others," which is more than adequate to satisfy Sax's qualified property thesis? The italicized language strikes me as rubbing salt into the dominion wound by turning the owner's choice against himself — assuming, indeed, that it were possible for owners to know that the buildings they are commissioning or purchasing will eventually be designated as landmarks.

### C. Collectors' Duties

Collectors of fine paintings, sculptures, and other cultural artifacts, Sax observes, usually treasure their art and maintain it in excellent condition (p. 64). Many see themselves as stewards, self-obligated to protect the art and even to loan it out for public viewing from time to time. Were all collectors similarly inclined, Sax would eschew a formal legal regime mandating periodic display of their master works. Not all collectors, however, are so inclined.

Take the case of the bizarre Albert Barnes and his collection of 2,000 of the greatest French post-Beaux Arts paintings (including the finest collection of Renoir works anywhere). The outrage and hostility greeting the 1920s display at another museum of 94 of his then-*avant garde* paintings so soured him on the orthodox art establishment that he thereafter embargoed access of a group so large that it in-

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24. See Sax, *Taking*, *supra* note 20, at 48-50.

25. See *Penn Central*, 438 U.S. at 133 n.30.

cluded "all persons whose education and work could have [given them] serious reasons for wishing to visit it."<sup>26</sup>

With the Barnes story in mind, Sax proposes obligating collectors to participate in an expense-compensated loan program in which their collections are periodically displayed for public view. Selection of the master works would be made by a committee of experts under the auspices of the National Gallery of Art or a similar institution. Once listed, the work would be subject to obligatory display at an appropriate national venue for a limited duration once or twice per generation. The national museum would be charged with all costs and responsibilities associated with the loan (p. 67).

Whether coherent, confinable standards can be defined for the broad range of cultural properties *Playing Darts* canvasses is highly doubtful. These doubts contribute to my belief that, independently of proprietary issues, control over many categories of these properties is best relegated to private ordering. Perhaps an exception is appropriate for fine paintings and sculptures because many that are cherished by the public are relatively easy to identify. But I would caution against the exception absent tight criteria strictly limiting selection on the basis of the number of entries, their minimum age, resource category, and of other conditions insuring appropriate citizen input and the qualifications of the selection panel. These criteria are obviously crude and underinclusive; many contemporary paintings and sculptures, for example, would be worthy of inscription as would works unknown to the public at large. Enlarging the class, however, creates an unacceptable risk of losing control of the process, which would likely kill adoption of the process in the first place. I would also be fearful that disturbing private ownership and its autonomy entitlements in this fashion might unsettle the current private ordering system, which, with all its warts, has been reasonably effective both in securing the display of privately owned works and in eventually shifting ownership of many of the best works to the museums themselves.

#### D. *Paper Trails*

*Playing Darts'* chapters that address the papers of American presidents (ch. 6) and Supreme Court justices (ch. 7), and the control of the papers and other materials of notable private figures by heirs, biographers and scholars (ch. 9), merit joint treatment. Of the three classes of property, Sax would rearrange dominion entitlements only over presidential papers, as Congress did in 1978 when it shifted ownership

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26. Pp. 74-75. Here Sax quotes Pierre Cabanne.

of the papers after the Nixon presidency from the incumbent to the federal government.<sup>27</sup>

Even photon theorists, I believe, would support this shift in view of the undeniably public nature of the resource and the limited and identifiable membership of the regulated class. Surely, something is wrong when incumbent presidents must apply to the libraries of their predecessors to obtain crucial documents linked to ongoing matters of state, as President Ford was obliged to do in seeking a record of the negotiations conducted by President Nixon with Chinese leaders. Grating, as well, is the contrast Sax portrays between the public stewardship that Franklin D. Roosevelt and Harry Truman displayed and the contrary stance of Richard Nixon's representatives in demanding tens of millions of dollars as compensation for a congressional directive that shifted control of his papers to the General Services Administration (pp. 84-88).

Sax finds no truly satisfactory resolution of the clash between public disclosure and institutional or personal prerogatives regarding the other two classes of papers. Frustration dogs his thoughtful effort to balance the public's right to know with insulation of the Supreme Court's internal processes from improper public disclosure. The justices themselves are unable to define a common position acknowledging the historical value of their papers (p. 201). Some justices, Hugo Black among them, condemn any disclosure, while others, including Thurgood Marshall, openly court it. Congress and Sax both decline to shackle the justices with formal rules akin to those of the Presidential Records Act transferring the papers' dominion to public depositories (p. 116). Because there is no even playing field for scholars and journalists, a favored few prosper while the others languish, and the public is kept waiting for biographies and other studies that appear decades later if, indeed, they appear at all.

Similarly troubled is the picture regarding access to the papers of private figures, but here, Sax tells us, the value impeding the public's right to know shifts from protecting confidentiality of institutional processes to safeguarding the privacy and sensitivities of these figures or their families. Although Sax states that "the claims of history outweigh those of family feeling," he ultimately declines to propose shifting dominion from the papers' custodians to the public (p. 198). He proposes instead that families and executors commit to an ethic subordinating protection of the family hearth and its confidences to service as stewards of a cultural resource (pp. 138-42, 198).

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27. See PRESIDENTIAL RECORDS ACT, 44 U.S.C.A. § 2203 (1996) ("[T]he President shall take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are . . . maintained . . . pursuant to the requirements of this section . . .").

But Sax is adamant that “[w]hatever sensitivity is appropriate to accommodate family feeling needs first to be separated from imperatives uttered in the name of proprietary rights” (p. 198). I would submit, however, that the claims of history are overridden not simply out of deference to family sensitivities, as Sax ultimately concludes, but because a formal legal rule favoring history’s claims over private dominion is simply not an option given the inherent nature of the property in question.

Unlike land, which is visible, inventoried in government registries, and the subject of public scrutiny through all manner of regulatory limits on its use, private papers typically are shielded from public view, uninventoried and uninventoriable, and free of regulation in no small part because of both characteristics. Ownership of these papers, moreover, is widely diffused throughout society. Since owner self-registration of these papers is not a realistic option, how would government begin to get a handle on where these papers are, who owns them, and what they contain? Even if it could, would the intrusiveness of the requisite effort be acceptable in a free society?

A related question suggesting that proprietary rights may not be so easily discounted is whether what Sax terms the family’s “privacy” interest is not actually rooted in private property’s autonomy value. Recall Sax’s own definition of autonomy as a “claim of entitlement to decide the fate of an object” (p. 9). This, of course, is precisely the claim that these papers’ owners are asserting and that, under the “privacy” label, Sax finds persuasive. Relevant as well (but deferred for later discussion) is the non-property problem associated with the impossibility in the private papers context of defining standards of cultural and historic value with sufficient clarity to exclude virtually anything that this or that elite views as exhibiting this value. One or more of the foregoing concerns, one can assume, accounts for Congress’s refusal to extend the protections of the Presidential Records Act beyond the confined sphere of the papers of the nation’s presidents alone.

E. *Dead Sea Scrolls, Publication Rights, and Access to Library and Museum Collections*

While issues clustered around private dominion are a principal concern of *Playing Darts*, the volume devotes substantial attention to the manner in which governments and other public entities allocate access to culturally significant objects and sites. Exploration of this issue occurs in the chapters addressing the Dead Sea Scrolls (ch. 10), publication rights (ch. 11), and the practices of museums and libraries in dealing with donor-restricted materials (ch. 8).

The controversy surrounding the Dead Sea Scrolls, one of the most dramatic archeological discoveries in human history, presents “in its

purest (and least attractive) form the issue of scholarly access to research materials,” according to Sax (p. 158). And a scandalous story it is because the Jordanian and Israeli governments, as successor-owners/custodians of this find, granted exclusive investigative rights to the Scrolls to a research team whose administration of their charge violated the most fundamental postulates of open scholarship. The four decades following the find witnessed warfare over translation and publishing rights, unconscionable delays in the Scrolls’ processing and publication, unwillingness of the team to share information beyond other team members and their graduate students, and the delayed disclosure of information of cardinal importance to biblical scholarship.<sup>28</sup> Aside from chronicling the ensuing frustration of the public’s right to know, the chapter introduces the archeologists’ convention known as a “publication right,” which Sax defines as “a scholarly convention [that] gives the researcher who is assigned to publish a text complete control over it for an indefinite period” (p. 164).

In a linked chapter entitled “The Privatization of Scholarly Research,” Sax explores the pros and cons of the publication rights convention and its source in government-permitting schemes for archeological sites under which the team selected for the excavation receives the exclusive right to publish its findings (pp. 165-78). Libraries and museums holding papyrological resources engage in similar practices when they assign favored scholars like rights to particular documents. Sax is troubled by this “privatization” of access because the practice is vulnerable to the varied abuses detailed in the Dead Sea Scrolls chapter. To these he adds arrangements blocking the access of other scholars to materials even *after* the favored scholar has published findings concerning them (pp. 176-78).

Sax’s commitment to the public’s right to know reappears in his critique of the access-denying practices of libraries and museums, particularly as they derive from restrictions imposed by donors as a condition of gifting their cultural artifacts to these institutions. Singled out for intense criticism are post-publication embargoes, exclusivity arrangements and other filters that deny scholars and the public they serve an even playing field, embargoes exceeding periods reasonably designed to ensure the privacy and privilege interests of persons referenced in the donor’s collection, and access limitations permitting administrators to pick and choose among access applicants. Sax warns that these devices undermine the community’s participation in its cultural heritage when placed in the hands of competing biographers, protective relatives, curators with their own research agendas, and

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28. For various accounts of the Dead Sea Scrolls history, see FRANK CROSS, *THE ANCIENT LIBRARY OF QUMRAN* (3d ed. 1995); LAWRENCE H. SCHIFFMAN, *RECLAIMING THE DEAD SEA SCROLLS* (1994); JAMES VANDERKAM, *THE DEAD SEA SCROLLS TODAY* (1994).



others who are disinclined "to let history make its own judgments" (p. 201). These concerns gain credibility in Sax's account of the manner in which the family of C.G. Jung and the acolytes of Sigmund Freud manipulated access to Library of Congress collections of the Jung and Freud papers to prevent unflattering portrayals of both (pp. 122-23, 128-33).

Readers unfamiliar with the practices of governments, libraries, and museums detailed in these three chapters will learn a great deal, much of it disturbing. They will also be impressed with Sax's probing, contextually nuanced arguments on behalf of the public's right to know, or of letting "history make its own judgments" (p. 201) unfettered by the access-distorting practices he details. Moreover, these chapters are fascinating reading. Whether exposing the academic scandals associated with the Dead Sea Scrolls research team or the Freud papers debacle at the Library of Congress, Sax engages the reader with graceful writing, cultural literacy, and dramatically apt examples.

The chapters also invite two observations adverted to earlier in this Review. First, they demonstrate that the answer to the cultural heritage issues *Playing Darts* poses does not reduce simply to shifting dominion entitlements from the private to the public sector. Government failure, as the Dead Sea Scrolls scandal illustrates, is no less a problem in this field than in any other regulatory sphere. Second, these chapters reveal how effectively property ownership's inherent characteristics constrain the extent to which private entitlements can be discounted in the effort to secure public access to cultural artifacts.

Sax's chapter on access to library and museum collections, for example, seethes with his abhorrence of access-distorting donor restrictions "made under the aegis of proprietary right" (p. 121). Yet his reform proposals slide around this right, as they do in his treatment of private papers of culturally influential figures, and focus instead on the adoption by institutions of a common set of rules designed to discourage the more egregious of the donor restrictions (pp. 126, 128). Sax understands, it seems clear, how utterly unworkable and impractical would be an effort to collectivize cultural heritage efforts by seeking, for example, to compel an across-the-board transfer to government of dominion over privately owned artifacts or to deny owners the entitlement to impose access-restricting conditions on their voluntary transfers.

#### F. *Antiquities*

*Playing Darts* closes its inventory of cultural artifacts with a chapter on antiquities, defined as culturally significant objects found in or under the soil of private sites (pp. 179-96). Demonstrating top form as one of the nation's premier land use theoreticians, Sax probes the pri-

vate/public dominion issue in antiquities by contrasting case studies featuring "Sue" the *Tyrannosaurus Rex* (a fossil found in South Dakota), and the Chauvet Cave, a Southwest France treasure containing the oldest cave drawings yet found in Europe. Sax's ideal would be an antiquities regime that protects the scientific value of the object, prevents destructive excavation, allows for appropriate research before the object is removed, provides assurance that future research opportunities will not be lost, and features an eminent domain valuation rule that excludes values from compensation awards associated with the object's cultural significance (pp. 193-94).

Sue enjoyed none of these protections because none are afforded in the United States for fossils or any other antiquities buried in private sites. In consequence, one of the most complete and best articulated skeletons of its type became simply another object of commerce, its preservation and availability for study subject to the vicissitudes of the marketplace. Happily, the story ends well because Sotheby's auctioned the fossil off for \$8.36 million to the Chicago Field Museum of Natural History in an arrangement underwritten by private corporations.<sup>29</sup>

The legal protections afforded the Chauvet Cave under French law are closer to Sax's ideal. France does not claim state ownership of antiquities and must compensate owners for their acquisition. But it effectively shifts the value of these antiquities to the state by granting owners excavation permits only on terms fixed by the state. Under its legislation, France sealed the Chauvet Cave off for preservation and scientific investigation. It declared the cave a historic monument, which had the effect not only of preserving the site but of burdening the cave with a public servitude coextensive with the cave's paleontological significance. The French government subsequently acquired the site outright in a condemnation proceeding that fixed compensation on the basis of the acquired property's current use rather than on the basis of the vastly inflated values attributable to the cave's cultural status or the tourist income it could be expected to generate (pp. 186-93).

Similar antiquities protection regimes for private sites could be established as police power measures in this nation, I believe, without running afoul of existing Fifth Amendment constraints, provided that the residual value of the site, as measured by its current or permitted uses, would not be severely diminished. *Penn Central*, for example, concluded that the tower ban imposed on the Grand Central Terminal was not a taking even though the tower's value was capitalized in the \$57 million dollar range. But the Supreme Court ignored this huge opportunity cost in favor of a finding that the landmark restriction left

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29. See Malcolm W. Browne, *Tyrannosaurus Skeleton Is Sold To A Museum For \$8.36 Million*, N.Y. TIMES, Oct. 5, 1997, at Sec.1 p.37.

undisturbed the income potential the property enjoyed in its *current use* as a railroad terminal incorporating supplemental commercial activities.<sup>30</sup>

Less clear is whether or not the Fifth Amendment would countenance eminent domain awards that exclude values associated with the site's cultural significance, as occurred in the Chauvet Cave example. In the United States, these awards are premised principally on the property's so-called highest and best use, a measure that, depending on the situation at hand, might be deemed to include values associated with the site's cultural stature.<sup>31</sup> Professor Sax implicitly resolves this issue earlier in his volume when he rejects the claim that government ought to rely upon its eminent domain power to achieve the volume's proposed cultural heritage goals. His response:

[t]he issues raised in the following pages, however, are intended to pose a prior question: what powers and responsibilities should be recognized in the owners of such objects *in the first instance?* . . . Such issues are not resolved by recognition of the government's power to expropriate such interests if they exist. They are questions about the relation that *ought* to exist between certain things that are physically capable of exclusive ownership and control and the larger community's claim upon them. [p. 9; first emphasis added]

If the courts were to agree with Sax that "in the first instance," owners of antiquity-laden sites are burdened by a public servitude, there would be no need for government to compensate owners for these values because it would be purchasing something that it already owns as trustee for the community.

### III. *PLAYING DARTS: AN APPRECIATION*

Three decades ago, Professor Sax sought to enlarge protection of the natural environment by premising citizen lawsuits on the thesis that, as fiduciary of a public trust, government was legally obligated to administer its property on behalf of the public, the beneficiary of this trust.<sup>32</sup> Today, his vision has broadened to encompass the cultural environment and the private sector with the more sweeping thesis that private owners of culturally significant resources should be obligated to administer *their* property as stewards or custodians of the public interest.

Sax extols a model of the private property owner as "the responsible collector who does not destroy and who does not conceal his treasures"; and as one of a group of like individuals who are "only

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30. See *Penn Central*, 438 U.S. at 129.

31. See Costonis, *supra* note 18, at 1038-45.

32. See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law*, 68 MICH. L. REV. 471 (1970).

temporary custodians”; and who “see themselves as the bearers of some special responsibility that transcends indulgence of their own fancies” (p. 201). What Sax declares of owners of great architecture — they are “not just owners, but custodians”<sup>33</sup> — he holds for owners of all classes of culturally significant property. This construct, Sax observes, “remains the law’s awkward little secret” (p. 59). His volume strives not only to disclose the secret, but to secure its recognition as a legal principle as influential for private dominion as his public trust thesis has been for public dominion.

His private stewardship claim is as much reflective of the direction in which the law may actually be developing as it is advocacy of a novel point of view, an observation that applies as well to his earlier public trust thesis. *Playing Darts*, in fact, understates this development in its claim that “the dominant modern idea of ownership is understood as entitlement to possess an object as an exclusively private thing, devoid of any public element except a broad obligation to avoid doing conventional harm such as trespassing on the territory of others” (p. 3). In truth, the public dimension of private ownership throughout the last half-century has been magnified well beyond this photon-like characterization. The point is quickly confirmed by consulting digests of legislation or decisions in the fields of historic preservation and urban design, endangered species protection, and, more broadly, the entire body of environmental law as it has developed since the late 1960s.

The conceptual thorn pressing against Sax’s thesis has been the rule encountered in the earlier *Penn Central* discussion that allows government to reduce private property entitlements to prevent harm, but *not* to compel a benefit. Strictly applied, the harm/benefit rule would overwhelm his thesis because no clearer example of a compelled benefit can be imagined than government’s singling out owners to share their culturally significant property with the general public. Despite its intuitive appeal and earlier influence, the rule has been weakened by assaults in the literature, including Sax’s own work,<sup>34</sup> and its uncertain standing in the courts, as evidenced by *Penn Central* itself.<sup>35</sup> We can be certain that the rule is in trouble when even Justice Scalia, the high priest of photon theory,<sup>36</sup> joins in trashing it.<sup>37</sup>

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33. P. 59. (citing Herbert Muschamp, *Critic’s Notebook: Art and Science Politely Disagree on an Architectural Jewel’s Fate*, N.Y. TIMES, Nov. 16, 1992, at C11).

34. See Sax, *Taking*, *supra* note 20, at 48-50; see also Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1196-201 (1967).

35. See *supra* text accompanying notes 23-24.

36. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (Scalia, J.); *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987) (Scalia, J.).

37. See *Lucas*, 505 U.S. at 1020-26.

Although conceptually distinct from his private trust reasoning, Sax's argument favoring the public's right to know about and participate in its cultural heritage will also facilitate his thesis's acceptance. The argument taps into a powerful trend dating back to the "citizen participation" movement, which developed as a backlash to abuses of urban renewal programs a half-century ago. Over the last thirty years of environmentalism, this movement, aided by Sax's generalship, has witnessed the emergence of public interest organizations as a potent force in public policymaking of federal and state environmental impact requirements, and of legislation empowering citizens to challenge government-sanctioned development proposals in administrative and judicial proceedings. Cultural heritage values, with historic preservation at the prow, have been a major beneficiary of these innovations.

Then, of course, there is *Playing Darts*' emotional appeal. Who, but a Visigoth, or perhaps a law and economics or public choice cultist, could possibly oppose a thesis that promises safe haven not only for the various cultural gems noted earlier but, to select randomly from Sax's fecund inventory, Da Vinci's *Codex Hammer*; Renoir's *Au Moulin de la Galette*; Frank Lloyd Wright's Guggenheim Museum; Stonehenge; *Homo Erectus* (Java Man); an undisclosed notebook of T.S. Eliot's poems; a manuscript of D.H. Lawrence's *Sons and Lovers*; and the papers of Franz Kafka, FDR, Sylvia Plath, James Joyce, and Justices Holmes, Brandeis, and Frankfurter?

A brilliant theorist, Sax is also passionate in his beliefs and very, very shrewd in his advocacy. He understands that his thesis will not carry unless he can convince us, first, that there truly is a "community" out there united by consensus values and, second, that standards of cultural significance for varied categories of privately owned cultural property can be defined that are accurate, confinable, and, what may be the same thing, administrable. How better to create the impression that neither claim is problematic than to scour the last 30,000 years of human history and prehistory for properties that have become indisputable icons of West European and American culture?

Although Sax's argument is likely to enjoy significant legal, political, and emotional support, I expect that its success will nonetheless be mixed. The obstacles to its practical implementation are obscured by the simplicity of the theoretical construct on which it is premised. Certain of these obstacles go beyond administrative complications, moreover, and contest the construct's de-sacrilization of private ownership. In tiptoeing past them, Sax reasons as if the cogency of the theoretical construct is unrelated to its capacity for implementation, and vice-versa.

My sense that *Playing Darts* promises more than it can deliver is sharpened by the evident disparity between the boldness of its thesis and the modesty of its proposed reforms. So wide is the gap that I am

led to wonder if Sax's modesty reflects his own silent discounting of his bold thesis in anticipation of these obstacles.

*Playing Darts'* two chapters dealing with the Dead Sea Scrolls (ch. 10) and publication rights (ch. 11) are not truly relevant to his private property thesis because they target government's allocation of access to property *it* owns or controls. To like effect is *Playing Darts'* treatment of the papers of Supreme Court justices; access to library and museum collections; and heirs, biographers, and scholars (pp. 93-133). These chapters do engage property that is, or once was, in private ownership, but Sax never challenges this ownership. He neither compels private owners to preserve and to provide access to their treasures (as he does owners of fine art) nor deprives private donors of the entitlement to condition access to their collections in any (constitutional) manner they please. His choices are the less intrusive, if quite admirable ones, of urging owners to manage their property pursuant to an ethic of stewardship, and urging museums and libraries to join collectively in accords that discourage donors from imposing access limitations on their gifts of private property.

Sax's two chapters on the preservation of great architecture (ch. 4) and presidential papers (ch. 6) make object lessons of legal developments that have already matured, rather than pursue novel directions. Historic preservation has been a familiar planning tool since the 1930s, even if the Supreme Court did not get around to its validation until 1978. The regulation of distinguished, but non-landmarked gems is a later development, but the land use codes of cities sophisticated in the urban design arts routinely address these properties as well. Post-Nixon Presidential papers have been in public ownership since 1978, when Congress adopted the Presidential Records Act.

The chapters on fine art (chs. 1-5) and antiquities (ch. 12), on the other hand, do call for a rearrangement of property rights. The former withdraws from owners the rights to destroy or mutilate fine art (pp. 13-34) and to deny access to it (pp. 60-80); the latter withdraws the right to destructive excavation and denial of access to the antiquity, and, in cases of eminent domain, to a valuation rule that includes monetary values linked to the object's cultural significance (pp. 179-96).

But even in these instances, Sax treads on private dominion as lightly as possible. Murals may be removed, provided their artists are given prior notice and the opportunity to remove them (pp. 32-34). Portraits need not be shown during the lifetime of their (offended) subjects and for a reasonable time thereafter, provided that they are made available for periodic public viewing after this time (p. 41). Obligatory loans of fine art to public institutions should be employed only as "a matter of last resort," at no expense, and with as little inconvenience as possible to their collectors (p. 67). Owners of land containing antiquities or discoverers of the latter should receive a

“substantial reward” and the former should be allowed to sell the antiquity if its sale does not imperil the public’s interest in the “ideas, information, or inspiration embodied within” it (p. 195).

Why does Sax apply his “qualified property” thesis in such muted fashion? I would propose three reasons. First, *Playing Darts* pursues multiple targets, only one of which seeks the immediate reformulation of private property rights, and the attention of the foregoing chapters is distributed among these targets. Second, an unfortunate consequence of Sax’s decision “not . . . to enunciate a set of rules, but rather to draw attention to issues . . . and to illustrate the common themes they display” is the diversion of his attention from the implementation obstacles adverted to above (p. 197). Finally, too aggressive an effort by Sax to de-sacrilize property, as his thesis seems to demand, would prove both infeasible and counterproductive.

Commencing with the first of these reasons, Sax adds to his property rights concerns the formulation of a *pre-legal* ethic of reverence for the cultural environment and an assault on the varied impediments to community access to and participation in this environment. With respect to the former, Sax seeks to do for the cultural environment what Aldo Leopold attempted for the natural environment when, in *A Sand County Almanac*, he preached a land ethic.<sup>38</sup> Sax, an evangelist no less than a lawyer, understands that ideas do have consequences, one of the most potent of which is to prepare the ground for their eventual passage from ethical to legal stature. It is *Playing Darts*’ strength, not its weakness, that it seeks to inculcate this ethic into what are largely private ordering arrangements at the present time. Sax’s hope, one suspects, is that this ethic, like Leopold’s land ethic, will progressively bleed into the legislation and constitutional jurisprudence of a later day. This Review’s earlier discussion of Sax’s commitment to the public’s right to know — the latter of his additions — reveals not only the depth of his passion for this value but the extensive treatment that it receives throughout *Playing Darts*.

Moving to the second reason, Sax’s theoretical focus causes him to avoid, rather than confront, the genuine difficulties posed by his premises regarding “community” values and coherent and confinable standards of cultural significance. Not surprisingly, these are the very premises, along with Sax’s diminution of private dominion, that will most rile photon theorists. But even those who, like myself, place themselves toward the center of the wave/photon spectrum have reason to be disappointed with the manner in which Sax’s silence has the unseemly effect of stacking the deck to his advantage.

*Playing Darts*’s world often appears to be one in which every painting is a Rembrandt, every fossil *Homo Erectus*, and every author

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38. ALDO LEOPOLD, *A SAND COUNTY ALMANAC* (1966).

James Joyce. If that were so, validating community values or defining standards of cultural significance would be simple tasks. Indeed, selecting icons satisfying both requirements *is* simple if the selection is done *ex post* from an inventory dating back to prehistory and comprehending every cultural artifact imaginable.

But that's not how the process would work with respect to many, if not most, of the categories of cultural property named in *Playing Darts*. Determinations of cultural significance would more often have to be made *ex ante*, long before the object has ripened into an icon or its creator into an artist or architect enjoying consensus status as a master among the elite or the general public. To take only one example of a figure whose paintings or private papers would likely be cultural artifacts for *Playing Darts*' purposes, Renoir was unacceptable to the Beaux Arts establishment during his lifetime and for an indeterminate period thereafter. Witness the reaction to Albert Barnes's 1923 exhibition at the Pennsylvania Academy of Fine Arts.<sup>39</sup>

Sax's confidence that governmental processes can enable "history [to] make its own judgments," thereby curing the shortsightedness and bias of the cultural property's "mere proprietors," borders on the grandiose (p. 201). In fact, it is Sax himself who observes that a "primary value" of the private collector "is the very presence of individual and eccentric, often advanced, tastes *that would never be reflected in (indeed is all too often rejected by) official canons of selection or propriety,*" (p. 60; emphasis added) and who inquires "why should one expect any special wisdom from a city council or any other collection of public worthies?" (p. 52). Why indeed? Despite the foregoing quotations, a recurring problem with *Playing Darts* is its inclination to advance its case by confusing governmental chambers with the salon of Gertrude Stein and public administrators and community activists with her erudite habitués. My experience with the kind of public oversight Sax envisages is that however useful as a ritual for community venting, it affords scant assurance that the judgment of history will either be divined or respected. Not infrequently, what occurs instead is the creation of spurious history, as evidenced by adobe shopping centers in Santa Fe or the designation of the most banal or architecturally scrambled of neighborhoods as "historic" districts.

The "community" to which Sax appeals may be solidly behind the preservation of Leonardo DaVinci's *Codex Hammer* or Freud's papers. But what about the works of history's countless scientists, artists, and authors of lesser import that are more likely to be the subject of the public processes he advocates. It must also be admitted that these "communities" are often simply cultural elites who, like the architectural critics who opposed the Salk Institute addition, align themselves

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39. See *supra* text accompanying note 26.



with heritage activists and purport to speak for the public. Let us accept that mandarins' voices should be regarded as proxy for the *vox populi*, at least when the actual public is acquiescent or indifferent, or in those rare cases when the cultural artifact in issue is indisputably an icon. Who speaks for the "community," however, if a cultural resource divides various groups as occurs, for example, when the inflated values associated with a neighborhood's historic district designation drive out its low-income population?<sup>40</sup>

My objection is not that Sax fails to answer these questions persuasively, but that he avoids addressing them at all. As a result, we lose the benefit of the contributions he might offer toward their resolution. In addition, his silence leads him to overstate the extent to which "[c]onventional notions of ownership and dominion" impede cultural preservation (p. 197).

Entitlement allocations certainly do enter into the picture. But they are by no means the whole story. Even if they were as malleable as Sax would like — and *Penn Central* suggests substantial movement in this direction — wholesale regulation of a number of the categories of privately owned property discussed in *Playing Darts* would likely not be preferable to the current private ordering alternative as long as these questions remain open. My exceptions would be architecture, antiquities, and perhaps, obligatory loans of fine art. Although not without standard-setting issues of their own, these categories may be more amenable than other types of cultural property to public permitting regimes featuring acceptably coherent and precise standards.

The final reason for the shortfall between Sax's ambitious thesis and quite modest proposals for reform returns us to this Review's introductory claim. *Playing Darts* may help us to understand why takings jurisprudence and property regimes move within very narrow margins despite the theoretical chasm dividing wave and photon property theorists. Paradoxically, Sax's effort to dispense with private dominion as a constraint on cultural preservation ends up demonstrating not only that private entitlements are indispensable to preservation's success, but that disregarding their pervasive presence is both infeasible and counterproductive.

Let us use *Playing Darts* as our text for the homily. Sax opens the volume by acknowledging that "[f]or the most part it is neither practical nor appropriate that [cultural heritage objects] be publicly owned" (p. 9). Subsequently, he cites various grounds for the proposition that

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40. Virtually the only point at which Sax expressly addresses the issues of "community" raised in the text is in Chapter I, note 4, where he discusses the "Kennewick Man," an ancient human skeleton of a Native American, that Native Americans wish to bury and scientists wish to study. Sax disclaims that it is his intent to "suggest there is a single, monolithic community." P. 203. But his claim is belied by his subsequent practice of identifying the values of the "community" with those he himself intuitively as most in keeping with the goal of securing cultural heritage protection.

the private collector “is crucial to the protection” of these objects (p. 60).

Cultural innovation is one ground. A “primary value” of private participation, Sax comments, “is the very presence of individual and eccentric, often advanced, tastes that would never be reflected in (indeed is all too often rejected by) official canons of selection or propriety” (p. 60). The “stewardship tradition” nurtured by private collectors is a second ground (p. 72). It receives Sax’s praise as “obviously powerful and deeply rooted . . . impressively it grows out of self-imposed restraint, not as a duty imposed by law or even the strictures of public opinion” (p. 72). Stocking the culture’s libraries and museums with great art, and its cities with great architecture is a third. In his appreciation of private collectors, Sax stresses that “through their philanthropy . . . many, perhaps most, of the greatest works eventually find their way into public institutions” (p. 201). His discussion of great architecture likewise acknowledges that owners of these gems “bear[] a special burden as [their] reward for having endowed us with . . . magnificent structure[s]” (p. 55).

A fourth ground is the preemptive weight Sax accords a value he describes as “privacy,” but which often seems indistinguishable from familiar sticks in the property bundle. Illustrative is his conclusion that owners of distinctive private homes should not be compelled to open them to public view because “privacy militates against legally compelled openings to the public” (p. 68). William Pitt would rush to exclaim, however, that “privacy” in this context is deeply rooted in, if not one and the same as, the right to exclude, certainly one of the proprietor’s most precious entitlements.<sup>41</sup> To like effect is Sax’s support for the artist’s or writer’s entitlement to order the destruction of his work, no matter how culturally momentous. At one point Sax describes the value being protected as the creator’s entitlement “to implement his own judgment about what is worthy of him” (p. 42). But is not this value congruent with the autonomy interest in property, which Sax himself defines elsewhere as a “claim of entitlement to decide the fate of an object” (p. 9)?

Deference to pro-dominion values appears in two other guises that receive attention in earlier paragraphs of this Review. One, seen in the discussion of private papers of notable figures, is Sax’s choice in particular contexts *not* to shift proprietor entitlements to government, even though they impede or bar the public’s right to participate knowledgeably in its cultural heritage. The other is his restriction of property rights to the minimum necessary in those instances when he believes some rearrangement is advisable.

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41. See *supra* note 11 and accompanying text.

Are these pro-dominion features mere gestures advanced by a shrewd wave theorist to minimize opposition to a radical rearrangement of property rights? Perhaps Sax thinks so, but I do not. I believe that they reveal instead that property rights are not so easily secularized, and, if barred at the door, may nonetheless find their way back in through the window, albeit garbed as pragmatic accommodation rather than as constitutional command. Sax understands that if he pushes his qualified property thesis too hard, his efforts will be counterproductive. Among a litany of drawbacks, collectors may cease to collect<sup>42</sup> or donate their treasures to museums (p. 69). Patrons may move their art to other jurisdictions (p. 66). Finders may discontinue their exploration for fossils or other antiquities, or vandalize these artifacts (pp. 195-96).

The upshot of these observations can be summed up in alternative ways. One, which continues the de-sacrilization of private property as a mere "fact," is to acknowledge that this "fact" has major functional implications that must be respected in any inquiry into how and whether cultural property will be created, made accessible to the public, and preserved in the United States. The second is to conclude that private property's functional importance explains why it has been sacrilized over the course of the development of Anglo-American property and why it has been singled out for special status by the Constitution's framers.

Whichever alternative is chosen, the reader leaves *Playing Darts* with confidence that the theoretical gaps dividing wave and photon property scholars will largely be filtered out in the practical conduct of cultural preservation. All that is lacking to test the question is a companion volume on the topic composed by a photon scholar. Theoretical rhetoric aside, how different would its basic prescriptions be from Sax's own? Would it have any greater success discounting the evident realities of culture and community than Sax has had in de-sacrilizing property? Would its predisposition to private ordering not have to yield from time to time to recognition that the collective action demanded to achieve some forms of imperatively valuable cultural preservation simply cannot be achieved without a governmental assist? Finally, would it recognize that, despite their formal elegance, systems, in the end, make fools of us all?

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42. See text *supra* following note 26 for a discussion of the related reluctance to display.