

# JOE SAX AND THE PUBLIC TRUST

BY

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*This Essay situates the work of Professor Sax in a broad intellectual and conceptual framework. Professor Sax's work is widely understood to be foundational in the modern understanding of both the public trust doctrine and the takings doctrine. It is also viewed as critically important to policy development in water resource management, protection of natural resources, and environmental law as a field.*

*While most commentators note the signal advances in property theory made by Professor Sax, few have noted the relationship of property theory to democratic political theory. The legitimacy of the state and the constituting role of property relations—both between individual members of the political community and between government and citizen—are implicated by Professor Sax's work. This Essay suggests that to fully appreciate the scope of Professor Sax's contributions to the law, one must also appreciate how his work in property and environmental law not only reconfigured the nature of the debate around those issues, but how it speaks to our understanding of what government is for. Moreover, because his arguments engage democratic theory through a variety of methodological approaches, it is not just environmentalists who can learn from his work, but all of us.*

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## I. INTRODUCTION

Most legal observers would agree that credit for the resurrection of the modern public trust doctrine ought to be placed at the feet of one scholar: Professor Joseph Sax.<sup>1</sup> Of course, if the only contribution Professor Sax had made was either to the public trust doctrine or to the reconceptualization of takings jurisprudence, his place in the scholarly firmament would be secure.<sup>2</sup> But he did much more. There are few people about whom it could be said—certainly in the law—that they were there at the beginning, when environmental law emerged as a field. Joe was one of those people. Yet as important as Professor Sax's work has been in the field of environmental law and in the cognate fields of property law, water law, and administrative law, I want to suggest in this short Essay that his work belongs in two additional categories.

First, his arguments all rely on a firm grounding in democratic political theory. He argues for an understanding of law that supports the democratic legitimacy of lawmaking.<sup>3</sup> Remember that property was a jurisdictional term

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<sup>1</sup> The seminal article on the public trust doctrine is Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). Since the publication of that article, many cases have invoked the public trust doctrine. See, e.g., *In re Water Use Permit Applications*, 9 P.3d 409, 445 (Haw. 2000) (“In its ancient Roman form, the public trust included ‘the air, running water, the sea, and consequently the shores of the sea.’”). Several scholars have collected cases that arose between the publication of Professor Sax's 1970 article and 1985. See, e.g., Richard Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 644–45 n.77 (1986); see also Lynda L. Butler, *The Commons Concept: An Historical Concept with Modern Relevance*, 23 WM. & MARY L. REV. 835, 840 (1982) (discussing the history of the commons concept).

There have been many more cases recently, especially those related to atmospheric trust litigation. See Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 WAKE FOREST J. L. & POL'Y 281, 297–310 (2014) (explaining why courts should not be reluctant to rule on the merits in public trust cases seeking action on climate change). In Texas, a district court held that “the public trust doctrine includes all natural resources of the State including the air and atmosphere.” *Bonser-Lain v. Tex. Comm'n on Env'tl. Quality*, No. D-1-GN-11-002194, 2012 WL 3164561 (Tex. Dist Ct. Aug. 2, 2012), *vacated*, *Texas Comm'n on Env'tl Quality v. Bonser-Lain*, 438 S.W.3d 887 (Tex. App. 2014). The Pennsylvania Supreme Court recently stated: “At present, the concept of public natural resources includes not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and groundwater, wild flora, and fauna (including fish) . . . .” *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 955 (Pa. 2013) (plurality opinion).

<sup>2</sup> See, e.g., Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) (discussing the use of police power takings under eminent domain); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971) (discussing the government's power to institute takings and the public's right to private property).

<sup>3</sup> This idea permeates virtually all of his work. It is what animates the critique in JOSEPH L. SAX, *MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS* 103 (1980): “The weight of the preservationist view, therefore, turns not only on its persuasiveness for the individuals as such, but also on its ability to garner support . . . of citizens in a democratic

before it signified ownership.<sup>4</sup> As Milsom put it, “[l]ordship was property, the object of legal protection from above, just as it was the source of legal protection for rights below.”<sup>5</sup> Professor Sax understood the relationship of property to the legitimate functioning of the state and to the capacity for members of a polity to move beyond the condition of subject to the capacity of citizen.<sup>6</sup> His 1964 article on takings<sup>7</sup>—like Professor Reich’s essay on “new property,” also published in 1964<sup>8</sup>—in many ways captured an emerging zeitgeist.<sup>9</sup> But Professors Sax and Reich were not just riding a current in our culture; they were illuminating the sources of that current.<sup>10</sup>

Second—and this point is directly related to the first—his work had a direct effect on the discursive field that defined the environmental movement. Aside from his explicitly scholarly work, more popular books like *Defending the Environment*<sup>11</sup> and *Mountains Without Handrails*<sup>12</sup> gave a theoretical framework and a language to the claims that environmentalists were making.<sup>13</sup> Importantly, his work insulated environmentalism from the charges of elitism by rooting protection of the environment in our democratic tradition and by reaffirming the public content of private rights.<sup>14</sup>

society to bring the preservationist vision into operation as official policy.” Or in the foreword to *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* xvii (1971): “Courts are not to be used as substitutes for the legislative process . . . but as a means of providing realistic access to legislatures so that the theoretical processes of democracy can be made to work more effectively in practice.” His work on the public trust and on takings is similarly animated by this desire to make the promise of democracy and its institutions real.

<sup>4</sup> See generally S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 88–89 (1969) (describing the modern distinction between concepts of ownership and jurisdiction, and noting that in a feudal system, land was the source of a lord’s jurisdiction over peasants).

<sup>5</sup> *Id.* at 88.

<sup>6</sup> See generally Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733, 771–72, 787 (1964) (discussing the interplay of private property, government, and society, and the need for individuals to assert protection over their property as a means to achieve social and political liberty).

<sup>7</sup> Sax, *Takings and the Police Power*, *supra* note 2.

<sup>8</sup> Reich, *supra* note 6.

<sup>9</sup> See Gregory S. Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 *COLUM. L. REV.* 1545, 1545 (1982) (citing Professors Sax and Reich in stating that there is “a discernible trend in the body of scholarship that discusses constitutional protection of property in the context of previously unfamiliar sorts of private economic interests”).

<sup>10</sup> See Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 *HARV. NEGOT. L. REV.* 97, 125, 129–30 (2001) (analyzing the “ideas developed by particularly creative individuals like Joseph Sax [and] Charles Reich”).

<sup>11</sup> JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* (1971).

<sup>12</sup> SAX, *MOUNTAINS WITHOUT HANDRAILS*, *supra* note 3.

<sup>13</sup> SAX, *DEFENDING THE ENVIRONMENT*, *supra* note 11, at xvii–xix, 245; SAX, *MOUNTAINS WITHOUT HANDRAILS*, *supra* note 3, at 103–09.

<sup>14</sup> In some ways, this insight marked the development of Professor Sax’s takings analysis from the 1964 essay, *Takings and the Police Power*, *supra* note 2, to its elaboration in his 1971 piece, *Private Property and Public Rights*, *supra* note 2. This exploration is continued in an important new context in his book, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures*, where he discusses the public interest in privately owned cultural objects, including historic documents, works of art, and scientific discoveries. JOSEPH L. SAX, *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES* 1 (1999). By

This Essay makes the following arguments. Part II argues that Professor's Sax's work is best understood—in addition to his direct contributions to legal theory—as an important contribution to democratic political theory. By focusing on the aspects of his work that deal specifically with property, I argue that his elaboration of both the public and private aspects of property law is rooted in a deep understanding of the role that the institution of property played in the development of our modern concepts of the market and the state. To privilege one aspect of property over another is to misrepresent the evolution of the institution. Professor Sax is careful in his attempt to rescue property theory from pure private law conventions, noting the public and constitutional aspects that the institution has historically played. My argument frames this analysis by looking at the social function of property, especially in the context of the modern public trust doctrine. I then turn to the work on the takings clause that reaffirms the public understanding of property that Professor Sax advances. Moreover, it is this move that lays the groundwork for the contemporary law of environmental and natural resource protection.

Part III explores the impact of Professor Sax's work on changing not just the debate about property relations, but also the broader debate about the appropriate boundaries for government regulation. In this context the value of Professor Sax's work is even more apparent. His work on property theory revealed the attempts to elevate classical liberal views of property as just one moment in the evolution of a complex and multifaceted institution. His work helped change the political debate, not just the technical legal debate. Finally, he tied traditional links in American cultural traditions—ideas about access to public lands and resources, for example—to the commitments to preserve the public function of property.<sup>15</sup> This

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trying to sketch out the limitations on private claims, Professor Sax links the continuing public interest in things that are not, in some ways, susceptible to purely private governance. *See id.* at 9 (explaining that because the public may have an interest in privately owned objects, “unqualified notions of ownership are not satisfactory for such objects”). This work is consistent with his argument on the public trust that all property comes embedded in a network of public and private obligation, and it is the role of law to identify the contours of those obligations. *See id.* at 3 (recognizing that although “the law so greatly values open access to the basic building blocks of human achievement . . . [o]wnership of physical things, in contrast to intellectual property, is conceived of as private and unqualified”).

The contexts and the costs associated with recognizing those limitations vary, but one of his important contributions is to show that this is not a novel idea, but one that is part of the property tradition we inhabit. *See id.* at 6 (discussing the ownership ideals of religious relics in the Middle Ages, in which “private ownership and use was recognized . . . [but] [t]he importance of the relic to the community thus generated a special kind of qualified, obligation-bearing ownership”). The one extension in the public trust analysis is that there might be some public claims that constitutionally structure the political decisions that can be made about them. *See* Gerald Torres & Nathan Bellinger, *supra* note 1, at 290 (noting that because the public trust doctrine is inherent within the Preamble to the Constitution, the people conveyed a duty to the government to safeguard natural resources).

<sup>15</sup> SAX, MOUNTAINS WITHOUT HANDRAILS, *supra* note 3, at Ch. 1 (1980) (discussing the history and evolution of the movement to preserve public lands)

understanding enabled advocates to demand that people in positions of power recognize that they are stewards of tradition.<sup>16</sup>

## II. DEMOCRATIC POLITICAL THEORY

When I suggest that Professor Sax's work is rooted in democratic political theory, I mean a couple of things. First, the problem that law is supposed to solve is how we resolve disputes over social life. Second, these disputes have a normative dimension, so that a theory of law must justify the substantive conclusions as well as the process for resolving disputes over ends. By focusing on property—especially the constitutional dimension of property—Professor Sax had to immediately engage a particularly troublesome intersection of public and private law. As I will discuss later, the New Deal was the emblematic effort that signified the remapping of this intersection for the modern era.<sup>17</sup> But what that effort immediately reveals is that notions of property also constitute us as members of the polity. As I suggested in my reference to Milsom's history of the common law, property ideas had as much to do with conceptions of the state as they did with the development of the market.<sup>18</sup> Thus, the changing conceptions of property constituted us as much as the overt specific political charters we adopted. By changing the jurisdiction over disputes both as to possession as well as to proprietary rights, local links could be weakened as claims became regularized.<sup>19</sup> We occupy a seat at the end of a very long train of events that make up our understanding of the social functions of property. What Professor Sax illustrated is that the train continues to add new cars as our understanding of the role of property evolves. But we continue to use the language of old understandings because that language signified our social role and the network of relations in which we found ourselves, as well as our relation to the state. The confluence of vernacular and specialist discourses not only leads to various confusions about the nature of property rights, but is also a site for their transformation outside of the courts. The democratizing currents in American social life could not help but have an effect on our understanding of legal categories.

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<sup>16</sup> Joseph L. Sax, *Ownership, Property, and Sustainability*, 31 UTAH ENVTL. L. REV. 1 (2011). Professor Sax also makes this point in his discussion about the development of the national park system, but he is well aware that venal politics as well as deep commitment to public values are always part of the mix.

<sup>17</sup> See *infra* Part III.B.

<sup>18</sup> See *supra* notes 3–4 and related text.

<sup>19</sup> S.F.C. MILSOM, *THE LEGAL FRAMEWORK OF ENGLISH FEUDALISM* 36–38 (1976) (discussing the change in relationship between Lords and their courts with the change of jurisdiction, and noting that the “tenant’s right to his tenement and the lord’s right to his dues become independent properties, each passing from hand to hand without reference to the other”).

### A. *The Social Function of Property*

Whole volumes have been written on this topic, but I will be brief.<sup>20</sup> The currently dominant idea about property rights is rooted in classical liberalism.<sup>21</sup> Briefly summarized, the state exists to protect established private property rights and to contribute with minimal interference to the free working of the market.<sup>22</sup> This conception begins with the existing distribution of property—broadly conceived—as the baseline, and is predicated on the idea that private uncoerced transactions will produce the optimal ordering of a free society.<sup>23</sup> This ordering will be Pareto-optimal, and it requires a strong justification that is rooted in the normative commitments of the system itself to legitimize state interference.<sup>24</sup>

The political and legal implications of reliance on this idea in its purest expression mean that some arguments about fairness, community, and

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<sup>20</sup> See, e.g., Gregory S. Alexander, *Pluralism and Property*, 80 *FORDHAM L. REV.* 1017 (2011) (discussing the monism–pluralism question of social obligation property theorists and arguing that the approach of value pluralism is morally superior); GREGORY S. ALEXANDER & HANCOH DAGAN, *PROPERTIES OF PROPERTY* (2012) (discussing the theoretical framework of property and providing five concrete details of property in everyday life); *PROPERTY AND COMMUNITY* (Gregory S. Alexander & Eduardo M. Peñalver eds., 2010) (discussing the relationship between communities and individuals in property theory). Of course, one might take Marx as providing a systematic critique of a specific social function of property. For example, from the Communist Manifesto:

We see then: the means of production and of exchange, on whose foundation the bourgeoisie built itself up, were generated in feudal society. At a certain stage in the development of these means of production and of exchange, the conditions under which feudal society produced and exchanged, the feudal organization of agriculture and manufacturing industry, in one word, the feudal relations of property, became no longer compatible with the already developed productive forces; they became so many fetters. They had to be burst asunder; they were burst asunder.

Karl Marx & Friedrich Engels, *Manifesto of the Communist Party*, in *BASIC WRITINGS ON POLITICS AND PHILOSOPHY* 1, 12 (Lewis S. Feuer ed., 1959). In its modern version, Thomas Piketty notes: “Although the answers to these questions are shrouded in mystery, there is no doubt that the Chinese notion of property rights is different from the European or American notions. It depends on a complex and evolving set of rights and duties.” THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 535 (Arthur Goldhammer trans., 2014).

<sup>21</sup> See, e.g., RICHARD A. EPSTEIN, *DESIGN FOR LIBERTY: PRIVATE PROPERTY, PUBLIC ADMINISTRATION, AND THE RULE OF LAW* (2011) (discussing the legal achievements of the classical common law); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (discussing the dominance of classical liberal theories of property). Even someone who is typically understood to be a critic of this particular conception of property rules builds his critique on a recognition that the principal social function is to mediate relations between the individual and the state. See Reich, *supra* note 6, at 733.

<sup>22</sup> See EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN*, *supra* note 21, at 5.

<sup>23</sup> See *id.* at 3 (“The question of governance is how the natural rights over labor and property can be preserved in form and enhanced in value by the exercise of political power . . .”).

<sup>24</sup> *Id.* at 4 (“The implicit normative limit upon the use of political power is that it should preserve the relative entitlements among the members of the group, both in the formation of the social order and in its ongoing operation.”).

public interests in private property are ruled off the table. Professor Epstein argued that this concept of property is at the heart of a correct understanding of the takings clause.<sup>25</sup> What Professor Sax did was to identify and question the role of the state in creating, defending, and regulating property—both private property in his analysis of takings jurisprudence and public property in his work on the public trust.<sup>26</sup> Yet he did this not by asserting a particular normative vision of his own, or by suggesting that the law must conform to one set of abstract commitments or another. Instead, he excavated the traces of his argument from our legal and cultural traditions. Thus, he notes the Roman law and early English law roots of the public trust doctrine.<sup>27</sup> Similarly, he locates the justification for asserting a durable public claim to important cultural artifacts in the response to the revolutionary Terror of 1794.<sup>28</sup>

This constitutive archeology is one of the foundations of Professor Sax's work, and while his arguments are commonly characterized as "novel," in fact they are faithful to the democratizing forces that balanced the private needs of an emerging market economy with the continuing solidary functions of property.<sup>29</sup> They are, in an important way, illustrations of the ways in which the social function of property constitute us as a people and as a polity. Of course, the law—marking as it does continuing struggles over power—does not trace a straight line, but that is not the point of Professor Sax's work. He locates families of principles as a method of inquiry. This is consistent with the position Holmes took in *Hudson Water Co. v. McCarter*<sup>30</sup>:

It is sometimes difficult to fix boundary stones between the private right of property and the police power . . . . But it is recognized that the State as *quasi*-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned.<sup>31</sup>

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<sup>25</sup> See *id.* at 333 (arguing that "[t]he state is not the source of individual rights or social community," and that the eminent domain framework must be situated in this context).

<sup>26</sup> See, e.g., Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 1, at 477 (questioning restrictions on government action under the public trust doctrine); Sax, *Takings and the Police Power*, *supra* note 2, at 36 (explaining the role of government in takings law).

<sup>27</sup> See Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 1, at 475–76.

<sup>28</sup> SAX, PLAYING DARTS WITH A REMBRANDT, *supra* note 14, at 18–19.

<sup>29</sup> See Carol M. Rose, *Joseph Sax and Idea of the Public Trust*, 25 *ECOLOGY L.Q.* 351, 355 (1998) (Sax argued "that the public trust should become a tool for avoiding destabilizing change and for incorporating community values in decisions about social as well as ecological resources").

<sup>30</sup> 209 U.S. 349 (1908).

<sup>31</sup> *Id.* at 355. As I explained in an earlier essay:

What Holmes was describing is the way in which policy is created both logically and prudentially. He was articulating a system for recognizing when a particular position is of doubtful authority. By referring to a system of rights (and within it a system for their evolution), he was rejecting a sterile search for first principles, because he was conscious of the fact that so-called first principles are never unmediated. The way in

Both Holmes and Professor Sax recognize that property has a constitutive function.

In a broad sense, all of Professor Sax's work could be included in the category "the social function of property."<sup>32</sup> Because any discussion of property moves on many levels at once, there is in property theory, as there is in most bodies of law, a vast divide between the vernacular and the expert usage of any particular term. Property has a private function, what all of us think of as simple ownership, but all property has a public function as well. That public function varies with the kind of property in question. The easiest way to think of this is to remember the maxim that every law student learns in first year property or torts: you are free to use your property in any way you like, but not to the injury of your neighbor. Professor Sax's work maps this social function, which is when your use of your property ceases to be a purely private concern. Yet, because the term "the social function of property" has acquired a specific meaning, some might exclude Professor Sax's work from the general inquiry about the social function. For example, Professors Sheila Foster and Daniel Bonilla define the concept of the social function of property in relation to the work of Leon Duguit.<sup>33</sup> They argue that Duguit claimed "property is not a right but rather a social function."<sup>34</sup> "According to this view, property has internal limits—not just external ones, as in the case of the liberal right to property."<sup>35</sup> In addition to locating his critique in the founding documents of the French nation, the important part of Duguit's notion of the social function of property is that it reflects the division of labor and the obligations that are associated with the social position into which we find ourselves thrown.<sup>36</sup> Of course, people are not irredeemably confined to one social position, but they find themselves at all times within a network of relations that is described by their social role.<sup>37</sup> Property relations are a function of these social obligations.<sup>38</sup> The duty of

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which they are mediated (the way in which we recognize their legitimate evolution) is by constantly comparing the principle in question with the "neighboring" principles that are not in question in this case, but which describe the boundaries of the issue under consideration. Too great a deviation from the norms described by the family of principles suggests the potential illegitimacy of the deviation.

Gerald Torres, *Taking and Giving: Police Power, Public Value and Private Right*, 26 ENVTL. L. 1, 24 (1996).

<sup>32</sup> Including his earliest work like Joseph L. Sax & Fred J. Heistands, *Slumlordism as a Tort*, 65 MICH. L. REV. 869 (1966).

<sup>33</sup> Sheila R. Foster & Daniel Bonilla, *The Social Function of Property: A Comparative Perspective, Introduction*, 80 FORDHAM L. REV. 1003, 1004–05 (2011).

<sup>34</sup> *Id.* at 1004.

<sup>35</sup> *Id.* at 1004–05.

<sup>36</sup> See *id.* at 1005 (asserting that the social division of labor is crucial to ensuring the varying needs of individuals are met because a community flourishes when individuals execute the demands of their social position).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1005–06.



property owners with respect to the property they possess is tied to the social value the property can produce.<sup>39</sup>

Phrased this way, much of the description of this aspect of the social function of property sounds alien to those of us steeped in the classical liberal conceptions of property. Yet it shouldn't. Anyone familiar with the classics of American nature writing commonly comes across the idea that we belong as much to the land as it belongs to us.<sup>40</sup> Although as Professor Sax pointed out, this aphorism was not the conception of property that drove the development of the continent.<sup>41</sup> He nonetheless notes that a form of the idea persists: "The general notion we carry around in our heads about what we ought to be able to do as owners . . . is in fact a way of describing the community's sense of what is important and what constitutes legitimate control of private autonomy."<sup>42</sup>

### *B. Environmental and Natural Resource Law and Takings Jurisprudence*

I turn here to a couple of specific areas with which Professor Sax has been particularly associated, in order to make the ideas of the social function of property and their rootedness in democratic political theory more explicit. In exploring Professor Sax's contribution to environmental law, it is important to note that his article on the public trust doctrine focuses on "effective judicial intervention."<sup>43</sup> While it is in the field of constitutional theory that the question of whether judicial intervention in controlling legislative prerogatives is legitimate, Professor Sax has illustrated that the role of the courts is often dispositive and often the only meaningful restraint on what would otherwise be illegitimate legislative action.<sup>44</sup> Yet, like Professor Charles Black, he demonstrates that the checking function of courts actually increases the democratic legitimacy of the popular branches of government.<sup>45</sup> Professor Black writes:

The premises of democracy are inarticulate and complex. But one proposition that is not among them, if the practice of all democracies means anything, is the proposition that democracy requires that all decisions on policy be made by

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<sup>39</sup> See *id.* at 1007 (noting that an owner must maintain productive land because unproductive land jeopardizes social cohesion and fails to meet the community's needs).

<sup>40</sup> Professor Sax captures these threads in *MOUNTAINS WITHOUT HANDRAILS*, *supra* note 3, at 5, and *JOSEPH L. SAX, OWNERSHIP, PROPERTY, AND SUSTAINABILITY*, *supra* note 16, at 5.

<sup>41</sup> *Id.* at 5.

<sup>42</sup> *Id.*

<sup>43</sup> Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 1, at 474.

<sup>44</sup> Compare CHARLES L. BLACK, *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 108 (1960), and ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 4-5 (2d. ed., Yale University Press 1986), with Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 1, at 559.

<sup>45</sup> Compare Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 1, at 559, with BLACK, *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY*, *supra* note 44, at 179.

public opinion from day to day, or even by those departments that are most responsive to public opinion.<sup>46</sup>

This is certainly true in constitutional cases, according to Professor Black, and the analysis advanced by Professor Sax suggests that the public trust doctrine is a species of constitutional law.<sup>47</sup>

If the public trust doctrine is in some sense part of our constitutional tradition, then the state has an obligation to create a mechanism for attending to that duty.<sup>48</sup> Environmental law is the structural expression of this obligation. The exact method for protecting those natural resources that are part of the inalienable assets of the public is within the legislative domain, but the courts have a specific and important role to play in superintending that duty's actual fulfillment. The claim that some issues are not justiciable is untenable.<sup>49</sup>

Professor Sax notes that the reluctance to intervene in the administrative process is a common default position, but he provides a test for courts to apply to ensure that the resources that are endowed with the public interest are protected.<sup>50</sup> Because the "fundamental function of courts in the public trust area is one of democratization," the court must inquire, at a minimum, whether the processes that produced a particular administrative or legislative outcome are a function of political imbalance.<sup>51</sup> As he painstakingly demonstrates, the question of political imbalance is not one that merely reflects any particular judge's preference; it requires a searching inquiry into the process that produced the decision, and consideration of whether the public had an adequate opportunity to have its interest represented.<sup>52</sup> This can also include an inquiry into the appropriate decisional authority.<sup>53</sup> The proper constituency to make a decision is thus part of the review, and the remedy can include a movement from one level of

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<sup>46</sup> BLACK, *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY*, *supra* note 44, at 179.

<sup>47</sup> Compare CHARLES L. BLACK, *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 108 (1960) (describing the judiciary as a check on the legislature in the context of constitutional law), with Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 1, at 552 (describing the judiciary as a check on the legislature in the context of the public trust doctrine).

<sup>48</sup> See Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 WAKE FOREST J.L. & POL'Y 281, 283, 288 (2014) (suggesting that the public trust doctrine is "the chalkboard on which the Constitution is written" and stating that the government "has a fiduciary duty to protect the resources for the beneficiaries of the trust").

<sup>49</sup> In the field of Indian law this is a common dodge that courts resort to, consistently refusing to resolve cases that allege violations of fiduciary duties on trust grounds. See *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313, 2318 (2011); *United States v. Navajo Nation*, 556 U.S. 287, 289, 295–96 (2009); *United States v. Navajo Nation*, 537 U.S. 488, 493 (2003).

<sup>50</sup> Sax, *The Public Trust Doctrine in Natural Resources Law*, *supra* note 1, at 561–65 (establishing an analysis for courts to identify problems that require judicial action).

<sup>51</sup> *Id.* at 561.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 560.

decision making to another.<sup>64</sup> Professor Sax also suggests a remedy that has come to be described as a “legislative remand.”<sup>65</sup> This is the capacity for courts to influence the legislative agenda in order to take better account of the public interests at stake in the management or protection of resources that are clothed with the public trust.<sup>66</sup>

Professor Sax outlined the most important issues raised by environmental law. Though I have not detailed his specific contributions to environmental law—which would necessitate including an entire section on water resource management—he has made clear what is at stake.<sup>67</sup> Environmental challenges could have been characterized, as many commentators have suggested, by highlighting the gravity of the threat posed by environmental degradation, but that physical threat is as much a function of political and democratic degradation as it is a function of inattention to the external costs associated with modern industrial life. Environmental law and the commitment to protect our natural resources and wild spaces are expressions of our commitment to a robust democratic life as well.<sup>68</sup> It is a reaffirmation of our obligation as citizens who stand in relation to each other and to the future.

Let me turn briefly to Professor Sax’s important contribution regarding the reconceptualization of takings jurisprudence. Takings law has often been described as one of the most difficult areas of law to explain or to justify.<sup>69</sup> Perhaps this is because of the problem pointed out by Justice Holmes in trying to discern the family of principles implicated by a particular government act;<sup>60</sup> or perhaps, as Professor Black said, “[t]he premises of democracy are inarticulate and complex.”<sup>61</sup> The difficulty was complicated by mistaking the “goes too far” language of Justice Holmes in the famous case of *Pennsylvania Coal Co. v. Mahon*<sup>62</sup> as somehow being separate from the diminution of value test set out earlier in the opinion.<sup>63</sup> “The general rule

<sup>64</sup> *Id.* at 560–61 (stating that the decisional authority should rest with a body that is “responsive” to a significant portion of potential users).

<sup>65</sup> William A. Butler & Roderick A. Cameron, Book Review, 58 CALIF. L. REV. 1499, 1501 (1970) (reviewing JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* (1971)).

<sup>66</sup> Sax, *The Public Trust Doctrine in Natural Resources Law*, *supra* note 1, at 560.

<sup>67</sup> *Id.* at 480.

<sup>68</sup> See SAX, *MOUNTAINS WITHOUT HANDRAILS*, *supra* note 3, at 82–83 (explaining that a commitment to democratic principles is consistent with a willingness to protect scarce resources by trading quantity for quality of experience).

<sup>69</sup> See Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299, 1362 (1989) (explaining that current takings theory is chaotic and that there is little guidance from the courts as to how or why it is justified).

<sup>60</sup> See *supra* note 30 and accompanying text.

<sup>61</sup> BLACK, *supra* note 44, at 179.

<sup>62</sup> 260 U.S. 393, 415 (1922).

<sup>63</sup> Prior courts held that regulation could diminish the value of property to some extent without constituting a taking. *Id.* at 413. However, the Court had also asserted that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every change in the general law.” *Id.*

at least is, that while property may be regulated to a certain extent, if regulation *goes too far* it will be recognized as a taking.<sup>64</sup> This Delphic formulation sowed confusion as commentators and courts searched for the edge of regulation that would tip it over into a compensable action.<sup>65</sup> But as Professor Sax pointed out, Holmes rarely found that the regulation went "too far."<sup>66</sup> Moreover, the rote application of even a relatively sophisticated test of the diminution in value created the illusion of precision and objectivity when it did not really exist.<sup>67</sup>

Instead, Professor Sax proposed a new way of looking at the issue of government action in takings cases. In some ways, his view could be conceived of as a mirror image of his critique of government inattention to the public trust. What Professor Sax proposed was to change the focus from the effect on the subject property to the character of the governmental action.<sup>68</sup> When the government is using its police power to enhance the economic value of a governmental enterprise—that is, when it is a form of public resource acquisition—then that action is a taking.<sup>69</sup> But if the governmental action is merely to resolve a private conflict, and that resolution incidentally improves the public condition, then there is no taking.<sup>70</sup> This was a signal advance, perhaps because of its clarity, but also because of its recognition that one of the principal functions of the takings clause was to ensure that there would be ethical use of governmental power consistent with the ends of government.<sup>71</sup> The focus on the ends, in this context, was tied to democratic legitimacy.<sup>72</sup>

In his subsequent article, Professor Sax expands his view of property to more fully reflect its social function, and thus to vindicate public rights in the context of takings litigation and reduce the number of governmental actions that might be compensable if his earlier test were applied.<sup>73</sup> While this is an advance, it shifts the focus from the nature of the government action and expands the ambit of permissible regulation. In this article, Professor Sax directly incorporates the ideas contained in his work on the public trust. Thus, rather than suggesting a mirror image of the trust analysis as applied to private land owners, he demonstrates that there is virtually no use of property that does not have some spillover effect on others.<sup>74</sup> He

<sup>64</sup> *Id.* (emphasis added).

<sup>65</sup> See Sax, *Takings and The Police Power*, *supra* note 2, at 37 (describing the takings area of law as a "welter of confusing and apparently incompatible results").

<sup>66</sup> *Id.* at 44.

<sup>67</sup> See *id.* at 50–52.

<sup>68</sup> See *id.* at 61–62.

<sup>69</sup> *Id.* at 62–63, 67.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 57.

<sup>72</sup> *Id.* at 60 (explaining that the takings provision is intended to protect against despotism).

<sup>73</sup> Sax, *Takings, Private Property and Public Rights*, *supra* note 2, at 150 ("Once property is seen as an interdependent network of competing uses, rather than as a number of independent and isolated entities, property rights and the law of takings are open for modification. This modification will include a change in the position I took in an earlier article. . . .").

<sup>74</sup> See *id.* at 154 (describing "a more accurate picture of property" in which "[t]he rights of each user can only be defined with reference to the claims of other users").

further explains that the government may normally regulate these spillover effects without triggering a takings claim.<sup>75</sup> In many ways this is a restatement of his earlier observation that merely resolving disputes between competing uses can never result in a taking even if there is some public benefit.<sup>76</sup> As he puts it, the purpose of his analysis is “only to put competing resource-users in a position of equality when each of them seeks to make a use that involves some imposition—spillover—on his neighbors, and those demands are in conflict.”<sup>77</sup>

What this change in view does is to require compensation whenever the government acts as a referee but does not act in a way to reduce spillover effects. Thus the government may not choose sides merely because choosing one side over another would produce public benefits.<sup>78</sup> If the conflict between competing users is not the result of spillover effects, the government may not change background default rules merely to achieve some advantage for the public that it would otherwise have to pay for.<sup>79</sup> In making this argument, Professor Sax argues that there is an equal protection dimension to takings jurisprudence.<sup>80</sup> Of course he is right, and these two articles merely highlight the point with which I began. The democratic political theoretic foundation of both his environmental work and his property work is essential for a complete understanding of the sweep and depth of his contribution.

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<sup>75</sup> See *id.* at 162 (explaining that demands to regulate property with spillover effects may constitutionally be restrained without compensation because “each of the competing interests that would be adversely affected has, a priori, an equal right to be free of such burdens”).

<sup>76</sup> Sax, *Takings and The Police Power*, *supra* note 2, at 63.

<sup>77</sup> Sax, *Takings, Private Property and Public Rights*, *supra* note 2, at 161.

<sup>78</sup> *Id.* at 162 (arguing that property cannot be “restricted without compensation simply because a neighboring demand would provide a greater net benefit to the society”).

<sup>79</sup> *Id.* (“[I]t is essential to observe that any uses of property that do not involve such spillover effects are constitutionally entitled to protection, and may not be restricted without the payment of compensation.”).

<sup>80</sup> *Id.* at 169 (“[T]here remains one additional category of situations in which compensation must continue to be constitutionally required: the protection of property owners against governmental discrimination. The rule against discrimination . . . operates to prevent the government, when accommodation of conflicting interests could be achieved by restraining any one of a number of similarly situated parties, from selecting the owner upon whom the loss is to fall. This might be deemed the equal protection dimension of compensation law.”). Even the most current takings cases, while not completely consistent with the broad reach of Professor Sax’s theory, draw on his critical insights. Since Professor Sax’s article was published, the Supreme Court has held it is unreasonable for a state to prohibit the owner from using the land as originally intended, unless it is shown that the owner’s use violates the restrictions placed on land ownership by background principles of property and nuisance law. See *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992).

### III. THE DISCURSIVE FIELD

The idea of the discursive field in the context of power relations is most commonly associated with Foucault.<sup>81</sup> The concept of a discursive field includes a mapping of the relationship between language, social institutions, subjectivity, and power.<sup>82</sup> The concept does not just describe ways of talking about things, but entails the entire system within which particular ways of understanding make sense and may be contested.<sup>83</sup> Law is a discursive field. Within legal discourse some things can be recognized as valid or legitimate arguments and others not. Yet it is important to note that the process of legitimization is exactly that: a *process* through which power gets worked out and meaning is transformed over time.<sup>84</sup> Discursive fields are described by constraints on the production of knowledge.<sup>85</sup> What I want to discuss here is the impact of Professor Sax's work on defining and creating conceptual space, both inside and outside of legal institutions, for environmental activism to take root. I am not claiming any kind of "but-for" causality; I am merely saying that we should not underestimate the role that engaged scholarship can play in how we understand the social world we inhabit.<sup>86</sup>

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<sup>81</sup> See Michel Foucault, *The Order of Discourse*, in UNTYING THE TEXT; A POST STRUCTURALIST READER 48–78 (Robert Young ed., 1981) (discussing the subversive power of discourse that extends beyond the controlling nature of desire and institutions).

<sup>82</sup> See Michael Karlberg, *The Power of Discourse and the Discourse of Power: Pursuing Peace Through Discourse Intervention*, INT'L J. OF PEACE STUD., Spring/Summer 2005, 1, 2, 4, available at [http://www.gmu.edu/programs/icar/ijps/vol10\\_1/Karlberg\\_101LJPS.pdf](http://www.gmu.edu/programs/icar/ijps/vol10_1/Karlberg_101LJPS.pdf) (discussing the dominant Western-liberal discourse of power and social practices).

<sup>83</sup> See Gerald Torres, *Sex Lex: Creating a Discourse*, 46 TULSA L. REV. 45, 51 (2010) (asserting that understanding a social practice is a way of understanding a particular discursive field, such as social inequality).

<sup>84</sup> I have developed this argument at length in several essays that confront the idea of pluralism in law—not in political theory. See, e.g., Gerald Torres & Kathryn Milun, *Translating Yonnonidio By Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 632 (1990) (arguing that "faith in American pluralism requires a recognition of certain fundamentally irreconcilable futures" and that the "choices contained in the structure of the law applied to the *Mashpee* case permitted only a limited kind of cultural vision"); Gerald Torres, *Translation and Stories*, 115 HARV. L. REV. 1362, 1364 (2002) ("[O]nly by recognizing the pluralism that narratives reveal can we approach the task of translating those stories into a more generally accepted statement of 'the good' that does not rely on coercion for its binding power.").

<sup>85</sup> See Brian Z. Tamanaha, *Enhancing the Prospects for General Jurisprudence*, 15 U. MIAMI INT'L & COMP. L. REV. 69, 76 (2007) ("[A]spir[ing] to a general jurisprudence runs contrary to a fundamental constraint on the modern production of knowledge.").

<sup>86</sup> See, e.g., CATHARINE A. MACKINNON, *THE SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979). While it is now commonly recognized as a form of sex discrimination in the workplace, Professor MacKinnon played a key role in transforming the popular understanding of sexual harassment from "normal" gender relations into one that expressed male subordination of women in the employment context. Deborah Dinner, *Legal Affairs, A Firebrand Flickers*, [http://www.legalaffairs.org/issues/March-April-2006/review\\_Dinner\\_marapr06.msp](http://www.legalaffairs.org/issues/March-April-2006/review_Dinner_marapr06.msp) (last visited Apr. 17, 2015).

*A. Changing the Debate about the State's Role in Property Regulation*

I have already described the impact of Professor Sax's role in reframing the law of regulatory takings and his role in providing a way to understand that public rights were not a deviation from the "true" understanding of property rights.<sup>87</sup> Importantly, however, what Professor Sax also did was to identify—almost before anyone else—that property rights would become a way through which we as a society worked out what he called in a conversation our "macro-social" issues.<sup>88</sup> What I think he meant by that is what Foucault called the proper discursive field on which disputes that were constitutive of our political community could be fought out.<sup>89</sup> Just as law is a discursive field, so politics is as well. The fight to keep them separate is an old one, but law might just as easily be understood as a subset of politics with its own discursive rules.<sup>90</sup> In any event, Professor Sax noted that until the late 1970s, legal discourse was dominated by fights over the substantive meaning of the equal protection and due process clauses—a fight that was animated by the struggle to eliminate the vestiges of de jure and de facto racial subordination. The landmark cases of the Warren Court all reflected the issues that were really at stake during this period.<sup>91</sup>

One of the results of the protracted litigation over civil rights was the reinforcement of the idea that the state could only regulate to cure the ills that it caused, or ills for which there was a constitutional or statutory remedy at the federal or state level.<sup>92</sup> The police power was not only constitutionally constrained; it was also constrained by existing understandings of its limitations. Professor Jack Balkin explains this in his

<sup>87</sup> See *supra* Part II.B.

<sup>88</sup> I am not sure he ever published anything that phrases things in exactly this way, but it reflects one of our many conversations.

<sup>89</sup> See MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE* 31 (A. M. Sheridan Smith trans., Pantheon Books 1972) (explaining Foucault's project of "describ[ing] statements in the field of discourse and the relations of which they are capable," creating what he calls "discursive formations").

<sup>90</sup> This is a long debate that implicates vast realms of jurisprudence and political philosophy. It is important to always keep in view that law is a *practice*.

<sup>91</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954), is, of course, the cardinal example, but it was in many ways merely a prologue. Even one of the leading takings cases of that era, *Berman v. Parker* 348 U.S. 26, 31 (1954), was about slum clearance and the capacity of the government to deal with problems associated with the history of racial discrimination and poverty.

<sup>92</sup> This was precisely the problem that made the issue in *Shelley v. Kraemer*, 334 U.S. 1 (1948), so vexing. See Richard S. Kay, *The State Action Doctrine, The Public-Private Distinction and the Independence of Constitutional Law*, 10 CONSTITUTIONAL COMMENTARY 329, 346 (1993) ("The judgment that only the lawmaking power of the state should be (presumptively) governed by the Constitution, however, excludes such permitted actions from its reach. This limitation is consistent with most of the pronouncements of the Supreme Court on the state action doctrine. In *Lugar v. Edmondson Oil Co.*, for example, the court defended its requirement that a Fourteenth Amendment violation be effected by a 'state actor' on the ground that otherwise 'private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.'") (footnotes omitted).

book, *Constitutional Redemption*.<sup>93</sup> In analyzing two cases that have historically been viewed as not just wrong, but for some, “wrong the day they were decided,” Balkin points out that while it might be true for *Plessy v. Ferguson*,<sup>94</sup> it is not true for that other antediluvian case, *Lochner v. New York*.<sup>95</sup> The difference is that once the Fourteenth Amendment was passed, there was no way *Plessy* could have been correct, but based on the understanding of economic freedoms at the time of *Lochner*, it is not at all clear that *Lochner* was wrongly decided.<sup>96</sup> What Professor Sax was resisting were the forces that were aligning to change the discursive field upon which debates about the appropriate limits of regulation could be had.

The property rights movement was building on the limitations to affirmative government action that were galvanized by opposition to the civil rights movement.<sup>97</sup> The property rights opposition to environmentalism had in its sights not just resistance to the internalization of external costs—something that might be justified by a version of economic efficiency—but delegitimization of the regulatory state.<sup>98</sup> This was happening not just in environmental law or in the management of natural resources, but across the regulatory horizon.<sup>99</sup> Professor Sax’s work in takings jurisprudence and in the public trust reveals that the claims that there is any kind of “original understanding” of common law notions of property that would handcuff the public from defending itself are not just wrong, but fundamentally wrong. Those claims actually misstate the constitutive nature of property relations and their transformation into property “rights.” Without the voices of tradition like those of Professor Sax and others, counterfeit versions of property claims could have occupied the privileged position in the discursive field represented by property rights discourse.

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<sup>93</sup> JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION* 177 (2011) (“[T]he conventions determining what is a good or bad legal argument about the Constitution . . . change over time in response to changing social, political, and historical conditions.”).

<sup>94</sup> 163 U.S. 537 (1896).

<sup>95</sup> 198 U.S. 45 (1905); BALKIN, *supra* note 93, at 176.

<sup>96</sup> BALKIN, *supra* note 93, at 176–77.

<sup>97</sup> There have been instances where property owners resisted civil rights laws that impacted their control of property. *E.g.*, *Thomas v. Anchorage Equal Rights Comm’n*, 165 F.3d 692, 718 (9th Cir.) *reh’g granted, opinion withdrawn*, 192 F.3d 1208 (9th Cir. 1999) and *on reh’g*, 220 F.3d 1134 (9th Cir. 2000) (affirming the district court decision that state officials were enjoined from enforcing nondiscrimination ordinances against landlords who objected to renting to unmarried couples on religious grounds; the district’s court decision was overturned on ripeness grounds).

<sup>98</sup> Nancie G. Marzulla, *Property Rights Movement: How It Began and Where It Is Headed*, in *A WOLF IN THE GARDEN: THE LAND RIGHTS MOVEMENT AND THE NEW ENVIRONMENTAL DEBATE* 39, 39–45 (Philip D. Brick & R. McGreggor Cawley eds., 1996) (describing the beginning of the property rights based backlash to federal environmental actions and legislation).

<sup>99</sup> The First Amendment is the new locus of that effort. *See, e.g.*, TAMARA R. PIETY, *BRANDISHING THE FIRST AMENDMENT* 1–3 (2012).



### B. The Environmental Movement

As Professor Balkin explained in his discussion of *Lochner*, the Great Depression changed the factual underpinning of the police power to regulate economic relations.<sup>100</sup> The New Deal not only dealt with the real problems facing the American people who needed relief, it attempted to restructure the economic system that had produced the suffering.<sup>101</sup> The Court was not immune from these pressures, but if the background understanding of the powers of the federal government to intervene in what had before been purely private and formally equal market relations had not changed, it is likely that the constitutional understanding of those powers would not have changed. The modern environmental movement, as a regulatory matter, is predicated on the changes produced during that era.<sup>102</sup>

#### 1. Linking Environmentalism with Conservation

There has long been a tradition of conservation, but it is a complex tradition tied to the "opening" of the West and the efficient use of natural resources.<sup>103</sup> What the modern environmental movement did was to tie the commitment to natural places to the general need to safeguard our resources.<sup>104</sup> Professor Sax reviews this history in *Mountains Without Handrails*.<sup>105</sup> It is not an untroubled relationship, however. The property rights movement unveiled a wing called the "wise use" movement that was aimed at expanding the economic uses of public resources.<sup>106</sup> The environmental movement necessarily had to tie its efforts to the positive goals of conserving a base of already protected lands and resources, while at the same time expanding the notion of protection.<sup>107</sup>

<sup>100</sup> BALKIN, *supra* note 93, at 176.

<sup>101</sup> See, e.g., RONALD EDSFORTH, *THE NEW DEAL 170, 190-91* (2000) (discussing the conditions that led to the New Deal and the restructuring of the U.S. economy).

<sup>102</sup> See ENVIRONMENTAL POLITICS AND POLICY 21 (James P. Lester, ed. 1995) (discussing the increased role of the federal government in establishing social programs and its willingness to intervene in the economy).

<sup>103</sup> See generally SAMUEL P. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920* (1959) (discussing the scientific underpinnings of the conservation movement and how this philosophy was aimed at deriving maximum return from the nation's natural resources).

<sup>104</sup> See, e.g., SAX, *MOUNTAINS WITHOUT HANDRAILS*, *supra* note 3, at 9-10 (describing the "contradictory, but compatible, beliefs" in the preservation of natural places and the "practical use of nature as a commodity").

<sup>105</sup> See *id.* at 5-10 (discussing the history of the national park system).

<sup>106</sup> See Ron Arnold, *Overcoming Ideology*, in *A WOLF IN THE GARDEN* 24-25 (Philip D. Brick et al. eds., 1996) ("Establishment interventionism . . . must find practical ways to accommodate property rights and entrepreneurial economic growth. Eco-socialism's collectivist program must find practical ways to accommodate individual economic liberties in its bureaucratic command-and-control approach.").

<sup>107</sup> See, e.g., Sax, *Ownership, Property, and Sustainability*, *supra* note 16, at 9. (discussing the need for "a different way of thinking about what ownership entails" to ensure the "benefit of natural services").

One important role that Professor Sax played in this movement was to demonstrate that there was not a partisan ideological dimension to environmental and resource protection, but that those commitments were part of our historical responsibility to practically manage the nation's public bounty.<sup>108</sup> There were many threads in the movement, as Professor Sax discussed in his Stegner Lectures,<sup>109</sup> but the pressures of economic expansion were always powerful foes.<sup>110</sup> Nonetheless, alternative voices could be heard.<sup>111</sup> Professor Sax notes: "There is a long history of tension in American property theory between the Jeffersonian, civic republican, view of property ownership and what has been called the modernist, commodification or market, view."<sup>112</sup> It is in this tension that the modern jurisprudence of environmental protection arose.

## 2. *The Consequences for Law of the Environmental Movement*

What the environmental movement does is to provide a background set of interpretive assumptions that affect the ways in which courts view legal arguments. Just as the civil rights movement grounded itself in the main currents of equality within our constitutional tradition,<sup>113</sup> the environmental movement locates itself within the best parts of our conservation and New Deal traditions.<sup>114</sup> The struggle is not just limited to legislative innovation, and it is not just within the domain of legal argument. Instead, it is within the discursive fields of history, politics, and law. My colleague, Philip Bobbitt, once noted in the context of constitutional discourse something that I think is generally true about the nature of persuasive legal argument. In fact, it marks out the discursive constraints on the production of knowledge:

Thus far, I have discussed the following types of constitutional arguments: historical, textual, structural, prudential, and doctrinal. If you were to take a set of colored pencils, assign a separate color to each of the kinds of arguments, and mark through passages in an opinion of the Supreme Court deciding a constitutional matter, you would probably have a multi-colored picture when

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<sup>108</sup> See, e.g., SAX, MOUNTAINS WITHOUT HANDRAILS, *supra* note 3, at 9–10 (describing the development of the national park system as balancing the "preservation of nature's bounty" with a "commitment to economic progress" and "nationalistic pride").

<sup>109</sup> See Sax, *Ownership, Property, and Sustainability*, *supra* note 16, at 19 (published comments from the 2010 Walter Stegner lectures).

<sup>110</sup> Sax, *Ownership, Property, and Sustainability*, *supra* note 16, at 5–6 (discussing industrialization and the resulting loss of natural services).

<sup>111</sup> *Id.* at 11–12 (explaining a model of "[m]anaging land with more sensitivity to the maintenance of natural services").

<sup>112</sup> *Id.* at 16 n.6.

<sup>113</sup> See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 428 (1960) (explaining that "the fourteenth amendment commands equality, and segregation as we know it is inequality").

<sup>114</sup> See NEIL M. MAHER, NATURE'S NEW DEAL: THE CIVILIAN CONSERVATION CORPS AND THE ROOTS OF THE AMERICAN ENVIRONMENTAL MOVEMENT 12, 20 (2008) (explaining that the roots of the American environmental movement involved the interweaving of New Deal thinking and conservation within the Civilian Conservation Corps).

you were finished. Judges are the artists of our field, just as law professors are its critics, and we expect the creative judge to employ all of the tools that are appropriate . . . to achieve a satisfying result. Furthermore, in a multimembered panel whose members may prefer different constitutional approaches, the negotiated document that wins a majority may, naturally, reflect many hues rather than the single bright splash one observes in dissents.

If you ever take up my suggestion and try this sport you will sometimes find (leaving aside the statement of facts and sometimes the jurisdictional statements) that there is nevertheless a patch of uncolored text. And you may also find that this patch contains expressions of considerable passion and conviction, not simply the idling of the judicial machinery that one sometimes finds in dictum. It is with those patches that I am concerned here.

The class of arguments that I call ethical arguments reflects, like other constitutional arguments, a particular approach to constitutional adjudication. . . .

By ethical argument I mean constitutional argument whose force relies on a characterization of American institutions and the role within them of the American people. It is the character, or *ethos*, of the American polity that is advanced in ethical arguments as the source from which particular decisions derive.<sup>115</sup>

What I have been arguing is that the content of those “blank spaces”—that which does not need to be argued about—is the critical part of what movements do. They change the background assumptions, and that can make all the difference. Professor Sax has argued, and I think persuasively, that the ethical part of our property tradition is contained in the doctrine he surveyed. It is the reason much of the justification for the public trust and the setting aside of the public lands seemed to be assumed rather than argued for, because it reflected the ethos of the American people. That was the main claim in his reflection on the national parks in *Mountains Without Handrails*.<sup>116</sup>

#### IV. CONCLUSION

I will close with a brief recapitulation. It is undisputed that without the work of Professor Sax, our understanding of environmental law, natural resource law, water law, and the nature of the public trust would be immeasurably poorer. I have tried, in this brief fashion, to suggest that his contributions are even more profound. Because his contributions are rooted in democratic theory, and his arguments engage this theory through a variety of methodological approaches, it is not just environmentalists who can learn from his work. Instead, anyone who cares about the experiment in democracy that the best parts of our tradition represent would be well

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<sup>115</sup> PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY FOR THE CONSTITUTION* 93–94 (1991). Bobbitt identified six modalities of constitutional arguments: historical, textual, structural, prudential, doctrinal, and ethical. *Id.*; see also Gerald Torres, *Social Movements and the Ethical Construction of Law*, 37 *CAP. U. L. REV.* 535, 537–39 (2009).

<sup>116</sup> SAX, *MOUNTAINS WITHOUT HANDRAILS*, *supra* note 3.

served to read his work carefully. His archeological, ecological, historical, philosophical, and legal methods will yield new insight wherever we focus them. That is the most we can ask of any scholar, but especially practical scholars in law.