

MAKING IDEAS MATTER: REMEMBERING JOE SAX

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Joe Sax made his ideas matter. He had consequential ideas that shaped an entire field—in his case, environmental law—both in theory and in practice. His scholarship was first rate and has enduring significance in academia, as evidenced by the fact that two of his law review articles are among the 100 most frequently cited articles of all time.¹ Others are more competent to review the importance of his scholarship; my experience in environmental advocacy is more pertinent to evaluating his impact on environmental policymaking. Here, his ideas have had a greater impact than any other legal academic. As the *New York Times* observed in the opening sentence of its obituary for Professor Sax, he “helped shape environmental law in the United States and fueled the environmental movement.”² As environmental law historian Richard Lazarus put it, Sax “provided much of the strategic blueprint followed by the environmental public interest groups,”³ which is still followed more than fifty years after he began his career at the University of Colorado Law School in 1962.

How did a self-effacing, erudite, bookish professor come to have such an impact?

I. THE TIME WAS RIGHT

Sax was fortunate in beginning his career just as the modern American environmental movement was birthed. He began as teacher and scholar in 1962, within days of publication of Rachel Carson’s seminal book, *Silent*

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1. Fred Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1490 (2012) (citing Sax’s “Takings and Police Power” as the 31st most frequently cited law review article of all time and “The Public Trust Doctrine in Natural Resources Law” the as 46th most frequently cited).

2. Douglas Martin, *Joseph Sax, Who Pioneered Environmental Law, Dies at 78*, N.Y. TIMES, Mar. 10, 2014, http://www.nytimes.com/2014/03/11/us/joseph-l-sax-who-pioneered-legal-protections-for-natural-resources-dies-at-78.html?_r=0 (emphasis added).

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

Spring,⁴ and well before the Cuyahoga River burned, Santa Barbara's beaches were befouled with oil, and the first Earth Day of 1970. The earliest citizen-initiated lawsuits to protect the environment—such as *Scenic Hudson Preservation Conference v. Federal Power Commission*⁵—were filed in the mid-1960s and an incredible burst of environmental lawmaking was bookended by the 1969 National Environmental Policy Act (and the 1970 Michigan Environmental Protection Act authored by Sax) and the 1980 Comprehensive Environmental Response, Compensation, and Liability Act. Although too modest ever to make the claim, Sax was indeed present at the creation of environmental law.

More generally, the time was also right for his ideas, given the pervasive mistrust of government engendered by the Vietnam War and the Watergate scandal. The ensuing loss of confidence in government was fertile ground for challenges by outsiders to the established order—whether in the streets through mass mobilizations such as Earth Day or in the courts through lawsuits challenging government decisions threatening the environment. Against this backdrop of social ferment, not surprisingly the explosion of environmental law and litigation was interwoven with similar developments in other fields—leading to what is often referred to today as “public interest” law and litigation. Sax was at the heart of this movement, as demonstrated by the fact that Consumer Reports magazine published its own edition of Sax's *Defending the Environment* for its members.⁶

II. SAX HAD BIG IDEAS

Sax's scholarship mounted timely and powerful challenges to the established order of private property rights and to the assumption that government could be relied on to advance the collective good, such as protecting the environment. First, his reworking of the “public trust doctrine” challenged longstanding views of private property rights based on emerging understanding of the “land community”—to use Aldo Leopold's phrase—as a set of ecological relationships in which there is a public interest and concerning which government has affirmative responsibilities. Sax had a career-long interest in protecting our “common heritage”⁷ through reconfiguring the law of private property, whether it concerned real property, prior appropriation rights in water, works of art, or the repatriation from museums of

4. *Id.* at 58.

5. 354 F.2d 608 (2d Cir. 1965), *cert. denied* 384 U.S. 941 (1966).

6. Dennis Holder, *Pleading for the Land: U-M Law Professor Joseph L. Sax Sees the Forest for the Trees – and Storm Clouds on the Horizon*, DETROIT FREE PRESS, Nov. 9, 1980, at 11.

7. Joseph L. Sax, *The Unfinished Agenda of Environmental Law*, 14 WEST-NORTHWEST 1, 6 (2008), available at <http://scholarship.law.berkeley.edu/facpubs/170>.

aboriginal artifacts.⁸ If anything, the importance of his challenge to an entrenched ideology of private property rights has been underappreciated and Sax's gentle demeanor belied the radicalness of his ideas.⁹

Second, Sax had a big idea about America's "best idea"¹⁰—the National Parks.¹¹ Sax unapologetically proselytized for the parks as shrines of a "secular religion."¹² Preservationists, said Sax, should embrace their role "as secular prophets, preaching a message of secular salvation"¹³ using National Parks to promote "intensiveness of experience" of nature for visitors, as opposed to responding to the masses' recreational preferences.¹⁴ Characteristically, Sax didn't stop with scholarship. He consulted with the National Park Service and authored a policy statement on the contemporary meaning of National Parks.¹⁵ According to the Service's official history, Sax provided "perhaps the most comprehensive and articulate assessment of the growth of the [National Park] idea."¹⁶ Linking this idea with his critique of private property rights, Sax argued for regulation of private lands located within Park boundaries—and, in some circumstances, nearby but outside of National Parks—as needed to curb incompatible activities.¹⁷

Finally, and most importantly, in his landmark book, *Defending the Environment: A Strategy for Citizen Action*,¹⁸ Sax proposed his big idea that citizens should have the right to sue government agencies or private actors for harming widely shared environmental rights. He astutely perceived that the institutional dynamic of "agency capture" made it unlikely that government agencies charged with protecting the environment would effectively and consistently do so over the long run. He also doubted the success of then-popular reforms to improve agency decisionmaking processes—such as

8. See, e.g., JOSEPH L. SAX, *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES* (1999).

9. Holder, *supra* note 6, at 12 (calling Sax "the most radical man in Michigan"); see, e.g., Joseph L. Sax, *Ownership, Property, and Sustainability*, 31 UTAH ENVTL. L. REV. 1 (2011), available at <http://scholarship.law.berkeley.edu/facpubs/757>.

10. Wallace Stegner, *The Best Idea We Ever Had*, 46 WILDERNESS 4 (1982); see also, *The National Parks: America's Best Idea* (Public Broadcasting System 2009).

11. JOSEPH L. SAX, *MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS* (1980).

12. *MOUNTAINS WITHOUT HANDRAILS*, *supra* note 11, at 15.

13. *Id.* at 104.

14. *Id.* at 75.

15. *Id.* at 111-13.

16. Dwight T. Pitcaithley, *Philosophical Underpinnings of the National Park Idea*, RANGER (Fall 2001), available at <http://www.nps.gov/history/history/hisnps/NPSThinking/underpinnings.htm>.

17. Joseph L. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239 (1976), available at <http://scholarship.law.berkeley.edu/facpubs/1489>.

18. JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* (1971).

expert review panels, enhanced disclosure through impact statements, or more and better public participation.¹⁹ Instead, Sax sought to fundamentally alter the power dynamic in citizens' (i.e., environmental groups') dealings with government agencies. By providing any citizen direct access to courts, wrote Sax, he or she would become "a claimant of rights to which he is entitled" instead of a "supplicant."²⁰ Sax's goal, he acknowledged, was to "change the balance of *power*"²¹ in agency decisionmaking.

He did more than propose lofty ideas. Sax teamed up with environmental advocacy groups, the United Auto Workers Union, and key state legislators to author and enact the first statute in history to authorize direct citizen enforcement of environmental rights, the Michigan Environmental Protection Act (widely known as the Sax Act).²² Passage of the Sax Act, publication of *Defending the Environment*, and his role as an effective advocate eventually led to inclusion of similar "citizen suit" provisions in many major federal environmental laws,²³ as well as in state laws across the nation.²⁴

The proliferation of citizen suits over the ensuing forty years demonstrates the impact of Sax's vision of changing the balance of power in agency decisionmaking. Major environmental groups—including Natural Resources Defense Council (NRDC), Earthjustice (formerly known as Sierra Club Legal Defense Fund) and, more recently, the Center for Biodiversity—have embraced citizen suits as central components of their advocacy strategies. The strategic use of citizen suits to drive policy change has become "[o]ne of

19. Although initially skeptical about such administrative reforms, late in his career Sax conceded he had "underestimated the influence of NEPA's 'soft law' elements." Joseph L. Sax, *Introduction*, 19 U. MICH. J.L. REFORM 797, 804 (1985).

20. DEFENDING THE ENVIRONMENT, *supra* note 18, at 58.

21. *Id.* at 83 (emphasis original).

22. Mich. Comp. Laws § 324.17 *et seq.* For a detailed history of MEPA's drafting and enactment, see Joan Wolfe, *A 'History' of the Michigan Environmental Protection Act of 1970 and A 'History' of the Inland Lakes and Streams Act 346 of 1972*, <https://dspace.nmc.edu/bitstream/handle/11045/10580/wolfe-history-of-mepa.pdf?sequence=6> (last visited Nov. 13, 2014); an abridged version of this history can be found at DAVE DEMPSEY, RUIN & RECOVERY: MICHIGAN'S RISE AS A CONSERVATION LEADER 171-76 (2001). For a history of early litigation under MEPA, see Joseph L. Sax & Joseph F. DiMento, *Environmental Citizen Suits: Three Years' Experience Under The Michigan Environmental Protection Act*, 4 ECOLOGY L.Q. 1 (1974), available at <http://scholarship.law.berkeley.edu/facpubs/1108>; Jeffrey K. Haynes, *Michigan's Environmental Protection Act in its Sixth Year: Substantive Environmental Law from Citizen Suits*, 6 ENVTL. L. REP. 50067 (1976).

23. See, e.g., 33 U.S.C.A. § 1365 (Clean Water Act); 42 U.S.C.A. § 7604 (Clean Air Act); 16 U.S.C.A. § 1540(g) (Endangered Species Act).

24. A summary of state-level "Sax Acts" was compiled in 1974 by Professors Sax and DiMento. Joseph L. Sax & Joseph F. DiMento, *Environmental Citizen Suits: Three Years' Experience Under The Michigan Environmental Protection Act*, 4 ECOLOGY L.Q. 2 (1974), available at <http://scholarship.law.berkeley.edu/facpubs/1108>.

the basic features of our nation's environmental protection systems"²⁵ with many significant victories; but tallying the number of cases filed and won does not tell the whole story.²⁶ As Sax envisioned and hoped, the ability to file lawsuits gave environmental groups a seat at the table historically reserved for regulated interests to influence agency decisions.²⁷ The continuing importance of this change is illustrated by two recent settlements of citizen suits.

In the first, environmental groups, including NRDC, and allies among state governments settled a lawsuit against the U.S. Environmental Protection Agency (EPA) in 2010 requiring EPA to use existing provisions of the Clean Air Act to regulate carbon dioxide emissions—an important greenhouse gas contributing to climate change—from existing power plants.²⁸ Significantly, this settlement occurred after Congress failed to pass major new legislation designed to address, among other things, the contributions of these plants to climate change. As a direct consequence of this settlement, NRDC (and other groups) then played a critical role in shaping EPA's proposed regulations for these plants²⁹—to the extent that industry groups and their congressional allies claimed NRDC's influence has been inappropriate and that they have been shut out of the process!³⁰ In effect, this settlement has shaped the United States' strategy for reducing greenhouse gas pollution from one of the most significant sectors.

Similarly, environmental groups have dramatically affected implementation of the Endangered Species Act (ESA) by wielding the leverage provided by the ESA's citizen suit provisions. For example, in 2011 the Center for Biodiversity and WildEarth Guardians reached a blanket settlement resolving thirteen ESA citizen suits against the U.S. Fish and Wildlife Service. This settlement set a comprehensive schedule for the Service's consid-

25. JOHN D. ECHEVERRIA & JON T. ZEIDLER, *BARELY STANDING: THE EROSION OF CITIZEN "STANDING" TO SUE TO ENFORCE FEDERAL ENVIRONMENTAL LAW 1* (1999), available at http://www.gelpi.org/gelpi/research_archive/standing/BarelyStanding.pdf.

26. Empirical studies of citizen suits have found, for example, that certain types of "citizen" suits are filed more frequently by traditional regulated interests. See, e.g., Patrick Parenteau, *An Empirical Assessment of the Impact of Critical Habitat Litigation on the Administration of the Endangered Species Act* (2005) (on file with Vermont Law School), available at http://lsr.nellco.org/vermontlaw_fp/1.

27. DEFENDING THE ENVIRONMENT, *supra* note 18, at 57 ("Litigation is thus a means of access for the ordinary citizen to the process of governmental decision-making.") (emphasis original).

28. Settlement Agreement, *New York v. EPA*, No. 06-1322 (Dec. 21, 2010), available at <http://www2.epa.gov/sites/production/files/2013-09/documents/boilerhgsettlement.pdf>.

29. 79 Fed. Reg. 34829 (June 18, 2014).

30. Coral Davenport, *Taking Oil Industry Cue, Environmentalists Drew Emission Blueprint*, N.Y. TIMES, July 6, 2014, http://www.nytimes.com/2014/07/07/us/how-environmentalists-drew-blueprint-for-obama-emissions-rule.html?_r=0.

eration of more than 720 species for protection under the ESA,³¹ which could represent a two-thirds increase in the existing ESA list of 1118 plant and animal species protected by the Act. As with the Clean Air Act example above, industry and congressional critics claimed that this settlement is driving the Service's ESA decisionmaking processes.³²

The success of citizen suits in changing these power dynamics is demonstrated by the complaints of regulated interests and their congressional allies, who long for the pre-Sax days when they enjoyed unchallenged access to agency decisionmaking processes.³³ And these critics have made many efforts—in Congress³⁴ and in the courts³⁵—to turn back the clock in limiting citizen suits.

III. SAX WAS A GIFTED TEACHER AND MENTOR

Finally, having big ideas at the right time does not guarantee their implementation. The “secular religion” of preservation preached by Sax inspired many acolytes. Through his teaching and mentoring, Sax influenced two generations of environmental leaders. As anyone who took one of his classes well remembers, Sax was an extraordinary teacher.³⁶ Even though he resorted to scheduling his classes for 8 a.m. in a futile attempt to keep the

31. Settlement Agreement, *WildEarth Guardians v. Salazar*, No. 10-377 (D.D.C. May 10, 2011); Settlement Agreement, *Center for Biological Diversity v. Salazar*, No. 10-377 (D.D.C. July 12, 2011); see also *In Re Endangered Species Act Section 4 Deadline Litigation*, No. 10-377 (D.D.C. 2011).

32. See, e.g., *Oversight Hearing on “ESA Decisions by Closed-Door Settlement: Short-Changing Science, Transparency, Private Property, and State & Local Economies” Before the H. Comm. on Natural Resources*, 113th Cong. (2013), available at <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=363649>; *Oversight Hearing on “The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts” Before the H. Comm. on Natural Resources*, 113th Cong. (2011), available at <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=270315>.

33. U.S. CHAMBER OF COMMERCE, *SUE AND SETILE: REGULATING BEHIND CLOSED DOORS* (2013), available at <https://www.uschamber.com/sites/default/files/documents/files/SUE-ANDSETTLERREPORT-Final.pdf>.

34. See, e.g., *Sunshine for Regulatory Decrees and Settlements Act of 2013*, H.R. 1493, 113th Cong. (2013).

35. For example, there have been repeated, and often successful, attempts to apply the doctrine of “standing” to limit citizen suits. See, e.g., ECHEVERRIA & ZEIDLER, *supra* note 25, at 1.

36. In 1980, Professor Sax was one of five University of Michigan faculty members receiving the Distinguished Faculty Achievement Award. *Professor Joseph Sax Receives Faculty Achievement Award*, L. QUADRANGLE NOTES (Univ. of Mich. L. Sch., Ann Arbor, Mich.), 1980, at 4. In 1983, he was appointed a Distinguished University Professor—only the second law professor and the youngest UM faculty member up to that time ever to receive this recognition. Sax named this professorship the “Philip A. Hart Distinguished Professor of Law” after

number of enrolled students manageable, his classes were typically packed.³⁷

His skill as a classroom teacher magnified the impact of his magnificent mind. His colleague, Professor Zygmunt Plater, once described Sax as “[a] guru, a visionary, the most exciting thinker I have ever known.”³⁸ Plater went on to explain the multiplier effect of Sax’s teaching:

He taught me, and now I am teaching students of my own. A lot of what I teach are Saxian principles, and a lot of my methods are Saxian. I want my students to take away from the association with me the same values, the same determination, I took away from my association with Joe Sax. It is an ever widening circle with Joe Sax at the center.³⁹

As an environmental activist, Plater also illustrates Sax’s impact outside the classroom as a mentor. Plater, then a young law professor at University of Tennessee, brought one of the most celebrated and consequential environmental lawsuits—an ESA citizen suit—*Tennessee Valley Authority v. Hill*.⁴⁰ As Plater recounts in his recent book, *The Snail Darter and the Dam*, Sax was a key adviser and critical mentor at every step as the case made its way through the courts and, subsequently, as Congress intervened.

In reflecting on the first twenty years of modern environmental law, Sax acknowledged the role of those he mentored in translating his big ideas into practice.⁴¹ And the list of those he mentored and advised is long and illustrious, including a generation of fellow environmental law professors like Plater, cabinet secretaries and undersecretaries (e.g., Secretary of Interior Bruce Babbitt, Assistant Attorney General James Moorman, and Interior Department Solicitor John Leshy), National Park superintendents, governors (e.g., Michigan Governors William Milliken and James Blanchard), federal and state elected officials (e.g., Senator Philip A. Hart), leading private practitioners, and leaders of national, state, and local envi-

Michigan U.S. Senator Philip Hart. *The Conscience of the University?*, L. QUADRANGLE NOTES (Univ. of Mich. L. Sch., Ann Arbor, Mich.), 1983, at 5-6.

37. Holder, *supra* note 6, at 10.

38. *Id.* at cover page.

39. *Id.* at 14.

40. 437 U.S. 153 (1978); ZYGMUNT J.B. PLATER, *THE SNAIL DARTER AND THE DAM* 36 (2013).

41. *Introduction*, *supra* note 19, at 804 (1985) (“Pioneering developments in environmental law made it possible. People like Van Putten, Plater, Dernbach, and Oppenheimer make it work.”).

ronmental groups—including Environmental Defense Fund CEO Fred Krupp and this author, former CEO of National Wildlife Federation.⁴²

I count myself among those fortunate to have known Joe Sax as teacher and mentor. As a young activist with a local environmental group—the West Michigan Environmental Action Council—I was inspired by his effective advocacy in rebuffing attempts in the late 1970's to weaken the Michigan Environmental Protection Act. Later, after taking four classes with him, I found Sax to be the best classroom teacher I ever had (and the hardest grader). As a young litigator, I sought his counsel on key questions of legal strategy in addition to doctrinal questions. Most importantly, Sax guided all of my important career decisions, used his connections to open doors, and always served as my lead reference. Others can better summarize Joe Sax's scholarly achievements, but I can vouch for his influence in shaping the careers of so many environmental advocates who helped make his ideas matter—and for that I am deeply grateful.

42. See also David M. Uhlmann, *The Quest for a Sustainable Future and the Dawn of a New Journal at Michigan Law*, 1 MICH. J. ENVTL. & ADMIN. L. 1, 14 (2012) (“His students went on to leadership roles in a wide range of environmental organizations and in government, helping Michigan Law play a preeminent role in the environmental successes we have enjoyed over the last forty years.”).