A Public Lecture by Joseph L. Sax,* Environment and Its Mortal Enemy: The Rise and Decline of the Property Rights Movement

I. INTRODUCTION

This public lecture, given by Professor Joseph L. Sax, took place on Wednesday, April 14, 2005, and was sponsored by the *William S. Richardson School of Law's Environmental Law Program.* The Environmental Law Program ("ELP") has hosted several prestigious scholars and environmental law practitioners as distinguished visiting faculty. In addition to enriching the learning experience of students through their teaching and mentoring, visiting faculty share their expertise with Hawai'i's broader legal and public interest communities. In Spring 2005, ELP was honored to host Professor Emeritus Joseph L. Sax, a nationally renowned expert on the public trust doctrine, takings jurisprudence, and public land and water issues.

II. OPENING REMARKS

Professor Denise Antolini:

The Environmental Law Program is truly honored and delighted to have Professor Joseph Sax here tonight as a distinguished visitor and to have his wife Elli back in Hawai'i. Joe was born in Chicago, received his A.B. from Harvard in 1957, and his J.D. from the University of Chicago in 1959. After working for several years at the Department of Justice under the Eisenhower Administration, Joe began his long and distinguished teaching career at the University of Colorado from 1962 to 1966. He moved to the University of Michigan from 1966 to 1986, and then he made the right move and came to Boalt Hall where I was a law student. I was so delighted and thrilled in my third year to have Joe at Boalt and was lucky to be able to take one class from him. Like myself, many of you have had a class with Joe in your lifetime and I think you would share my comment that once you've been a student of Joe Sax, you always treasure that opportunity.

A little bit about Joe's scholarship; it's remarkable, it's prolific, it's profound, it's lively, and sometimes revolutionary. Closer to home, his

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seminal 1970 article on the public trust[1] became the cornerstone of the Waiāhole water rights decision.[2] And for those of us here who are water groupies, we know that *Waiāhole* was an absolutely landmark decision and Joe's scholarship really paved the way for that decision.

Joe's teaching is legendary. He's brilliant yet accessible, challenging but welcoming of student ideas. His commitment to public service is unparalleled. He steadfastly worked for many environmental organizations. He also did a stint in the Clinton Administration working for Bruce Babbitt.

Lastly, I want to share with you a comment that was made at a conference of environmental law professors in San Francisco. Annually we gather, and this year it was in San Francisco. There was one particular panel on the evolution of environmental law and Joe was the featured speaker. And, really, people came because of Joe and his pioneering role in the field. Richard Lazarus[3] from Georgetown called Joe: "Our rock star." And with that please welcome Joe Sax.

III. LECTURE

Professor Joseph L. Sax:

You heard a number of things from tonight's introductory comments about the Environmental Law Program. Of course, these are the comments of insiders. But let me say something from the perspective of an outsider. It is true that the Environmental Law Program here is much admired by people at mainland law schools. It is really a remarkable program and a remarkable faculty. I want to say briefly that it has been a great pleasure for me, and a wonderful opportunity, to be able to teach a course here. I have been enormously impressed by the students, by their knowledge, their involvement, their engagement, and their liveliness. It has been an entirely positive and wonderful experience. If I didn't have to grade an exam it would be perfect.

Let me now turn to the order of business for tonight. Just about 100 years ago, in 1904, the state of New York, in response to the decimation of the beaver population as a result of the fur trade over the previous two centuries, passed a statute that said "[n]o person shall molest or disturb any wild beaver or the dams, houses, homes, or abiding places of the same."[4] Following that, the wildlife program reintroduced a population of beavers into several places

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[1] Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

[2] *See generally In re* Water Use Permit Applications, 94 Hawai'i 97, 9 P.3d 409 (2000).

[3] Professor Lazarus teaches environmental law, natural resources law, Supreme Court advocacy, and torts at Georgetown University Law Center.

[4] *See* Barrett v. State, 116 N.E. 99, 100 (N.Y. 1917) (quoting 1904 N.Y. Laws, c. 674, § 1).

in the state in an effort to restore the population. Not surprisingly, the beavers came out of a particular river where they had been planted and started chewing on some trees that belonged to a man named Barrett who harvested trees for a living. Mr. Barrett was quite distressed, as you might imagine, by the behavior of these beavers. He hired a lawyer who was a fairly imaginative fellow, who said that since the beavers had been planted by the state, they should be viewed as agents of the state of New York. And, in their capacity as agents of the state of New York, they had taken away his trees and for that reason Barrett had to be compensated.

This case went up through the court system in the state of New York and ultimately the court decided against Barrett.[5] The justices wrote an extraordinary opinion, one of the really remarkable and most interesting opinions ever written in this field. I want to quote to you one very brief paragraph from it:

> Wherever protection is accorded, harm may be done to the individual. Deer or moose may browse on his crops; mink or skunks kill his chickens; robins eat his cherries. In certain cases the Legislature may be mistaken in its belief that more good than harm is occasioned. But this is clearly a matter which is confided to its discretion. It exercises a governmental function for the benefit of the public at large, and no one can complain of the incidental injuries that may result. . . . The police power is not to be limited to guarding merely the physical or material interests of the citizen. . . . The eagle is preserved, not for its use, but for its beauty. The same thing may be said of the beaver.[6]

This opinion set out a number of striking and important principles. First, that we as members of the community have certain rights. And, in this case, rights to one of the benefits of nature: the presence of wildlife. Second, that in order to ensure and protect these benefits, the legislature needs to, and is entitled to, protect habitat, and not just the physical creatures that are the subject of the legislation. And third, and most importantly, that affording this protection inevitably imposes some burden on landowners and other property owners since we have to protect wildlife where it is found.

Now, it is interesting that by the time this case was decided, in the period shortly after the first World War, we already had public parks, we had public refuges, we had national forests. And, the court makes clear that for all their importance and their benefits that this, what you might call the enclave theory of protection of environmental resources, cannot do the job in and of itself; that protecting the natural services in the environment implicates a more pervasive form of land management than can be accomplished simply by setting aside certain public areas.

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[5] *Id.* at 101.

[6] *Id.* at 100-01.

In any event, as we have learned in other settings, setting aside public refuges can never be adequate to do the job. It is always a partial solution because of what one might call the frontier problem. And, just as an example, I think of the case of *Christy v. Hodel*,[7] about which I will say a few words in a moment. In that case, a man had obtained a lease to raise sheep on land that happened to be Indian reservation land right on the eastern edge of Glacier National Park, which is a refuge for the grizzly bear. And, to no one's surprise, or should be to no one's surprise, the grizzlies walked over the property line of Glacier Park and started eating the sheep. Of course, if they had moved the boundary of the park another hundred yards or another thousand yards and put the sheep just next to it, the bears would simply have moved down there. So there really is no way to deal with these problems simply by setting artificial boundaries, as important as they are.

Another important implicit teaching of the *Barrett* case is how imperfectly conventional justifications about the nature of ownership and property rights fit with the services that natural systems provide: whether they're benefits arising from wildlife other than as an economic good or the benefits that arise from the bioproductivity of a wetland. These benefits do not fit easily, in fact it seems in many ways that they don't fit at all, with the conventional notions of ownership. For example, the conventional ideas of first possession, or the more well known Lockean notion of ownership being justified by producing a benefit through mixing one's labor with the land. While wildlife and their benefits are inextricably connected to land, they are not attributable in any way to any labor or effort of human possessors on the land. Indeed, one might say the opposite is the case: that they thrive despite the efforts that owners usually put into the land. So there is a poor fit between our conventional notions of ownership, and why and how it's justified, and our concerns about protecting natural systems.

Another striking thing about the *Barrett* case is its provenance and its history as an exemplar of what Justice Scalia in the famous *Lucas* case called the "background principles" of property law.[8] The *Barrett* case itself, as I mentioned when I started, goes back nearly a century and it cites in its support New York wildlife protection laws going back to 1705.[9] So it would be hard to find a more modern and more full-bodied spelling out of the entitlement of legislatures to recognize public rights in the protection of habitat. Or a more emphatic rejection of the economic losses thereby engendered as a violation of property rights. That's old law and *Barrett* is not an unusual case, but a conventional case of its time.

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[7] 857 F.2d 1324 (9th Cir. 1988).

[8] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

[9] *Barrett*, 116 N.E. 100.

It's out of this history that I devised the title that I gave to my talk tonight: *Environment and Its Mortal Enemy*. For the modern property rights movement has in effect urged the judiciary to repudiate the background principles upon which our law has long rested, and to advance a radically novel version of private property rights and of compensable police power regulation. The *Barrett* case illustrates a foundation precept of modern environmental protection and is a component of the background principles of our legal system. In this respect, one may truly say that the property rights movement—and I don't mean property in general or property rights in general, but I mean this particular movement which has been so active in litigating against environmental protection cases, as it is presently constituted—is a radically revisionist version of American law. And it is in that respect environment's mortal enemy.

For example, while the *Barrett* case along with the property jurisprudence of Justice Holmes recognizes that preservation actions that unduly oppress individuals could call for a different result, and could justify claims for compensation,[10] the current property rights movement has urged that any diminution of value caused by regulation of other than nuisance-like activity is compensable, a position it has promoted through its view of the temporary takings doctrine. Many of you in the audience know the *First English* case[11] and its articulation of that doctrine and of the so-called parcel-as-a-whole or denominator issue, a position that was clearly articulated by the lawyer for the property owner in the recent *Tahoe-Sierra* development moratorium case.[12] Those doctrinal claims assert that any loss of value of property for any period of time, even a very short period of time, or any loss in the value of property even though it is not a loss of the whole property, constitutes a compensable act. This view is entirely at odds with the tradition in American property rights cases.

The same is true of an effort to radically restructure property law relating to the so-called property salvage or property protection theory upon which the grizzly bear case that I mentioned earlier, the case of *Christy v. Hodel*,[13] is based. In that case when the grizzly bears came and started eating the plaintiff's sheep in violation of the law, the plaintiff shot the grizzly bears and argued that even though that was a violation of the statute, that there was a federal constitutional right to protect your property. Since property was being threatened by the grizzly bears, the owners argued they had a constitutional right to shoot the grizzly bears if that was necessary to protect their property.

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[10] Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

[11] First English Evangelical Lutheran Church v. County of L.A., 482 U.S. 304 (1987).

[12] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

[13] 857 F.2d 1324 (9th Cir. 1988).

Now, as an example of how radically removed that theory was from the background principles of American property law, the claimants were reduced to citing as authority for their constitutional theory a case which in general has been utilized by conservatives to berate activist liberal judges, the case of *Griswold v. Connecticut*,[14] the Connecticut contraceptive case in which the Court relied on an asserted spirit of the Constitution, rather than any constitutional text or historic understanding.[15] My point is only that the claim of the owners in *Christy* was so at odds with any established constitutional doctrine that they had to reach out for the very sort of activist constitutional interpretation they are usually so eager to condemn. Fortunately, their claim was rejected.

Finally, as yet another example of radical revisionism, I would point to a case that has gotten a good deal of attention in recent months, the so-called *Tulare Lake* decision.[16] That was an endangered species case in which agricultural irrigators were required to take less water in order to protect downstream species needs. They argued for compensation on the ground that their water rights had been taken. They were granted compensation by a trial court, the Court of Federal Claims, in a case that is based on a fundamental rewriting of established California water law. In my view, and I think in the view of most other knowledgeable water specialists in California, the decision was entirely at odds with established California water law. Nonetheless a trial judge held that it was a taking of property and made an award of about sixteen million dollars. Despite the request of the state of California, among others, to appeal the case, the Bush Administration decided it would not appeal and is paying the compensation.

Much takings litigation is founded on claims of regulation that imposes oppressive burdens. Let me turn to that question. It should be noted that contemporary law does routinely respond to extreme or oppressive burdens, as the *Barrett* case suggested that it should. I would point perhaps most notably to the use of the habitat conservation plan approach under the Endangered Species Act,[17] which was strongly promoted during the time of Bruce Babbitt's tenure as Interior Secretary. This is a provision of the Act that permits some impact on protected species and seeks to find an economically workable plan of protection that permits both use and development as well as conservation and restoration of habitat in order to prevent oppressive burdens. The idea is to protect the environmental resources as the law mandates, but at the same time to minimize as much as possible the

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[14] 381 U.S. 479 (1965).

[15] *See id.*

[16] *See* Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313 (2001).

[17] *See* 16 U.S.C. § 1539(a)(2)(A) (2005).

economic burdens on landowners. Hundreds of habitat conservation plans designed to protect against oppressive burdens have been put into place with the collaborative effort of property owners in order to avoid reaching the compensable taking boundary suggested long ago by Justice Holmes who regularly cautioned regulators against going "too far."[18]

Another example of 'burden mitigation' is the voluntary policy of compensating stock losses resulting from the reintroduction of wolf populations in the Northern Rockies Ecosystem, funded by conservation organizations and private communities to reduce the economic burdens on ranchers of wildlife restoration programs. Similarly—using the Endangered Species Act as an illustrative case since it has been the most controversial of all these laws—there are provisions in the Endangered Species Act immunizing individuals from liability if they are acting to protect human safety.[19]

In addition, one can find a variety of instances in which the public has shown itself willing to share the burdens imposed by environmental protection. A famous example is our primary modern public trust case, the *Mono Lake* case, in which the city of Los Angeles, which had been taking water for the purpose of meeting municipal water needs, was required to cut back very sharply its diversions out of Mono Lake.[20] The state appropriated some eighty million dollars to be made available if and when Los Angeles would use that money to institute water conservation policies to substitute for the water that it lost from the Mono system. The state was willing to tax itself as well as the citizens of Los Angeles, but to do it in a way that would assure that Los Angeles did not just go to some other place to get its water, where it would do as much or more environmental damage. That is another response to the oppressive burden problem.

More recently, California has made money available for restoration efforts in the Salton Sea, in the southernmost part of the state. In order to reduce agricultural irrigation use of water and make some water available for transfer to growing urban areas in southern coastal California, the state is willing to bear part of the burden of protecting listed species in the Sea, rather than putting the economic burden all on irrigators.

Having said that there is a long tradition of protecting wildlife and wildlife habitat, and that this tradition rests on the same principles that are needed for modern environmental protection of endangered habitat, one may ask why we find ourselves embroiled in so much controversy over modern environmental laws, and in particular the Endangered Species Act? I think there are several

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[18] Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

[19] *See* 16 U.S.C. § 1540(a)(3), b(3) (2005).

[20] Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709 (Cal. 1983).

explanations. First and most importantly, there has been a huge increase in land development, sharply reducing habitat. Most of the coastal development has been a product of post-World War II activity and much of it of post-1960 development so that much, but not all, of the intense pressure on wetlands has been the result of this tremendous desire of people to develop on and to live on the coast.

A related development is that people have shown a very strong desire to move into quite remote places, such as rural forested areas. People move into these areas, but they bring urban values and urban demands with them and they create a very bad fit with nature.

Third, our knowledge of the value of biological diversity has considerably increased the ambit of desire for protection. We've gone far beyond traditional species like the eagle, the grizzly bear, the peregrine falcon, and the beaver, to many species that are highly important from a biodiversity perspective but are not charismatic and thus generate less public sympathy and understanding.

I want to conclude with some comments about the last aspect of my title. It says *The Rise and Decline of the Property Rights Movement*, and I am sure some people looked at the title and said, 'the property rights movement is declining, really?' It certainly is not acting like it's declining. It's pretty vigorous and it has in recent years had a number of very important victories, most recently in the *Tulare Lake* case[21] and in a number of important cases in the United States Supreme Court that are very familiar to virtually everybody in this room: the *Nollan*[22] and *Dolan*[23] cases, the *Lucas*[24] case, the *Loretto*[25] case, *Palazzolo*,[26] and *First English*,[27] to name only some of a fairly long list of cases that we have seen since the early 1980s.

But I believe that there has now been a major turn taken in the United States Supreme Court and what I am about to say rests on my reading of the very interesting opinion of Justice Stevens for a six to three majority in the recent *Tahoe-Sierra* case.[28] On its specific facts the case was not very hard. It involved a planning moratorium for Lake Tahoe. The Court only looked at a relatively brief moratorium and the argument in the case made by the property

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[21] *Tulare Lake*, 49 Fed. Cl. 313.

[22] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

[23] Dolan v. City of Tigard, 512 U.S. 374 (1994).

[24] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

[25] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

[26] Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

[27] First English Evangelical Lutheran Church v. County of L.A., 482 U.S. 304 (1987).

[28] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

owners was that any moratorium was an unconstitutional taking of property.[29] That's a loser.

But what was interesting and important about the case is not simply that planning moratoria were upheld, but that Justice Stevens's opinion went far beyond merely upholding the moratorium, and that he got not only a concurrence but built an alliance with both Justice O'Connor and Justice Kennedy—but most particularly with Justice O'Connor who tends to be the crucial justice in many of these cases. If you go back and look at the case, I think you'll see that Justice Stevens cited Justice O'Connor on at least seven different occasions in his opinion. I believe the case really marks a kind of watershed in the Court's modern takings doctrine. I think the majority of the Court, and not just a mere majority, has finally given up on the leadership that Justice Scalia was exercising in trying to develop a categorical approach, trying to find some relatively hard and fast rules to govern constitutional property rights cases. I think there was a strong willingness on the part of both Justice Kennedy and Justice O'Connor, who are really quite strong advocates of private property rights, to let Justice Scalia take the lead in these cases to see where things would go, and to see if he could bring a degree of rationality and clarity to an area that everybody from one end of the spectrum to the other has viewed as complicated, puzzling, and confusing. When you read carefully the *Tahoe-Sierra* case you can see that on one issue after the other they've effectively given up.

Prior to the list of cases that I mentioned earlier where the property rights folks have prevailed, the leading case was the *Penn Central* case of 1978, the historic preservation case in which the Court said you have to look at a variety of factors, you have to look at these cases in a very fact specific way, you have to decide whether the owner's reasonable expectations have been disappointed, what the government was trying to do, and so forth.[30] That's a test that turns out to be in fact quite deferential toward legislative decisions.

The Court hadn't talked much about *Penn Central* in recent takings cases but *Tahoe-Sierra* over and over and over again comes back to trying to revive Penn Central as the leading regulatory takings precedent. I think that development foreshadows a more deferential case-by-case analysis. Also, the Court expressly affirmed the property-as-a-whole rule. This is a major defeat for the property rights movement. *Tahoe-Sierra* also represents a very strong defeat on the temporary takings issue, the so-called *First English* issue, in which the position that has been taken by property rights movement advocates had been that a temporary taking means a loss of value for any period of time even a short period of time. The Court in *Tahoe-Sierra* said that is not what

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[29] *Id.*

[30] Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104 (1978).

First English means; *First English* is a remedy case. First, you have to decide if there was a taking according to *Penn Central* standards, or the physical invasion standard.[31] First you decide that. Then, if you find there is a taking by that standard, and only then, do you look to *First English* and say you have to compensate for that period of time. So it is purely a remedial case.

In any event, the major point is that the so-called *First English* standard and the property-as-a-whole doctrine were two major issues for the property rights movement and they were soundly rejected in this six to three opinion, while there was a revival of the *Penn Central* standard. So I think that we are going to see quite a different approach by the Court except in what I would call the 'abuse cases,' cases like the *Monterey* case where somebody wants to develop their land and keeps coming back to the local government, and the local government says we don't like that plan, come back again.[32] And after repeated delays, you say to yourself 'they're never going to let this guy do anything.' The Court does not like that and they are not going to like that whatever the numbers are. But other than what I would call these abuse cases, or what you would think of as government expropriation cases, I think the Court is really taking a turn.[33]

So now I am really going to go out on a limb and I am going to tell you what I think the Court is going to do with the takings cases that they have before them this term. They have two really important takings cases, one from Hawai'i as I am sure all of you know. But they actually have four cases before them. I predict that the property rights people are going to lose all four cases. That's not to say they're going to lose everything on every possible issue. In the Hawai'i case, *Lingle v. Chevron*,[34] I feel quite confident that the majority will disavow the so-called *Agins'* test,[35] the substantially advance test, which has been much talked about, much cited in cases but not applied. It's a test that invites the court to do more, to look more closely, to be more evaluative of legislative decisions, to be less deferential, to look at how effective they are, how much of a public interest they are. I think it is going to go bye-bye.

Okay. Case number two. I am equally confident that the Court will not give a newly expansive reading to the public use doctrine in the *Kelo* case, the Connecticut public use doctrine case.[36] They may say some things like you cannot really do terrible things but the notion that they are going to open up

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[31] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

[32] *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999).

[33] The decision in *Lingle v. Chevron U.S.A. Inc.*, handed down shortly after this speech was delivered, is consistent with the views expressed here. *See* 544 U.S. 528 (2005).

[34] *Id.*

[35] Agins v. City of Tiburon, 447 U.S. 255 (1980).

[36] Kelo v. City of New London, ___ U.S. ___, 125 S. Ct. 2655 (2005).

the public use issue for substantial inquiry—don't believe it for a moment. They took a strong view about it in another Hawai'i case, *Midkiff*.[37] The issue was powerfully raised in the World Trade Center case some years earlier.[38] And despite the problems with the public use doctrine, as in the *Poletown* case in Detroit,[39] they are not going to touch it in any significant way in my view.[40]

The third case, I feel almost as confident that they will not permit the property owners a second bite at the apple. This is the San Francisco hotel case, the *San Remo* case, in which the owners made a takings claim in the state court claiming that under the state constitution their property was taken.[41] They went all the way up to the state supreme court, lost,[42] and now they want to come to federal district court and make a federal constitutional claim.[43] This is what people sometimes call a second bite at the apple type case. They are not going to win that either, I don't think.[44]

Finally, there is another procedural property rights case, the *Orff* case,[45] which is actually sort of a version of the *Tulare Lake* case.[46] You've got farmers who had to reduce their water diversions in order to meet downstream environmental standards, and they are claiming that they have standing to make this claim even though the water is in the name of the water district. This comes up as a third party beneficiary case. I think they are going to lose. The issues before the Court are not important in terms of property doctrine but it is a takings case and the underlying issues are important in terms of the constitutional status of water rights, but I think they are going to lose on standing to sue.[47]

That's what I think the law is in terms of *Tahoe-Sierra*, that's where I think the law is going to go. So I think despite the best efforts of the "mortal enemies," they are gradually losing ground and the property rights

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[37] *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

[38] *See* Courtesy Sandwich Shop, Inc. v. Port of N.Y. Authority, 190 N.E.2d 402 (N.Y. 1963), *appeal dismissed*, 375 U.S. 78 (1963).

[39] *See* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

[40] However, the Court was much more sharply divided than I would have predicted. *See Kelo*, ___ U.S. ___, 125 S. Ct. 2655.

[41] San Remo Hotel L.P. v. City and County of S.F., ___ U.S. ___, 125 S. Ct. 2491 (2005).

[42] *Id.*

[43] San Remo Hotel L.P. v. City and County of S.F., 41 P.3d 87 (Cal. 2002).

[44] San Remo lost in an unanimous decision. *San Remo*, ___ U.S. ___, 125 S. Ct. 2491.

[45] Orff v. United States, ___ U.S. ___, 125 S. Ct. 2606 (2005).

[46] Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313 (2001).

[47] The Court unanimously denied them standing-to-sue. *Orff*, ___ U.S. ___, 125 S. Ct. 2606.

movement's fortunes are declining although they are far from exhausted. Anyway, that's the way I see it. Thanks very much.

IV. QUESTION AND ANSWER SESSION

Professor Arnold Lum:

Let me take you away from takings and property rights and back to the public trust doctrine. In my view, the doctrine is amongst those background principles of property law. Recently in *In re Wai'ola O Moloka`i*, the Hawai'i Supreme Court adopted an APA standard of review.[48] In my view, challenges under the public trust doctrine should be reviewed de novo and I cite to you *Greylock*.[49] How can those of us who wish to correct the situation get the courts to adopt a *de novo* review standard?

Professor Joseph L. Sax:

The last thing I want to do is comment about the administration of Hawai'i law and particularly about cases that I have not read. Let me just say it this way. As you probably know, I wrote about the *Mount Greylock* case[50] in my article back in 1970, so I do think it is an important case and I think it is a good model of public trust administration. How it exactly applies to the case you are referring to, I don't know. My own view about the trust, and I think that this is the position that your court took in the first *Waiāhole Ditch* case,[51] is that the public trust is not only authority for development administrators to act but that it creates a positive duty, and a strong duty, and the effective question the court has to ask itself is: Did the agency in question act affirmatively to implement the duty that it had? I believe in the *Waiāhole* case that the court quoted the statement from the *Hudson River* case that you can't stand by as an "umpire passively calling balls and strikes."[52] That's one of the famous statements in early environmental cases. I think that's right and I think it does suggest a more affirmative approach to administrative action than is the usual highly deferential position. I don't know if that makes you happy or unhappy.

Professor David Callies:

Joe, I have to ask. Was *Lucas* an abuse case?

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[48] *In re* Wai'ola O Moloka`i, Inc., 103 Hawai'i 401, 83 P.3d 669 (2004).

[49] Gould v. Greylock Reservation Comm'n., 215 N.E.2d 114 (Mass. 1966).

[50] *Id.*

[51] *In re* Water Use Permit Applications, 94 Hawai'i 97, 9 P.3d 409 (2000).

[52] *Id.* at 143, 9 P.3d at 455 (citations and quotation marks omitted).

Professor Joseph L. Sax:

That's a really good question. It is not an abuse case of the type I was focusing on. I think that the Court, because the whole area had been developed and this was the last remaining piece of property, just couldn't see the merit of it. In that sense at least, I think it was a very weak case and of course as you know very well, when it was all over the state got rid of the restriction. So it was a pretty weak case. But I agree that it was not the kind of case that I think is at the heart of things. I would say that *Lucas* was sort of the highpoint of Justice Scalia's influence on the Court. And I think it is such a puzzling case for people because there was said to be a total loss of value and that was not a contested fact although it probably wasn't true. And then the question is what if it was 95%? It is such an odd case, this 'total loss of value.' So I never understood quite where to fit it doctrinally. I wrote a long piece in the Stanford Law Review about the case and what I thought.[53] I view the case as one that showed how little appreciation the Court has for what environmental protection is really about.

Professor David Callies:

Without question the Court is not very sympathetic to environmental issues most of the time. But the Court in *Lucas* mostly uses the term "economically beneficial use" rather than "value" in the context of *per se* takings. Granted, as the Court said, the regulatory taking battleground will primarily be over partial takings, where *Penn Central* applies. We nevertheless in Hawai'i have classifications like the state Conservation District which effectively prohibit virtually all use of land. What about these?

Professor Joseph L. Sax:

I am really glad you raised this. I take your point. That is, I think it is partly why I focused on the oppressive burden issue in the *Barrett* case. I think if you get a case in which someone is pretty much wiped out, I think those kinds of cases will continue to be troublesome to the Court. If you came back to the Holmesian standard which is how much is too much, I personally feel that those of us who see ourselves as being strong supporters of environmental protection could live with that. That is, that you want to give a message to the regulatory community that we don't want to put people out of business, we don't want to wipe people out, we don't want to create these very unfavorable economic situations. That is why I gave the list of mitigation examples. I give Babbitt a lot of credit. His notion was that we are under attack; the Act is under attack. It was the Gingrich era. They were really

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[53] *See* Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433 (1993).

going after the environment, among other things. And the question was: How do you save the Endangered Species Act? And Babbitt said, look we've got to take this habitat conservation plan process, which was essentially a dead letter, and sit down with these people and say, you've got to do something to satisfy the Fish and Wildlife Service or the National Marine Fisheries Service or whatever, that you are not going to wipe out this species, and that we're going to work with you and try to figure out how you can carry on your business in some effective way and still meet the legal requirements. And they did it in case after case after case. So, in my view, that is the right way to do it. And the more you move to this edge of just wiping people out, the more the Court is going to get down on you. I know it is a very undoctrinal way of talking about it. But if you stand back from all these cases, I think that is where you come out. I understand what you are saying, if it is abuse cases plus these economically overwhelming cases, that is another category that the Court is probably going to be very sympathetic to the property owner. I would strongly agree with that and I think it's a good message to give to the regulatory community.

William Tam:

I'm glad to hear that we are getting back toward a regression toward the medium. What advice would you give to the government and people in the government about giving notice about conduct to avoid abuse cases? It seems to me that the lessons are not learned by a lot of the regulators and if they just went back and read a little history they'd know not to go too far sometimes and would save us the trouble of these educators.

Professor Joseph L. Sax:

Well, I think you've said it. I think that is the right advice. I think that sometimes you get people in the regulatory community who are overzealous and who don't understand that there has to be some kind of moderation or some kind of search for accommodation. The great challenge is that we are trying to restore these environmental services that natural systems provide for us and figure out a way to do that and still promote the real needs of human communities. And there are lots of ways to do that. Sometimes they're pretty simply. You get these turtle egg cases, do you have those in Hawai'i? I mean turn out the damn lights. Or you get cluster things like you don't have to build in the wetlands, you don't have to cut down all the trees, sometimes you make more money to do it that way, leave some open space. There are a lot of things where with a little imagination these problems can be dealt with. As I said, I thought Babbitt understood that. He was very strong in promoting environmental resources; he never tried to put pressure on the Fish and

Wildlife Service or anything. It was always 'let's see if we can find some way to resolve this problem.'

Diane Drigot:

As a non-lawyer but as a seasoned land use and natural resource program manager at a military installation, I wanted to know your opinion. Do you think there is a link between the trend towards outsourcing in the federal government and this property rights movement? From where I sit, so far the argument has held up that management of public trust resources are inherently governmental functions built into laws saying that you cannot outsource the positions that manage these resources. But there are trends, like there are whole military bases being run by corporations. My point is, do you see any sort of parallel between this outsourcing tendency and the property rights movement and any reason for optimism on the benefit of resources?

Professor Joseph L. Sax:

That is an interesting problem. It's not one that I've ever encountered. It is true that a lot of laws are sort of focused on the assumption that you are going to have public officials managing these things and they are focused on obligations of public officials. And I can see the possibility of some of these obligations sort of slipping through the net when you turn to private people doing things that traditionally you never thought private people would do, like run prisons. I have to tell you that I've never encountered it so I don't really think I have light to shed on it.

Professor Carl Christensen:

The Endangered Species Act is also under attack from a different direction, from the Commerce Clause challenges. We in Hawai'i, something like 90-95% of our plants and animals are endemic to the state. Do you have any thoughts on where that is going?

Professor Joseph L. Sax:

I'm glad you raised that because it is another piece. The Commerce Clause approach is another line of attack that the property rights folks have been using and have had some success. I guess all I can say is that I'm not as focused on those issues as I probably should be and I am not as focused on those issues as I am on the more direct property rights issues but my sense is that the Court is narrowing the traditional scope of the Commerce Clause and there is a kind of warning sign out there that you better think about Commerce Clause implications in a way that people did not traditionally have to do.