

INTER-LOCAL EXTERNALITIES: FURTHER THOUGHTS ON RICHARD BRIFFAULT'S "EXTRATERRITORIALITY AND LOCAL AUTONOMY"

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It is hard to imagine a more provocative example of extraterritorial power than the extraterritorial eminent domain documented by Professor Richard Briffault in his contribution to this Symposium.¹ At first blush, it looks less like the natural exercise of state delegated authority than like a cross-border invasion. In Professor Briffault's fascinating treatment, it is more than that, too. It represents a point of uncomfortable intersection between the dual sources of local government power: top-down delegation from the state, and bottom-up representation of local voters.²

Extraterritorial eminent domain appears, at first glance, to be uniquely problematic. It seems to invite a direct clash between co-equal governments. Moreover, the condemnee's political recourse is to a government in which he or she has no formal voice. In the face of these concerns, why is extraterritorial eminent domain ever permitted? The reason, as Professor Briffault argues, and as expanded modestly here, is that extraterritorial eminent domain is, in fact, hardly unique in the problems it presents. Indeed, Professor Briffault shines a light on this practice at least in part because it is "simply one facet of a broader question . . . which is how to make sense of local autonomy in a world in which large numbers of small localities divide up shared economic, social, or topographic areas."³ Instead of exceptional, it is but another example of familiar problems of inter-local externalities and political accountability. Identifying directly what feels exceptional about extraterritorial eminent domain, but relating it to these more familiar phenomena, provides a useful opportunity to elaborate on complicated interactions between local governments.

There are two different aspects of extraterritorial domain that look remarkable. First is the inter-local relationship between the condemning jurisdiction (the "condemnor") and the jurisdiction in which the condemned property is located (the "host"). Second is the political economy

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1. Richard Briffault, *Town of Telluride v. San Miguel Valley Corp.: Extraterritoriality and Local Autonomy*, 86 DENV. U. L. REV. 1311 (2009).

2. *Id.* at 1312.

3. *Id.* at 1323.

of condemnation when the condemnee cannot vote in the condemnor's elections.⁴

Professor Briffault appears most interested in, and troubled by, the first: the effect of extraterritorial eminent domain on inter-local interactions.⁵ In *Telluride v. San Miguel Valley Corp.*,⁶ Telluride, Colorado, sought to condemn property in the neighboring San Miguel County. Interestingly, San Miguel County consented, at least implicitly, to Telluride's action.⁷ It is easy to see why. The purpose of the condemnation was to provide "open space, parks, and recreation."⁸ The host community was, in essence, getting a park and open space for free. Its wealthy neighbor was paying to assemble the property into a use that would generate positive externalities for the host community and, indeed, the entire region.

As Professor Briffault recognizes, however, the fact of the positive externalities in this case may have allowed the Colorado Supreme Court to ignore important interests that other host communities might have in the future. If, instead of a park, Telluride had been condemning property in a neighboring municipality in order to site a landfill, or other NIMBY, the interests between the two communities would have quickly diverged. The condemnor in such a case would internalize only the acquisition costs of the property, and not the ongoing costs of the use, which would then be externalized to another locality. What's more, Professor Briffault suggests that the condemned property may not even be subject to the host community's land use regulations.⁹ Even if it were, the host community could still find itself home to some undesirable use that would not have existed but for its neighbor's acquisition of local property.

The externalities resulting from extraterritorial eminent domain could also be more subtle. By acquiring land in a neighboring jurisdiction, whether for a park, recreational use, or some other use preserving open space, the condemnor is at least marginally decreasing the supply of

4. For sustained treatments of the political economy of eminent domain, see generally Thomas Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986), and Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101 (2006).

5. Briffault, *supra* note 1, at 1324 ("I think the more serious issue, particularly when eminent domain is at stake, is the . . . potential for interlocal conflict.")

6. 185 P.3d 161 (Colo. 2008).

7. Briffault, *supra* note 1, at 1326.

8. *Town of Telluride*, 185 P.3d at 163.

9. Briffault, *supra* note 1, at 1323. Professor Briffault cites the fascinating case of *Valley Twp. v. City of Coatesville*, 894 A.2d 885 (Pa. 2006), in which a host community challenged the condemnation action by a neighboring town. The condemnor sought to condemn a portion of a parcel of privately owned property within the host jurisdiction. The host jurisdiction objected that the action amounted to a subdivision without first obtaining a subdivision permit. The Pennsylvania Court of Appeals disagreed, suggesting that the condemnor is not bound by land use regulations in the host community, at least relating to acquisition of the property. Whether the condemnor would be bound by land use regulations, like zoning restricting the actual use of the property, may be a different question altogether.

developable land. Whether the effect of such preservation will be positive or negative depends entirely on local context. All else being equal, limiting supply will tend to increase prices of the remaining developable or already developed property. Given a fixed level of demand, preservation of open space effectuates a wealth transfer from future residents to existing owners.¹⁰ But preserving open space also imposes opportunity costs on the host jurisdiction. Development can increase property tax revenue, or lower it depending on the attendant burdens on local infrastructure.¹¹ The bottom line: the effect of preservation on local property values can be significant, but is hard to predict without taking a close look at local conditions. Cross-border condemnation threatens to take away the ability of the host jurisdiction to weigh for itself the competing costs and benefits of preservation and development.

Extraterritorial eminent domain therefore has the obvious potential to affect the balance of benefits and burdens between localities. A condemnor can generate benefits for the host community, as in *Telluride*, or costs, as Professor Briffault rightly anticipates. Ultimately, however, these boil down to familiar problems of inter-local externalities. Even in intra-territorial exercises of municipal power, the actions of a local government can have dramatic effects on neighboring jurisdictions.

Local governments regularly impose negative externalities on each other, a fact well documented both theoretically and empirically.¹² For example, siting a landfill or other noxious use on the edge of town pushes some of the costs on to neighboring jurisdictions.¹³ Land use controls with their impact on growth patterns can generate congestion on neighboring roads and degrade environmental and scenic resources. Perhaps most profoundly, highly restrictive growth controls, or outright exclusionary zoning, can steer disproportionate numbers of poor residents into neighboring jurisdictions.¹⁴

There is, of course, a flip-side to each of these costs. Local governments can also generate positive externalities that are not territorially bound. The benefits of various forms of preservation are not confined to the enacting municipality. And creating the conditions for economic growth, whether through direct subsidies or through any combination of pro-growth policies, can also generate substantial benefits to neighboring

10. Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 402 (1977).

11. Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 941-42 (2007).

12. Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1674-79 (2006).

13. *Id.* at 1677 & n. 208 (citing sources).

14. *Id.* at 1678.

municipalities in the form of employment for residents, increases in property values, and the like.¹⁵

In the context of this rich panoply of inter-local effects, extraterritorial eminent domain is hardly a standout. The costs and benefits it is capable of creating fall within the broad categories of externalities that local governments regularly generate.¹⁶ Moreover, the compensation requirement is a good reason to be less concerned about the externalities from eminent domain than from more run-of-the-mill land use regulations. Of all the ways that local governments impose costs on each other, condemnation may be literally the most expensive and therefore the least common.¹⁷

Of course, condemnation may not be expensive for local governments in the currency that matters, and this introduces the second concern: the political economy of extraterritorial eminent domain. Public choice theorists have argued that governments do not internalize costs the way private actors do, and that it is political costs, not budgetary costs, that matter most to decision-makers.¹⁸ Indeed, the political costs of eminent domain may be much more important than financial costs as a check on government condemnation.¹⁹ If that is true, the extraterritorial application of eminent domain reemerges as a particular problem because the condemnee has no vote in the condemnor's elections.

It is not at all clear, however, that the availability of the vote tracks a property owner's ability to exert political pressure in any meaningful way. Public choice theory's insights go beyond rejecting assumptions that government actors are motivated by wealth maximization and point to the power that special interest groups exert on the political process.²⁰ It may not be the vote that matters so much as the ability to mobilize others, an ability that is more likely to be affected by information and organizational costs than anything else.²¹

15. *Id.* at 1676-77.

16. For a general discussion of inter-local externalities see *id.* at 1674-79.

17. See Christopher Serkin & Nelson Tebbe, *Condemning Religion: The Political Economy of RLUIPA 29* (Brooklyn Law Sch. Research, Working Paper No. 127, 2009) (on file with author) (finding condemnation less likely source of religious discrimination than zoning because of compensation). To the extent extraterritorial eminent domain requires some kind of state authorization, whether explicit or implicit, the interests of host jurisdictions have at least theoretically been represented in the state political process. Briffault, *supra* note 1, at 1323 (discussing sources of authority for extraterritorial eminent domain).

18. This claim is undoubtedly too broad. Many governments, and in particular small local governments, are highly sensitive to budget pressures. When local property taxes fund compensation for eminent domain, and property taxes are capitalized into local property values, local governments will be very sensitive to the fiscal costs and benefits of condemnation. Serkin, *supra* note 12, at 1665-73.

19. Professor Merrill has described the "Due Process costs of eminent domain" as among the most important costs affecting government decision-makers. Merrill, *supra* note 4, at 77-78.

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

21. *Id.*

Here, one might be tempted to argue that the ability to generate political pressure does, in fact, depend on being a voter in the local jurisdiction. It is not the vote itself that is meaningful, but instead the social networks that develop within a community, and being a local voter is a proxy for those kinds of broader social networks. Local property owners may have a unique ability to develop the social networks within a community that translate directly into political power.

There is little reason, however, to expect actual political power to track the ability to vote. In fact, as a proxy for political influence, it is both expansively over- and under-inclusive. Communities have many members with little or no ability to generate political power, despite having the franchise in local elections. Moreover, non-residents in a community may well generate political power despite the absence of a vote, as with second-home owners, or well-connected business leaders who do not live in the town in which they do business. More generally, too, social networks are not confined by municipal borders. Political influence often extends fluidly into neighboring localities through social, business, and political connections that are rarely jurisdictionally constrained. It is at least an open question whether, say, renters within a municipality will fare better in the local political process than property owners outside.²² Short of an Equal Protection problem, the power to condemn is not limited because the condemnee lacks clout.

None of this is to deny the theoretical problems presented by extra-territorial eminent domain. It takes only a little imagination to envision a town resisting eminent domain within its borders by condemning the property right back. Or what of the potential for retaliatory condemnations, where towns condemn property back and forth from each other? Or the wholesale expropriation of an entire town, where a small municipality is swallowed up by its larger, wealthier neighbor? Would the Public Use Clause be permitted to stretch so far?²³ Were these problems to arise, state intervention would almost certainly be required to resolve the competing interests. But the fact that these concerns remain merely hypothetical suggests that local governments do not, by-and-large, overreach. Indeed, the ability of local governments to impose costs on each other in so many ways serves as an implicit check on abusive power, as does the ability of neighbors to generate political pressure that is not jurisdictionally bound.

Notice that this account may apply differently to local governments than to state governments. Governments, after all, are not fractals; their

22. Considerable empirical evidence suggests that renters have considerably less influence in local decision-making than homeowners. WILLIAM FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 80 (2001).

23. U.S. Const. amend. V. For consideration of the meaning of Public Use see James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859 (2004).

political and structural topography are not replicated at every level of magnification. Indeed, Colorado cannot condemn property from New Mexico, at least not without the latter's consent.²⁴ The formal doctrinal distinction is obvious: State police powers are not delegated by some higher level of government, and are circumscribed by more inherent geographical limits on sovereignty. Moreover, local governments, existing as they do at or near the bottom rung of sovereign power, operate in a far more circumscribed legal space than states. Even in home rule jurisdictions, local governments' powers are limited by layers of both state and federal statutory and constitutional constraints. Recourse to the state government in instances of real conflict can provide significant protection against overreaching. In fact, the Telluride example is telling on this score. Failing to convince Telluride not to take his land, the condemnee successfully petitioned the state legislature to limit Telluride's extraterritorial power, an act that required the Colorado Supreme Court to overturn.²⁵

This distinction between state and local governments is amenable to a functional justification, too—one that suggests some natural limits to inter-local extraterritorial domain. States are likely to be less intertwined with each other than are local governments. While neighboring states create external costs and benefits on each other too, inter-state externalities are relatively smaller than inter-local ones as measured per capita, geographically, or by some other jurisdictionally scaled denominator. State jurisdictional boundaries may also be less porous than local ones, at least when it comes to social and political networks. As organizational costs go up, political power goes down.²⁶

These functional differences have implications for inter-local eminent domain as well. Condemning property in a neighboring jurisdiction is one thing. Doing so three towns over, or on the other side of the state, may be something else entirely, because the political and structural mechanisms for accountability disappear. Extraterritorial power should be at least roughly co-extensive with the political and structural checks on that power, and so should decrease with distance from the condemning locality. But that is at least not at issue (or is less of an issue) when neighboring towns are involved.

Ultimately, then, extraterritorial eminent domain is not as exceptional as it may initially appear because the relationships between the condemnor and the host community, and between the condemnor and the non-resident condemnee, are not fundamentally different than in territo-

24. Inter-state condemnation is not completely unheard of. A Nebraska statute, for example, expressly authorizes other states to condemn property within Nebraska for purposes of developing or maintaining an airport, so long as Nebraska consents. *See* NEB. REV. STAT. ANN. § 3-242.

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

26. KOMESAR, *supra* note 20, at 61.

rial application of the power. Professor Briffault takes from the example of extraterritorial eminent domain a more general need for some mechanism for mediating between the interests of competing localities. He suggests that, at some level, the State must be involved.²⁷ I, too, have previously endorsed a state-level mechanism for evening out the costs and benefits local governments impose on each other.²⁸ Such an accounting is likely to increase the efficiency of local decision-making, at least by small local governments. But the reality, of course, is that local governments have been generating externalities for a long time. Extraterritorial eminent domain is just one more line item to add to the inter-local balance sheet in what is by now a long-running tally. Short of the kinds of direct conflicts suggested above, state intervention may not actually be required to mediate between competing inter-local interests, even though it would help.

Extraterritorial eminent domain is, at the very least, a provocative example of local power. Professor Briffault is absolutely right, however, that it is interesting mostly for what it reveals about more commonplace local actions. It surely has the power to impose significant costs on neighboring jurisdictions, or to secure substantial benefits, as was the case in Telluride. But this is the nature of many inter-local interactions. What is ultimately most remarkable, then, may not be the existence of extraterritorial eminent domain, but how seldom it is actually used. At least in this particular context, structural and political checks on local power may be enough to prevent egregious overreaching, and that is a surprisingly optimistic story about what, at first blush, appears to be a source of direct conflict in territorial power.

27. Briffault, *supra* note 1, at 1327 (“Ultimately, state action will be necessary to accommodate different local interests, to harmonize interlocal conflicts, and to provide rules and procedures for resolving interlocal disputes.”).

28. Serkin, *supra* note 12, at 1689-97.