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The Essential Legacy of a Sustaining Civilization: Professor Sax on the National Parks

Sally K. Fairfax

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The Essential Legacy of a Sustaining Civilization:* Professor Sax on the National Parks

Sally K. Fairfax**

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INTRODUCTION

The tendency in both popular and professional discussion of national parks is to treat them as unique—things radically apart from how Americans normally deal with land and resources—and therefore

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beyond analysis. Further, much parks literature begins with images of scenic wonders and derives its weight from either paens to nature, or the devastation that pends if we do not rally to some parks-related cause. Although Sax is consistently eloquent, he treats these special places as simply a part of larger fundamental issues of property and democracy. To Sax, parks are not beyond analysis, but very much a part of his continuing attention to the balance of public and private rights in property,¹ the role of markets and politics in a democratic society, and the impact of land parcels and boundaries. Sax's work is important because it has been a major force in moving the parks discussion away from rapture and toward critical policy-relevant questions.²

While the individual pieces are excellent, what is interesting about reading Sax's work on parks as a whole is that one sees Sax's learning curve, his expanding view of parks and park priorities over twenty years. In this Article, I note Sax's framework of fundamental questions, but emphasize his increasingly textured and insightful consideration of the national parks and, more challenging, the National Park Service (NPS).

Sax's thinking about parks grows around three major themes. The most accessible issue in his work concerns the role(s) of parks in a

¹. In an essay on water law, Sax identifies his interest in studying "a distinctive regime of property law, quite different in concept from any of the property law to which we are accustomed." Joseph L. Sax, Why I Teach Water Law, 18 U. Mich. J.L. Reform 273, (1985). He wonders, has "some special value been attached to water—some publicness—that induces us to view it as different? And is that special public quality unique to water, or is water law at the cutting edge of a new view of private/public relations that will come more and more to the forefront of American law?" Id. at 274. See also, Joseph L. Sax, Licenses—Restricting Private Rights in Public Resources, 7 Nat. Resources J. 339 (1967).

². It is absolutely not true that to appreciate Sax you have to wade through some of the more standard pieces written by others in the field; but to gauge his contributions, it is important to realize that much of the other work in the area is pretty thin gruel. Unfortunately, it is also extensive—a sizable agglomeration of travel logs, celebrations of the parks (individually and collectively) and uncritical, atheoretical and unanalytical sagas, chronicling the building of the agency and presenting expansion of its holdings as the highest good. See, Freeman Tilden, The National Parks (1970); William C. Everhart, The National Park Service (1983). Analytical pieces began to emerge more or less with Sax's early writings and include: Alston Chase, Playing God in Yellowstone: The Destruction of America's First National Park (1987); Ronald A. Foresta, America's National Parks and Their Keepers (1984); Karl Hess, Jr., Rocky Times in Rocky Mountain National Park: An Unnatural History (1993); William R. Lowry, The Capacity for Wonder: Preserving National Parks (1994); Alfred Runte, National Parks: The American Experience (2d ed. 1979); Richard West Sellars, Preserving Nature in the National Parks: A History (1997). For a less analytical work, but still profoundly challenging to the dominant myths, see Polly W. Kaufman, National Parks and the Woman's Voice: A History (1996). Perhaps the most startling is Mark Spence's treatment of Native American rights and peoples in the formation of early parks. Mark Spence, Dispossessing the Wilderness: The Preservationist Ideal, Indian Removal, and National Parks (1996) (unpublished Ph.D. dissertation, University of California at Los Angeles) (On file with the UCLA History Department).
democracy. Sax asks, "Why should the government be involved?" in a number of ways. Most important, and, I believe, most characteristic, are his frequent reflections on the question "What ought the parks to teach us?" He moves from an eloquent, but too narrow, focus on contemplative recreation to a still broadening and evolving understanding of parks as a place to teach about sustaining and sustainable human relationships with nature.

These explorations lead to a second theme: the nature of communities and their place and rights in the context of park management. As a friend and advocate of national parks, Sax's initial position is in favor of rapid and efficient acquisition of land for parks and the exclusion of signs of civilization from the parks. However, his evolving position regarding park priorities is that some human activities may belong in parks and, indeed, be the appropriate focus of preservation activities. Eventually, Sax broadens his focus from "natural" park areas to include "heritage" or cultural resources, such as art and artifacts. In later works, Sax adopts a seminar-like tone as he experiments broadly with making room for community needs and priorities, especially in the growing realm of urban and cultural parks.

Finally, his current emphasis reflects the third theme of Sax's parks scholarship—the problem of boundaries: inconsistent land use problems along park borders and the difficult challenge of preserving natural systems in multiple-ownership landscapes.

In addition, Sax has begun to focus critical attention on the NPS itself. Part of this growing interest in the agency appears to be associated with a changing emphasis in Sax's thinking about process. His early work on parks reflects the belief that improved policy comes from assertive interpretation of law and advocates driving policy through litigation. As his interests became more complex and less subject to resolution in the courts, Sax changed to a teaching mode, identifying questions and seeking to understand problems. By the 1990s, Sax was fully involved with the disappointing reality of the NPS as an agency. Still undeniably a friend of the service and its programs, his analysis becomes persuasion oriented, albeit increasingly couched in the political context in which park service managers work.

Sax's exploration of these three themes is amplified by his consistent contributions as both a popular commentator and teacher. His

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4. See, Joseph L. Sax, Defending the Environment (1970). One of the interesting puzzles which emerges from a reading of Sax's parks work concerns the litigants who did not bark. Park advocates did not emerge in great numbers—as did Forest Service and BLM critics—to press their priorities or to test Sax's legal theories.
most accessible work, *Mountains Without Handrails*, was a best seller and much of his most important thought appeared in *Natural History*, a popular journal. Further, he has appeared frequently at symposia, participated in NPS planning, and (in the process of educating several generations of law and natural resource management students) taught and created important texts and courses. Sax has made contributions as a public intellectual far beyond his role as an academic and scholar. I shall address his parks work under four chronological headings: his early embrace of Olmstead's theory of leisure; a broadening exploration of communities in parks; a still broader consideration of artifacts and historic preservation; and his current focus on management of multi-ownership landscapes.

I.

LEGITIMATE GOVERNMENT GOALS: THE ROLES OF THE PARKS IN A DEMOCRACY

Sax's early work on national parks represents two distinct analytic modes: philosophical essay and tight legal analysis. These modes strike the durable themes of his parks analyses. In *America's National Parks: Their Principles, Purposes, and Prospects*, an extended 1976 essay published in *Natural History*, Sax elaborates on Frederick Law Olmstead, Jr.'s "philosophy of leisure," which is central to Sax's early thinking about the role of parks in a democracy. In 1980, Sax revisits many of these same issues in his brief for preservation advocates, *Mountains Without Handrails*. Then, having apparently established the legitimacy of government participation in providing recreation experiences, Sax explores, in two articles, the strategies of regulating as opposed to acquiring private lands to achieve parks purposes.

A. Olmstead's Theory of Leisure

In the *America's National Parks* essay, Sax aims at justifying government involvement in the provision of park experiences. Sax wants to move parks policy away from providing the same type of mass recreation experiences available in the market place and toward a policy supportive of complex, contemplative recreation conducive to per-

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sonal growth.9 His vehicle for achieving that purpose is to give Olmstead a legitimate voice in defining the goals and standards for national parks.10 Popular demand for mass recreation, which Olmstead characterized as "bread and circuses," is not democratic: it is based on the false idea that ordinary citizens are incapable of exercising "esthetic and contemplative faculties." Popular demand, therefore, should not drive public recreation policy.11 Readily admitting that Central Park in New York City, of which he was the principle architect, met no extant public demand, Olmstead argued that the goal was to "train" the public "to the use of it . . . ."12

Sax's enthusiasm for Olmstead's views is understandable: they provide a justification for recreation management as an undertaking of a democratic government. The essential element of Olmstead's training is contrast—an opportunity for experiences that remove citizens from all the forces that constitute their daily routine.13 For example, in designing the facilities at Niagara Falls, Olmstead insisted that visitors be unable to view the falls from their carriages.14 This is not, Sax argues, wilderness advocacy. It is an effort to assure that visitors eschew the urban carriage experience and encounter the Falls on foot, "in an absorbed and contemplative way."15 "To such an experience, the carriage is an obstruction."16 It is this contrast, drawing ordinary citizens beyond what is available in the market, that justifies government involvement in recreation.

B. Preservation Advocacy: An Olmsteadean Clarification

In Mountains Without Handrails, Sax has given himself the more difficult, and ultimately less successful, task of clarifying and improving the preservationists' message.17 In the process, he seeks to defend

9. See id. at 83.
10. See id. at 84.
11. See generally id. at 74-83.
12. Id. at 74. Sax also notes Olmstead's insistence that Central Park was not designed to remain, as it started, at the edge of the city. Rather it was designed for the subsequent century in which it would be in the center of a growing metropolitan area. See id. at 74.
13. See id. at 77.
14. See id. at 79. Olmstead argued that Niagara Falls should provide an experience "of quiet solitude in a setting of untrammeled natural scenery [which] could attract and stir the contemplative faculty in even the most ordinary citizen." Id. at 75.
15. Id.
16. Id. For an interesting perspective on Sax's reading of Olmstead, compare SELLAIRS, supra note 2, at ch. 2.
them against the charge that they are elitist. To achieve that, he urges again a frank embrace of Olmstead.

According to Sax, preservationists are, like Olmstead, moralists.\textsuperscript{18} They are concerned primarily with telling people what they \textit{ought} to want.\textsuperscript{19} People ought to want the contemplative, aesthetic recreation that Olmstead sought for them.\textsuperscript{20} And, preservationists ought to be clear that in advocating for their own preferences, they are also embracing the democratic vision of complex, independent, natural, non-urban activities. Ultimately, the preservationist position promises to all people a chance to “develop a taste” for reflective recreation.\textsuperscript{21} Thus, in \textit{Mountains Without Handrails}, Sax argues very little on behalf of nature for nature’s sake. He specifically rejects the idea that it is important to limit development in parks for ecology’s sake. The point of limiting motor boat trips on the Colorado River, for example, is not to protect the ecosystem,\textsuperscript{22} but rather to make room for the contemplative recreation which Sax views as fundamental.

The path from Olmstead to preservationist advocacy is, however, a difficult traverse. To sustain his case on the importance of contemplative recreation, Sax recognizes that he must rely on participants’ preferences rather than mere theory.\textsuperscript{23} Nevertheless, Sax ignores an enormous literature on the actual preferences of diverse recreationists and turns instead to an undeniably elite phalanx of nature writers rhapsodizing on angling, back packing, mountain climbing, and, curiously (for it is illegal in most national parks), hunting.\textsuperscript{24} The benefit is that Sax’s weave of nature writers gives \textit{Mountains Without Handrails} a luminous erudition unprecedented even in park literature. This benefit, however, comes at a cost. The stories do not accomplish the assigned task of representing actual participants. The views of actual participants, of course, clearly would not lead inevitably back to Olmstead.\textsuperscript{25}

Sax also asserts that recreational choice is most likely a matter of class:

\textit{[T]hose who already have the power in the society (like successful professionals) are attracted to recreation that demonstrates to them}

\begin{flushleft}
\begin{itemize}
\item \textsuperscript{18} See \textit{Sax, Mountains Without Handrails}, supra note 5, at 20, 103.
\item \textsuperscript{19} See \textit{id.} at 51.
\item \textsuperscript{20} See \textit{id.} at 20.
\item \textsuperscript{21} See \textit{id.} at 61.
\item \textsuperscript{22} See \textit{id.} at 51.
\item \textsuperscript{23} See \textit{id.} at 26-27, ch. 3.
\item \textsuperscript{24} See \textit{id.} See also \textit{id.} at 32-33 (discussing hunting technique as opposed to technology).
\item \textsuperscript{25} We are, after all, talking about what the public ought to want, not what it actually wants or does in parks. See, \textit{Nash, supra} note 17 at 1303.
\end{itemize}
\end{flushleft}
that they are above needing power; while those who are powerless need nothing so much as to demonstrate (however pitifully) that they are capable of dominion. Thus the distinguished New York lawyer and fly-fisherman lies by the side of a stream contemplating the bubbles, while the factory worker roars across the California desert on a motorcycle.26

Here, Sax wavers on Olmstead's justification for recreation as a government policy. Sax is urging public investment in recreation experiences on the grounds that they teach important things to ordinary citizens, while acknowledging that they will be utilized primarily by those best positioned to provide for their own recreation needs. The democratic justification appears as a make-weight for the preservation of natural areas. Confronted with the specter of James Watt in the Department of the Interior, a little less purity of discourse was perhaps permissible. Certainly the book filled an enormous need for a principled argument in defense of natural values deeply threatened. Nevertheless, Mountains Without Handrails is not consistent on key elements of Sax's early argument.

C. Balancing Public and Private Rights: Regulation and Acquisition in National Park Policy.

Having built, on Olmstead's foundation, a justification for government participation in recreation programs, Sax addresses two fundamental issues of publicness: the choice between regulation and acquisition of private property and the appropriate role, especially in regulation, for federal and local agencies.

Sax argues for extensive federal regulation of private land in his Helpless Giants27 article. He concedes that Congress and the NPS have been "extremely restrained" in their efforts to regulate private land uses affecting parks.28 Congress has granted the NPS "very little explicit authority to regulate private lands."29 Concerned about urban

26. Sax provides no data to support these assertions and may be unnecessarily eroding his argument. See Sax, Mountains Without Handrails, supra note 5, at 48.
28. See id. at 245.
29. Id. at 241.
encroachments on the natural settings of national parks, Sax nevertheless seeks authority for the NPS to regulate private lands which constitute "external threats" to parks.30 Yet Sax's efforts to locate such authority in the Enclave Clause avail little;31 and he specifically rejects a public trust approach, noting that there "is a good deal of difference between invalidating a dubious state land grant [in Illinois Central] and forcing the Congress to enact protective regulation."32 Sax is more successful when he revisits earlier public lands cases33 and, following Kleppe v. New Mexico,34 argues that the Property Clause "doubtless" grants the NPS authority to engage in routine zoning "[t]o protect the uses that Congress sought to promote in establishing" a park unit.35 Nevertheless, Sax concludes that "as best it can be discerned," Congress prefers land acquisition as the solution for conflicts with private land owners in or near Park Service boundaries,36 and

30. See Sax, Helpless Giants, supra note 27, at 250-58. The precipitating events include logging near Redwoods National Park, a proposed theme park next to Manassas National Battlefield Park, and the protracted controversy surrounding proposed construction of a viewing tower on private land adjacent to Gettysburg National Military Park. Let me be fully candid: I consider the "external threats" refrain dangerous, but also one of the more successful public relations gambits of the 20th century.

This notion enables Park Service groupies and the agency itself to deflect attention away from shortcomings in Park Service programs and policies and focus instead on problems beyond park boundaries. While not wanting to minimize the problems created for any resource manager by decisions on neighboring holdings, I find this preoccupation in the Parks context risible. For comparative purposes, contemplate for a moment a discussion of Forest Service or BLM management that ignores agency decisions and begins and ends with decisions made by neighbors.

31. See id. at 247.
32. Id. at 247.
33. See, e.g., United States v. Alford, 274 U.S. 264 (1927) (upholding a federal prosecution of an individual who set fire to land adjacent to a national forest); Camfield v. United States, 167 U.S. 518 (1897) (upholding a federal statute regulating fences on private land intermixed with public domain on the grounds that the fences constituted a nuisance).
36. See id. at 260. Although that is undoubtedly true, it is interesting to note that Congress has not been consistently enthusiastic about acquisitions either. One surprising result of research in progress on federal land acquisition for conservation is a growing awareness of how reluctant Congress has been to grant the National Park Service, as opposed to any of the alternative conservation agencies (for example, the Forest Service, Fish and Wildlife Service, or Bureau of Land Management), any general, comprehensive, or uncompromised land acquisition authority. Until 1961, with very few exceptions, the NPS did not have any authority at all to acquire land for park purposes. Early eastern parks, such as Acadia, Shenandoah, Great Smokies, and Cape Hatteras were acquired by states and/or private funding and then donated to the NPS. In Shenandoah and the Blue Ridge Parkway the state and not the NPS took the political heat for the acquisitions. Similarly, in the Grand Teton expansion, it was Rockefeller's participation rather than the NPS that became particularly controversial. Following the 1961 Cape Cod statute, 16 U.S.C. §459b Congress began granting the NPS acquisition authority, albeit frequently quite compromised. Sax characterizes many of these constraints as "sword of Damocles" provisions. For example, in the Cape Cod statute, the NPS was authorized to acquire lands for park pur-
that legislative clarification of the Park Service's authority to engage in land use planning is "desirable."\textsuperscript{37}

The NPS, he concludes, should be authorized to issue wide-ranging regulations, giving it the flexibility to address unanticipated problems. In addition, Sax argues that the NPS ought to be authorized to litigate to prevent adverse developments, allowing the courts to develop a common law of nuisance concerning parks. Advantageous to both the NPS and property owners, the availability of a judicial remedy would allow the courts to address the merits of a particular case rather than limiting them to the narrow arguments available under the Administrative Procedures Act.\textsuperscript{38}

An implicit message in \textit{Helpless Giants} is that boundaries do not matter. The NPS ought to exercise authority to protect park resources without regard to where the park boundary actually lies. Sax's argument does not adequately recognize that exercising every shred of potential authority will not make the NPS popular as a neighbor in towns where it must live, manage, and cooperate.\textsuperscript{39} Nor will it make NPS programs popular in Congress, where the agency must seek both new park designations and annual appropriations for management of designated units.

In \textit{Buying Scenery}, Sax shifts focus from regulation to the NPS's land acquisition program and to practical solutions rather than merely legal devices.\textsuperscript{40} Four years after the publication of \textit{Helpless Giants}, Sax concedes, at least temporarily, defeat on much of the regulation issue.\textsuperscript{41} Sax now recognizes that Congress is "understandably reluctant to compel communities and property owners" to accommodate poses. However, the Secretary's authority to acquire lands by the exercise of eminent domain was restricted if the local government adopted land use regulations which met the needs of the park. By the 1970s, NPS acquisition activities had attracted intense negative responses among the public and in Congress. Probably the most bitter dispute arose in connection with the acquisitions in Cuyahoga Valley National Recreation Area. Ironically, the NPS contracted with the Army Corps of Engineers for much of the early purchases. See Ron Cockrell, \textit{A Green Shrouded Miracle: The Administrative History of Cuyahoga Valley National Recreation Area, Ohio} ch. 9 (1992). See also Ron Cockrell, \textit{A Signature of Time and Eternity: The Administrative History of Indiana Dunes National Lakeshore, Indiana} (1988); Sarah Connick and Sally K. Fairfax, Federal Land Acquisition for Conservation: A Policy History (draft on file with author). Congress evinces limited enthusiasm for both acquisition and regulation—a curious result given its rabid designation of parks. This disjunction may explain part of the current disarray in the NPS. Congress wants to provide the public benefits of parks but, unlike Sax, is unwilling to interrupt decisively the intervening private rights.

\textsuperscript{37} See id.

\textsuperscript{38} See Sax, \textit{Helpless Giants}, supra note 27, at 266-68.

\textsuperscript{39} My recollection is that \textit{Helpless Giants} was not uniformly well received in some circles and that Sax was criticized for threatening a rather delicately balanced apple-cart in asserting that the agency had authority beyond its boundaries.

\textsuperscript{40} See id. at 711.

\textsuperscript{41} See Sax, \textit{Buying Scenery}, supra note 3.
park needs, and, more emphatically, the very term federal zoning "makes landowners gag."\textsuperscript{42}

This is Sax's first direct analysis of what the NPS actually does, rather than what it ought, in theory, to do. Much of the underlying data is drawn from his own surveys of park superintendents.\textsuperscript{43} Sax is still critical of Park Service regulations,\textsuperscript{44} but his real concern here is with Congress. Sax argues that Congress should authorize acquisition early, rather than waiting until development is pending and prices are at their maximum to acquire a parcel. Early acquisition of lands subject to development is desirable as a matter of both "cost minimization and of fairness to landowners." These are reasonable thoughts; but more striking to my eye is that Sax's piece is the first serious attempt in the literature to treat park land acquisition in an analytical light.

### D. Concessions: A Perennial Problem

In \textit{Free Enterprise in the Woods},\textsuperscript{45} Sax treats the perennial problem of parks concessions. While the publicness of parks has never extended to government financing of tourist facilities therein, Sax observes that railroads were the initial providers of accommodations.\textsuperscript{46} But to this familiar point, he adds the insight that the railroads could afford to operate hotels at a loss because of the "excellent returns" from the transportation services which they also provided.\textsuperscript{47} As railroads were displaced by automobiles and withdrew from the parks, new concessionaires, typically large recreation conglomerates, were forced to promote supplementary, high-profit amusement facilities to support hotels and food services.\textsuperscript{48} Still echoing Olmstead, Sax ques-

\textsuperscript{42} Id. at 709-10.

\textsuperscript{43} \textit{See Id.} at 710, n.5. \textit{Buying Scenery} acknowledges that the NPS "has an interest in maintaining friendly relations with neighboring landowners." \textit{Id.} at 739.

\textsuperscript{44} In old parks, those established prior to 1959, the agency has adopted a policy of "eventual acquisition," acquiring inholdings when there is a willing seller. In new parks, the policy is one of prompt acquisition. Except where the it has granted retention rights to existing landowners, or where its acquisition authority is conditioned on local compliance with federal zoning guidelines, the NPS will acquire interests as rapidly as funding permits. In neither case does NPS policy contemplate acquiring lands outside the boundaries of park units to prevent incompatible uses. \textit{See id.} at 714-16. The NPS regulations have not changed much since Sax wrote. The current version is discussed in \textit{National Park Service, U.S. Department of the Interior, Management Policies—Land Acquisition} 3-3 (1988).


\textsuperscript{46} \textit{See id.} at 18.

\textsuperscript{47} \textit{See Id.} at 19. Alfred Runte, another rare analytical voice in the fundamentally uncritical, romanticized park literature, see \textit{supra}, note 2, is even more enthusiastic about the railroads in national parks policy. \textit{See, Alfred Runte, Trains of Discovery: Western Railroads and the National Parks} (1984); his enthusiasm is excessive at points. \textit{See e.g. id.} at 81.

\textsuperscript{48} \textit{See, Sax, Free Enterprise, supra} note 45, at 24.
tions the quality and appropriateness of those services in public parks.\(^{49}\)

Rather than condemning such corporate activity altogether, Sax plays with an idea from the era of Steven Mather—the first NPS Director. He wonders whether the same motive that leads large corporations to sponsor “high-quality radio and public television programs” could lead them to offer visitor services of “a quality and dignity suitable to the crown jewels of America’s landscape?”\(^{50}\) Concluding that neither unbridled free enterprise nor the regulated monopoly practices presently in effect can provide the kind of experience Congress and the American people associate with National Parks, Sax proffers the “showcase concession” as an idea worth exploring.\(^{51}\)

II. BEYOND RECREATION: THE ROLE OF COMMUNITIES IN SUSTAINABLE RESOURCE MANAGEMENT

Returning to the question of what parks ought to teach, Sax’s next set of parks articles move decisively beyond Olmstead’s theories of leisure. Parks are no longer for contemplative recreation alone, but for the much more profound and complex goal of exploring humans’ relation to nature. Accordingly, Sax adopts a seminar-like tone—thinking aloud and offering tools, analogies, and models rather than persuasive conclusions to increasingly contested issues.

Once again writing in Natural History, Sax’s article, In Search of Past Harmony\(^{52}\), distinguishes French regional parks from American National Parks. Sax notes that “insofar as practicality permits, most American parks seek to show no evidence of human activity.”\(^{53}\) In the United States, exploitation “has dominated our relationship to the land, and... when humans appear on the natural scene, they come as intruders and destroyers.”\(^{54}\) Thus, our parks reflect a belief “that harmonious relations between humans and nature are not normal—that perhaps they are not even possible.”\(^{55}\) In contrast, French regional parks include “communities that had lived for centuries in a sustaining relationship with the natural world around them.”\(^{56}\) Broadening his view of what a park ought to teach, Sax shifts the priority from Olmstead’s contrast to harmony. He ponders what would happen to our

\(^{49}\) See Id.
\(^{50}\) Id. What would happen in the far more numerous units that are not crown jewels is not discussed.
\(^{51}\) See id. at 25.
\(^{53}\) Id. at 43.
\(^{54}\) Id.
\(^{55}\) Id.
\(^{56}\) Id. at 45.
parks "if we began with the assumption that human habitats in and near the parks are as much a part of the natural scene as the park's flora and fauna," if "a nature park . . . included these communities, rather than ousted or treated them as intruders." The French parks "ramble[] through the midst of working farms and traditional villages before turning to the forests and up to the mountaintops" where recreation—for example riding, kayaking, fishing, and cross-country skiing—utilizes the "region's natural advantages." But that recreation experience is not the major lesson. In the French regional parks, Sax concludes, "the impression of people as natural to the landscape, but not in a destructive relation to it, is powerfully conveyed."

The subtext of the article is less bucolic than Sax's focus on the French countryside might suggest. In the 1970s, Congressional park designations moved heavily into settled rural and even urban areas, creating enormous controversy and hostility toward NPS land acquisition programs among affected local communities and homeowners. Sax's descent from the handrail-free mountain top provided a principled justification for growing NPS efforts to work with local communities and supported elements of the agency that were under consistent attack. It also appeared to be a continuation of Sax's efforts, begun in *Mountains Without Handrails*, to instruct his confreres in the preservationist community. His message was that viable economies for local communities are a mandatory element of park protection and management.

57. Id.
58. Id. at 47.
59. Id.
60. The subtext is: In French regional parks, human inhabitants are part of the natural landscape.
61. See THE CONSERVATION FOUNDATION, NATIONAL PARKS FOR A NEW GENERATION: VISIONS, REALITIES, PROSPECTS (1985), 157 (discussing the Cape Cod National Seashore), 219 (discussing the Santa Monica Mountains National Recreation Area). See Foresta, supra note 2, chs. 3, 6, and 7; JOHN C. WHITAKER, STRIKING A BALANCE: ENVIRONMENT AND NATURAL RESOURCES POLICY IN THE NIXON-FORD YEARS 185-205 (1976). For a jaundiced view of Congress's enthusiasm for this new breed of parks see JAMES M. RIDENOUR, THE NATIONAL PARKS COMPROMISED: PORK BARREL POLITICS AND AMERICA'S TREASURES (1994). For a more analytical approach to the same issue, see LOWRY, supra note 2.
62. See Sax, In Search of Past Harmony, supra note 52, at 50. Sax notes ruefully that experiments along the lines of French regional parks have met with "something less than wild enthusiasm." Id. at 50. Taking some risks with his own constituency, Sax notes disapprovingly: "Environmentalists remain suspicious of private owners who need to make a living from their land." Id. The emphasis on economic viability for local communities in and around parks is in part an artifact of growing efforts to establish parks to protect threatened ecosystems in developing nations that are primarily focused on economic development. This is perhaps best symbolized by the United Nation's Man and the Biosphere Program of biosphere reserves, which emphasizes economic participation by local communities in reserve management. For a good quick introduction to the Biosphere Reserve idea and some starting references, see Joseph L. Sax and Robert B. Keiter, *Glacier Na-
Whereas Sax’s later treatment of the boundary issue is couched in terms of natural imperatives, the Past Harmony article speaks in terms of economic benefit to localities. Sax notes that if park managers are told that “their responsibilities end at the park boundary,” they will be unable to use the French model where it might be appropriate in this country. Sax argues that park managers must “take into account the need of neighboring communities for a sustaining as well as resource-protecting economy . . . .” Most fundamentally, however, his response to the question, “what ought parks teach us” clearly shifts to include lessons for living off the land. The achievement of “harmony between people and nature” must, Sax argues, become an explicit part of the park manager’s mission.

Sax later returned to several of these same themes in the more lawyerly essay, Do Communities Have Rights?, which explored the rights of communities adversely impacted by the establishment of national parks. The article opens with a vignette of Poletown, locating parks in the context of property law. In the Poletown incident, a long established Polish neighborhood was condemned by the City of Detroit to make room for a new General Motors facility. Individual property owners were compensated, but the “law offered no opportunity even to raise a question about the non-economic losses incurred when an established community is destroyed.” Sax notes that parks policy and the law have evolved to meet the needs and wishes of individual property owners whose lives are similarly interrupted by park designations. For example, Congress has authorized use of retention of life estates and other devices designed to gradually phase out private holders. However, whole towns are not as easily protected.

64. See Sax, In Search of Past Harmony, supra note 52, at 50.
65. Id.
66. See Id. at 48.
67. See Id. at 50.
70. Sax, Do Communities Have Rights?, supra note 68, at 499.
71. See id. at 504.
72. See id. Sax speaks in terms of the NPS’s strong inclination to “minimize the presence of residents within park boundaries,” Id., and to view “returning the land to its natural condition as its primary task.” Id. at 505.
Through the gradual elimination of local residents and facilities in an area, viable communities can be programmed to die gradually.\textsuperscript{73}

Sax concludes that there is no real benefit in trying to address the issues of local autonomy and self determination through the typical "effort to carve out separate domains of authority along political subdivision lines, and using doctrines such as Commerce Clause analysis and preemption."\textsuperscript{74} Sax is also clear that this is not necessarily a bad thing. He is far less enthusiastic about American localities than he is about French regional parks.\textsuperscript{75}

Nevertheless, the negative impact of parks on communities is important. To make this point, Sax describes phases in evolution of NPS policy toward Boxley Valley—a small agricultural village along the Buffalo National River in Arkansas.\textsuperscript{76} The NPS's initial policy was to acquire all the properties in the village and move the residents out—a classic community programmed to die.\textsuperscript{77} The local store and numerous residences were acquired and boarded up. The park supervisor was then replaced and Sax participated, at the invitation of local residents, in an agency planning process designed to reduce local hostility to the park. By 1983, the agency had rejected its previous effort to return the valley to its natural, presettlement condition.\textsuperscript{78} Instead, it decided to list the entire valley on the national register of historic properties so that the small farms could be preserved and worked and some owners could remain as permanent proprietors.\textsuperscript{79}

This shift, Sax notes, presents problems of its own. What types of controls are appropriate? Having decided that the community should not die, should the residents

be compelled to live as if they the were denizens of a museum, unable to grow and change simply because they happen to inhabit a quaint, historic town that others find interesting? But, are no controls permissible? Should farm practices be permitted that would impair the quality of the Buffalo River . . . ? Should developers be allowed to come in to this charming valley and make it a weekend retreat for jaded

\textsuperscript{73} See id. at 505.
\textsuperscript{74} Id. at 502.
\textsuperscript{75} See id. at 509 n.31. The nation as the dominant community has "triumphed" for good reason: localism is associated with parochialism and is tainted by its association with slavery and "know-nothingism." Id. at 508.
\textsuperscript{76} See id. at 506.
\textsuperscript{77} See id. at 507.
\textsuperscript{78} See id. at 508.
\textsuperscript{79} See Id. Ultimately a plan was approved that allowed the government to sell back property to former owners or others. Also, the Park Service has engaged in Historic Property Leasing (whereby tenants work off rent by engaging in historic preservation work). Telephone Interview with Jim Lyles, Management Assistant, Buffalo National River (Nov. 24, 1997). Compare this plan to that proposed for Las Trampas, New Mexico, in the late 1960s (discussed infra).
urban residents . . . ? Are controls here any different from those in the historic district of a large city, or the public interest in them any less?80

Sax carries these questions into a third and even more professorial piece, The Trampas File.81 Structurally, the article is noteworthy: two pages of introduction, and a slightly more brief post script enclose about 20 pages of carefully edited government reports from the late 1960s. Together, the three segments enmesh the reader in a live and urgent dispute resulting from a proposal to include an “[e]ntire functioning village, people and all,” in the national park system.82

Las Trampas, New Mexico, is an isolated, traditional Hispanic village amidst over two hundred acres of agricultural land surrounded by national forests on the less traveled road to Taos. A road had been proposed to be built through the historic plaza and NPS reports evince a tone of real urgency: “it will soon be too late;”83 and “if we are to save the village, we must act decisively, and now.”84 The proposed response to the pending tragedy was the preservation of the village as a National Monument.85

The proposal “stresse[d] the need for comprehensive planning that would reroute the highway, put new life in village agriculture, develop tourist and recreation facilities, revive art and craft enterprises, and preserve and interpret the historical, cultural, and architectural heritage of Las Trampas . . . including the other villages on the high road to Taos.”86 A dissenter argued that an NPS takeover of the village was neither feasible nor suitable, noting that “the people of Las Trampas are overwhelmingly in favor of a modern paved highway through their village . . . .”87 This dissenter asked whether Federal government and diverse cooperators had the “fine touch” to pull off such a complex venture.88 Answering no, he proposed instead a “half-loaf” preservation scheme which would limit itself to protecting the architectural facade of the village—the church, the plaza, and selected buildings.89

In The Trampas File, Professor Sax brings us all into his class room to wonder together not just about the justification for government involvement but about a broadening array of preservation is-

80. Id.
81. Joseph L. Sax, The Trampas File, 84 MICH. L. REV. 1389 (1986). Let me be fully candid again: I find this the most intriguing of all Sax’s parks work and indeed among the most evocative and successful scholarly articles I have ever read.
82. Id. at 1389.
83. Id. at 1390.
84. Id. at 1390.
85. See id. at 1395-99.
86. Id. at 1403.
87. Id. at 1401.
88. See id.
89. See id. at 1404.
sues. Given our end-of-the-century enthusiasm for community empowerment, it would be easy to gloss these pieces as an embrace of local autonomy. This would be an error. Sax's threshold for community self-determination remains quite low: "We should be reluctant to treat communities as if they were human bonsai trees."90 Nor does Sax bring a huge body of legal literature to advocate for particular solutions to the problems of Boxley Valley or Las Trampas.91 He simply involves the reader in a string of unresolvable issues that Park Service managers face every day. Sax's post script complicates matters even further, revealing that the proposal was never acted upon and yet, "[t]he village is not greatly different in physical appearance from what it was in 1967."92 From the perspective of Boxley Valley and Las Trampas, the issues of preservation are a whole lot knottier and more interesting than as first encountered in Olmstead's theory of leisure. Olmstead emerges not as glib, but as too easy an answer.

III.
MER STONES AND MERE PROPERTY:93 HISTORIC PRESERVATION AND CULTURAL RESOURCES

Following the Las Trampas article, Sax renews his quest for a "theory of public preservation policy" which will provide "principles for setting priorities governing both natural and cultural resources, including communities of indigenous peoples, historic and artistic treasures, and the materials of scientific inquiry."94 We do not, Sax concludes, have such a theory.95 His efforts to understand why we do

90. Sax, Do Communities Have Rights?, supra note 68, at 509. It might be "easy" to gloss this statement as an embrace of community rights, but refusing to treat communities as bonsai trees is not a very high standard. Moreover, although Sax indicates that we should be "reluctant" to treat communities this way, he presumably thinks that, if necessary, we should do it anyway.


92. Sax, The Trampas File, supra note 81, at 1411.


95. Sax, Is Anyone Minding Stonehenge, supra note 93, at 1544-55. I believe that this absence of theory is in part responsible for the proliferation of process and procedures that surround historic preservation programs in the United States. The emphasis on process is discussed in Carol M. Rose, Preservation and Community: New Directions in the Law of Historic Preservation, 33 STAN. L. REV. 473 (1981).
not, and to create one, include designing a graduate course on the subject and preparing two articles on the efforts of previous scholars.

The first, *Heritage Preservation as a Public Duty: The Abbé Gregoire and the Origins of an Idea*, introduces the Abbé Gregoire in much the same way that Sax's earlier work introduced Frederick Law Olmstead. During the French Revolution, the expropriation of feudal and ecclesiastical goods left the new government with vast storehouses of treasures and limited tools for thinking about what to do with them. The Abbé was called upon to provide a justification for the government's caring for paintings, books, and buildings. This assignment came at a time when both the government and the citizenry were "determined to repudiate everything associated with the ancien régime, whose social, political, and religious values were represented in pre-revolutionary art." 

The Abbé Gregoire framed the issue as "not only a matter of protecting certain artifacts, but as a much broader issue of public values." Gregoire argued that the essential quality of the Republic "reposed in the genius of individual citizens as revealed in the achievements of science, literature, and the arts. The body of artifacts that embodies the best of the people," is the "quintessence of France, its true heritage and patrimony." Thus, Gregoire did not ask "why is art or history important, but rather what does the spirit of liberty require?" He responded with the theory that cultural property "belongs" to the nation regardless of formal ownership and creative achievement is a national asset. The logic underlying these assertions is familiar to readers of *Mountains Without Handrails*: Gregoire focused on the genius of the artist, which cannot be demeaned by the intent or the politics of the patron.

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96. Sax describes the course while proffering the idea that natural resource policy provides a more fruitful conceptual approach to the topic than the "bewilderment and frustration" that accompany efforts to approach the topic through the "numbing complexity" of pollution control statutes. See, Joseph L. Sax, *Environmental Law in the Law Schools*, supra note 94, at 10251, with an important assist, it is worth noting, from co-panelist Carol Rose, contemplating the state of a "commons." Id. Pollution law, Sax argues, has "failed to open new legal vistas or to engage environmental issues deeply." Id. In natural resources law, in contrast, far reaching changes are underway which offer the opportunity to set problems in an ecosystem context. "Traditional notions of property are being fundamentally reexamined in areas such as wetland regulation, wildlife management, forest regulation, water resources, endangered species, and public land law." Id.


98. Sax notes that, similar to early public domain policy, the original plan had been to "sell everything for the benefit of the treasury." Id. at 1152.

99. Id. at 1153.

100. Id. at 1159.

101. Id. at 1156.

102. Id. at 1155.
However, the image of public capital and cultural artifacts as common intellectual and aesthetic assets, then novel, is also not without serious problems. Important issues of official taste and support for the regime rather than the nation enter the field when art and preservation of art and artifacts are justified as crucial nation building strategies as opposed to opportunities for personal growth and communion with nature.

Sax's second piece, *Is Anyone Minding Stonehenge*, picks up a century later with the efforts of Sir John Lubbock to establish cultural preservation policies in the United Kingdom. Lubbock worked to rescue ancient ruins—most especially those at Avebury—which were threatened by a boom of development that swept through England in the mid- to late eighteenth century. At the time, it was common for “Roman and prehistoric ruins to be dismantled for their stones or plowed under for housing developments.”

Sax describes Lubbock's crusade as "an endeavor to build a perspective of time into public policy, to institutionalize the long view." However, the crux of the issue is, once again, the nature of property. Unlike Gregoire's artifacts, most of Lubbock's ruins were privately owned. Therefore, Lubbock argued that the owners were "trustees of something that did not fully belong to them." The principal that he espoused was not government ownership and management of historic sites, but rather the "dual nature of heritage property." The use value belonged to the proprietors. If that value was impaired in order to protect the historic and scientific value, the owner would have to be compensated. However, the historic and scientific value belonged to the nation.

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103. See id. at 1157-58.
104. See id. at 1160. Unfortunately, while alluding to the issue of official taste, Sax does not engage in it. A more complete discussion would be particularly interesting given the role of nationalism and nation building in our experience with national parks. Further, although it makes sense in the Abbé's context, I do not extract from his argument anything that would justify Sax's continuing embrace of the nation as opposed to the locality as the appropriate locus of either encouragement of the arts or preservation of cultural assets.
106. See id. at 1546.
107. *Id.* at 1545.
108. *Id.*
109. *See id.* at 1554. Sax notes that Lubbock presented the dual notion of property "so casually and confidently" in debates on the bill "that one might have thought it an established principle of law." *Id.* at 1555. It was not. Lubbock appears, according to Sax, to have picked it up from John Ruskin, who probably drew it out of Victor Hugo's earlier campaign against destruction of historic monuments in France. *See id.* at 1560-61 nn. 61-69. Sax also distinguished between Lubbock's attempt to develop a new notion of the "essence of the nation" in property, and the commons and public trust notions in which "public right[s] [are] vindicated by ordinary claims of physical access and use." *Id.* at 1558.
This position has two implications which were radical at the time. First, private proprietorship was insufficient to ensure the protection of the artifacts. Second, the duty of protection required a much enlarged role for the government, allowing the government to “affirmatively veto” owners’ priorities.

Lubbock was ultimately unsuccessful in his efforts to define a theory of heritage protection. Instead, he was forced to save his cherished ruins by purchasing them himself. “Discerning a rationale for the claim that certain artifacts ‘belong’ to the community, rather than solely to their proprietor, has remained elusive.” This failure concerns Sax “even though the claim has been transformed from popular slogan to legal reality through a multitude of statutes protecting cultural artifacts from unconstrained private jurisdiction.” Acknowledging the principle of public responsibility for cultural heritage properties, we are, Sax indicates, still in quest of a theory that provides guidance and standards.

IV.
SEEING THINGS WHOLE: BACK TO THE PARKS IN AN ERA OF ECOSYSTEM MANAGEMENT

In Sax’s most recent parks work, a conclusory tenor more characteristic of the initial pieces replaces the seminar tone. Perhaps this is because his focus on Glacier National Park and the greater Yellowstone ecosystem seems to identify what was lost in Boxley, and what the Abbe Gregoire and Lubbock could not provide: a coherent theory why the government must intervene to preserve resources. In addition, Sax’s focus in these two parks is on natural systems rather than heritage resources. This is a major redirection: in Mountains Without Handrails, Sax explicitly disavowed “ecology for ecology’s sake.” A decade later, the interconnections of ecosystem management trump private dominion, now presented as incompatible with the natural world.

The core of the Glacier National Park article is familiar: it concerns boundaries and “simple curiosity about how neighboring federal

110. See id. at 1548-51.
111. See id. at 1550.
112. See id. Although a “toothless bill” was enacted in 1882, it was almost a century later, in 1979, that the present law governing ancient monuments—providing both a broad definition and compulsory acquisition—was passed. See id. at 1565-66.
113. Id. at 1561.
114. Id.
115. The phrase is taken from Sax, Dialogues, supra note 1.
agencies resolve land use conflicts among themselves." Nevertheless, the piece is a major departure on several counts. First, Sax and his co-author Robert Keiter are in much closer contact with the day-to-day operations of a particular park unit than is Sax's norm. Second, the article addresses organizational rather than legal issues. More precisely, it explores organizational strategies that lead the park to avoid dealing with legal issues. Third, although the piece is sympathetic to the park and the constraints under which the park superintendent operates, it is quite critical of the agency's failure to participate effectively in land use disputes.

The authors seem surprised at the "unimportance of the law," having at least feigned an initial assumption that "Glacier officials would vigorously assert the legal protection available to the park" under various federal environmental statutes. To the contrary, the authors find that Glacier officials rarely mentioned legal authority and were unlikely to openly pursue their interests in contested arenas. As a result, Sax and Keiter concluded that the park was a sitting duck for oil development, clear cutting, and other affronts on its boundaries.

The best argument for why the Glacier officials engaged in such seemingly irrational behavior comes in a rich discussion of "The High Price of Discretion." The Park's priority, was not, as the two analysts perceived it, to protect the park. Rather, Glacier officials were motivated to "resist being rule-bound." Park managers at Glacier did not seek to determine the fundamentals of policy but preferred broad mandates; they opposed park protection legislation even when they seemed to be losing out on key issues like oil development; they did

118. See id. at 220-21. For example, the authors lavish attention on neighboring Forest Service officials' efforts to accommodate Glacier and view the park as one of the constituencies the Forest Service must serve, and are correspondingly critical when those officials fail. According to the authors, however, the NPS is under no analogous obligation to see the Forest Service as a neighbor with priorities that ought to effect NPS decisions. The article is less about how the two agencies resolve disputes, see supra note 62, at 115, than about why the NPS does not more actively seek "leverage with the Forest Service." Id. at 219.
119. See id. at 259.
120. Id. at 217.
121. See id. at 218-19. The authors are perhaps understandably prone to conflating legal authority and park officials' interests, which is not clearly appropriate. However, their evidence regarding opportunities foregone is far broader. See id. at 259-60.
122. See generally id. at 260-61. “[U]pon reflection,” the authors proffer a few initial thoughts regarding why it is less surprising that law and legal authorities are not central here: neither management unit has ready access to legal advice, the personnel involved are not sophisticated about the legal system, and the officials do not want to deal with each other in a formal legal manner, since to do so is a sign that one has failed to deal with the data and policy issues. See id. at 219-20.
123. See id. at 259. “Law is a shackle, only discretion liberates.” Id.
not welcome support from the Fish and Wildlife Service (FWS) on issues like endangered species protections, but instead viewed the FWS as an “outsider” whose participation threatened NPS autonomy. They avoided alliances with environmental groups for the same reason.

Instead, Glacier’s central strategy was to “legitimize the idea of regional land management and move its neighbors away from traditional boundary or enclave consciousness. To do so, Glacier officials felt that they had to keep pressing the notion of a common enterprise . . . and avoid conflict and confrontation.” 124 However, “regional” land management relies on a number of aspirations regarding the United Nations’ Man and the Biosphere (UN-MAB) biosphere reserve concept. 125 This regional focus one could argue, ought to please Sax. The impulse is perhaps correct, but the upshot of the Glacier strategy is that the park’s ability to respond to its neighbors was “constrained by bureaucratic prudence and timidity.” 126 The organization was “becoming largely a bystander as decisions are made that will determine its destiny.” 127

In a similar, shorter piece, Ecosystems and Property Rights in Greater Yellowstone: The Legal System in Transition, Sax again explores the boundary issue 128 and proffers the greater Yellowstone ecosystem as the cutting edge of changes taking place in fundamental presuppositions of the legal system. The article starts by arguing that a “fundamental purpose of the traditional system of property law has been to destroy the functioning of natural resource systems.” 129 For generations, property law has encouraged owners of specific, tradi-

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124. Id. at 221. Sax and Keiter describe NPS’s timid interactions with the Forest Service as follows: “Seeking maximum discretion themselves, they are acutely conscious that their Forest Service counterparts likewise value autonomy, and they don’t feel comfortable having veto power over decisions on another manager’s turf.” Id. at 259.

125. “Prematurely,” the authors charitably conclude. See id. at 255. As a former chair of the board of directors for a biosphere reserve (the Golden Gate Biosphere Reserve) and a former member of the national Directorate of US Man and the Biosphere, I found Glacier’s reliance incredible. To mis-quote Gertrude Stein, there is little there there. Sax and Keiter discuss the US Man and the Biosphere program. Id. at 255-57. Right wing Congresspersons subsequent manipulation of the MAB’s statements of good intentions by exploiting some citizens’ preoccupation with jack booted storm troopers in black helicopters has likely put the kaibosh on any near term elaboration of the biosphere reserve concept. Probably the more serious issue is that it is not clear how NPS and other land owners are to move toward a more regional approach to management without to some extent negotiating, and perhaps compromising, with surrounding landowners. Sax and Keiter are clear that the NPS holding is the dominant one, and that others in the area, particularly the Forest Service, ought to see it as their role to accommodate the Park’s priorities. See supra note 118.

126. Id. at 260.

127. Id. at 261.

128. See Sax, Ecosystems and Property Rights in Greater Yellowstone, supra note 63.

129. Id. at 77. This is intended to be a “slightly shocking statement.”
tionally 160-acre parcels, to enclose the land and make exclusive use of it. In so doing, we transformed what was essentially a wilderness into an agricultural and, later, an industrial economy.\(^\text{130}\)

Sax argues that the issue is not who owns the land, but the use society will allow the owners to make of it.\(^\text{131}\) This time around, however, Sax is emphatic about the direction of evolution in the law.\(^\text{132}\) We are not simply heading in the direction of more public elements of private property—the dual nature that Lubbock addressed. Nor are we moving toward less development. Instead, property law is increasingly heading in the direction of “maintenance of natural systems and the processes sustaining them.”\(^\text{133}\) This means, Sax argues, less emphasis on boundaries: “[i]n other words, the law will be used less to encourage cutting natural links and more to require the protection of public trust values in functioning natural systems.”\(^\text{134}\)

What changes in the law will be required are not clear, but Sax is emphatic that: “[m]erely acquiring more public land or compensating property owners will not be sufficient.”\(^\text{135}\) Sax is also clear that “[t]he traditional notion that every landowner of every acre, wherever located, has identical rights of use will not, I am confident, prevail much longer. Such claims will bend to a changing conception of property that affirmatively values the sustenance of natural systems.”\(^\text{136}\)

Sax offers pallid nostrums indeed to those concerned about rights in property. First he asserts that this change is not so radical as might first appear. Property owners already exercise markedly different rights depending on the jurisdiction in which property is located and the propensity of the citizens to engage in land use regulation.\(^\text{137}\) For those unsatisfied with their slot on the emerging spectrum, Sax simply


\(^{131}\) Sax, Ecosystems and Property Rights in Greater Yellowstone, supra note 63, at 80. Sax focused on this theme during the Sagebrush Rebellion. He was a frequent speaker at the numerous conferences and symposia that accompanied the perennial debate on continued disposition of the public lands. He defended the collective values and political choices evinced in federal land retention—the publicness of public lands—from what appeared then as a rising tide of free market enthusiasts, privatizers and marketizers. Use rather than ownership was key, he asserted. See Joseph L. Sax, Why We Will Not (Should Not) Sell the Public Lands: Changing Conceptions of Private Property, 1983 Utah L. Rev. 269 (1983); Joseph L. Sax, The Claim for Retention of the Public Lands, in Rethinking the Federal Lands 125-148 (Sterling Brubaker ed., 1984); Joseph L. Sax, The Legitimacy of Collective Values: The Case of the Public Lands, 56 U. Colo. L. Rev. 537 (1985).

\(^{132}\) Sax, Ecosystems and Property Rights in Greater Yellowstone, supra note 63, at 80.

\(^{133}\) Id.

\(^{134}\) Id. Interestingly, for the first time in this context, Sax relies on his classic public trust article, Joseph L. Sax, The Public Trust Doctrine in Natural Resources: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970).

\(^{135}\) Sax, Ecosystems and Property Rights in Greater Yellowstone, supra note 63, at 79.

\(^{136}\) Id. at 81.

\(^{137}\) Id.
encourages them not to despair—we will all be better off under the more ecosensitive property regime.138

Finally, Sax applies this same framework in Nature and Habitat Conservation.139 There, he argues that, until recently, conservation programs have been defined by the same parcel-by-parcel, boundary oriented vision that has afflicted agricultural and other private lands. This "enclave" strategy "sets aside a defined tract of land for a specified purpose and then manages that land solely for that purpose."140 Thus, Sax argues, "the boundary and not the resource traditionally has determined the management strategy,"141 allowing the federal government to pursue different management mandates on adjoining parcels in the same ecosystem.

The transition to an ecosystem rather than an enclave or parcel based approach encounters many of the barriers that Sax described in the Glacier context142 and Helpless Giants;143 federal agencies and local authorities are jealous of their prerogatives and do not want to yield to another agency or level of government.144 Beyond that, prioritizing conflicting uses, as would be required if all these ostensibly single use parcels were blended and managed as one ecosystem, would be difficult.145 Nevertheless, Sax points to a number of indicators that we are moving away from the enclave strategy: cooperative management strategies, such as joint law enforcement or fire protection; inter-agency agreements on endangered species, such as the grizzly bear;146 the Endangered Species Act more generally;147 procedural statutes, such as the cumulative effect analysis required under the National Environmental Policy Act;148 and information tools such as "GAP analy-
sis,”149 all serve to erode the grip of enclave strategies on our thinking. The boundary focus—"the castle with its moat"—is eroding, Sax asserts, and "ecological management is the necessity and shape of the future."150

CONCLUSION

It is not clear that Sax's embrace of "ecological management" will provide any more compelling justification for government involvement in preservation programs than his previous efforts. Indeed, in many ways the ecosystem argument may be the least satisfactory of the paths we have explored under Sax's leadership: it omits the built environment, including art, science, and heritage resources, and it commits heavily altered natural ecosystems to a purgatory status that could ultimately risk more than it justifies. Most seriously, of course, it is not clear that any allegations regarding preservation of particular places will survive the transformation of ecological sciences. Having been exalted beyond all legitimate expectations in the "ecosystem management" craze,151 the science of ecology appears presently to be retreating into complexity, contingency and humility. The growing recognition that ecosystems are dynamic rather than headed towards a stable "climax" assemblage of plants and animals has eroded the scientific manager's ability to make pronouncements about what causes ecological change, or what is necessary to direct or prevent it.152 It is therefore not clear that ecologists can provide what Olmstead, Greigore, and Lubbock could not.

Professor Sax has left us, appropriately, with the same issues with which he started. These issues are and will remain absolutely at the core of park management in this and every other era. Sax's contributions are that he identified the problems, and that he has provided a rich palette of tools for thinking about them at different times and in different contexts. His fundamental questions—what should parks teach us, should we acquire or regulate, what do we do with boundaries—were not on the normal menu of parks debate before he raised

149. Id. at 54. Gap analysis is a geographic information system based approach to mapping biodiversity, which identifies priorities for habitat management and/or acquisition.
150. Id. at 56.
151. Believe it or not, ecosystem management has also been the occasion of even more conferences than the Sagebrush Rebellion. For a recent conference in a legal context see Symposium, The Ecosystem Approach: New Departures for Land and Water, 24 Ecology. L. Q. 619 (1997).
them. Grounded in property law and an expanding sense of the role of the parks and the process in which park managers make decisions, Sax has been principled, curious, and analytical where others have been primarily hortatory or merely ecstatic.