LAND WARS

THE POLITICS OF PROPERTY AND COMMUNITY

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For Sarah, Laura, and John P. Francis

Contents

1

Property and Community: Localist Paradigms

Land use is no local matter. In this book, our goal is to explain and challenge the apparently platitudinous but deeply controversial localist claim. The claim is apparently platitudinous because of the nature of land itself. In some respects, land is the most local of entities: the unmovable substrate on which communities settle and build. It is the place where people live, work, and play, where they are born, where they worship, and where they bury their dead. When people move, their land does not travel with them. The claim of localism for land is also apparently platitudinous because land use decisionmaking in Western democracies has traditionally been undertaken principally by local entities. At the same time, the claim of localism for land is—and should be—deeply controversial. Land use decisions have far-reaching effects on the memories of emigrants, on the hopes of tourists and immigrants, and on the fortunes of those near and far who depend on the land's resources or are otherwise affected by how the land is used.

In current discussions of land use, two localist paradigms predominate. The first is the localism of property rights: that owners' voices should control what is done with land. The second is the localism of spatially defined community: that those who live on or near the land should have the most to say about its governance. We contend in this book that each of these localisms is far too simplistic. Land use decisionmaking, like land itself, is messy and complex. It should be treated as a balance of competing and interrelated move-

ments, voices, and claims. Our preliminary goal in this volume is to defend the complexity of land use decisionmaking against the localist paradigms. Our ultimate goal is to chart a way through the complexity to construct a more global paradigm for decisionmaking about land.

Localist Paradigms of Land Use: Property Rights and Community

In the United States and in Britain, claims of property owners historically have been the dominant starting place for discussions of land use. The proprietarian argument has been that owners have an unfettered right to decide what will be done with their property. Land use decisions, the argument goes, must just work around that right. Writers in the utilitarian tradition—the tradition in moral philosophy that we should maximize pleasure, happiness, or welfare—have based arguments for property on the contention that owners have incentives to take care of their land and ensure its productivity. In other philosophical traditions, property rights in land have been seen as the subject of invested labor, as integral to identity, or as existing on some other grounds. Even writers in these traditions who disagree on the extent to which property rights are absolute generally agree that regulatory initiatives of modern governments affecting what owners may do with their land require justification in the face of ownership rights. In the United States, this property rights paradigm, as we shall call it, finds legal expression in constitutional doctrines such as the takings clause requirement that property may be taken only for public purposes and then only with just compensation.

In Western democracies, moreover, political decisionmaking with respect to land has been implanted typically at the level of local government. In the tradition of utilitarian liberalism, the justification for this location has been that members of the local community are more knowledgeable about and have a greater stake in what happens to the land than those who live far away, and as a result will make more thoughtful decisions about it. In the social contract tradition, parties to the contract are seen as hypothetically dealing antecedently possessed rights in exchange for protection of themselves and their property, land included. Writers in the social contract tradition, how-

ever, with the notable exception of Rousseau, largely ignore the problem of generating a theory of political boundaries from the commitments of a collection of landowners. Locke, for example, argued that any group of free men may join together into political society. But in the *Two Treatises on Government,* he did not discuss what to do if a property owner in the midst of other owners refuses to join in the contract, leaving holes in the pattern of territorial authority (Locke 1988, 105).[1]

Voices less clearly in the liberal tradition have also been raised in support of placing land use decisions at the local level. Some writers claim "local knowledge" should be called upon to enrich decisions. This may be taken to mean that care for the land will be generated out of a love for the land or that prudential stewardship will lead to the realization of the community's economic just deserts. Others argue in a related vein that if political decisions track bioregions, the result will be better management of the land. Still others, representing more standard forms of communitarianism, argue that locating decisions with the community will better protect community values about the appearance of the land, activity on the land, and preservation of areas of special iconic or religious significance. In this book, we shall refer to the wide range of positions favoring local decision-making as the community paradigm.

Individual owners and communities thus each can claim extended traditions of moral and political argument in favor of their assertions of control against restrictions on how they use land. More recently, however, as interest in land use has shifted from agriculture toward recreation, pollution control, and environmental protection, each of these paradigms has come into question. Adherents to the property rights paradigm have been challenged to defend their claim that their justifications are adequate to show that property rights are unlimited. Perhaps owners' rights do not include destroying property, using it in ways that damage others, or developing it despite adverse environmental impacts—and perhaps these limits are built in from the very bottom as defining what the "owner" rightfully "has" in the first place. Or perhaps owners' rights are sometimes overridden by community or broader social concerns, in which case the constitutional question arises under U.S. law of whether there has been a taking requiring compensation.

The community paradigm has been challenged by regulatory

approaches that rest on the assumption that what happens on and to land may have national or even global repercussions. If the owner of a wetland builds a shopping center on it, and it was a critical section of a flyway for migratory birds, that decision will have effects far beyond the desires of the locals for employment and ready access to goods. Similar points can be made about decisions that affect waterways or ambient air quality. But far-away effects are not confined to environmental examples. Consider destruction of a natural wonder that is a favorite of tourists—flooding of the Grand Canyon, for example. Or consider alteration of a cultural artifact of great significance, such as the Roman Forum or the Wailing Wall in Jerusalem.

Not only have the property rights and community paradigms been challenged, but the relationship between the two has come to be recognized as itself unstable. Historically, the two paradigms have frequently been taken together. Some writers, even very recently, have seemed to take it almost for granted that the paradigms cohere. Rawls, for example, in his recent treatment of "the law of peoples," begins by intermingling property and existing boundaries as the locus of political control:

> An important role of a people's government, however arbitrary a society's boundaries may appear from a historical point of view, is to be the representative and effective agent of a people as they take responsibility for their territory and its environmental integrity, as well as for the size of their population. As I see it the point of the institution of property is that, unless a definite agent is given responsibility for maintaining an asset and bears the loss for not doing so, that asset tends to deteriorate. In this case the asset is the people's territory and its capacity to support them *in perpetuity;* and the agent is the people themselves as politically organized. (Rawls 1999, 38–39, emphasis in original)

In this passage, Rawls is not clear whether he means "the people" as collective owner, or "the people" as an aggregate of individual owners sharing a social tradition.

Yet it is not obvious that the property rights and community paradigms fully mesh with each other. Indeed, protection of strong property rights has historically been associated with liberal individualism, in possible conflict with the dominance of community. Property and community paradigms are not necessarily incompatible, but under contemporary circumstances there are important sources of tension

between them. Several concrete factors play into the current shape of that tension.

One contributing factor is the virtual disappearance of farming from many areas of the United States and Britain. Historically the apparent coincidence of the property rights and the community paradigms resulted from the fact that much land use was agricultural. The powers of the property owner and the local community were linked in the Jeffersonian celebration of the yeoman farmer, who worked diligently and thrived in a stable and harmonious community. These agrarian images, powerful and enduring in the United States and in the European context as well, bring with them linkages between the interests of owners and the interests of the community. Land is seen as plentiful and bountiful—the more so as community members work together. This celebration of agricultural proprietarianism is by now a distortion, however, as farming has virtually disappeared in many areas of the United States and Britain. Property use is varied and market possibilities are extensive; subdivisions sprout up on former farms ever more distant from city centers. The economic interests of the individual proprietor no longer coincide with community efforts to retain character or open space. Communities are rarely settled, and the ties that bind are progressively less likely to be locally defined.

Indeed, this is a second explanation for the tension between the property rights and the community paradigms. As people have become more mobile, the definition of *local community* has itself become increasingly problematic. In *Democracy in America,* Alexis de Tocqueville (1966) celebrated both agrarianism and the political power of the local community. Rutherford Platt, in his classic on land use and society, describes how towns in New England and counties in the South became focal points for land use decisionmaking. Local government, he concluded, was a sacred element of the U.S. civil religion. Municipalities usually could not go beyond their corporate limits in the exercise of their allotted powers (Platt 1996, 143–144).

This nineteenth-century embrace of localism waned as the twentieth century progressed. Local governments increasingly were seen as inadequate to the tasks they were assigned. For example, many states authorized extraterritorial powers for local communities so they could develop public water supplies when they lacked adequate sources within their incorporated areas. Platt concluded that municipalities undermined themselves by using such strategies:

> Once the proud legal expression of the autonomous medieval city, the municipal corporation in America is now an ironic metaphor for governmental inadequacy in the face of external economic, political and environmental forces. It is the victim of its own success, having been replicated in such vast numbers that each individual municipality retains only a fragmentary role in the management of the overall metropolitan area. (1996, 149)

Over the course of the twentieth century, mobility expanded ever more quickly; agricultural communities had experienced particularly rapid depopulation by the century's end. Aging farmers or their offspring sold off land that became part of ever-expanding suburbs or more pastoral residential or commercial areas. As people moved away, the range of those identifying with the locality contracted. Rural ghost towns are now the subject of nostalgic feature articles in newspapers and magazines.

The recent bioregionalist interest in aligning political and ecological boundaries is one of many renewed efforts to define community along more localized lines. Wendell Berry reflects this view when he writes,

> If the word "community" is to mean or amount to anything, it must refer to a place (in its natural integrity) and its people. It must refer to a placed people. Since there obviously can be no cultural relationship that is uniform between a nation and a continent, "community" must mean a people locally placed and a people, moreover, not too numerous to have a common knowledge of themselves and of their place. (1993, 168)

For Berry, the nation is an assemblage of many communities; it is pluralistic, but not pluralistic in the sense of embracing a set of aggrieved groups and individuals. In like vein, Bruce Williams and Albert Matheny argue that the community perspective assumes a democracy where political values are to be hammered out by people working together in communities. They are concerned, however, that *community* is often vaguely expressed, and so they describe it thus: "A specific political community may be defined by a residential neighborhood, a workplace, or both: we argue that the strongest democratic communities would be situated around both workplace and residence" (Williams and Matheny 1995, 46–47). In the tradition of John Dewey, Williams and Matheny identify self-interest as emerg-

ing from social interaction and association. Attempting to develop community identity through a sense of place, bioregionalist communitarians (e.g., Kemmis 1990) seek to use natural forms to align individual and community interests. But individual and community interests may not track along bioregional lines. In Chapter 5, we criticize identification of community with residence in a circumscribed locality as far too facile to capture the complexity of contemporary life. Extended communities based on part-time residence, family ties, or work away from home may be important additional voices in land use decisions, or so we will argue in this volume.

Theoretical attempts to link liberalism and communitarianism also point to a third explanation for the tension between the property and community paradigms. Liberalism as autonomy, it has been argued, conflicts with the understanding of the self as embedded in community. Against this contention, Will Kymlicka (1989) has argued that communities may represent the "context of choice" within which people realize autonomy. Communities provide the support and structures needed for people to establish identities and pursue chosen forms of life. Thus protection of group rights is compatible with liberal autonomy, at least when the group seeks protection from outside interferences with its cultural or linguistic heritage. An example would be protecting the integrity of a group's educational system against externally imposed requirements about the language of instruction. But not all group practices are liberal. When groups coerce their own members, as by preventing members from leaving the group, they violate their members' autonomy. Schools may be protected from outside influences, but group members may not be forced to send their children to group schools. Protecting groups against outside interference with their cultural heritage may allow individuals to exercise autonomy effectively within their cultural contexts. When groups engage in illiberal coercion of their own members, however, the tension between liberalism and communitarianism once again emerges. If an individual is not allowed to leave her community, the community has become a source of oppression rather than the locus of choice. With respect to individual rights, therefore, Kymlicka argues that the group should be protected against interference from outside except when it engages in coercion of its own members.

With property rights, however, the situation would appear to be reversed. The case for protection against interference from outside

weakens when the group is using its land in ways that affect those who live beyond its borders. An example would be the imposition of generally applicable pollution control regulations within the borders of group-controlled land. Here, outsiders have interests that can be injured by actions on the group's land. Similarly, the case for allowing a group to coerce its own members in the interest of preserving the integrity of the group's territory is stronger when group members would seek to put group land to individual use. For example, Julia Martinez, a member of the Santa Clara Pueblo, wanted to bequeath her possessory interests in Pueblo lands to her daughter rather than follow rules about tribal membership.[2] Pueblo rules provided that children born of male members and female nonmembers were tribal members, but children born of female members and male nonmembers were not. Pueblo rules also provided that only tribe members could hold possessory interests in Pueblo lands. Martinez raised a civil rights challenge to these rules, but the U.S. Supreme Court held that tribal self-governance prevailed. This case illustrates how there may be serious moral flaws with group practices; the Santa Clara Pueblo's rules of inheritance protect the children only of males, not females, who marry outside the pueblo.

This book challenges both the property rights and the community paradigms as assumptions of localism. Through these challenges, we hope to make room for debate about the claims of those more distant, in both space and time, to a say in what happens now to land. Concomitantly, we will explore in Chapter 6 the obligations of those who live far away to help out when those who live nearby are expected to incur burdens to protect land. As we said at the outset, land is messy and complex, and so are our claims. As with land itself, however, our claims' very messiness increases their attraction.

Conflicting Claims to Land: The Grand Staircase of the Escalante

To illustrate the complex nature of land use issues, we begin with an example, the creation of the Grand Staircase–Escalante National Monument in the southwestern United States. The monument includes vast expanses of land owned by the federal government, isolated tracts that are individually owned, and entire towns. Under monument plans, land use will be limited in the interest of preserving

natural and cultural areas of great value, contrary to impoverished local communities' desire for economic development. The creation of the monument by President Bill Clinton in the second term of his administration stepped up ongoing controversies about the roles of the federal government, private industry, environmentalist interest groups, and local communities in decisionmaking about land. There are many similar examples involving complexities of individual, group, subnational, national, and supranational claims to land. This example by no means exhausts the richness of disputes over land use decisionmaking. It does, however, provide a contoured background against which to begin the exploration of the property rights and community paradigms. We will use the monument and other examples in the discussion as this book unfolds.

The Grand Staircase of the Escalante is a nearly 1.9-million-acre area of the Colorado plateau in southern Utah that Clinton designated as a national monument in 1996. The region features spectacular red-rock country, extensive paleontological and archaeological sites, grazing lands, and a wealth of minerals, especially fossil fuels. In designating the area a monument, the president used his powers under the federal Antiquities Act (1906); the designation was accomplished without either congressional or state action. The monument's creation was thus both presidential and federal. For this and other reasons, the designation has proved controversial.

The area covered by the monument is sparsely populated and in general not well-off economically. By far the majority of residents in the region are Mormons. The area is also the traditional land of the southern Paiute Indians. Out-migration has been steady because the region does not generate the jobs needed to continue to hold people economically. The area has a history of concern about the respective roles of development and preservation. Commenting on the 1947 dedication of the paved access road over the Colorado River to Hite Ferry, one of the first efforts to open up areas of remote southern Utah that are now part of the monument, Jared Farmer writes: "Rural Utahns wanted paved roads, they wanted tourists, yet they wanted to maintain their way of life. They saw tourism, ranching, and uranium mining as compatible economic activities, all of which stood to benefit from improved roads. To the men and women gathered by the Colorado River, there was no apparent contradiction between promoting the country to tourists and keeping it like it was" (1999, 57). The monument designation, while likely to increase tourism, is seen

by local residents as cutting off desired possibilities for economic development that would allow them to keep their communities vibrant.[3] Tourism jobs tend to be seasonal, low-paying, and lacking in advancement opportunities—all reasons why the locals favor "harder" employment possibilities, such as those they envision extractive industries might bring. But these are exactly the forms of development environmentalists wish to bar from the monument area.

National monuments are designated by the president of the United States under the Antiquities Act.[4] The act is unusual in that it gives the president the power to designate monuments without consulting or seeking the consent of Congress (Leshy 1998, 84).[5] The presidential proclamation establishing the monument became a legal source guiding monument management. Grand Staircase–Escalante differs from other national monuments because the establishing proclamation designates that it will be managed by the Bureau of Land Management (BLM) rather than by the National Park Service, traditionally a more preservation-oriented organization. In a similar controversial move, the president awarded management of the Arctic National Wildlife Refuge in Alaska to the U.S. Fish and Wildlife Service over the less environmentally friendly U.S. Geological Survey, which is perceived as more supportive of extractive industries, but also over agencies perceived as more environmentally protective than U.S. Fish and Wildlife, such as the National Park Service.[6]

The Antiquities Act charges the responsible federal agency with providing for "the proper care and management of the objects to be protected." In the proclamation establishing the Grand Staircase–Escalante National Monument, President Clinton spoke poetically of "a place where one can see how nature shapes human endeavors in the western United States, where distance and aridity have been pitted against our dreams and courage." He also identified "exemplary opportunities for geologists, paleontologists, archeologists, historians, and biologists" (Clinton 1996) and acknowledged "valid existing rights," state authority for wildlife management, and grazing rights. The proclamation takes precedence over other federal designations but does not revoke them so long as they are consistent with monument purposes; some commentators therefore argue that wilderness study designations within the monument should remain intact. The "valid existing rights" provision in the proclamation tracks standard land management language that has been linked to

constitutional takings doctrine, allowing regulation but requiring compensation when property rights are taken over (Keiter, George, and Walker 1998, 90–94). "Valid existing rights" include mineral rights and rights-of-way (Laitos 1990). The proclamation also explicitly grandfathers in existing grazing rights, but does not create new ones. Thus ranchers will be able to maintain but not expand their herds. Ranching interests who are critical of the designation contend that this compromise will result in the ultimate demise of ranching communities; environmentalists contend that it will perpetuate deterioration of the range through overgrazing.

The vast majority of the area covered by the monument is federally owned. About 15,000 acres, however, are privately owned (Bureau of Land Management 1999, 2). Some of these in-holdings are clustered in towns, but others are scattered throughout the monument. The BLM may encourage exchanges of property, especially of isolated parcels. It has already concluded an exchange with the state of Utah for 180,000 acres of state holdings within the monument, and it has concluded agreements to purchase coal leases from Andalex and PacifiCorp, two major developers of mineral resources. While the BLM does not have the authority to manage the privately owned parcels, actions it takes on the surrounding federal land may well affect what the private owners can do by way of land development; control of rights-of-way is a particularly important constraint. The BLM may also seek to assert regulatory authority over activities by in-holders that threaten the character of the monument (Keiter, George, and Walker 1998, 97).

In developing a management plan for the monument, the BLM proposed using the Federal Land Policy Management Act planning process, which mandates state and local involvement. The planning process, which took place over three years and included thirty public workshops and a two-day science symposium, occurred outside of local governmental units. Five members of the planning team were appointed by the governor of Utah. The BLM also invited participation from members of the public, including Native American representatives; civic organizations; public interest groups; and other governmental agencies. The result was a management plan, effective February 2000, that asserts two basic principles: protecting the monument in "its primitive, frontier state" and providing opportunities for the study of scientific and historical resources (Bureau of Land Management 1999, iv).