Title
In Honor of Joe Sax: A Grateful Appreciation

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Publication Date
2015-03-21

Peer reviewed

IN HONOR OF JOE SAX: A GRATEFUL APPRECIATION

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INTRODUCTION

Joseph L. Sax passed away on March 9, 2014. His passing was a great loss for his family, friends, colleagues, and of course for the large community of his followers and admirers in the profession. It will be some time before we can accurately assess his contributions to the fields of environmental, natural resources, and cultural resources law, if indeed we can ever fully do so. It is fitting, however, that we make a preliminary effort at this conference, given the centrality of takings law to some of Professor Sax's best-known work, his pre-eminent standing as a takings scholar, and his frequent participation as a speaker at this annual event.

I cannot come close to capturing all of Professor Sax's contributions in this essay. Luckily I need not (and do not) construe my task that broadly. During his lifetime there were multiple, well-deserved celebrations of Professor Sax's scholarship and other contributions. He squirmed to sit through those presentations, but at the same time he did appreciate the tangible confirmation that his colleagues admired and respected his work.

Two major scholarly celebrations provide excellent places to get to know Professor Sax's writing, its context, and its influence. The first is a symposium that appeared in *Ecology Law Quarterly* in 1998, based on a panel discussion at the annual meeting of the American Association of Law Schools, the major gathering point for legal academics.[1] It includes contributions by an all-star line-up: Thomas Merrill,[2] Carol Rose,[3] Buzz

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† I am privileged to have been Professor Sax's student and later his colleague, and humbled to have succeeded him in the chair I currently hold. I am deeply grateful to John Echeverria and Rick Frank for the invitation to contribute this piece to the 2014 edition of the annual Takings Litigation Conference. Appropriately, the conference was held shortly after the Environmental Law Section of the State Bar of California announced that it would award its first Lifetime Achievement Award to the late Professor Sax. *Environmental Law Section to Award Its Inaugural Lifetime Achievement Award to the late Professor Joseph L. Sax*, THE STATE BAR OF CAL., http://environmental.calbar.ca.gov/#award (last visited Apr. 12, 2015). I am also indebted to the staff of the *Vermont Law Review*, who were far more patient than they should have been with my delays in revising my remarks for publication.

1. Symposium, *Takings, Public Trust, Unhappy Truths, and Helpless Giants: A Review of Professor Joseph Sax's Defense of the Environment Through Academic Scholarship*, 25 ECOLOGY L.Q. 325 (1998).

2. Thomas W. Merrill, *Compensation and the Interconnectedness of Property*, 25 ECOLOGY L.Q. 327 (1998).

3. Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351 (1998).

Thompson,[4] Sally Fairfax,[5] and Zyg Plater,[6] ably covering the many different faces of Professor Sax's scholarly identity. The second, which appeared in the *Hastings West-Northwest Journal of Environmental Law and Policy*, includes several short appreciations by close friends and colleagues of Professor Sax, including John Leshy,[7] Dan Tarlock,[8] Hap Dunning,[9] Buzz Thompson,[10] and Joe DiMento.[11] In addition, after Joe's passing there was an outpouring of personal reflections, tributes, and obituaries.[12]

Those other tributes and analyses free me up to focus a little more narrowly in this essay, rather than trying to cover every aspect of Joe's

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4. Barton H. Thompson, *Water Law as a Pragmatic Exercise: Professor Joseph Sax's Water Scholarship*, 25 ECOLOGY L.Q. 363 (1998).

5. Sally K. Fairfax, *The Essential Legacy of a Sustaining Civilization: Professor Sax on the National Parks*, 25 ECOLOGY L.Q. 385 (1998).

6. Zygmunt J.B. Plater, *Three Economies: An Essay in Honor of Joseph Sax*, 25 ECOLOGY L.Q. 411 (1998).

7. John D. Leshy, *In Praise of Joe Sax*, 14 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 13 (2008).

8. A. Dan Tarlock, *Professor Joseph L. Sax, Visionary Lawyer*, 14 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 17 (2008).

9. Harrison C. Dunning, *A Short Tribute to Joe Sax*, 14 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 19 (2008).

10. Barton H. Thompson, *Promoting the Public's Interest*, 14 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 22 (2008).

11. Joseph F.C. DiMento, *Transformation of the Law: Thoughts on the Contributions of Professor Sax*, 14 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 26 (2008).

12. *See, e.g.*, Jonathan H. Adler, *Remembering Professor Joseph L. Sax*, WASH. POST (Mar. 12, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/12/remembering-professor-joseph-l-sax; Bettina Boxall, *Joseph Sax Dies at 78; Law Professor Wrote Influential Article on Public Trust Doctrine*, L.A. TIMES (Mar. 10, 2014), http://articles.latimes.com/2014/mar/10/local/la-me-joseph-sax-20140311; Douglas Martin, *Joseph L. Sax, 78, Dies: Pioneered Environmental Law*, N.Y. TIMES (Mar. 10, 2014), http://www.nytimes.com/2014/03/11/us/joseph-l-sax-who-pioneered-legal-protections-for-natural-resources-dies-at-78.html; Antonio Rossman, *A Tribute to Joseph L. Sax*, 2014 Environmental Law Conference at Yosemite (Oct. 18, 2014), *available at* http://landwater.org/wp-content/uploads/2014/11/Sax.sbse_.pdf; Reed D. Benson, *Remembering Prof. Joe Sax*, WESTERNRIVERLAW (Mar. 12, 2014, 3:15 PM), http://westernriverlaw.com/2014/03/12/remembering-prof-joe-sax; Holly Doremus, *In Memoriam: Joseph L. Sax, Gentleman, Scholar, Giant of Environmental Law*, LEGAL PLANET (Mar. 10, 2014), http://legal-planet.org/2014/03/10/in-memoriam-joseph-l-sax-gentleman-scholar-giant-of-environmental-law; David Farer, *Joseph Sax, Innovator and Inspirer (1936–2014)*, AM. COLL. OF ENVTL. LAWYERS (Apr. 1, 2014), http://www.acoel.org/post/2014/04/01/Joseph-Sax-Innovator-and-Inspirer.aspx; Eric Goldstein, *David Sive and Joe Sax, Titans of Environmental Law: An Appreciation*, SWITCHBOARD: NATURAL RES. DEFENSE COUNCIL STAFF BLOG (Mar. 14, 2014), http://switchboard.nrdc.org/blogs/egoldstein/ david_sive_and_joe_sax_titans.html; Carl Nolte, *Joseph Sax—Public Trust Doctrine Author-Dies*, SFGATE (Mar. 21, 2014, 6:39 AM), http://www.sfgate.com/bayarea/article/Joseph-Sax-public-trust-doctrine-author-dies-5336282.php; Dave Owen, *Joe and the Baby*, ENVTL. LAW PROF BLOG (Mar. 12, 2014), http://lawprofessors.typepad.com/environmental_law/2014/03/joe-and-the-baby.html; Nicholas Robinson, *A Tribute to David Sive and Joseph L. Sax*, ENVTL. LAW PROF BLOG (Mar. 26, 2014), http://lawprofessors.typepad.com/environmental_law/2014/03/a-tribute-to-david-sive-and-joseph-l-sax-by-nicholas-robinson.html.

career and contributions. Taking advantage of that freedom, I offer here a brief appreciation of Joe Sax in three specific respects: as an architect of the fields of environmental and natural resources law; as a teacher and mentor; and as a takings scholar. In each of these roles, Joe profoundly influenced my own professional development and identity, so the appreciation I offer is personal and heartfelt. I also have tried to capture a sense of the breadth and depth of his influence, which was (and continues to be) global and multi-faceted.

I. JOE SAX, ARCHITECT OF ENVIRONMENTAL LAW

The starting point, from my perspective at least, has to be Professor Sax's role as one of the founders of the field I and the other attendees of this conference are lucky enough to work in. Frequently those seeking to sum up Professor Sax's career have described him as the architect of the modern public trust doctrine.[13] It is certainly true that he brought that doctrine to the attention of modern environmental advocates, and that he pursued it passionately as both academic and advocate throughout his career. But his foundational influence was much broader than that; he brought public values to the fore with respect to an array of resources, and in the process helped to invent what we now know as the fields of environmental and natural resources law.

Today, dozens of law schools have strong environmental law programs. The American Bar Association sponsors a robust Section on Environment, Energy and Resources, and many state bars have similar groups. Environmental law is a recognized career path. That was not the case when Professor Sax launched his career. Like most law professors then and now, Professor Sax practiced for a few years before entering academia. He was not an environmental lawyer because there was no such specialty. Rather, he worked as a labor lawyer at the U.S. Department of Justice and indulged his love of the outdoors in his free time.

Things changed in 1962, when Sax joined the faculty at the University of Colorado's law school.[14] Luckily for him, and for us, he was assigned to teach water law. That turned out, unexpectedly, to be a perfect fit. Water law, again then as now, was a bit of a niche topic, certainly not the place a major academic figure would be expected to make a name, but vitally important to certain communities. While environmental law had yet to be created, natural resources law had existed for decades. It focused not on the

13. *See, e.g.*, Boxall, *supra* note 12.

14. Andrew Cohen, *Professor and Environmental Law Pioneer Joseph Sax Dies at 78*, BERKELEY LAW (Mar. 11, 2014), http://www.law.berkeley.edu/16842.htm.

protection of natural resources but on dividing rights to exploit them. Water in the arid west, minerals, and oil and gas were the subjects of what essentially were specialized property classes.

Professor Sax, of course, was not content simply to replicate or further entrench established ways of thinking about water. Deep exposure to the law of water as property was the source of his initial engagement with the interplay of public and private rights in resources, which became the dominant theme of his scholarly career. He fell in love with water law, which remained his favorite course to teach throughout his career.[15] Within a few years, he had produced his first water law casebook and begun to put his indelible stamp on the field.[16]

The ideas that teaching water law triggered for Professor Sax rapidly matured into a much broader vision of the nature of property generally. At the time, property law tended to be seen through the lens of private ordering. Sax saw it instead as a doctrine centered on the intersection of public and private interests. That led him naturally to the Takings Clause, which directly mediates those interests. More on that later.[17] It was primarily his takings work that drew the interest of the University of Michigan School of Law, where he moved in 1966.[18] But his property work always continued to be intimately tied to, and indeed in many respects an outgrowth of, his environmental law work and interests.

When he joined the Michigan law faculty he was, according to a contemporary interview published in Michigan's alumni publication, already focused on an ecological vision for managing natural resources.[19] The headline of the story, considered surprising and attention-getting at the time, was *Sax Fights for Natural Resources*.[20] Professor Sax was obviously ahead of his time in that role, or at least well ahead of the publication's staff. The article noted with wonderment that "[i]t is hard to imagine" that someone like Sax, not only brought up in urban Chicago, but Harvard-educated and now teaching at an elite law school, would be interested in such things.[21] Sax was ahead of his time in another respect as well: He went to Michigan in part because they had a Natural Resources School as well as

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15. Joseph L. Sax, *Why I Teach Water Law*, 18 U. MICH. J.L. REFORM 273, 273 (1984).

16. JOSEPH L. SAX, WATER LAW, PLANNING & POLICY: CASES & MATERIALS (Bobbs-Merrill Co., Inc. 1968).

17. *See infra* Part III.

18. Cohen, *supra* note 14.

19. *Sax Fights for Natural Resources*, L. QUADRANGLE NOTES, Spring 1967, at 13, *available at* https://www.law.umich.edu/historyandtraditions/faculty/Faculty_Lists/Alpha_Faculty/Documents/Law_Quad_Notes/Siegel_Stanley_1967.pdf.

20. *Id.*

21. *Id.*

a law school, enabling him to teach classes that brought students from the two together. Professor Sax was interdisciplinary before anyone was using that word, and long before that word became respectable in the world of legal academia.

Soon after Sax moved to Michigan, it became a lot easier to imagine that serious scholars, even serious legal scholars, might take a serious interest in the environment. That was no coincidence; Professor Sax was one of the people who made it respectable. He was a key participant in a conference on "Law and the Environment," sponsored by the Conservation Foundation and held at Airlie House in Northern Virginia, a short drive from the nation's capital.[22] A small cadre of academics (including Joe Sax and Dan Tarlock), practitioners (including Jan Stevens, a perennial mainstay of this conference), and gadflys (a fair description of Ralph Nader even then) met to brainstorm about how the law could help combat what was beginning to be recognized as a growing environmental crisis. Professor Tarlock describes Professor Sax as fulfilling a critical role at that conference, a role that typified his career: the bridge between academia and practice.[23] He focused what could have been an abstract philosophical discussion on "the essential issues of good lawyering" in this new context.[24] Those issues haven't changed much in the intervening decades: Professor Sax listed them as understanding whether intervention would be desirable and at what procedural stage; what role expert scientific knowledge would play and where it could be found; and what concrete, long-term results legal intervention might produce.[25]

The field of environmental law took off rapidly after the Airlie House conference. Within a year or two, the landscape had grown thick with the mainstay non-governmental organizations, such as the Environmental Law Institute,[26] Environmental Defense Fund,[27] and Natural Resources Defense Council.[28]

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22. Dan Tarlock provided an evocative personal remembrance of the conference and Professor Sax's role in it to Ecology Law Currents. A. Dan Tarlock, *Present and Active at the Creation*, ECOLOGY L. CURRENTS (Dec. 5, 2014), http://elq.typepad.com/currents/2014/12/saxmemorial.html.

23. *Id.*

24. *Id.*

25. *Id.*

26. ELI was launched in 1969. *About the Environmental Law Institute*, ENVTL. L. INST., http://www.eli.org/about-environmental-law-institute (last visited Apr. 3, 2015).

27. EDF grew out of the teamwork of two scientists and a lawyer responsible for developing one of the first environmental law cases, a challenge to use of the pesticide DDT. *Our Story: How EDF Got Started*, ENVTL. DEF. FUND, http://www.edf.org/about/our-history (last visited Apr. 3, 2015).

28. NRDC was formally launched in 1970. *E-Law: What Started It All?*, NATURAL RES. DEF. COUNCIL, http://www.nrdc.org/legislation/helaw.asp (last visited Apr. 3, 2015). The organization traces its roots to the court battle over approval of a hydroelectric project on the Hudson River without

Soon there was federal and state legislation explicitly aimed at protecting environmental values, or at least at ensuring that those values would be fairly considered. Professor Sax again played a key role at the fulcrum between highly effective law practice and rigorous but creative academic work. His classic book, *Defending the Environment*,[29] provided the theoretical justification for citizen access to the courts in defense of public values. And with his students, Professor Sax literally drafted the Michigan law, commonly known as the "Sax Act," which first put that theory into practice.[30]

As environmental litigation and legislation proliferated, law schools began to take notice as well. In short order, Oregon's Lewis and Clark[31] and California's UC Berkeley[32] law schools launched environmental law journals. Professor Sax's "extraordinarily creative mind"[33] and remarkably elegant writing were quite directly responsible for both the development of the field and the fact that within a decade or two the words "environmental law" could be said out loud without embarrassment or apology at even the snobbiest of law schools.

For these contributions, I offer a sincere thank you to Joe and all his compadres from that watershed period in American legal history. By insisting that environmental values legitimately mattered, coming up with creative legal strategies to address them, and following through with dogged hard work and determination, they laid the foundation for our modern system of environmental law. Their efforts directly contributed to the recognition and protection of values we now regard as fundamental. They also created institutional roles for present-day environmental law academics and practitioners, ensuring that emerging environmental concerns from climate change to nanotechnology continue to receive attention in the nation's courts and legislatures.

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consideration of environmental values. Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 354 F.2d 608, 611 (1965).

29. JOSEPH L. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION 110–12 (1st ed. 1970).

30. Joseph L. Sax & Joseph F. DiMento, *Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act*, 4 ECOLOGY L.Q. 1, 2 (1974). The law, formally titled the Michigan Environmental Protection Act, quickly became more commonly known as the Sax Act.

31. *Environmental Law Review*, LEWIS AND CLARK LAW SCHOOL, http://law.lclark.edu/law_reviews/environmental_law/ (last visited Apr. 3, 2015).

32. *About ELQ*, ECOLOGY LAW QUARTERLY, http://www.boalt.org/elq/about.php (last visited Apr. 3, 2015).

33. A. Dan Tarlock, *The Story of Calvert Cliffs: A Court Construes the National Environmental Policy Act to Create a Powerful Cause of Action*, *in* ENVIRONMENTAL LAW STORIES, 77, 80 n.10 (Richard J. Lazarus & Oliver A. Houck eds., 2005).

II. JOE SAX, TEACHER AND MENTOR

Professor Sax made a second set of important contributions as a teacher and mentor to emerging environmental law practitioners and academics—roles to which he devoted five decades. These roles are much lower-profile than the invention of a new field of law, but ultimately just as important.

These are the roles in which I first encountered Professor Sax. In the fall of 1990, as a 3L, I was a student in his unique Nature and Culture class at Berkeley. He had been on sabbatical during my second year, so this was my first chance to take a class with him.

From the outset I was completely in awe of him. I had just discovered his classic on the national park system, *Mountains Without Handrails*,[34] which immediately became one of my favorite books of all time. At just over a hundred pages, it remains an important reminder to wordy academics that if you think and write clearly you don't need a lot of space to make a big point. I was also intimidated by what I took for old-fashioned formalism in the classroom, with his trademark bow ties and somewhat austere brilliance at the podium.

Professor Sax (it would be years before I could think of him as Joe) did not banter with students in that classroom as many law professors might today. That is not to say that he was harsh or dismissive. He was unfailingly polite, but always (and appropriately) demanding. He insisted on rigorous analysis, and on full and fair consideration of opposing arguments. You could not get away with being intellectually shallow or analytically lazy in his class, or indeed in his presence. If you could hold your own in the classroom discussion, though, you learned invaluable lessons about how to be an effective analyst and advocate, and how to engage tough issues directly without demonizing opponents.

The substantive material covered in the class was mind-opening, as I suspect Professor Sax's classes generally were. It was a law class which had essentially no existing law supporting it. We read and talked about the connection between human cultures and natural landscapes, the reasons we might want to protect the former as well as the latter, and the challenges of dealing with both in places like Alaska's enormous national parks. It was fascinating even when it was over our collective heads. In retrospect, it provided a great window into Joe's approach to understanding what law can

34. JOSEPH L. SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS *passim* (Univ. of Mich. 1980).

and should do, as well as into his remarkably broad appreciation for the unique products of human and non-human creation.

In the classroom, Joe taught by his example as much as by his words, which means that he taught a lot more than the subject matter of the class. Berkeley Law alumnus (now environmental law practitioner) Chris Carr remembers that Joe's teaching "conveyed the unmistakable message that the issues needed to be engaged deeply, with rigor, and with an appreciation for the perspectives of others."[35] We all know that's not always the way environmental law advocates, academics, or, for that matter, others with a deep personal stake in the issues they teach, operate. It's all too easy to get wrapped up in passion for the issues and forget that one's personal values are not necessarily shared by others. Joe never fell into that trap. Joe was always respectful of those who didn't share his views, and although he was deeply committed to his vision of fairness and community, he did not either believe or pretend that was the only possible vision.

Another Berkeley Law alumnus who has become a leading environmental law academic, Dave Owen, recounts a wonderful story of a water law class in which Joe taught the students a lesson about kindness, compassion, and empathy that had nothing to do with prior appropriation or usufructuary rights.[36] A student mother had been bringing her infant child to class. The child was usually quiet, but one day was fussy. As Dave tells it, the whole class (consisting mostly of single 20-somethings) was uncomfortable, which is no doubt why the mother got up to take the baby out of the classroom. But Professor Sax wasn't in the least bothered. He assured the mother there was no need to leave, because "That's just what babies do."[37] He added that he didn't think anyone else minded, allowing (perhaps even compelling) the whole class to emulate his calm acceptance. It was one more reason to want to live up to Joe's standards; he showed everyone that it was fully possible to "combin[e] greatness with kindness and compassion."[38]

Professor Sax, of course, was much more than a classroom teacher. He modeled great scholarship and great advocacy, but he did not stop there. He actively helped his students make their way in careers as practitioners and academics. A remarkable number of environmental law teachers were helped on their way by Joe Sax—people lucky enough to sit in his classrooms, like Rob Fishman, Reed Benson, Zyg Plater, Bo Abrams, Joe

35. Chris Carr, *Joseph L. Sax: In Memoriam*, ECOLOGY L. CURRENTS (Dec. 5, 2014), http://elq.typepad.com/currents/2014/12/saxmemorial.html.

36. This story is taken from Owen, *supra* note 12.

37. *Id.*

38. *Id.*

Dimento, Sarah Krakoff, Cymie Payne, and myself, but also others he encountered in practice or as they were starting their career, who he helped with some positive feedback, a suggestion for improvement, or an invitation to a conference.

I have certainly benefitted from those kinds of interventions. When I had been teaching a few years at the UC Davis School of Law, I was still much in awe of Joe Sax. But at the urging of Davis mentors such as Harrison ("Hap") Dunning, who knew him far better than I did, I sent Joe copies of my writings, not actually expecting that he would read them. He did, though, and from my perspective today I understand what a gift that was. Almost any academic is overloaded with requests like that, and of course far more so a leading light like Joe Sax. Yet he took the time to read and provide constructive comments. And he didn't stop there: He called to invite me to come talk to his seminar class about a piece I had just published. That doesn't sound like much, but it was an important validation for an early-career scholar still not quite sure if she belonged in the business. It also meant that I got to talk more with him and his class about my ideas. That discussion both forced me to think through points that were insufficiently developed and encouraged me to add thoughts and connections. It was a marvelously stimulating experience, one of those great reminders of how much fun our job can be.

Again, there was always that skeptical side of Joe. Knowing that he wouldn't hesitate to flag shortcomings made you feel that much better if you got a positive comment. When he did have doubts, of course, they were always politely expressed. I once sent him a (published) piece I'd written about the national parks, sure he would like it because I relied heavily on *Mountains Without Handrails* to reach the conclusion that commercial bioprospecting, exploring for unique and potentially useful organisms, had no place in national parks.[39] It didn't persuade him. He didn't argue with me about it at that point in the game, or send a devastating critique (as I might have done). He simply sent a note saying, "I think I disagree with you, but I'll give it more thought." He could be honest—I don't believe he was ever less than honest in evaluating the scholarship of others, and his standards were very high—but at the same time he could leave you thinking, if you'd made a good-faith effort to grapple with tough issues, that there was something there even if you hadn't fully captured it. I wish I'd had the courage to send him the piece in draft; I'm sure it would have been measurably improved by his probing.

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39. Holly Doremus, *Nature, Knowledge and Profit: The Yellowstone Bioprospecting Controversy and the Core Purposes of America's National Parks*, 26 ECOLOGY L.Q. 401, 402, 407 (1999).

Joe did not just teach proto-academics, or even just law students. He showed practitioners, many of them deeply skeptical of much academic work, that scholarship could (and should) be relevant to actual practice. As a result, he was that rarest of creatures in today's world: an academic given the highest accolades both within the academy and from the practice.[40] He took every opportunity to speak to the public as well, in part by writing books that you don't have to be a lawyer to read, but also by talking to the media and making himself available for projects like Forces of Nature, which is recording interviews with "environmental elders."[41]

As a teacher, a mentor, a sharer of information and experience, Joe Sax provided a model we should all try to emulate. In a quiet way, he taught a generation to be lawyers and scholars, inspired us to be environmental advocates, and never let us take the easy way out. If we in turn do the same, as do our successors, that influence will multiply exponentially. I can think of no more fitting way for those of us who have benefitted from his teaching in one way or another to honor his legacy.

III. JOE SAX, TAKINGS SCHOLAR

Finally, inevitably given the nature of this conference, I want to offer a few words of appreciation for Joe Sax as a takings scholar, a role to which he returned again and again throughout his lengthy academic career.

Professor Sax wrote about many topics, including citizen activism;[42] cultural resources;[43] public lands management;[44] groundwater regulation;[45] the arcane property doctrines of accretion and avulsion;[46] endangered species protection;[47] even *Slumlordism as a Tort.*[48] But he kept returning to

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40. Among many practice-oriented awards Professor Sax received, two of the last were the (unfortunately posthumous) inaugural Lifetime Achievement Award of the Environmental Law Section of the State Bar of California, and the Mono Lake Committee's 2013 Defender of the Trust award.

41. Professor Sax did at least two interviews with the Forces of Nature project: on water policy, *Getting Smart About Water*, FORCES OF NATURE (Oct. 15, 2013), http://theforcesofnature.com/movies/joseph-sax; and on the public trust doctrine, *Public Land, Public Trust*, FORCES OF NATURE (Sept. 15, 2013), http://theforcesofnature.com/movies/joseph-sax-2.

42. *E.g.*, JOSEPH L. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION 231–32 (1st ed. 1970).

43. *E.g.*, JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 9–10 (1999).

44. *E.g.*, Sax, *supra* note 34, *passim*.

45. *E.g.*, Joseph L. Sax, *We Don't Do Groundwater: A Morsel of California Legal History*, 6 U. DENV. WATER L. REV. 269, 270–74 (2003).

46. *E.g.*, Joseph L. Sax, *The Accretion/Avulsion Puzzle: Its Past Revealed, Its Future Proposed*, 23 TUL. ENVTL. L.J. 305, 306 (2010).

47. *E.g.*, Joseph L. Sax, *The New Age of Environmental Restoration*, 41 WASHBURN L.J. 1 (2001).

the Takings Clause, and more generally to the boundaries of property rights, whether set by constitutions, by courts, or by legislatures. Joe's first published article as a law professor, I believe, was his first takings piece.[49] He came back to takings questions again and again over fifty years, including in his final published piece, on the "fair share" concept.[50]

That the Takings Clause turns out to have been so central to Professor Sax's scholarship is, I think, unsurprising. Thematically, the question of the boundary between public and private rights united the disparate threads of his writing. The Takings Clause is central to identifying that boundary.

The only prior attempt I am aware of to sum up Joe Sax's takings scholarship is Professor Tom Merrill's contribution to the 1998 *Ecology Law Quarterly* symposium.[51] My perspective differs from Professor Merrill's in two important respects. First, I have the benefit of seeing the full arc of the story. When Professor Merrill wrote in the late 1990s, he thought Joe's interest in takings had faded over time. Looking back, however, that was emphatically not true. Joe continued to think and write about takings to the very end of his life.

Second, not surprisingly I have a more sympathetic view than Professor Merrill of the themes of Joe's takings work. As I read Merrill's assessment, it can be boiled down to two quite negative conclusions. First, Merrill reads Sax as relentlessly anti-compensation, and finds that stance insufficiently explained.[52] Merrill concludes that it springs simply from Sax's value preference in favor of environmental protection.[53] Second, Merrill criticizes that logic, arguing that the ends of environmental protection are not in fact inconsistent with a stronger pro-compensation

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48. Joseph L. Sax, *Slumlordism as a Tort*, 66 MICH. L. REV. 465 (1967) (responding to critiques of the idea that slumlords commit tortious actions).

49. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

50. Joseph L. Sax, *The "Fair Share" Concept in Takings Law*, 19 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 357 (2013) [hereinafter *The "Fair Share" Concept in Takings Law*]. A list of Professor Sax's major takings writings would also include at least: Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971) [hereinafter *Takings, Private Property and Public Rights*]; Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481 (1983); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433 (1993) [hereinafter *Property Rights and the Economy of Nature*]; Joseph L. Sax, *Why America Has a Property Rights Movement*, 2005 U. ILL. L. REV. 513 (2003); Joseph L. Sax, *The Property Rights Sweepstakes: Has Anyone Held the Winning Ticket?*, 34 VT. L. REV. 157 (2009); Joseph L. Sax, *Land Use Regulation: Time to Think About Fairness*, 50 NAT. RESOURCES J. 455 (2010) [hereinafter *Land Use Regulation*]; Joseph L. Sax, *Some Unorthodox Thoughts About Rising Sea Levels, Beach Erosion, and Property Rights*, 11 VT. J. ENVTL. L. 641 (2010).

51. Merrill, *supra* note 2, at 328.

52. *Id.* at 334.

53. *Id.* at 339.

stance, since a public which values environmental protection should be willing to pay for it.[54] To put it in simple terms, Merrill takes Sax to be making a knee-jerk environmentalist argument against compensation, and responds with a knee-jerk conservative argument for compensation.

That may be an unfair oversimplification of Merrill's thesis, but I think no more unfair than Merrill's oversimplification of Sax's. I see Merrill as talking across Sax's argument because he simply does not see it in full. Contrary to Merrill's starting point, Joe Sax was not fundamentally anti-compensation. But he saw both the purpose and the consequences of compensation quite differently than Merrill, and therefore took a very different view of when compensation should or should not be required. Over the years, three key themes emerged from Professor Sax's takings scholarship: first, that the government need not compensate when it chooses among competing values to determine the preferred use of limited societal resources;[55] second, that the government must fairly allocate the burdens of those public value choices;[56] and third, that courts should be careful not to inhibit healthy innovation by being too generous with compensation (a kind of moral hazard concern).[57] In many situations, but certainly not all, those themes led Professor Sax to a conclusion that compensation should not be constitutionally required. But he never reached that conclusion in a knee-jerk way or without explanation.

A. The Legitimacy of Collective Values

To understand Professor Sax's takings scholarship, it helps to put it in the context of his full body of work. The unifying theme of his disparate scholarship is summed up in the title of a 1985 paper, *The Legitimacy of Collective Values*.[58] The paper was a response to the periodic demands in the West that the federal government dispose of a large fraction of its landholdings.[59] Professor Sax explained that the dominant intuition underlying objections to public land ownership is that only individual

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54. *Id.* at 342.

55. *See id.* at 342 (noting Sax's argument against providing compensation for "collective action[s]" such as "environmental and historic preservation," which society has come to value).

56. *See id.* at 339–40 (identifying several methods available to allocate costs).

57. *See id.* at 339 (noting that compensation interferes with efficient outcomes).

58. Joseph L. Sax, *The Legitimacy of Collective Values: The Case of the Public Lands*, 56 U. COLO. L. REV. 537 (1985).

59. Everything old is new again, of course. That same theme is being sounded today, primarily by the Rocky Mountains states. Amy Joi O'Donoghue, *Western State Leaders Convene in Salt Lake City, Urge Control of Federal Lands*, DESERET NEWS (Oct. 9, 2014, 3:40 PM), http://www.deseretnews.com/article/865612789/Western-state-leaders-convene-in-Salt-Lake-City-urge-control-of-federal-lands.html?pg=all.

preferences matter, and those preferences are best expressed, evaluated, and aggregated through individual decisions.[60] That intuition, in other words, is that ordinary markets do and will satisfy individual preferences, and further, that the maximum satisfaction of those preferences is the only legitimate public function. If those are your starting assumptions, it follows inevitably that the best thing government can do, perhaps the only legitimate thing it can do, is to help markets function well by, among other things, recognizing robust individual property rights.

Joe Sax emphatically and repeatedly rejected the premise of that argument. Joe believed that there are legitimate *collective* goals—*public* values that are not simply the aggregation of private values. Those public values cannot be protected by market decisions, because they emerge only from collective decision-making processes. Mark Sagoff has made a similar argument in slightly different terms: People think differently, and make different decisions, when they understand themselves to be acting in the role of citizens, members of a collective, than they do when acting as individual market participants.[61]

As Sax put it, the proponents of market solutions necessarily see *autonomy* as the fundamental, and in the extreme as the only, value.[62] For Sax, the value question was not that simple. He was not arguing for the other extreme. Joe agreed that some degree of autonomy is important, and that the institution of private property serves that value. But he argued that collective behavior is also important because some kinds of values can only be expressed as a political community, as "we the people."[63] That, then, is the fundamental argument for recognizing public property: Public property supplies a collective statement about values that is distinctive and important precisely because it is collective. The market by definition cannot make such a collective statement.

The Legitimacy of Collective Values is not a takings paper, but it provides the clearest explanation in Joe's scholarship of the fundamental distinction that underlies his skepticism of an overly strong compensation rule.[64] That distinction turns up repeatedly in his takings work. It underlies the first test he suggested for identifying illegitimate takings, in *Takings and the Police Power*.[65] There, he argued that government should have to

60. Sax, *supra* note 58, at 542.

61. Mark Sagoff, *We Have Met the Enemy and He Is Us* or *Conflict and Contradiction in Environmental Law*, 12 ENVTL. L. 283, 302–06 (1982).

62. Sax, *supra* note 58, at 541.

63. *Id.* at 550.

64. *Id.* at 537.

65. Sax, *supra* note 49, at 62.

pay when it acts as an "enterprise," that is when it takes on the role of a private market participant, but not when it acts in its unique governing capacity through the police power.[66] As he began to come to grips with the takings conundrum in this first piece, Professor Sax emphasized the role of government in resolving private economic conflicts, but he quickly realized that was too narrow a focus. The truly public role of government is not just the resolution of conflicts generally; that can be delegated to anyone the conflicting parties agree will follow their chosen decision rules. The quintessentially public role, which cannot be delegated to markets or other private institutions, is the resolution of societal value conflicts, or to put it in more positive terms, the choice of guiding community values.

His deep engagement with environmental issues led Professor Sax to that broader focus by the time of his second major takings paper, *Takings, Private Property, and Public Rights*.[67] The question of wetlands protection provided the catalyst. In *Takings and the Police Power*, Professor Sax had been notably unsympathetic to zoning regulations that sharply curtailed development of "swampy land."[68] He argued that such regulations called for compensation because they, in effect, made the land the equivalent of a public park.[69] Eight years later, however, he saw the interconnectedness of property as justifying a different outcome. He realized that protection of wetlands, and resolution generally of claims on common resources, was an expression of collective values, a resolution of competing demands for the various functions land might provide, rather than (as he had thought earlier) a way to gain market advantage. In this second piece, he more directly articulated a theme that would animate his takings work from that point forward: When government declares, expresses, or implements public values, it should not have to compensate dissenters.[70] Determining collective values is the very essence of governance and, in a democracy, of the political process. That process should not be distorted, Professor Sax believed, by importing an obligation to compensate losers on one side (the private interest side) of the equation.

The legitimacy or otherwise of collective values is the fundamental issue responsible for our deep societal divisions over the need to offer compensation for government actions. Those who emphasize autonomy and individual preferences are comfortable with leaving most decisions, including public policy decisions, in the hands of private market actors. In

66. *Id.* at 62–63.
67. Sax, *Takings, Private Property and Public Rights*, supra note 50, at 150.
68. *Sax*, *supra* note 49, at 72–73.
69. *Id.* at 72.
70. Sax, *Takings, Private Property and Public Rights*, *supra* note 50, at 162.

the absence of a demonstrable market failure, they are skeptical of collective, that is government, decisions, and are therefore happy to have a strong compensation requirement rein in potentially overzealous government actors. By contrast, those who emphasize the legitimacy of collective preferences tend to be comfortable with majoritarian decision making (at least in the abstract, putting aside for the moment flaws in the process), even when it restricts individual autonomy. Professor Sax was firmly in this latter camp.

B. Fair Allocation of Burdens

That need not leave the dissenters wholly at the government's mercy, however. Certainly Professor Sax did not favor unbridled government discretion. Joe Sax was no environmental extremist. He did not believe that government should never be fiscally accountable for its decisions through compensation. Indeed, he believed passionately that government must not be permitted to arbitrarily impose the burdens of collective value choices on selected victims. Government must allocate those burdens fairly. That the essence of the Takings Clause was to produce fair sharing of public burdens was the second major theme of Professor Sax's takings scholarship, and the one that was dominant in his most recent scholarship.

Of course, fairness can be in the eye of the beholder, so calling for fairness in and of itself is a pretty empty statement. The U.S. Supreme Court has repeatedly described the fundamental purpose of the Takings Clause as fairly adjusting the boundary between public and private burdens.[71] Yet the Court has left that statement nearly entirely empty for more than half a century. Either it has been uninterested in articulating principles of fairness in this context, or incapable of forging agreement on what those principles might be.[72]

Professor Sax was committed to articulating principles. Most fundamentally, throughout his takings scholarship he emphasized the importance of non-discrimination.[73] Government must not be allowed to single out some persons to bear the costs of public choices, while allowing

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71. Armstrong v. United States, 364 U.S. 40, 49 (1960). Since then, the Court has routinely repeated *Armstrong*'s statement that the core purpose of the Takings Clause is to prevent the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" in its takings decisions. *Id.*

72. The Court's best attempt was its articulation of a multi-factor test in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124–28 (1978). The *Penn Central* test itself, however, remains under-explained. Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVTL. L. 1, 7–8 (2003).

73. *See, e.g.*, Sax, *supra* note 49, at 64 (emphasizing the risk of government discrimination among those who might bear the costs of government choices).

others to enjoy the benefits.[74] In some contexts, a non-discrimination principle is self-explanatory. Government cannot create a public road system for the benefit of all at the expense of those landowners unlucky enough to own property in the path of the selected route. But in other contexts it is much more difficult to determine who is "similarly situated" and therefore entitled to equivalent treatment.

Professor Sax did not shy away from those difficult cases. In his last writings, he was grappling with one of the trickiest: the question of whether it is unfair for latecomers to a resource such as land, commercially valuable fish, or endangered species, to face tighter regulatory restrictions than their predecessors.[75] Claims that latecomers are entitled, as a matter of fairness, to behave as earlier generations were permitted to do are a common feature of domestic resource conflicts, and today of international negotiations over responsibility for reducing carbon emissions. Essentially, the latecomers' claim is that they are being denied their "fair share" of a resource to which others have been allowed access. That claim has considerable political appeal because people are prone to think in comparative terms; whether they think they are being treated fairly or not depends not just on their individual treatment but also on how they perceive that treatment to compare to the treatment of others.

Professor Sax was right to see the question of whether latecomers are unfairly treated by the imposition of new property restrictions over time as an important one deserving a thoughtful response. His response wasn't yet complete, but the picture was beginning to emerge. In *The Fair Share Concept in Takings Law*, his last published piece, he argued that despite the appeal of fair share claims, as a descriptive matter there are few contexts in which resources have been allocated on a fair share basis.[76] Drawing on insights from water law, he explained that most resources have been allocated effectively on a "prior appropriation," first-come-first-served basis.[77] In essence, we tend to let people use the commons until we notice, typically after the fact, that the commons has been used up.

As a practical matter, Professor Sax noted, that approach may be unavoidable. It is not possible to prospectively allocate "fair shares" if we lack knowledge at the outset of the level of demand a resource can sustain, or if the value we place on the resource might change unpredictably over time. Both of those features, of course, have been typical of environmental conflicts to date. Finally, and equally to the point, a "fair share" system

74. *Id.* at 64–65.
75. Sax, *The "Fair Share" Concept in Takings Law*, supra note 50, at 361.
76. *Id.* at 359.
77. *Id.* at 357, 363.

requires institutions with the authority to allocate shares prospectively. Such institutions are rare indeed in the United States, where resistance to centralized planning is strongly ingrained.

Professor Sax offered a dual answer to the latecomers' objections. First, he challenged the objectors to overcome the practical difficulties. Resource users who want to maintain future development opportunities should seek early planning exercises capable of identifying thresholds as a first step toward allowing the costs and benefits of those thresholds to be fairly shared.[78] That sharing might well be facilitated by market-based processes such as tradable emission permits or transferable development rights. Professor Sax had no objection to using markets to allocate whatever level of pressure on the resource was deemed acceptable by the public processes responsible for identifying collective values. He was not an opponent of markets, just an opponent of putting markets in charge of public decisions.

Second, Professor Sax challenged the notion that first-in-time systems are necessarily intuitively unfair.[79] He pointed out that such systems, where the governing rules are known from the outset, have been widely accepted. Western water users are not prone to complain about the prior appropriation system, which is explicitly based on a first-in-time approach.[80] Nor has unfairness been an important knock on allocation systems based on capture of resources such as wildlife or fugitive minerals.[81] If there is unfairness, then, it is not in the use of a priority approach but rather in late restrictions catching property owners by surprise.

I wish there had been opportunities for Professor Sax to probe this line of thinking more deeply. He may not have been quite right that prior appropriation isn't seen as unfair; there is some evidence that its rigid priority rules for cutting off junior users are rarely enforced precisely because of fairness concerns.[82] And as Professor Sax noted, the rigidity of state prior appropriation rules has been to a significant extent softened in the arid West, at least for major users, by the proportional cuts approach

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78. *Id.* at 362.

79. *Id.* at 366.

80. At least, major irrigators are not. In times of drought, municipal users whose junior rights are curtailed may well see the system as unfair to what they see as their more critical use. In ordinary times, though, only environmentalists see the system as unfair to their interest, largely because they were not allowed to capture instream rights during the early water rush.

81. There are plenty of other objections to capture rules, which tend to encourage an inefficient and sometimes dangerous scramble for the resource. But so long as everyone has an opportunity to join the scramble, capture rules aren't generally seen as unfair.

82. A. Dan Tarlock, *Prior Appropriation: Rule, Principle, or Rhetoric?*, 76 N.D. L. REV. 881, 883 (2000).

typical of federal water project operation. The point is not that his analysis of the fairness of allocation decisions was wrong, but that it was far from complete. There remains considerable room for discussion, and that discussion should be informed by data collection focused on real-life allocation choices. Professor Sax was certainly right to highlight the importance of the methods used to distribute scarce resources. It will be up to his successors to work out the full implications of distributional choices, with the care and thoughtfulness he would have applied.

C. An Obligation to Adapt

The distributional issues are closely related to the third major theme in Professor Sax's takings scholarship: the idea that the law should encourage adaptation both to new factual conditions and to new social values.[83] This theme echoes the "moral hazard" literature in economics.[84] The prospect of takings compensation, like insurance or public disaster relief, might have the unintended effect of discouraging property owners from taking steps to limit the risks to which they are exposed. The expectation of publicly funded disaster relief, for example, may increase willingness to build in a hazard zone. It is less intuitively obvious that the risks of economic loss through regulatory change can be foreseen or reduced, but Professor Sax consistently made the case that they could.

His most extended discussion of the need to encourage property owners to foresee and, if possible, avoid conflicts with public values came in his wonderful article *Property Rights and the Economy of Nature*.[85] There, he described the historical record as one of not compensating for even "the most unexpected and sweeping changes" in property law, such as the redefinition of nuisance in the wake of the Industrial Revolution.[86] The general rule against compensation for the effects of social and legal change "reflects a decision to encourage adaptive behavior by rewarding individuals who most adroitly adjust in the face of change."[87] In a world where change is seen as inevitable and often desirable, human and institutional adaptability ought to be encouraged and rewarded. Professor Sax noted that landowners have successfully adjusted to changing physical conditions and collective values directly, through changes to farming

83. Sax, *Property Rights and the Economy of Nature*, *supra* note 50, at 1455; Sax, *Land Use Regulation*, *supra* note 50, at 467–68.

84. Sax, *Property Rights and the Economy of Nature*, *supra* note 50.

85. *Id.* at 1447.

86. *Id.* at 1449.

87. *Id.*

methods and development practices which reduce environmental impact, and indirectly through investment pooling and diversification, which spread the risk of new regulatory restrictions.[88] A general practice of non-compensation, while seemingly harsh, in effect rewards those most able to adapt, and encourages creativity and adaptive behavior.

Professor Sax recognized that it is difficult for compassionate societies to maintain harsh transition rules. He conceded that adaptation would not always be feasible, especially for those caught up in unexpected transitional moments. He encouraged the use of non-constitutional softening measures, such as legislative grandfathering of established uses or regulatory phase-ins.[89] In his most recent takings work he went further, acknowledging that in deciding the constitutional issue courts can and should explicitly consider the rapidity, foreseeability, and timing of regulatory transitions, as well as the extent to which they single out a small group of property owners to bear the costs of regulation.[90]

D. Principles, Not Algorithms

I believe those three themes—appropriately accounting for collective values, ensuring fairness, and encouraging adaptive responses to change—sum up the most important substantive contributions of Professor Sax's lifetime of takings scholarship. But another key contribution was his careful analysis, measured tone, and acknowledgment of other perspectives. In a field often characterized by doctrinaire proclamations and "tribal" huddling on both sides of the issues,[91] Joe's scholarship stood out as a model of moderation. He openly conceded that takings cases were difficult because every one of the key elements is legitimately contestable. No one has the single "right" answer to where the boundary between individual autonomy and collective values should be placed, how distributional fairness should be evaluated and how rough a fit might be acceptable, or how rapidly adaptation should be demanded of property owners.

He would certainly tell us on all of these counts that we should not expect to find a simple mathematical algorithm for deciding whether compensation is appropriate. I think he would also tell us that struggling forthrightly to articulate principles for resolving these questions can provide

88. *Id.* at 1450.

89. *Id.* at 1451.

90. Sax, *Land Use Regulation, supra* note 50, at 467–68. I wish he'd cited my paper about the relationship between takings liability and transition events, but it's no surprise that I agree with the principles he articulated. Doremus, *supra* note 72, at 1.

91. Douglas A. Kysar & James Salzman, *Environmental Tribalism*, 87 MINN. L. REV. 1099, 1102 (2003).

an opportunity to identify and sort through our value differences in ways that are productive rather than destructive. Civil discussions that highlight differing perspectives and polite but forceful advocacy are the very essence of both the best scholarship and a healthy democratic process. Joe never thought takings cases could or should be easy, but I think he saw them as one way that we decide who we are collectively, based on individual input tempered by respect for the views of others. Academic scholarship is not formally a part of the process of identifying collective values, but it can provide crucial opportunities for civic discourse that eventually filters into and moderates the worst excesses of the political process.

As someone who gracefully straddled the line between careful scholarship and effective advocacy, Joe Sax provides a model that his successors would do well to emulate. His example helps us to see the nuances of difficult issues; understand that collective values are a legitimate counterweight to individual autonomy; appreciate the importance of struggling to explicitly articulate the competing principles that define fairness; and appreciate the importance of the temporal landscape, which makes a dynamic view of property rights both necessary and challenging.

CONCLUSION

I hope this brief essay has provided some sense of three ways that Professor Sax has shaped not just the past but the future of law: through his generative role in formation and definition of a field that, while no longer new, is constantly in an exciting (if stressful) state of flux; through his work as teacher and mentor, inspiring and encouraging others to carry on, extend, and constantly challenge his work in the academy and in the trenches; and through his elegant, creative, forceful, but never doctrinaire scholarship at the intersection of public and private interests in resources. As one of many who has benefitted from encounters with Joe in all three of those roles, I am personally much in his debt for his contributions to the profession, to individual careers including mine, and to the evolving societal understanding of the complexities and interrelationships of property rights.

If I may be so bold as to speak for everyone at this year's takings conference, Joe, we miss you. A lot. But we are extraordinarily grateful for the time we had with you. To honor your memory we will continue to struggle with the tough problems you helped us identify; we will never stop searching for creative ways that law can help solve emerging societal problems; and we will take the time and make the effort to help others follow in our (and your) footsteps.