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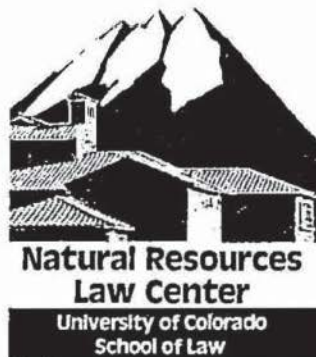
Natural Resources Law Center

Occasional Papers Series

THE RIGHTS OF COMMUNITIES:
A BLANK SPACE IN AMERICAN LAW

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Professor of Law
University of Michigan

Presented July 11, 1984
Distinguished University
Professor Lecture
University of Colorado, Boulder



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These remarks are a modified version of a presentation given in the Distinguished Mellon Scholar Lecture Series of the University of Pittsburgh on November 3, 1983 under the title "This Valley Shall Not Die: Managing Resources As If People Mattered."

THE RIGHTS OF COMMUNITIES:
A BLANK SPACE IN AMERICAN LAW

Back in 1980, to aid General Motors, which wanted to build a new factory in Detroit, the City condemned and tore down a long-established, close-knit, ethnic neighborhood known as Poletown. Whether Detroit's desperate interest in maintaining jobs at that time, or General Motors' insistence on that site as the preferred location for its new facility, ultimately justified the condemnation is, for my purposes, less important than the fact that the law offers to people in that situation no opportunity to object to anything other than the economic losses they suffer when an established community is destroyed.

Neighborhood value is not even measured indirectly, for the constitutional test of just compensation includes nothing but the economic values that have been acquired. The Poletown case, which was the subject of controversial litigation in Michigan, is only one recent example of a familiar problem that receives very little attention in the legal literature - the values inherent in the existence and vitality of communities.

To be sure, insofar as community issues are seen as rising to the constitutional level, the problem has attracted a fair amount of commentary, as in the Amish school case, the right of association litigation involving the NAACP, and even in the peculiar case of Indian sovereignty. But at the more commonplace level at which most of us think about community and ourselves as members of community, the notion of community entitlement is virtually empty space in the legal constellation. Indeed, there isn't even an accepted or commonplace legal definition of community.

I don't mean by this to suggest that the system has been entirely indifferent to particular claims that arise in specific situations. The decades-old acquisition of the water in the Owens Valley by the City of Los Angeles which left that community literally high and dry has been a continued source of outrage and embarrassment that has generated several books and even a popular movie. Relocation benefits have been provided in the context of urban renewal, the most familiar modern setting in which the destruction of communities has been a visible issue.

There are many other particular examples. Congress established a law not many years ago to replace lost income for lumberers in towns affected by the establishment of Redwoods National Park in California. The Alaska Lands Act of 1980 permits special uses of federal lands by native peoples to continue some subsistence economic activities. Large scale water diversion projects often provide area-of-origin protection designed to assure that source areas will not suffer the fate of the Owens Valley. While these particular instances reveal a widespread sense that community is important, and a willingness to protect community interests in a given case, there is no principle in the law to assure that such interests will be protected when, as is often the case, the people affected are unable to generate the political support necessary to induce an act of administrative or legislative grace.

Why does this situation persist? I think the reasons are not very difficult to discover and are more than merely administrative difficulties in defining community rights. The first reason is that any notion of community is strongly tied to localism and the chips

are strongly stacked against localism in the American legal system. It is a standard rule that a city has only the powers with which the state endows it, and that the authority of the states themselves is subordinated to that of the federal government under the supremacy clause of the Constitution.

A second and related reason is that localism is strongly tied to parochialism in our history. Among the most familiar instances of demands for local autonomy are the states' rights movement, tainted by its association first with slavery and more recently with resistance to the civil rights movement; local "know-nothingism" evidenced by periodic assaults on the right to learn, to teach and, to read; and by the unending economic efforts of states to discriminate against interstate commerce.

This centralizing hierarchy of our legal system often serves us well in practice. Surely it is desirable that every town is not empowered to veto a toxic waste repository within its boundaries, because every town would veto it. It is likewise desirable that exclusionary zoning is subject to state intervention. And it is a good thing that the fate of Yellowstone National Park isn't left in the hands solely of the people in these states where the Park is located.

There is a powerful tension, both in American society and in the American legal system, beneath these commonplace observations. On one side, though most of us are reluctant to say it openly or admit it directly, our deepest commitments and most important associations flow to the national community. Our identity as Americans carries more weight than does our identity as

citizens of any state or region. I suggest that one can casually test this assertion from almost any point on the political spectrum by reference to the centrality attached to national values running the gamut from patriotism to freedom of speech. In addition, one can observe the readiness of a President, even one as tied to the rhetoric of localism as Ronald Reagan, to treat issues like quality of education or the unemployment rate as obvious issues of national importance. It doesn't seem odd to us that a President would, or even politically must, concern himself with such issues. But it's precisely the fact that it doesn't seem odd or inappropriate that reveals just how central and decisive the national community has become in our thinking and in our political life.

At the same time, it is not surprising that in the midst of this highly developed national consciousness, there is a continuing, very strong yearning for local autonomy and self-determination. One notes, for example, current demands in the Great Lakes region for recognition that the waters in the Great Lakes Basin, which seem to be coveted by people elsewhere, belong to the people there and should not be exported as if they were national resources. We have recently seen the rise and fall of a recurrent phenomenon, most recently called the "sagebrush rebellion," involving a demand by some western states for ownership or control of federal public lands by the states in which they lie. There has also been a resurgent desire for state or local vetos over federal projects for things like offshore oil and gas development or the siting of national waste repositories.

The conventional means of dealing with these competing forces has been an effort to carve out separate domains of authority along political subdivision lines, using doctrines such as the Commerce Clause, preemption and the Supremacy Clause to establish legal boundaries between the nation and the states, or in the personal freedom cases -- the Amish School case, for example -- assimilating community claims to personal liberties.

Such efforts, in my view, are not sufficient or adequate to deal with the problem that this tension raises. In the settling of disputes over the siting of a nuclear storage facility, sagebrush rebellion issues, or the fate of national parks or wilderness, such analysis is hard-pressed to accommodate local interests when confronted with the facts of nationalization of the economy and the extent to which national values have triumphed.

Moreover, a "realms of authority" approach takes little, if any, account of such special interests as the neighborhood, though that certainly is one of the settings in which concerns about community demand the greatest attention. Conventional analysis has been too willing to yield to generalizations that impede rather than advance the effort to sort out important substantive values that deserve attention as community interests.

For example, it is customary to begin discussion with the premise that the more decision-making is decentralized, the more diversity one is going to get. But that is not at all necessarily the case. As the sagebrush rebellion issue suggests, it is highly probable that if a good deal of federal public land in the West were turned over to the states

or to private proprietors, those lands would primarily be utilized for conventional commercial activities, such as mining, grazing, and timber harvesting. The result would be less rather than more diversity of use, and less rather than more opportunity for diversity of lifestyle in the communities in which those lands are located. One might make exactly the same point about communities on the fringe of urban areas. Developmental pressures are similar from place to place. Local government control of land use in most places and at most times has done little to prevent a dreary similarity of shopping centers, fast food strips, and standardized residential developments throughout the country. If the goal is diversity and distinctive communities, mere passivity in the presence of local decision-making might be quite counterproductive. We would have localism and decentralization, but we might at the same time be losing the very things that we usually associate with community values -- distinctiveness, stability, a strong association of people with the landscape, maintenance of traditions, and preservation of historic structures and other cultural resources.

Having said all this by way of setting out the problem, let me now turn to some specific suggestions about protecting community interests. My observations will not imply some all-encompassing global theory, I will take the opposite approach. I want to offer some comments in the context of a micro-setting that may serve as a provocative point of beginning. My hope is that the little case study I am about to mention offers a fresh angle of vision on some problems that have routinely been denominated by what I have called the "realms of authority" style of analysis.

My illustrative case arises from the fact that a number of newer units in the national park system have been established in places that already have existing human settlements, rather than, as was traditionally the case, on the vast areas of public domain that were more or less uninhabited wilderness. Since parks are created to preserve natural resources and to facilitate public recreation, the question inevitably arises: How should the Park Service deal with existing communities whose presence within these new enclaves advances neither of those goals - that is, neither recreation nor preservation of the resources. The legislation governing such places reveals that Congress has been aware of the potential for conflict but neither Congress nor the Park Service has had a strategy for dealing with that conflict. In general, the idea seems to have been that undeveloped land would be left undeveloped, that existing residential uses would be left in place when they don't intrude upon other purposes for which the park was established, that commercial uses would be removed, and that incompatible residential uses would gradually be phased out through what are called "use-and-occupancy" provisions by which the government acquires the land but permits continued private use and occupancy for a term of years, up to 25 years or for the life of the present residents.

The central, if not exclusive, focus of legislation of this kind is on the promotion of traditional park purposes, mitigated only by compassionate concern for the sudden removal of residents within park boundaries. In light of its experience, principally focused on the great western nature parks, it is not surprising

that it has been more comfortable managing resources than managing human settlements, and has viewed returning land to its natural condition as its primary task.

If the problem is seen as one of community, as well as natural resources management in these new parks, the conventional use-and-occupancy removal technique that I have described is clearly revealed as unsatisfying. One need only imagine a situation in which a functioning village is located in the middle of a park. Some of the land is acquired, commercial uses are removed, some owners sell out immediately, others remain under a range of use-and-occupancy agreements, ranging from a few years to several decades, and some owners are left in place. The result is that a viable community is gradually programmed to die -- stores are gone, some houses are boarded up and empty while the Park Service decides what to do with them, others are demolished, and as time goes on, more and more of the residents must leave as the term of their occupancy agreement ends.

The Park Service, having followed this general pattern in several places, was apparently surprised and discouraged to discover that such arrangements generated a great deal of opposition and controversy. Its view in general, and until quite recently, was that the residents in such situations had little to complain about. The Park Service took the position that where sales or condemnations of property were made, the owners received fair or even generous compensation. The use-and-occupancy agreements permitted a transition to be made gradually and under terms that

were also quite generous to the owners. Where owners were swiftly removed, nothing more was seen as being at stake than the long-accepted right of the government to exercise its power of eminent domain. And, since parks are established around natural features of national importance, it was thought that no individual should be able to assert a private right to capture the value of those resources for their personal benefit. The removal of private users was seen, at worst, as a fully compensated redistribution from the few to the citizenry as a whole. The Park Service was confirmed in these views by the fact that there have been some exercises of its policy that in retrospect seem highly successful, such as the removal of residents in the Shenandoah Park, which has now been returned to its essentially natural condition and is highly valuable and much used by people in the Washington and nearby Virginia area.

Certainly these perceptions, taken on their own terms, cannot be said to be false. The problem is that the Park Service in viewing the problem this way adopted a highly disaggregated view of the issue. Piece by piece, taking each individual and each item of property as a separate entity, every right attaching to those disaggregated things has been vindicated. What is missing in such an approach is the question whether there is something consisting of all the pieces together -- a community, the interests of which are neglected in any such item-by-item, issue-by-issue approach.

While Park Service Policy, as it developed in these dealings with human settlements in these newer parks, can be faulted for lack of imagination or lack of initiative, it has been doing little more than working within

the structure that Congress and the legal system established for it. It had no general mandate to protect communities; it had no definitions of what constituted community; it had no set of standards to implement. In fact--and this is what I am about to turn to--the Park Service today is to be commended for taking on the much neglected issue of community in a small, but potentially very important, matter now before it.

In 1972, Congress established the Buffalo National River in Arkansas as a unit of the national park system. Though there were several viable villages within the boundaries of the park, no special attention was paid to them in the legislation establishing Buffalo National River, which simply provided that the park was established for the purpose of conserving and interpreting an area containing unique scenic and scientific features and preserving an important segment of the river. The Secretary of the Interior was authorized to acquire privately owned land within the boundaries. Immediate acquisition was permitted for those places determined to be necessary for administration, development, access, and public use; other noncommercial, residential, or agricultural use was to be acquired on condition that the owners be permitted to retain use and occupancy.

Within the Buffalo National River is a small village known as the Boxley Valley. It consists of some forty dwellings with attached small farms, a church, a school, a community building, and a store; some one hundred plus structures all together. It is not a

very prepossessing place, but it presents a highly attractive and increasingly rare example of a traditional Ozark Valley farming community. Some of its buildings, houses, and barns are considered fine examples of vernacular country architecture.

The Park Service policy for the Boxley Valley has gone through several interesting stages. At first, as you would expect from what I said a few minutes ago, the policy was to acquire properties and gradually move the residents out with the notion that the land would revert to its natural condition, and be available for river recreation. The store was acquired as were a number of homes and farms. Some owners took their compensation and moved out; others took use and occupancy agreements for various terms of years. A number of homes and formerly commercial buildings owned in fee by the government are boarded up and stand empty. Somewhat more than half of the houses in the valley are unoccupied.

The Park Service, in a partial modification of its policy, later permitted some owners to remain permanently, as proprietors, negotiating scenic easements designed to control development and to assure that the scene retained its rural character. Plans for visitor use were largely abandoned. The historical value of the valley began to come to the fore, both as a traditional landscape and as a setting for several architecturally significant structures, residences, and barns. At the present time, the Park Service is in the process of developing a new plan for the future of

the Boxley Valley and it is this plan which in my view represents a significant, unexpected, and important step forward in the thinking about the community problem. The plan proposes that the village not be returned to its natural, presettlement condition. Indeed, it leans in the opposite direction: It proposes to have the entire valley listed on the National Register of Historic Properties so that the small farms, with their aesthetically pleasing fence lines will be preserved and worked. Historically valuable houses and barns would be occupied, maintained and, where necessary, restored.

While the current inclination is to save rather than to destroy, a preservation strategy can raise some problems of its own. If the place is to be preserved for its historic and aesthetic values, rigorous controls would seem to be called for. The sort of problems that arise seem trivial, but they are revealing. Should an owner be allowed to tear down a traditional style barn and replace it with a cheaper and more useful aluminum structure? What if residents want to install the sort of obtrusive saucers necessary to bring television to remote areas? What if they want to build mobile homes or add new houses, even in untraditional styles? Or if they want to take down fences to permit larger fields to be built? The Park Service realizes that it is faced with some unusual problems for which there are no conventional answers. These are a few specific questions that attention to the question of community, and taking communities seriously, raises. How far the answers to them help to unravel the wider range of community rights issues that I raised in the

beginning of my comments is uncertain, but I think Boxley Valley is a useful place to begin. I would suggest several propositions about places like this and about communities in general.

First, one should be reluctant to require people to arrange their lives to serve the demands of some larger external community, including the national community. Just as we are reluctant to conscript people into public service in other settings, we should hesitate to demand of people in a town or village that they turn their community into a museum for our benefit, or that they abandon it for some asserted public benefit.

Second, diversity is a good thing in human settlements as well as nature. Or to put it another way, eclecticism is not a bad thing. There is a strong inclination in parks, as elsewhere, to be intolerant of facilities and practices that do not conform to some preconceived plan and are tidily consistent with it. We should be reluctant to treat communities as if they were human bonsai trees. There is nothing incongruous in having a few human settlements remain within a place that is a national park, such as the Buffalo National River, even though such places are principally devoted to maintaining natural systems. (I'm talking about pre-existing human settlements.)

Third, diversity is not the same thing as local decision making, and I want to re-emphasize that. The reason diversity is interesting is precisely because it reveals differences, variety, and range of the human spirit. In seeking to identify those elements that

comprise community, a useful focus is diversity in the sense of distinctiveness. Is there a distinctive local lifestyle? Is there an indigenous architecture or special flavor to the local community? Is there a population that has generated some distinctive ties to the land, through continuity or by some special relation that binds them to each other and to the place? Are the local interests internally rather than externally generated? Is there authenticity in both the human and physical structure of the sort that Rene Dubos called "the genius of the place": Character and rootedness? That feature which generates what was described some years ago in a study of Boston's West End as "the sense of belonging someplace, in a particular place which is quite familiar and easily delineated [where] one feels 'at home'."

Where such diversity, distinctiveness, and character exist my suggestion is that there should be a national policy to encourage but not coerce its continuance, departing from that stand only where there is a collision with national values of primary importance. Devices such as grants or tax credits for restoring indigenous structures and to maintain the atmosphere or rural family farms are highly appropriate. Where there are constituencies who want to retain these values, they deserve help, since we all benefit by maintenance of elements of our history and culture, no less in living communities like this one than in museums. In taking an approach like this, it is possible that significant local autonomy and individuality can be promoted consistent with recognition that national values are, in the last analysis, predominant. For

promoting authenticity and diversity for those who want it and want to maintain it is itself an important national value. In this sense, it seems possible to accept and understand what may be called the triumph of nationalism without either effacing respect for localism or, conversely, treating localism as having independent validity without regard to the content of local decision making and what it ultimately produces.

The proposal of the Park Service that is now under consideration in review for the Boxley Valley is, in my judgment, a significant and an admirable step forward toward a community policy. The present plan proposes "to protect the natural and historic character of the valley while allowing and encouraging a relatively natural evolution of the rural landscape." The plan aspires to return structures to private ownership and use with stipulations only to protect critical natural and cultural resources, such as maintaining federal control of the river corridor itself, while turning the valley back to the people who live there.

It aspires to encourage exterior preservation and restoration, preferring rehabilitation over new construction, trying to maintain density essentially as of the time the park was created, and to maintain the rural character of the landscape; to allow new construction with modern materials but seek compatibility in size, scale, and character; to let nonviable land revert to forest that will be available to the residents for uses such as local woodlots; to regulate

grazing and crops only to protect water quality in the river; to encourage the reestablishment of the community store to support a sense of community within the valley; to encourage residents to establish things like bed-and-breakfast type facilities to meet tourist demand rather than await the development of commercial motels and their attendant facilities, thus aiming to preserve both the physical character of the community and its economic viability; and finally to provide things such as technical assistance to residents on matters such as structural preservation by way of assistance and encouragement rather than coercion and dominance.

The initiatives the Park Service is taking in the Boxley Valley, small and detailed as they may seem, are nonetheless an encouraging and a rare sign that the question of community is beginning to get some attention in public land management. The setting is modest, but the issue is of consequence. It deserves our attention and our support as a precedent upon which great things may be built.