

THE LEGACY OF PROFESSOR JOE SAX

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I grew up as the environmental movement did, in the 1960s and 1970s. In college at Yale, engineering professor Charlie Walker became my mentor and taught me that there are practical solutions for almost all environmental problems. This hopeful point of view inspired me to devote myself to the subject, first as an academic pursuit. As I neared graduation and was trying to decide on a path, Professor Walker handed me a book: *Defending the Environment* by Joseph Sax.¹ That book was visionary in its description of private citizens' ability to protect and defend the environment through the legal system. It furthered my view that these problems could be solved and instilled in me the desire to study environmental law from Professor Sax at the University of Michigan.

But I was not admitted to Michigan and instead spent my first year of law school at the University of Virginia, before again applying to Michigan as a transfer student. At the time, it was uncommon to transfer between law schools and usually required fairly serious exigent circumstances. To my mind, being able to study environmental law under Professor Sax was such a circumstance. Professor L. Hart Wright, University of Michigan's famous former tax professor, agreed, and I was off to Michigan, one of eight transfer students that year.

One of my first classes with Professor Sax was Water Law, an antiquated series of overlapping nineteenth and twentieth century doctrines. One case in particular stood out, in that it did not have anything to do with water: a battle over airports in Chicago in the aftermath of World War II. Midway airport was built in 1926; in 1946, the city began plans to turn a former aircraft production and testing plant into the new O'Hare airport. However, a coalition of business owners around Midway sued the city, concerned that the new airport would cut into their customer base. It was easy for the business owners to argue they were being harmed by the city's actions, but tough to capture the many benefits that a new airport would provide to people across the city.

The same concept applies in the water context, Joe taught. When the government protects wetlands by preventing development or regulating the use of water or pollutants in the surrounding area, property owners will argue that it is a taking from them. But what is less readily apparent, though no less real, are the benefits that accrue to the public as a result of preserv-

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1. JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT* (1971).

ing these wetlands. Professor Sax stated the problem succinctly: “For most of our history, largely because of the illusion of abundance we created, we have operated as if the private element of the property system was the whole of it, and the public elements could be relegated to a back corner.”²

And so I was introduced to the public trust doctrine—Professor Sax’s creation and one of the foundational environmental law doctrines of the twentieth century.³ In its simplest form, it argues that the public deserves an equal place at the table alongside those specific individuals who would benefit or be harmed in a more traditional sense. The doctrine helps empower diffuse majorities that often are not well represented in the law. It recognizes people as the catalysts for change, not the government. *Defending the Environment* is based on these same lessons, evaluating the reasons citizens were unable to use the court system to protect the environment they benefited from, and proposing ideas to change that.

Some of the ideas are now familiar, but at the time, they were revolutionary. Still, they were just ideas, and Joe was not interested in legal scholarship as an end unto itself; he promised: “I’m going to change this from private law to public law, and I’m going to do what I can to try to put the public as a legitimate participant into the center of these debates.”⁴

And he did. Before the first Earth Day in 1970, Prof Sax not only catalogued all the obstacles keeping citizens out of court in environmental matters, he wrote a piece of model legislation that had no chance of passing but showed what it would take to clear these hurdles. If the bill could pass in the Michigan Legislature, it would correct the problems, but Professor Sax figured there was no point sending it to anyone; it was a nonstarter.

Then the first Earth Day came, and one of the leaders in the Michigan Legislature called Joe asking if he had any ideas for new environmental legislation. Perhaps the politician was hoping for a symbolic declaration, but Professor Sax sent over his model bill, a substantive mother lode written by the nation’s foremost expert on environmental law. Named the Michigan Environmental Protection Act,⁵ it passed overwhelmingly, and was then enacted in similar form in dozens of other states. His series of powerful legal principles, including the public trust doctrine, are also deeply interwoven into our nation’s clean air and water laws. Political windows open and close, Joe taught me. Be prepared for the moment.

2. Joseph L. Sax, *The Constitution, Property Rights, and the Future of Water Law*, 61 U. COLO. L. REV. 257, 281 (1990).

3. See, e.g., Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

4. Environmental Elders Speak, *Joseph Sax: Public Land, Public Trust*, FORCES OF NATURE (Sept. 15, 2013), <http://theforcesofnature.com/movies/joseph-sax-2/>.

5. Mich. Comp. Laws §§ 324.1701–06 (1970) (later known as the “Sax Act”).

The true brilliance of the public trust doctrine lies neither in its legal creativity nor in its influence over our nation's environmental laws. Instead, its power is founded on the fundamental recognition that individuals, when given a voice, can have outsized, positive impacts on the world around them.

I was fortunate enough to talk with one such individual through an independent research project I completed under Professor Sax's guidance. Joe asked me to study the history and politics surrounding Assateague Island, a beautiful thirty-three-mile-long narrow sand spit off the Virginia and Maryland coasts. A local Congressman had introduced a proposal to develop the island, paving the entire length for vehicle traffic. I started my research by looking at this Congressman's public statements and the Congressional Record, but was not getting very far. Professor Sax taught me to question more deeply. Who was behind that the proposal? What was the person thinking when they testified? What is really happening, and why? He made his students not only internalize the material, but also learn why it mattered—an approach consistent with his teachings in my Water Law class: “the legal issues of water resource problems cannot be isolated from economic, technical, and political considerations.”⁶ Understanding every dimension of a problem was critical.

I soon realized that reading transcripts was not going to get me to the level of understanding I needed, so I began making calls. One of those was to Judy Colt Johnson, who created the Committee to Preserve Assateague Island, Inc. She had built an array of environmental allies and unleashed a firestorm of opposition directed at Congress and the Department of Interior for even considering this development project. Eventually, her work paid off: in 1976, Congress voted to rescind plans for the highway and further commercial development on the island.⁷ Speaking to Judy was an inspiration that remains with me today. She was an activist who had actually made something happen in the real world—the preservation of an elegant island. Assateague's gently sloping white sandy beaches remain unspoiled to this day, thanks to Judy and the other citizens who worked to protect the irreplaceable.

Beyond his work as a professor, legal scholar, and dedicated advocate, it was just plain delightful to talk with Professor Sax. He had a fantastic sense of humor, often on display: tongue-in-cheek, cynical, and biting wit. His

6. *Professor Sax Authors Book on Water Law*, 15 L. QUADRANGLE NOTES 4, 4 (Winter 1969).

7. See generally BARRY MACKINTOSH, ASSATEAGUE ISLAND NATIONAL SEASHORE: AN ADMINISTRATIVE HISTORY (1982), available at <http://www.nps.gov/asis/parkmgmt/upload/asisadminhistory.pdf>.

wry observations about environmental law and politics always amused, but also hit close to home, especially as they related to the profit motives behind most of our country's environmental issues. His words shaped my views on many issues, even if he might not agree with all of my conclusions.

I learned a lot about externalities from him, which led to my ideas about comprehensive climate legislation, lobbying for a cap rather than a tax on pollution. He taught that taxes set too low can cause an increase of pollution, while a cap provides more certainty of pollution reduction. I learned about the intricacies of water law, which led me to believe that many of the historical relics within the law will come into sharper focus as rainfall patterns change.

My most important lesson was not an academic one. I learned from Joe that the best advocates for the environment are those who gain a direct benefit from the environment, whether financial or not—an inspiring vista, a drink of pure, sweet water, or that essential breath of clean air. I learned that the best policy or legal strategy for creating change is to put power in the hands of those who have the most at stake.

When I applied to be the president of Environmental Defense Fund, Professor Sax was one of my references. When the board called and asked why I would be good for the job, Sax provided me with a strong recommendation, not because of any academic achievements, but because I founded the Connecticut Fund for the Environment: "Fred built something."

Using that standard as a barometer of accomplishment, Professor Sax's work, over his more than forty years of legal scholarship, built the foundation for the modern environmental movement. Joseph Sax was a great scholar of environmental law, but he was more than that. He changed the very fabric of the law as it relates to the environment. He changed the way people interact with the law and with the government, and he did not do it to empower lawyers as agents of change. He did it to encourage people like Judy Colt Johnson to step up and make a difference. He did it so the children who play on the beaches, the fishermen who make their living on the lake, and the backpackers who find their peace in the wilderness can have a voice in the courts as well. The lasting impacts these individuals have made and will continue to make, enabled by Joe's extraordinary vision, represent an enduring legacy for which we are all extremely fortunate.

I still own that same copy of *Defending the Environment*. It reminds me of the incredible man who wrote it and the unique legacy he built into the law and the environmental movement. It reminds me of all of the lessons that he taught me, including the most important one: people matter. And giving them the power to create change can make all the difference.