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# MINORITY INTERESTS, MAJORITY POLITICS: A COMMENT ON RICHARD COLLINS' "TELLURIDE'S TALE OF EMINENT DOMAIN, HOME RULE, AND RETROACTIVITY"

ASHIRA PELMAN OSTROW<sup>†</sup>

In his article, *Telluride's Tale of Eminent Domain, Home Rule, and Retroactivity*,<sup>1</sup> Professor Richard Collins skillfully parses many of the unique legal issues that confronted the Colorado Supreme Court in *Town of Telluride v. San Miguel Valley Corp.*<sup>2</sup> In particular, Professor Collins explores the constitutional right to a change of venue based on jury bias in an eminent domain action,<sup>3</sup> the scope of Telluride's home rule power of eminent domain,<sup>4</sup> and the extent to which a state statute purporting to limit such power could be retroactively applied.<sup>5</sup>

As Professor Collins notes, the *Telluride* case was unusual in several ways:

The decision to condemn the land was made by Telluride's citizens rather than its government officials. Indeed, the officials reached a compromise with the owner that the citizens rejected. Questions about possible above-market values of a resident owner who is subjected to condemnation were largely inverted because the absentee landowner had never lived on the land, while local residents passed through it often. Instead of an orderly review of the subject of extraterritorial eminent domain, an amendment was hastily tacked onto a bill about urban renewal. . . . The amendment may have hardened Telluride's voters against a compromise with the landowner . . . . [T]here was no significant statewide interest in the condemnation, contrary to most such cases.<sup>6</sup>

In this Comment, I would like to expand on Professor Collins' observations, first, by framing Telluride's tale of extraterritorial eminent domain through the lens of public choice theory, and, second, by arguing that extraterritorial condemnation, wherein a local government condemns land *outside* of its own geographic boundaries, necessarily implicates

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1. Richard Collins, *Telluride's Tale of Eminent Domain, Home Rule, and Retroactivity*, 86 DENV. U. L. REV. 1433 (2009).

2. 185 P.3d 161 (Colo. 2008).

3. Collins, *supra* note 1, at 1434-38.

4. *Id.* at 1438-51.

5. *Id.* at 1451-55.

6. *Id.* at 1455-56 (footnotes omitted).

extra-local concerns. I therefore suggest that a state perspective, though subject to its own political process failures, is better able to balance the inter-local and statewide interests at stake in cases of extraterritorial eminent domain.

Part I describes the events leading up to the Colorado Supreme Court's decision in *Town of Telluride* and contrasts *Town of Telluride* with the more familiar tale of eminent domain told most recently by the United States Supreme Court in *Kelo v. City of New London*.<sup>7</sup> Part II borrows from public choice theory to compare the relative advantages of special interest groups at the state and local level. In particular, this Part argues that some of the peculiarities in *Town of Telluride*, including Telluride residents' rejection of a negotiated compromise with the landowner and the hasty passage of a state statute intended to circumvent Telluride's condemnation action, can be explained through an analysis of the relative political advantage of each party. The Telluride case, thus, dramatically illustrates that in the land use context developers have an advantage in influencing politics at the state level, while homeowners tend to dominate at the local level.

Part III then argues that a state-wide perspective is needed to fully account for the impact of a locality's decision to condemn land outside of its own geographic borders. Extraterritorial condemnation impacts residents or potential residents who are excluded from the political process of the condemning locality. The ability of a local community, particularly an elite and wealthy community, to use its land use regulatory power to stymie development that would benefit individuals who are not represented in the condemning locality's political process gives rise to a significant state-wide interest in regulating extraterritorial condemnation.

## I. TELLURIDE'S TALE OF EMINENT DOMAIN

The Supreme Court's highly publicized decision in *Kelo v. City of New London* brought much attention (mostly negative) to the use of eminent domain for economic redevelopment.<sup>8</sup> In *Kelo*, an economically depressed local government sought to revitalize its community by attracting private development. Jessica Corry, Director of the Independence Institute's Property Rights Project, described a similar Colorado condemnation case as follows:

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7. 545 U.S. 469 (2005).

8. Ilya Somin, *The Limits of the Backlash: Assessing the Political Response to Kelo* 7-11 (George Mason Law & Econ. Research Paper Series No. 07-14), available at <http://ssrn.com/abstract=976298> (describing negative public response to *Kelo*); Adam Karlin, *A Backlash on Seizure of Property*, CHRISTIAN SCI. MONITOR, July 6, 2005, at 1, available at <http://www.csmonitor.com/2005/0706/p01s03-uspo.html> (describing massive anti-*Kelo* backlash). Forty-three states have enacted eminent domain reforms since *Kelo* was decided. Castle Coalition, 50 State Report Card, [http://www.castlecoalition.org/publications/report\\_card/index.html](http://www.castlecoalition.org/publications/report_card/index.html) (last visited June 8, 2009).

Sheridan residents face a situation typical of what is occurring in many struggling Colorado towns and cities. A decline in sales tax revenue due to a major retailer's departure in 1997 led to the loss of the city's municipal building, and in response, city leaders created the Sheridan Redevelopment Agency, aggressively sought redevelopment opportunities to generate additional tax revenue, and turned to condemnation of existing businesses to make way for a private redevelopment project perceived to have the ability to generate greater tax revenue.<sup>9</sup>

In *Kelo* the Supreme Court held that economic redevelopment constitutes a permitted "public use"<sup>10</sup> under the Takings Clause.<sup>11</sup> Unfortunately, in some cases, the property owner, forced from her home or business, is nonetheless injured if she is not adequately compensated for the non-monetary value of her property.

As Professor Collins observes, however, *Telluride* presents a far different dynamic. Instead of a local home or business owner, the property owner in *Telluride* was Neal Blue, a San Diego-based defense contractor, who purchased several hundred acres of land at the entrance to the Telluride Valley through his company, the San Miguel Valley Corporation (SMVC).<sup>12</sup> Thus, in this case, the "above-market values of a resident landowner who is subjected to condemnation were largely inverted because the absentee landowner had never lived on the land, while local residents passed through it often."<sup>13</sup>

One could scarcely think of a better foil for Blue than the Town of Telluride. Once a mining town, Telluride is now famous for its scenic views, snow capped peaks and anti-development stance. In the words of Seth Cagin, publisher of the Telluride Watch, "What you have in Telluride is a large constituency of people who moved here because they are of the mind that the Earth is imperiled . . . to them it's important to draw the line and take a stand—and just say no."<sup>14</sup>

Early on the battle lines were drawn between Neal Blue, "easily caricatured as a ruthless capitalist, for whom the Valley Floor was a sym-

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9. JESSICA PECK CORRY, INDEPENDENCE INSTITUTE PROPERTY RIGHTS PROJECT, AT THE CROSSROAD OF CONDEMNATION: THE DEBATE OVER THE USE OF EMINENT DOMAIN FOR PRIVATE DEVELOPMENT AND OPEN SPACE 9 (2006), available at [http://www.i2i.org/articles/IP\\_1\\_2006\\_b.pdf](http://www.i2i.org/articles/IP_1_2006_b.pdf) (footnote omitted).

10. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

11. *Kelo*, 545 U.S. at 478-81, 483-84. See also *Berman v. Parker*, 348 U.S. 26, 35 (1954) (holding that private structures which are not themselves blighted may be condemned as part of a larger program designed to prevent the spread of blight and that transfer of a condemned property to a private entity for redevelopment qualifies as public use).

12. Bruce V. Bigelow, *Setback for S.D. industrialist*, S.D. UNION-TRIB., May 10, 2007, available at [http://www.signonsandiego.com/uniontrib/20070510/news\\_1b10blue.html](http://www.signonsandiego.com/uniontrib/20070510/news_1b10blue.html).

13. Collins, *supra* note 1, 1455-56.

14. Richard Bernstein, *A clash of values, Rockies resort-style letter from America*, INT'L HERALD TRIB., Feb. 26, 2007, available at 2007 WLNR 3703058.

bol of private property” and the citizens of Telluride, “equally easy to caricature—from Blue’s perspective—as idealistic hippies, or leftists, who did not respect private property rights.”<sup>15</sup> The conflict came to a head in 2002, when Telluride residents voted to use the town’s power of extraterritorial eminent domain to forcibly acquire almost two-thirds of Blue’s parcel for public open space, parkland and recreation use. The town filed its condemnation petition in San Miguel County on March 26, 2004.<sup>16</sup>

Here again, the *Telluride* tale diverges from other eminent domain stories. Most property owners are powerless to resist an official condemnation order.<sup>17</sup> Once a government has made the decision to exercise its power of eminent domain, the fight turns to the valuation of the condemned property.

But Neal Blue is not an ordinary landowner. Blue took his fight to the state legislature and succeeded in tacking an amendment, known as the Telluride Amendment, onto a more general bill reforming eminent domain law.<sup>18</sup> The Telluride Amendment explicitly prohibited extraterritorial condemnation for public open space, parkland and recreation use. It applied retroactively to January 1, 2004, neatly capturing Telluride’s March 2004 condemnation order.

The Telluride Amendment, at best, fit awkwardly into the larger property rights bill onto which it was tacked.<sup>19</sup> House Bill 1203 was passed in response to public outcry over alleged abuse of the Colorado Urban Renewal Law, which permitted local agencies to transfer property ownership in designated blighted areas to private developers for the purpose of urban renewal.<sup>20</sup> Enacted one year prior to the Supreme Court’s decision in *Kelo*, House Bill 1203 narrowed the public use requirement by excluding from the definition of public use “the taking of private

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15. Seth Cagin, *Field of Dreams*, TELLURIDE WATCH, Feb. 28, 2009, available at <http://tinyurl.com/djnmu8>. Adding fuel to the fire, Telluride residents, already opposed to any development of the Valley Floor, grew even more distrustful of Blue when an internal memo was leaked to the press recommending that Blue gain community support by buying a local newspaper and using a seemingly fictitious agricultural scheme to drain wetlands. Bernstein, *supra* note 14.

16. Town of Telluride v. San Miguel Valley Corp., 185 P.3d 161, 163-64 (Colo. 2008).

17. Posting of Ilya Somin to The Volokh Conspiracy, <http://volokh.com/posts/1235208323.shtml> (Feb. 21, 2009, 3:25 PST) (reviewing *Little Pink House* by Jeff Benedict and noting Benedict’s description of the great difficulty of resisting eminent domain when those targeted are relatively lacking in political influence).

18. 2004 Colo. Legis. Serv. 367 (West) (codified at COLO. REV. STAT. § 38-1-101(4)(b) (West 2009)).

19. Collins, *supra* note 1, at 1444 (noting that the Amendment’s hasty consideration was illustrated by the fact that it left unamended a conflicting statute that expressly allowed municipalities to condemn land within five miles outside their boundaries for park and open space purposes).

20. CORRY, *supra* note 9, at 4.

property for transfer to a private entity for the purpose of economic development or enhancement of tax revenue.”<sup>21</sup>

The Telluride Amendment, in contrast, prohibited the use of eminent domain for public open space, park and recreation purposes. Open space condemnation is unlikely to be used by urban renewal agencies seeking to attract new development projects.<sup>22</sup> Moreover, condemnation of private land for public open space and parkland, though perhaps objectionable on other grounds,<sup>23</sup> falls squarely within the narrow meaning of public use as “use by the public.”<sup>24</sup> Thus, House Bill 1203 prevents communities from *privileging* private commercial development, while the Telluride Amendment prevents communities from *excluding* private commercial development.

While it is possible that the Telluride Amendment was legitimately inspired by the property rights movement and would have passed even without Blue’s lobbying,<sup>25</sup> the fact that the Amendment was just retroactive enough to capture the Telluride condemnation makes that theoretical possibility unlikely.<sup>26</sup> In the words of a local blogger writing at the time the Amendment was being considered by the state legislature:

This open space amendment clearly still represents special interest legislation; the amendment was brought up at the request of lobbyists (4 of them, this time) from the law firm representing one landowner: SMVC, owner of Telluride’s Valley Floor. This amendment was clearly and indisputably written with the express purpose of thwarting Telluride’s rights of self-determination. There have been no oth-

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21. COLO. REV. STAT. § 38-1-101(1)(b)(I) (2009) (“[P]ublic use’ shall not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenue.”). See also NCSL.org, State Legislative Response to *Kelo*, <http://www.ncsl.org/programs/natres/annualmtgupdate06.htm> (last visited Apr. 16, 2009) (describing post-*Kelo* legislative efforts including reforms which prohibit the use of eminent domain for economic development purposes, to generate tax revenue, or to transfer private property to another private entity and reforms which define “public use” as the possession, occupation or enjoyment of the property by the public at large, public agencies or public utilities).

22. Cf. Collins, *supra* note 1, at 1457 (noting that “historical uses of eminent domain have mostly been pro-development, public or private. Land was taken to intensify its use or to supply services to other developments. Takings for parks were a limited exception, . . .”).

23. See discussion *infra* pp. 1470-71 (analogizing extraterritorial condemnation for open space to other forms of exclusionary zoning).

24. *Kelo v. City of New London*, 545 U.S. 469, 479 (2005) (describing narrow view of public use requirement as use by the public).

25. Collins, *supra* note 1, at 1450 (“Legislative motivation for the Telluride Amendment was either ideological opposition to any use of eminent domain to acquire land for parks and open space, an attempt to accommodate the wishes of a wealthy landowner and potential campaign contributor, or some mix of both.”).

26. As noted above, the Telluride Amendment was retroactive to January 1, 2004. See COLO. REV. STAT. § 38-1-101(4)(b)(I-II) (2009). The Town of Telluride filed its condemnation action on March 26, 2004. *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161, 163-64 (Colo. 2008).

er examples of cases that this amendment would effect [sic] or benefits of this legislation outside of benefits to SMVC.<sup>27</sup>

Professor Collins similarly concludes that “making a new law just retroactive enough to benefit a single wealthy interest that procured the law can be walled off as a distortion of democracy.”<sup>28</sup> Indeed, as I will discuss more fully below,<sup>29</sup> passage of the Telluride Amendment likely illustrates the capacity of a special interest to capture the democratic process at the state level.

Ultimately, the District Court invalidated the Telluride Amendment under Colorado’s constitutional Home Rule provision.<sup>30</sup> The District Court also ordered the parties to enter into mediation.<sup>31</sup> In December 2005, Telluride town officials reached a tentative compromise with Blue. The agreement would have allowed Blue to build 22 houses on 64 acres of land.<sup>32</sup> In exchange, Blue would build 15 units of affordable housing for Telluride’s working-class people, donate land for a new hospital and school, and place the remaining 91% of the land under a conservation easement.<sup>33</sup>

Despite the seemingly beneficial terms of the compromise and the endorsement of the Telluride Town Council and San Miguel County Commission, Telluride’s residents voted to reject the compromise.<sup>34</sup> In rejecting the compromise, residents took an absolute stance against development.<sup>35</sup>

With the Telluride Amendment invalidated and the compromise agreement rejected, all that was left for the condemnation to be complete was a trial to set compensation. At the time of the trial, Telluride appraised the land at \$26 million, which the town itself had raised, mostly

27. Progress Now Colorado, <http://www.progressnowcolorado.org/page/community/post/jbholston/CLWc> (Mar. 26, 2004, 02:00 EST). In his post, blogger JB Holston further notes:

According to a Colorado Municipal League release, SMVC attorney Tom Ragonetti testified before the House committee that heard this bill that this amendment is not special interest, but failed to site examples outside of his client’s Valley Floor land. Ragonetti’s firm has since hired at least four of the state’s hardest hitting lobbyists to fight for this amendment. Some of these lobbyists are from state home-builders associations, a powerful lobby group, fighting for property rights and development rights.

*Id.* Bigelow, *supra* note 12 (citing Telluride Mayor, John Pryor, as saying that Blue’s company lobbied for the passage of the Telluride Amendment).

28. Collins, *supra* note 1, at 1455.

29. See *infra* Part II.

30. See Appellants’ Opening Brief at 2-4, *Town of Telluride v. San Miguel Valley Corp.*, No. 07SA101 (Colo. Aug. 15, 2007).

31. Collins *supra* note 1, at 1434.

32. Patrick O’Driscoll, *Land Fight in Telluride, Colo., Enters 11th Hour*, USA TODAY, May 8, 2007, available at [http://www.usatoday.com/news/nation/2007-05-07-telluride\\_N.htm](http://www.usatoday.com/news/nation/2007-05-07-telluride_N.htm); Bernstein, *supra* note 14 (describing the terms of the mediated compromise).

33. O’Driscoll, *supra* note 32.

34. According to Art Goodtimes, one of the county commissioners who recommended the proposal, “It was hard to say no to that (compromise), because it offered so much for so little.” *Id.*

35. In the words of one Telluride resident, the compromise was rejected because “A little development on the valley floor is like being a little bit pregnant.” Bernstein, *supra* note 14.

by incurring bond debt. In contrast, Blue appraised the land at closer to \$50 million. A panel of jurors agreed with Blue, leaving the town with only three months to raise the \$24 million shortfall.<sup>36</sup>

For most local governments, a \$24 million shortfall would have created an insurmountable obstacle to the condemnation action. But Telluride is not an ordinary local government. In 2002 the median home price in the United States was \$156,200,<sup>37</sup> while the median home price in the incorporated area surrounding the Telluride Ski Resort was over \$2 million.<sup>38</sup> Telluride is also “home or second home to many wealthy (and celebrated) citizens, including Tom Cruise, Christie Brinkley, Daryl Hannah, and Oprah Winfrey,”<sup>39</sup> as well as diplomat Richard Holbrooke, former eBay CEO Meg Whitman, and Hollywood movie mogul Tom Shadyac, who alone contributed \$2 million in the days before the deadline expired.<sup>40</sup> The Telluride community, therefore, was able to raise the funds necessary to complete the condemnation.<sup>41</sup>

## II. COMPARATIVE POLITICAL ADVANTAGE AT THE STATE AND LOCAL LEVEL

As Part I explains, Telluride’s tale of condemnation turns the more notorious eminent domain saga on its head. Instead of a politically vulnerable landowner, such as Suzette Kelo, being forced from her lifelong home or business, this case involved a commercial landowner so politically powerful that he was able to persuade the state legislature to pass a law specifically designed to preserve his property. And instead of a locality motivated by a desire to rejuvenate its declining community by

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36. *Id.*; see also Collins, *supra* note 1, at 1437 (“The town’s last offer before the jury’s verdict was \$26 million; the landowner claimed a value of almost \$51 million. The jury’s verdict was for \$50 million.”). In addition, Professor Collins explains:

The jury’s verdict was entered on Feb. 20, 2007. This was followed by a hearing on the amount of time the town had for raising the funds to satisfy the verdict because there was no explicit Colorado rule setting a deadline. The landowner argued for 44 days, until April 5. The town argued for no deadline or in the alternative for 90 days, until May 21. The District Court adopted the May 21 deadline.

*Id.* at 1437 n.36.

37. RealEstateABC.com, Median Sales Prices of Existing Homes Since 1968, <http://www.realestateabc.com/graphs/natlmedian.htm> (last visited Apr. 16, 2009).

38. Bernstein, *supra* note 14.

39. Collins, *supra* note 1, at 1437.

40. O’Driscoll, *supra* note 32; Bigelow, *supra* note 12.

41. See O’Driscoll, *supra* note 32 (stating that the town needs to raise the money by May 9, the deadline date); Bigelow, *supra* note 12 (describing fund raising efforts, including a \$2 million donation from a Hollywood producer and other large contributions that enabled the town to raise \$24 million in less than 3 months). See also Joanne Kelley, *Telluride Passes Hat, Collects \$50 Million*, ROCKY MTN. NEWS, May 10, 2007, available at <http://tinyurl.com/co5zfy>.

In fact, the total amount raised was actually higher than \$24 million because, as Professor Collins notes, “because Colorado requires a condemning town to reimburse attorneys fees when an eminent domain verdict is 130% or more of the town’s last offer, Telluride had to pay almost \$2.8 million more for fees and costs.” See Collins, *supra* note 1, at 1437-38 & n.39 (citing *Town of Telluride v. San Miguel Valley Corp.*, 197 P.3d 261, 262 (Colo. App. 2008) (applying COLO. REV. STAT. § 38-1-122 (1.5) (2008))).



attracting private development, it involved a town so wealthy it was able to pay \$50 million to prevent development outside its borders.

Although the case presents some unique issues, this Part demonstrates that the actions of both the landowner and the residents of Telluride can be explained through an analysis of the relative political advantage of each party at the state and local levels of government. More specifically, the Telluride case dramatically illustrates the general observation that in the land use context, developers have an advantage in influencing politics at the state level, while homeowners tend to dominate at the local level.<sup>42</sup>

Political scientists have long recognized that small groups enjoy an advantage in the political process.<sup>43</sup> Indeed, a central insight of public choice theory is that a motivated minority group can exert more political influence than an unorganized or apathetic majority. Neal Komesar explains that:

Interest groups with small numbers but high per capita stakes have sizeable advantages in political action over interest groups with larger numbers and smaller per capita stakes, because higher per capita stakes mean that the members of the interest group will have greater incentive to expend the effort necessary to recognize and understand the issues.<sup>44</sup>

In addition, smaller groups can more easily overcome free-rider problems, transaction and information costs and other organizational hurdles that can plague larger groups. Moreover, special interest group influence increases in proportion to the size of the government because the larger the government, the more difficult it is for majorities to organize effectively.<sup>45</sup>

In contrast, small governments are more easily captured by dominant majorities.<sup>46</sup> The notion that small polities are vulnerable to majori-

42. Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1664 (2006).

43. *Id.* at 1638 ("In contemporary politics, their relative advantage can explain special interest groups' frequent ability to capture legislatures, regardless of the preferences of the majority of voters.").

44. NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 61 (2001).

45. Serkin, *supra* note 42, at 1662-64. Serkin notes, however, that: there may be a size cutoff above which the marginal cost of organizing the majority does not substantially change, at which point other factors, like the quality of the decisionmakers, become increasingly important. In other words, this comparison may work better between small, local governments on the one hand, and state and federal governments on the other, than between states and the federal government.

*See id.* at 1663 n.149.

46. Of course, rule by majority is a central tenet of democracy and is not, in and of itself, harmful. The danger in small localities arises because "logrolling by competing constituencies is less likely to ensure that every group will get its say. Instead, a dominant majority can effectively shut out competing voices and systemically have its way." *See Serkin, supra* note 42, at 1647.

tarianism, or faction, can be traced directly back to James Madison and the Federalist Papers. Madison worried that in a small society, "a common passion or interest will, in almost every case, be felt by a majority of the whole . . . and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual."<sup>47</sup>

In particular, small local governments are often responsive to their largest and most motivated constituency, namely homeowners.<sup>48</sup> As a result, in towns like Telluride, developers must negotiate with the community, through exactions and other compromises, in order to gain local approval for their projects.<sup>49</sup>

For over two decades, Neal Blue, a Denver native whose mother, "a state treasurer and University of Colorado Regent, is honored in a stained glass window in the State Capitol,"<sup>50</sup> and whose take-no-prisoner's style of business earned him the personal nickname "The Predator,"<sup>51</sup> negotiated unsuccessfully with the local community to gain approval for his development plans. Having failed to woo the local majority, Blue, not surprisingly, turned to the state legislature to defeat Telluride's condemnation motion.

That Blue was unable to persuade the local government to approve his development plans is also not surprising. The homeowner majority is

47. THE FEDERALIST NO. 10, at 81 (James Madison) (Clinton Rossiter ed., 1961).

48. William A. Fischel, *Voting, Risk Aversion and the NIMBY Syndrome: A Comment on Robert Nelson's Privatizing the Neighborhood*, 7 GEO. MASON L. REV. 881, 891 (1999) ("[C]onvincing econometric evidence supports the supposition that in small towns, the preferences of the median voter—usually a homeowner—prevail in local political decisions"); Serkin, *supra* note 42, at 1648 (supporting Fischel's hypothesis that local politics are dominated by homeowners who have both the incentive and the means to exert political influence locally); Winter King, *Smart Growth Meets the Neighbors*, 34 ECOLOGY L.Q. 1349, 1357-58 (2007) ("A local government's responsiveness to the desires of landowners within its jurisdiction is unsurprising given the representative nature of local government. City councils (and often planning commissions) are elected bodies, and are therefore unlikely to approve a project, much less a significant change in policy, in the face of significant opposition from the electorate."). Not all scholars agree with the characterization of local governments as majoritarian. See, e.g., David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1273 (1997) ("Theoretical constructs aside, however, there seems to be a slim empirical basis for concluding that small locality politics are generally rife with majoritarian abuse of power."); Vicki Been, *The Perils of Paradoxes—Comment on William A. Fischel, Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?*, 67 CHI.-KENT L. REV. 913, 920 (1991) ("[T]here is enormous room for debate about whether all or even most local governments fit [the majoritarian] model."); Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1131-32 (1996) (reviewing WILLIAM A. FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* (1995)) (criticizing the majoritarian model of local politics as an example of "localism bashing").

49. Serkin, *supra* note 42, at 1652 (noting that in small local governments special interest groups may be better viewed as petitioners for homeowner approval).

50. Collins, *supra* note 1, at 1433 & n.4 (citing Colorado State Capitol, <http://www.colorado.gov/dpa/doit/archives/cap/blue.htm> (last visited Apr. 16, 2009)); Matt Potter, *General Atomics: Color It Blue*, S.D. WEEKLY READER, July 12, 2001, available at <http://www.sandiegoreader.com/news/2001/jul/12/general-atomics-color-it-blue>.

51. Collins, *supra* note 1, at 1433 & n.7 (citing Barney Gimble, *The Predator*, FORTUNE MAGAZINE, Oct. 31, 2008, available at [http://money.cnn.com/2008/10/28/magazines/fortune/predator\\_gimble.fortune/index.htm](http://money.cnn.com/2008/10/28/magazines/fortune/predator_gimble.fortune/index.htm)).

primarily motivated by a common desire to maintain property values within the community.<sup>52</sup> In economically depressed communities this desire may translate into a concerted effort to attract new development to the community. In wealthy communities such as Telluride, however, homeowners are likely to *oppose* development within and adjacent to the locality out of “fear that greater density will adversely affect local road congestion, neighborhood character, crime, taxes and public services.”<sup>53</sup>

Moreover, as Christopher Serkin argues, homeowners are motivated by a desire to maintain not only the objective market value of their homes, but also the subjective use value of their homes and communities. According to Serkin:

Homes embody more than a substantial financial investment; they incorporate aspects of their owners' lives and identities. An account that focuses exclusively on market values or risk aversion misses important interests like the commitment members of a community may have to preserving its character, independent of any effect on property values.<sup>54</sup>

Factoring in the subjective use value of property can account for homeowners' desire to exclude minorities or other groups of neighbors considered to be undesirable, even where the economic benefit of excluding these groups from the community is unclear.<sup>55</sup> It can also account for Telluride's stubborn refusal—over the course of two decades—to approve Blue's development plans and its refusal to accept even the negotiated compromise, which would have provided the Town with affordable housing, a school and a hospital.<sup>56</sup>

Instead, Telluride residents focused on maintaining the subjective use value of their elite community, set literally and figuratively above its neighbors, which would be diminished by the construction of a nearby development. As one newspaper reported, “[t]here's a powerful determination among those lucky or rich enough to live here not only to enjoy their earthly paradise but also to ensure that it is a responsible paradise. Telluride-esque means recreation as a way of life combined with a cer-

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52. “Homeowner control over local governments means that local governments will seek to maximize the use value of people's property.” Serkin, *supra* note 42, at 1659.

53. Fischel, *supra* note 48, at 881. See also WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 229-31 (2001).

54. Serkin, *supra* note 42, at 1656. See also D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 278-83 (2006) (describing psychological value of a home). For a related explanation of why neighbors oppose even property value enhancing development see King, *supra* note 48, at 1362 & n.56 (“Another explanation . . . is that owners of older homes do not to [sic] want to be outdone by new development . . . . Even if their property values go up due to the new development, neighbors may still find it distasteful to feel like poor relations to the new residents.”).

55. Serkin, *supra* note 42, at 1657.

56. See Bernstein, *supra* note 14 (describing terms of the negotiated compromise between Town officials and Neal Blue).

tain high-minded utopianism, where the morally and physically polluting elements of the outside world should and can be kept at bay.”<sup>57</sup> Seth Cagin characterized the condemnation more critically, noting that “the \$50 million . . . could have been spent to save rainforest in the Amazon, to build a wind farm, or any other number of things. To spend it on the Valley Floor when we could have had 91 percent of the same land for free is one thing only: conspicuous consumption.”<sup>58</sup>

In the end, it is difficult to determine who “won” the Telluride case. Although the Colorado Supreme Court invalidated the Telluride Amendment, thereby permitting the condemnation, a jury forced Telluride to pay Blue \$50 million—almost exactly the amount Blue had appraised the property to be worth and nearly double the Town’s appraisal.

At least from an economic perspective, the outcome was efficient because Telluride residents were forced to internalize the full cost of their condemnation action. Indeed, the Telluride case serves as a striking illustration of how the Takings Clause works in small local governments: “Given any government proposal that requires compensating burdened property owners, the local government will have to decide—under the control of local homeowners—whether the proposal will cost more in property taxes than it will generate in gain through increased property values.”<sup>59</sup> In this case, Telluride residents agreed that preserving the Valley Floor was worth the \$50 million price tag.<sup>60</sup>

### III. IDENTIFYING THE EXTRA-LOCAL INTEREST

Although Telluride’s condemnation of the Valley Floor may have been economically efficient, there are still reasons to question whether it achieved the optimal result, particularly since, as Part II explains, it was motivated not only by environmentalism but also by a less lofty desire to preserve Telluride’s character as an elite resort community. As Seth Cagin admonished in the aftermath of the community’s rejection of the negotiated compromise with Blue:

And so, we have become what we are: Beverly Hills in the mountains; Aspen south. We are now a community of very wealthy second homeowners, a few very wealthy families who can afford to live here full-time, a dwindling and aging population of others who got in before prices hit the stratosphere and a small, static population of workers in subsidized housing . . . . What has passed for environ-

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57. Bernstein, *supra* note 14.

58. See Allan Best, *Telluride Open Space Won't Be Cheap*, ASPEN TIMES, Feb. 23, 2007, available at <http://www.aspentimes.com/article/20070223/NEWS/70223006>.

59. Serkin, *supra* note 42, at 1661.

60. Perhaps not surprisingly, the court’s decision in *Town of Telluride v. San Miguel Development Corp.* represents both an end and a beginning. It is the end of the decades’ long battle against Neal Blue, but it is also the start of a new battle between town residents who are bitterly divided over how the 572 acres of condemned land should be used. Cagin, *supra* note 15.

mentalism in Telluride . . . is not environmentalism at all. It is elitism, pure and simple.<sup>61</sup>

Exclusionary zoning is not new,<sup>62</sup> and Telluride's use of its land use regulatory authority to maintain its elite status and exclude newcomers is hardly unique.<sup>63</sup> Exclusionary zoning is the natural consequence of a decision-making process in which the interests of potential residents are not represented by the locality enacting the exclusionary policies.<sup>64</sup> As William Fischel has noted, "the political market's failure in NIMBYism<sup>65</sup> is that those who would benefit from the project are either absent from the jurisdiction, or present in such small numbers that they are politically ineffective."<sup>66</sup>

Extraterritorial condemnation often exhibits the same political market failure because residents, or potential residents, of the area to be condemned are not represented by the locality exercising the condemnation power. This market failure was vividly illustrated by the recent attempt of another Colorado city, ironically named Golden,<sup>67</sup> to prevent the construction of a digital broadcasting tower outside its own borders by condemning the proposed site for open space.<sup>68</sup> The broadcasting tower

61. Bernstein, *supra* note 14.

62. Traditionally, exclusionary zoning has been used to describe large-lot, low-density zoning used by some communities to prevent development. In this Comment, I use the term more broadly to include other land use controls designed to exclude new development.

63. Richard Briffault, *Our Localism: Part II-Localism and Legal Theory*, 90 COLUM. L. REV. 346, 347-49 (1990) (describing suburbs' use of exclusionary zoning); Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1082 (1996) (arguing that zoning is used to keep out "the wrong kind of people"—those who have to be excluded in order to make a residential neighborhood seem desirable.); Stephen David Galowitz, *Interstate Metro-Regional Responses to Exclusionary Zoning*, 27 REAL PROP. PROB. & TR. J. 49, 71 (1992) ("In decisions affecting land use, landlords and homeowners naturally unite to further their common interests . . . influence[ing] local governments to enact zoning policies that effectively deny many individuals their choice of residence. In most cases, these individuals also are excluded from the political process."); Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 1025 (2007) (describing use of zoning to reinforce preferences of an artificially created majority).

64. Nestor Davidson articulates this phenomenon by noting that "the confluence of the Civic Republican ideal of local participation and the Tieboutian rationale for intergovernmental competition combine in the realm of privileged local communities to foster exclusion and inequality." Davidson, *supra* note 63, at 1025 (citing Briffault, *supra* note 63, at 403-25); *see also* Galowitz, *supra* note 63, at 71.

65. NIMBY, an acronym for Not In My Backyard, describes "nearby homeowners who object to further development within their community." William A. Fischel, *Voting, Risk Aversion and the NIMBY Syndrome*, 7 GEO. MASON L. REV. 881, 881 (1999).

66. *Id.* at 891.

67. Founded as a mining town in 1859, the City of Golden is actually named for Thomas Golden, a miner. Britannica Online Encyclopedia, <http://www.britannica.com/EBchecked/topic/237473/Golden> (last visited June 8, 2009).

68. *See* CORRY, *supra* note 9, at 11 ("According to Golden Spokeswoman Sabrina Henderson, the city wants to acquire the land at a cost of \$1.7 million to taxpayers, demolish the existing towers, and turn the land into open space . . ."); *id.* (noting that Golden City Council members claim their purpose is to create new open space); Golden's Condemnation, [http://www.hdtvcolorado.com/content\\_pages/condemnation.htm](http://www.hdtvcolorado.com/content_pages/condemnation.htm) (last visited Apr. 16, 2009); Michael Roberts, *Golden Showers: A City's Plans Rain on Local TV Powerhouses*, WESTWORD, Apr. 13, 2006, available at <http://www.westword.com/2006-04-13/news/golden-showers/1>; Editorial, *Merciful Intervention in TV Tower Dispute*, DENVER POST, Dec. 12, 2006, at B06 (characterizing decision to condemn the

serves residents of the greater Denver metropolitan area, who, for the most part, are excluded from Golden's political process.<sup>69</sup>

Professor Collins maintains that the Telluride condemnation was unique, in part because there was no significant statewide interest in the Telluride condemnation.<sup>70</sup> Professor Collins acknowledges that a statewide interest could exist if the county in which the property was located objected to the condemnation or if the condemnation conflicted with a statewide land use policy, but concludes that in this case, "ownership and use of the [Telluride] Valley Floor land did not fairly present any issue of statewide concern. . . . San Miguel County, the territorial local government for the Valley Floor . . . sided with Telluride, declaring that the issue was local to Telluride. The Valley Floor is a uniquely isolated piece of land that affects few outsiders."<sup>71</sup>

Collins, therefore, suggests that the breadth of the court's decision could have been tempered without changing the substantive outcome had the court applied its traditional state-mixed-local framework to Telluride's condemnation action. Specifically, if the court had concluded that the condemnation was purely local, it would have given Telluride the power to condemn the Valley Floor, while at the same time preserving the authority of the state to limit the extraterritorial condemnation powers of home rule localities.<sup>72</sup>

Even if the particular parcel of land at issue in Telluride was geographically isolated, however, condemnation of this land by an adjacent municipality likely implicates broader state interests. Indeed, in light of the political market failure identified above, I would suggest that any extraterritorial condemnation for open space necessarily presents an issue of statewide or mixed state-local concern.<sup>73</sup>

More generally, the enormous overlap of municipal borders and functions in our increasingly global economy makes it difficult to identify any municipal action that is purely local.<sup>74</sup> As Richard Briffault has

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site as "ludicrous"). See also *Mount Laurel Tp. v. Mipro Homes, L.L.C.*, 878 A.2d 38 (N.J. Super. Ct. App. Div. 2005), *aff'd per curiam*, 910 A.2d 617 (2006) (upholding municipal open space condemnation designed to prevent residential real estate development), *cert. denied*, 128 S. Ct. 26 (2007).

69. See Anne Mulkern & Ann Schrader, *Congress OKs TV Tower*, DENVER POST, Dec. 10, 2006, at C01. See also Collins, *supra* note 1, at 1446.

70. Collins, *supra* note 1, at 1449. Professor Collins nonetheless acknowledges that a statewide interest could exist if the county in which the property was located objected to the condemnation or if the condemnation conflicted with a statewide land use policy. *Id.*

71. *Id.* at 1449-50.

72. *Id.* at 1450 ("Had the local-mixed-statewide doctrine been applied in *Telluride* without an automatic assumption that extraterritorial action cannot be local, the result should have been the same, but the implications of the decision for other situations far less sweeping.").

73. Collins notes that this view was shared by the parties to the Telluride case. *Id.* at 1448.

74. See Laurie Reynolds, *Home Rule, Extraterritorial Impact, and the Region*, 86 DENV. U. L. REV. 1271, 1272 (2009) ("[M]ore than 80% of our population now lives in what can be defined as

observed, "With most urban areas composed of dozens, if not hundreds, of local governments—and few, if any, local governments, fully encompassing their economic and social regions—local governments inevitably have needs which cannot be satisfied entirely within their borders and inevitably undertake actions which affect people outside their boundaries."<sup>75</sup>

Local government decisions, particularly in the area of land use, impose external effects on neighboring communities.<sup>76</sup> Indeed, land use regulation, once thought to be exclusively within the domain of local government, has increasingly been viewed as a regional or statewide concern.<sup>77</sup>

The *Telluride* court acknowledged the state's interest in extraterritorial condemnation when it noted that the state legislature may *regulate* the exercise of extraterritorial eminent domain powers, even if it may not *prohibit* it.<sup>78</sup> This point was emphasized by Justice Coats' concurrence, which explicitly recognizes the state's "cognizable interest in regulating the acquisition of property, beyond their own boundaries, by so many home rule cities."<sup>79</sup> In cases of extraterritorial eminent domain, both the condemning locality and the locality in which the land to be condemned is located have an interest regulating the property. Thus, as Professor Richard Briffault observes, "surely the state has an interest in protecting the land use regulatory authority and, more broadly, the policy-making

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metropolitan areas, with their multiplicity of local government units and the corresponding overlapping and intersecting boundary lines.").

75. Richard Briffault, *Town of Telluride v. San Miguel Valley Corp: Extraterritoriality and Local Autonomy*, 86 DENV. U. L. REV. 1311, 1317 & n.35 (2009) (citing *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161, 164-69 (2008)).

76. Davidson, *supra* note 63, at 1024.

77. See Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL'Y 717, 719-20 (2008) (noting a growing recognition that excessive reliance on local governments may have contributed to regional problems such as exclusionary zoning and environmental degradation). In some instances, local land use has been deemed of federal concern. See, e.g., Patricia E. Salkin, *Smart Growth and Sustainable Development: Threads of a National Land Use Policy*, 36 VAL. U. L. REV. 381, 389 (2002) ("The most appropriate role for the federal government in land use issues is not embodied in a national zoning scheme, but rather in the facilitation of community planning through guidelines, technical assistance, and funding."); Shelby D. Green, *The Search for a National Land Use Policy: For the Cities' Sake*, 26 FORDHAM URB. L.J. 69 (1998) (documenting federal laws and programs that affect state and local land use, including federal spending on highways, tax benefits and mortgage insurance, inner-city housing, urban renewal, block grants, and enterprise and empowerment zones). More recently, the federal government has constrained local discretion in areas where Congress determined that national interests should outweigh, or at least balance, local majoritarian concerns. See, e.g., Telecommunications Act of 1996, 47 U.S.C.A. § 332(c)(7) (West 2009) (preempting local zoning process in siting of cell phone towers); Energy Policy Act of 2005, 15 U.S.C.A. § 717b(e)(1) (West 2009) (preempting local zoning of liquid natural gas terminals); Religious Land Use and Institutionalized Persons Act, 42 U.S.C.A. § 2000cc(a)(2)(C) (West 2009) (regulating local zoning of religious land use).

78. *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161, 170 n.8 (Colo. 2008).

79. *Id.* at 172 (Coats, J., concurring).

autonomy of the local governments in which extraterritorially condemned land is located.”<sup>80</sup>

Professor Collins argues that the Telluride condemnation presented no issue of statewide concern, in part because San Miguel County, the locality in which the condemned parcel was located, agreed that the issue was local to Telluride. County consent in this case, however, does not negate the broader statewide interest in regulating extraterritorial condemnation, particularly since the County may not have fully accounted for all of the extra-local interests impacted by the condemnation decision.<sup>81</sup>

Instead, the County, a local political body, might have been overly responsive to the desires of its wealthy Telluride constituency, especially since the uninhabited parcel presented no opposing constituency. Thus, the County, though more broadly constituted than a single locality, may still be too narrow to fully internalize all of the costs associated with certain local land use decisions. In contrast to a locality and despite its own political process failures, a state government, at times, may be better situated to balance extra-local costs.

### CONCLUSION

In his article, Professor Collins highlights a number of unusual facets in Telluride’s tale of extraterritorial condemnation. This Comment demonstrates, first, that many of these twists and turns, including Telluride’s stubborn refusal to accept any development of the Valley Floor and Blue’s subsequent attempt to circumvent the local community by appeal to the state legislature, can be explained through a public choice theory analysis of the state and local government political processes. Moreover, this Comment argues that the ability of a local community, particularly a wealthy community, to use its land use regulatory power to stymie development that would benefit individuals who are not represented in the condemning locality’s political process gives rise to a significant state-wide interest in regulating extraterritorial condemnation.

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80. Briffault, *supra* note 75, at 1325.

81. See also Appellants’ Reply Brief at 2, *San Miguel Valley Corp. v. Town of Telluride*, No. 07SA101, 2007 WL 4312701 (Colo. Oct. 26, 2007) (“The Town and the amicus briefs denigrate the state interest in the subject matter of the Statute by focusing upon the particular geographic position of Telluride. But the state interest is self-evident when the focus shifts to the remainder of the state. While Telluride may exist in isolation, many home-rule municipalities are part of larger metropolitan areas. Indeed, the Denver Regional Council of Governments contains 30 home-rule governments.”).



