ARTICLES

DO COMMUNITIES HAVE RIGHTS? THE NATIONAL PARKS AS A LABORATORY OF NEW IDEAS*†

Joseph L. Sax**

In 1980, to aid General Motors in building a new factory, the City of Detroit condemned and razed a long-established neighborhood known as Poletown.1 Whether Detroit’s desperate interest in maintaining jobs, or General Motor’s insistence on Poletown as the preferred site of its new facility, ultimately justified the condemnation is less important than is the fact that the law offered no opportunity even to raise a question about the non-economic losses incurred when an established community is destroyed.2 The current legal situation is that condemnees are rarely permitted to dispute anything other than the dollar amount of compensation to which they are entitled.3 Neighborhood value is not even measured indirectly, for “just compensation” includes only the value of the economic interests taken.4

The Poletown case is only a recent illustration of a problem that has received surprisingly little attention.5 The decades-old ac-

---

* © Copyright 1984, University of Pittsburgh Law Review.
† This Essay is based on remarks given by Professor Sax at the University of Pittsburgh School of Law on November 3, 1983, as part of the Mellon Lecture Series.
** Philip A. Hart Distinguished University Professor, University of Michigan Law School.
2. Id. The question in the case was whether the condemnation was for “a public use or purpose” rather than for the private benefit of General Motors. The court sustained the condemnation as for a public purpose by a vote of 5-2. None of the judges viewed the breakup of the Poletown neighborhood as raising an issue under eminent domain law, though that was plainly a feature of the case that troubled the dissenters. Id. at 658, 682-83, 304 N.W.2d at 464, 478.
5. A refreshing and instructive exception is Frug, The City as a Legal Concept, 93 HARV. L. REV. 1059 (1980). See also Professor Michelman’s discussion of the Belle Terre and East Cleve-
quisition by Los Angeles of the Owens Valley water supply, 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 film. The removal of American Indians from their homelands is considered one of the most woeful episodes in the history of westward expansion. Although there is no definition of community, nor a doctrine of community entitlements to bring legal coherence to such diverse cases as these, the law has by no means been indifferent to particular claims in a range of specific situations. Problem-specific responses have been made to ameliorate disruptive effects on communities in a number of instances, such as the relocation benefits that are provided in urban renewal or the federal jobs program to replace the lost wages of lumberers in the towns affected by the establishment of the Redwoods National Park. The Alaska Lands Act of 1980 goes a step further by permitting some special uses of federal lands by native peoples to continue their subsistence economies. Large scale water diversion projects, under some state laws and federal development schemes, provide protection for areas of origin, to assure that such source areas will not suffer the fate of the Owens Valley.

These particular instances reveal that there is a widespread sense that community is important, and a willingness exists to protect community interests; yet there is no principle or doctrine to which to turn in those cases where, for whatever reasons, the people affected are unable to generate the political support necessary to induce an act of grace. The reasons are not so difficult to discover, and they are more than the mere administrative problems of defining a "community" and articulating rights. First, our notion of community is strongly tied to localism, and the chips are strongly

---


10. E.g., CAL. WATER CODE §§ 11460-11463 (West 1971); Clark, NORTHWEST-SOUTHWEST WATER DIVERSION—PLANS AND ISSUES, 3 WILAMETTE L.J. 215, 248-54 (1965); a federal area-of-origin protection plan for Colorado, worked out politically, is discussed in J. SAX, WATER LAW, PLANNING AND POLICY 199 (1968).
stacked against localism in American law. It is a black-letter rule, for example, that a city has only the powers with which the state endows it, and that the authority of states is subordinated to that of the national government under the Supremacy Clause of the Constitution. The second and related reason is that localism is strongly tied to parochialism. Among the most familiar instances of demands for local autonomy are, of course, the "States' rights" movement, tainted by its association with slavery and the more recent resistance to civil rights; local know-nothingism, evidenced by periodic assaults on the rights to learn, teach and read; and by the unending economic efforts of states to discriminate against interstate commerce.

The centralizing hierarchy of our legal system often serves us well in practice. Surely it is desirable that towns in Michigan are denied the right to veto needed waste repositories within their boundaries; that exclusionary zoning is subject to state intervention; and that the fate of Yellowstone National Park is not left exclusively in the hands of the people of Wyoming, Idaho and Montana.

Both our legal structure and our history of parochialism reveal something about American life that most of us resist admitting 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. One may casually test this assertion from any point on the political spectrum by reference to the centrality attached to such national values as "patriotism" or "free speech." In addition, one may observe the readiness of even a president as ideologically committed to localism as Ronald Reagan to treat the quality of education or the unemployment rate as obvious issues of national importance. Of course, it hardly seems odd to us that a president would, and even politically must, concern himself with such issues, but it is precisely

15. For some colorful examples of local plans to "improve" the national parks, see Sax, Free Enterprise in the Woods, 91 Nat. Hist. 14 (June 1982).
the fact that it does not seem inappropriate that reveals just how strongly national values influence American life.

At the same time, it is not surprising that in the midst of this highly-developed national consciousness there is a continuing, and very strong, yearning for something that goes under such banners as "local autonomy" and "self-determination." Note, for example, the regional demands in the Great Lakes and the Columbia River basins for recognition that the waters in those areas of origin "belong" to the people there and should not be exported as if they were national resources. We have recently seen a new version of the "Sagebrush Rebellion" involving the recurrent Western demand for turning over ownership or control of the federal public lands to the states in which they lie, or to their citizens. There also has been a resurgent desire for state or local vetoes over federal projects for coastal oil and gas development and the siting of waste repositories.

My impression is that the tension these competing claims generate is not likely to be fruitfully resolved by the means that have traditionally been applied to them—the effort to carve out separate domains of authority along political subdivision lines, and using doctrines such as commerce clause analysis and preemption. Such traditional analysis fails to recognize the extent to which the nation, as the dominant community, has triumphed, and fails to accept that what local community values need most is to obtain recognition within (rather than as competitors of) national values. Moreover,

16. See The Interbasin Transfer of Water: The Great Lakes Connection, Address by Wisconsin Governor Lee Sherman Dreyfus, Wisconsin Coastal Management Conference, Milwaukee, Wisconsin, at 7 (May 10-11, 1982): "I believe that because the Great Lakes and the St. Lawrence totally lie within the borders of eight states and two provinces . . . the water is the property of the people of those states and those provinces."


18. E.g., Ventura County v. Gulf Oil Corp., 601 F.2d 1080, 1082 (9th Cir. 1979), aff'd, 445 U.S. 947 (1980) ("The question on appeal is whether the County . . . can require the federal Government's lessee . . . to obtain a permit from Ventura . . . .").

19. This cause, sought under a banner of local rights, is now paradoxically promoted by the environmental movement which has traditionally been in the forefront of asserting national and even global interests against the perceived parochialism of regions and localities.

the traditional mode of analysis takes little, if any, account of the special interests of a neighborhood, such as Poletown, though certainly that is one of the settings in which concerns about community need the most attention. Finally, conventional analysis has been too willing to yield to generalizations that impede, rather than advance, the effort to sort out the important, substantive interests that deserve attention in the setting of what we call “community.” For example, it is customary to begin with the premise that the more decision-making is decentralized, the more diversity one is going to get. Thus, it is assumed, if we want diversity we should promote decentralization. But that is not 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 turned over to conventional commercial activities, such as mining, grazing, timber harvesting and the like. The result would be less, rather than more, diversity of use, and less, rather than more, opportunities for diversity of lifestyles in the communities where those lands are located. If the goal is diversity and distinctive communities, mere passivity in the presence of local decision making may be counter-productive. We would have localism, and decentralization, but we might at the same time be losing those things that we usually associate with “community”: Distinctiveness, stability, a strong association of the people with the landscape, maintenance of traditions and historical structures.

This essay does not propose a global formula for the ‘good’ community. Instead, it offers some observations and suggestions about the problem in one micro-setting that is a provocative point of beginning for thinking about the substance of community interests worth maintaining. Perhaps this case study will at the least serve as a novel angle of vision on some problems that have routinely been dominated by the ‘realms of authority’ style of analysis.

---

21. E.g., Stewart, supra note 20, at 254: “Allowing states and localities substantial freedom to limit natural resource development in the face of homogenizing development pressures helps to preserve . . . diversity, and with it the capacity for community identity and self-determination.” Stewart does not, however, think that permitting localities to allow resource development promotes local identity and self-determination; nor does he favor all local limits (national nuclear waste repository).

22. One might make a similar point about communities on the fringes of urban areas. To the extent that developmental pressures are similar from place to place, it may well be that the more local governments control land use, the more we will observe a dreary similarity of shopping centers, fast-food strips and standardized residential developments all over the country.
This illustrative case arises from the fact that a number of newer units of the national park system are being established in places that already have existing human settlements, rather than, as was traditionally the case, on vast areas of public domain that were more or less uninhabited wilderness. Since parks are created to preserve natural resources, and to encourage public recreation, the question inevitably arises: How should the Park Service deal with the existing communities whose presence within these new enclaves advances neither of those goals.

The governing legislation reveals that Congress has been aware of the potential conflict in these situations, but neither Congress nor the Park Service has had a general strategy for dealing with that conflict. In general, the idea seems to be that undeveloped land will be left undeveloped, that existing residential uses may be left in place where they do not intrude upon the purposes for which the park was established, that commercial uses will be removed, and that incompatible residential uses will be gradually phased out through “use and occupancy” provisions by which the government acquires the land but permits continued use and occupancy for a term of years (up to 25) or for the life of the present residents. The central, if not exclusive, focus of the legislation is on the promotion of park purposes, mitigated only by a compassionate concern for the sudden removal of residents. The Park Service, as the administrator of these laws, has had a strong inclination to minimize the presence of residents within park boundaries. In light of its experience, principally focused on the great western nature parks, it is not sur-

23. For a brief description of some of the newer type of parks, see Sax, Helpless Giants: The National Parks and the Regulation of Private Lands, 75 Mich. L. Rev. 239-45 (1976). My comments in this lecture suggest some limits that should be applied to the desire and the need for federal regulation urged in that article.

24. The policy originated in the law establishing the Cape Cod National Seashore, 16 U.S.C. § 459b-3 (1976). A more recent version is exemplified by the Chattahoochee River National Recreation Area, 16 U.S.C. § 460l-1 (1978). Residents reluctant to move had previously been permitted to remain for a time in some parks where forced removal was strongly resisted. See infra note 28.

25. The story of land acquisition in the Cuyahoga Valley and Delaware Water Gap National Recreation Areas is told in a (somewhat tendentious but nonetheless revealing) documentary film, “For All People, For All Time” (Mark and Dan Jury, Valley Filmworks, Box 194, Waverly, Pennsylvania 18471). See also the Comptroller General’s Report, U.S. General Accounting Office, Lands in the Lake Chelan National Recreation Area Should Be Returned to Private Ownership (Jan. 22, 1981). The last gasp of the landowners’ unsuccessful effort to prevent condemnation was the denial of the petition for a writ of certiorari in Cuyahoga Valley Homeowners v. Clark, 104 S. Ct. 526 (1983).
prising that the Park Service prefers managing resources to managing human settlements, and has viewed the maintenance or returning of land to its natural condition as its primary task.

If the problem is seen as community rather than natural resource management, however, the conventional use and occupancy technique is an unsatisfying arrangement. By imagining a situation in which a functioning village is located in the middle of a park, the picture becomes clear: Some of the land is acquired; commercial uses are removed; some owners sell out immediately, while 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. As time goes on, more and more of the residents must leave as the term of their occupancy agreement ends.

The Park Service was apparently surprised and discouraged to discover that such arrangements have generated so much opposition and controversy. Its view until quite recently was that the residents in such situations had little to complain about, and it took the position that: (1) Where sales or condemnations of property are made, the owners receive fair, or even generous, compensation; (2) Use and occupancy agreements permit the transition to be made very gradually, and under terms that are also generous (the owners return one percent of the property’s value per year, for each year that they opt to remain); (3) Where owners are swiftly removed, nothing more is at stake than the long-accepted right of the government to exercise the power of eminent domain; (4) Since parks are established around natural features of national importance, no individuals should rightly be able to assert a private right to capture the value of those resources for their personal benefit; (5) Removal of private users is, at worst, a fully-compensated redistribution from the few to the citizenry as a whole; and (6) As a final point, it is frequently observed that there have been some implementations of this policy that in retrospect seem highly successful. For example,

26. An important public airing of the issue, which the Park Service found a bitter pill to swallow, was the Comptroller General’s Report, U.S. General Accounting Office, The Federal Drive to Acquire Private Lands Should Be Reassessed (Dec. 14, 1979). My own view of the report is that it is unduly harsh, and not entirely accurate, but that it did highlight some important, and insufficiently considered, problems in federal land acquisition.

residents were removed decades ago from the area that is now the Shenandoah National Park; the land has been returned to its natural condition, and now serves as a very valuable, and much used, facility for all those who live in the Washington, D.C. and northern Virginia region.\textsuperscript{28}

Certainly these perceptions, taken on their own terms, cannot be said to be incorrect. The problem is that the Park Service adopted an entirely disaggregative view of the issue. Piece by piece, taking each individual and each item of property as separate entities, every right attaching to those disaggregated things has been vindicated. What is missing is the question whether there is some entity consisting of all the pieces taken together, a community, the interests of which are neglected in any such item by item approach. The current law does not agonize over this issue. There is a hierarchy that exalts national values over local ones. The interests of a community have no formal status; they are not, for example, property rights. In the law's eye, they are only sentiment.

The Park Service cannot be faulted except for a lack of imagination and initiative, for it had been doing little more than working within the structure, or absence of structure, that Congress and the legal system established for it. It has no general mandate to protect communities. No definitions of what constitute a community have been provided. No set of standards exists. In fact, the Park Service today is to be commended for taking on the task of grappling with these very issues in a small—but potentially highly important—matter now before it.

In 1972, Congress established, as a unit of the national park system, the Buffalo National River in Arkansas (hereafter "the River").\textsuperscript{29} Though there were several viable villages within the


\textsuperscript{29} 16 U.S.C. § 460m-8 (1972). The information following in the text is taken both from personal interviews of Park Service officials in 1983, and from the following documents: Final Master Plan, October, 1975, Buffalo National River, Arkansas; Task Directive, Master Plan Supplement, Boxley Valley Land Use Plan, Buffalo National River, Arkansas, Package No. 112 (203), June, 1983; Scenic Easement Deed, October 11, 1979, Buffalo National River, Tracts 61-113 \& 61-122; Conditions of Use and Occupancy of Single Family Noncommercial Residential Property
boundaries of the unit, no special attention was paid to them in the legislation, which provided only that the River 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 was authorized to acquire privately owned land within the boundaries. Immediate acquisition was permitted for those tracts determined to be necessary for administration, development, access and public use. Other non-commercial residential or agricultural use was to be acquired only on the condition that the owners be permitted to retain use and occupancy for life, or up to 25 years, so long as the residential property was the owner's permanent place of abode, was a detached one-family, year-round dwelling, and had been constructed no later than three years prior to enactment of the statute.

Within the River is a tiny agricultural village known as Boxley Valley. It originally consisted of approximately twenty dwellings, with attached small farms, a little church, school and community building and a store. Boxley is not a very prepossessing place, but it presents a highly attractive example of a traditional Ozark Valley farming community. Some of its buildings, houses and barns are considered fine examples of vernacular country architecture.

Park Service policy for the Boxley Valley has gone through several stages. At first, the policy seems to have been to acquire all the 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. As of late 1983, the half-dozen homes and former stores owned in fee by the government are boarded up and stand empty.30 Eventually, the historical value of the Valley came to the fore, both as a traditional landscape, and as a setting for several architecturally significant structures, residences and barns. The Park Service, therefore, partially modified its policy and permitted some owners to remain as proprietors permanently. The Park Serv-

and Land Used for Agricultural Purposes (Agreement, Buffalo National River, n/d, photocopy); Conveyance of Freehold and Leasehold Interests on Lands of the National Park System, 36 CFR, Part 17.

30. The author made a visit to Boxley Valley, October 3, 4, 1983, as a consultant for the National Park Service.
ice negotiated for scenic easements designed to control development and to assure that the Boxley scene retained its rural, 1920's character. Plans for visitor use were largely abandoned.

Presently, the Park Service is in the process of developing a new plan for the future of the Boxley Valley. It seems to have decided that the village should not be returned to its natural, pre-settlement condition. Indeed, the Park Service is leaning 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. The historically valuable houses and barns are to be occupied, maintained and, where necessary, restored.

While the inclination now is to save Boxley, rather than destroy it, such a plan raises 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 small, 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 the residents want to install the sort of obtrusive 'saucers' necessary to bring television to remote areas? Shall mobile homes be allowed in the Valley? May new houses—in what might be untraditional styles—be allowed to be built? Can fences be taken down to create bigger agricultural fields?

The Park Service realizes that it is faced with some unusual problems for which there are no conventional answers. By refraining from destroying the village and turning it into a picnic ground out of sensitivity to the interests of the residents, the Park Service has thrust itself into an almost equally uncomfortable opposite posture. Are the residents to be compelled to live as if they were the denizens of a museum, unable to grow and change simply because they happen to inhabit a quaint, historic town that others find interesting? But, are no controls permissible? Should farm practices be permitted that would impair the quality of the Buffalo River, and thus the recreational experience of those for whom Congress established the area? Should developers be allowed to come in to this charming valley and make it a weekend retreat for jaded urban residents, totally changing its character? Are controls here any different from those in the historic district of a large city, or the public interest in them any less? Ought the Park Service to withdraw entirely,
selling back the properties to private owners, in order to let local autonomy prevail?

These are just a few of the specific questions that attention to the question of community raises. How far the answers to them will help to unravel the wide range of "community rights" issues raised earlier is uncertain. But, Boxley Valley may be a useful place to begin. First, we should be reluctant to require people to arrange their lives to serve the demands of some larger, external community. Just as we are reluctant to impress people into service in other settings, we should hesitate to demand of villagers that they turn their community into a museum for our benefit, or that they abandon the place for what we think comprises "our benefit."

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 things and practices that do not conform to some preconceived plan. 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 newer type parks such as the Buffalo National River, even though such parks are principally devoted to maintaining natural systems.\footnote{Diversity is not the same thing as local decision making. The reason diversity is interesting is precisely because it reveals differences, variety and the 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 a special flavor to the local economy? Is there a population that has generated some distinctive ties to the land, by continuity or by some special relation, that bind them to each other and to the place? Are the local interests internally rather than externally generated? Where diversity and distinctiveness exist, there should be a national policy to encourage them, but not to coerce them except where there is a collision with national values of primary importance. In a place like the Boxley Valley, devices such as grants or tax credits designed to aid residents in maintaining or restoring in-}

\footnote{The potential for making a virtue of such mixtures of nature and man in the setting of the French regional parks has been noted in Sax, \textit{In Search of Past Harmony}, 91 \textit{Nat. Hist.} 42 (Aug. 1982). \textit{See also} Kihn, \textit{A Second Generation of National Parks: Background Paper}, IV \textit{Am. Land. F.} 19 (Fall 1983).}
digienous structures, and to maintain an atmosphere of rural, family farms, seem highly appropriate. To the extent that there is a constituency of people who want to promote these interests, they deserve our help, and our help is justified since we all benefit by the maintenance of such distinctive structures and life styles. At the same time, if no such constituency exists, coercive measures, such as rigid controls either on life style or on land use designed to impose such life styles, are undesirable. In giving any such incentives, and in refraining from measures that intrude upon distinctive community life styles, however, it is important to emphasize that distinctiveness does not imply a petrified community. However charming an early twentieth century village may be, any real community lives and changes over time. Authenticity is another feature of that special quality—what René Dubos called the "genius of the place"—that gives a location vitality. It is not realistic to expect a town of the 1980's to be without television, or modern building additions or some capacity to grow and change. Here, too, there is a convergence of points made previously: tolerance for change and some eclecticism goes together with a valuing of authenticity.

Certainly nothing said to this point is intended to suggest that community values should never be subordinated to other values of larger communities. The protection of the local community should not be the preeminent national value, but it should be viewed as one significant such value to the extent that what goes under the label "community" does in fact comport with values that are part of the national identity. In this respect, it is possible to accept the triumph of nationalism without either effacing respect for localism and its potential for maintaining diversity, or, conversely, treating localism as having independent validity without regard to the substantive content of local or state decisions.

What is suggested, using the Buffalo National River as an example, are some foci for decision making. (1) Maintaining a place like Boxley Valley, with its elements of distinctiveness, should itself be a part of the calculus of national goals in establishing and maintaining places like Buffalo National River. (2) The less distinctive-


ness there is, however, the less such a goal is appropriate; localism alone is not the determining factor. (3) The presence of a human settlement should not automatically be seen as an intrusion on the goals Congress has in establishing places like the River. (4) To the extent such places are seen as having value in themselves, that value cannot be maintained by forcing such places to be managed for the education or amusement of others, but rather the communities must function as living organisms, with their own life and lifestyle, whose vitality is itself important. (5) Incentives are the preferred technique to assure that community residents are not asked to subsidize the national values that their lifestyle or community is providing the rest of us. (6) Coercive displacement of community values ought to be reserved for those situations where important values of national or regional communities are clearly threatened (such as the destruction of the redwoods, or the pollution of a river), and where no workable, less intrusive alternatives are available.

These are tentative suggestions, drawn from a very small context, and put forward only with the thought that they might be tried on a range of larger and more far-reaching problems. We need to worry more about the importance of distinctive communities from which are drawn important elements of identity. Surely, this is an appropriate concern of the legal system which has not received sufficient attention.