TOWN OF TELLURIDE V. SAN MIGUEL VALLEY CORP.: EXTRATERRITORIALITY AND LOCAL AUTONOMY

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INTRODUCTION

At first blush, the decision of the Colorado Supreme Court in *Town of Telluride v. San Miguel Valley Corp.*[1] seems like an extraordinary endorsement of home rule and a significant milestone in the evolution of local power. The Colorado Supreme Court adopted a very broad construction of the power of a home rule municipality under the state constitution[2] and invalidated a state statute that expressly sought to limit that power.[3] The power in question—extraterritorial eminent domain—seems to go well beyond even the most generous assumptions about local government authority. As the uproar following the United States Supreme Court's decision in *Kelo v. City of New London*[4] reminds us, a growing concern about local governments trenching on property rights has made eminent domain increasingly controversial. More importantly, *extraterritorial* eminent domain would appear to be precisely the subject that is beyond the ordinary scope of local autonomy. As by definition it has extra-local effects, extraterritorial eminent domain seems to be a matter that ought to be subject to state control. Putting to one side the question of whether the Colorado Supreme Court correctly interpreted its state constitution, *Telluride* looks like one of the greatest judicial vindications that home rule—and the goal of strong local self-government that underlies home rule—has ever received.

In this Article, I challenge the assumption that *Telluride* is a striking advance for either home rule in particular or local autonomy more generally. Extraterritorial authority in general, and extraterritorial eminent domain in particular, is neither novel nor particularly linked to home rule. Although extraterritorial eminent domain surely strengthens the municipality authorized to use it, such a municipal action potentially challenges the autonomy of other local governments. Indeed, it can undermine the model of local self-determination usually associated with strong home rule. Extraterritorial eminent domain ultimately relies on the older (and continuing) notion of local government as an agent or arm

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1. 185 P.3d 161 (Colo. 2008).
2. *Id.* at 164.
3. *Id.* at 169.
4. 545 U.S. 469 (2005).

of the state for its legitimacy.[5] As I shall indicate, early and mid-twentieth century commentators looked to state delegation as the source of local power to act extraterritorially, and the more the value of local self-government becomes the foundation for home rule, the more problematic municipal extraterritorial action becomes.[6]

More generally, extraterritoriality reveals the problematic nature of local autonomy in the contemporary United States. 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.[7] External effects cannot be avoided, yet the fact that nonresidents who do not participate in local elections and are not part of the local community are directly affected by local government actions challenges the local self-government ideal that drives the quest for local autonomy. The autonomy of one locality can be fully legitimate only when it takes into account the interests of its neighbors or is coordinated with the other local governments that represent those neighbors' interests. Yet, the mechanisms for interlocal coordination—and for increasing local accountability to the extralocal residents affected by local actions—also necessarily constrain local autonomy.[8]

This article consists of three parts. The first draws on older cases and academic commentary to examine the surprisingly well-established recognition of municipal extraterritorial action in American local government law. The next part then considers the interplay between extraterritoriality and the two dominant theories of local government—local government as agent or delegate of the state, and local government as representative of local people. As I have already suggested, even when extraterritorial power grows out of a home rule grant, extraterritorial action—particularly coercive forms of municipal action like eminent domain—is more closely tied to the state delegate than the home rule ideal of strong local self-government. The final part concludes by assessing the relationship between extraterritoriality and interlocal relations. Extraterritorial power is important because the land and resources within municipal boundaries are frequently inadequate to meet municipal residents' needs, and territorial expansion may be legally (or politically) unavailable or unlikely to meet those needs. Yet extraterritorial actions

5. *Cf.* Costco Wholesale Corp. v. City of Beaverton, 161 P.3d 926, 931 (Or. 2007) ("[I]t is legislative, and not home rule, authority that a city exercises when it acts extraterritorially.").

6. *See, e.g.*, David E. Hunt, Comment, *The Constitutionality of the Exercise of Extraterritorial Powers by Municipalities*, 45 U. CHI. L. REV. 151, 151-57 (1977).

7. *See, e.g.*, Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1130-34 (1996).

8. *See, e.g.*, Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1 (2000).

have direct implications for the self-governance of the locality's neighbors. Some supralocal mechanism is necessary to reconcile the extraterritoriality that may be necessary for effective local self-government with the political accountability that provides the democratic legitimacy that is also necessary for local self-government. Although that mechanism need not involve the state directly, it will have to impose some limitations on the autonomy of some local governments in order to protect the autonomy of others and the democratic nature of the local government system as a whole.

I. THE EXTRATERRITORIAL TRADITION IN LOCAL GOVERNMENT LAW

Local government power is closely associated with local boundaries. Local governments are elected by voters who reside within local boundaries; they are financed primarily by taxes collected on land, income, or activities within local boundaries; they provide services to people, firms, and landowners primarily within local boundaries; and their regulatory activities are primarily focused on people, businesses, and land within local boundaries.[9] The significance of local boundaries for basic aspects of local governance drives the often intense conflicts over the rules and procedures for municipal incorporation, annexation, consolidation, and other forms of boundary change.

Yet, American local governments have long engaged in extraterritorial activities and have long wielded extraterritorial power. Under the Dongan Charter of 1686, New York was authorized to acquire "a burial place 'without the Gate of the Citty [sic],'"[10] and the Baltimore Charter of 1796 gave that city quarantine jurisdiction three miles beyond the city limits and authority over navigation four miles outside the city.[11] In 1853, the Pennsylvania Supreme Court upheld the authority of the city of Philadelphia to acquire land for a railroad outside the city,[12] and in 1885, the New York Court of Appeals upheld the authority of New York City to condemn land for a public park outside the city limits in nearby Westchester County.[13] Nor was extraterritorial authority limited to big cities or metropolitan centers. In 1869, Kentucky's highest court upheld the authority of the town of Falmouth to regulate liquor sales and taverns, and to charge a licensing fee within a one mile extraterritorial zone surrounding the town.[14]

9. *See generally* RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 174-93 (7th ed. 2009).

10. RUSSELL WEBBER MADDOX, EXTRATERRITORIAL POWERS OF MUNICIPALITIES IN THE UNITED STATES 8 (1955).

11. *Id.*

12. *See* Sharpless v. Mayor of Philadelphia, 21 Pa. 147, 174-75 (1853).

13. *In re* Mayor of New York, 2 N.E. 642, 652-53 (N.Y. 1885).

14. Bd. of Trs. of Falmouth v. Watson, 68 Ky. (5 Bush) 660, 661-62 (1869).

These early exercises of extraterritorial authority, and their multiple contemporary equivalents, can be grouped into several categories. First, and most common, cities were long able to go beyond their borders to purchase goods and services needed for municipal operations and to acquire, operate, and maintain physical infrastructure necessary for the health, safety, and well-being of their residents. As a 1928 Harvard Law Review Note explained, "[e]fficiency in the performance of municipal functions often requires the acquisition and administration of property outside the corporate limits . . . ."[15] For well over a century, many municipalities have obtained and controlled extraterritorial water supplies and water systems; sewage disposal and drainage facilities; electric, gas, and other power plants and transmission systems; parks and recreational facilities; and transportation systems, such as roads, bridges, and, in the twentieth century, airports.[16]

Sometimes this was because the necessary resource—the water supply—was simply located beyond municipal borders. As one early twentieth century political scientist noted, "[w]ithin the restricted limits of their ordinary boundaries, cities are frequently unable to find certain materials and substances which are essential to the provision of the ordinary municipal services. Of these, perhaps the first in importance is an adequate and satisfactory water supply."[17] Similarly, a city which begins a bridge or road or drainage ditch within its borders may have no choice but to continue the structure extraterritorially if it is to fulfill its transportation or waste removal function.[18] More commonly, however, extraterritorial acquisition and operation was less a matter of municipal necessity and more a matter of convenience: from the municipal perspective, the best place for certain undesirable forms of infrastructure needed to serve the municipality—such as sewers, drains, cemeteries, and quarantine stations[19]—might be outside the city limits.

Second, municipalities frequently sell goods and services—water, gas, and electric power, sewage and waste removal—to residents, businesses, or other local governments located outside the city limits.[20] Courts and commentators have justified this as a means for the municipality to profit from its excess capacity; as a form of protection of the health of the residents of the municipality from sanitary problems on the urban fringe; and as a means of developing areas that are potential targets

15. Note, *Extraterritorial Powers of Municipalities*, 41 HARV. L. REV. 894, 895 (1928).

16. *See, e.g.*, MADDOX, *supra* note 10, at 10-21 (water and sewage), 22-32 (utilities and transportation facilities), 51-57 (airports and parks); William Anderson, *The Extraterritorial Powers of Cities*, 10 MINN. L. REV. 475, 482-95 (1926).

17. Anderson, *supra* note 16, at 482.

18. *Id.* at 487-92.

19. *Id.* at 486, 495.

20. *See* MADDOX, *supra* note 10, at 15-18 (extraterritorial sale of water), 27-29 (sale of power); FRANK S. SENGSTOCK, EXTRATERRITORIAL POWERS IN THE METROPOLITAN AREA 16-25 (1962) (sale of utility services).

for future annexation efforts.[21] Certainly, when extraterritorial service delivery could be shown to benefit the local government's residents, courts generally have had little difficulty upholding such local action.[22]

Owning, operating, and selling the products of physical infrastructure are not inherently governmental. Virtually all of these facilities have private sector counterparts, so that municipal waterworks or power plants may be seen as falling on the "proprietary" side of the proprietary/governmental divide and, thus, may pose less of a challenge to the notion that local governments' governmental or coercive powers are territorially limited.[23]

However, the third major form of extraterritorial action—police power regulation of people, land, or designated activities—involves clearly governmental activity and is in tension with the idea that "the principal purpose of setting municipal boundaries is to set a territorial limit to the city's governmental powers."[24] Although not the norm, extraterritorial local police power is surprisingly widespread. Sometimes the extraterritorial police power is connected to the extraterritorial facilities already mentioned. For example, local governments may have been able to prohibit the contamination of the extraterritorial water supply,[25] or to regulate land uses in the immediate vicinity of the extraterritorial airport in order to enhance aviation safety.[26] More commonly, municipalities engage in extraterritorial regulation to protect their residents from harms originating just across the city's borders, such as the stench from slaughterhouses or tanneries, the danger of blasts from stored explosives, air pollution from smokestacks, and the moral pollution from dram shops and liquor sales. These powers may also be seen as part of the future orderly development of the community, or as a means of providing basic police services to residents of the extraterritorial area.

Extraterritorial regulatory authority is typically limited to certain legal categories of municipalities, or targeted on specific activities, or tied to specific territorially-defined zones, or restricted to specific powers, such as the power to prevent nuisances, impose quarantines, or regulate the subdivision of land.[27] Certain powers, like taxation, are very rarely

21. SENGSTOCK, *supra* note 20, at 21-22; *see also* City of N. Vernon v. Jennings Nw. Reg'l Utils., 829 N.E.2d 1, 7 (Ind. 2005).

22. *See, e.g.*, Vill. of Orland Hills v. Citizens Utils. Co. of Ill., 807 N.E.2d 590 (Ill. App. Ct. 2004); GTE Nw. Inc. v. Or. Pub. Utils. Comm'n, 39 P.3d 201 (Or. Ct. App. 2002).

23. *See, e.g.*, Anderson, *supra* note 16, at 482 (referring to water, sewage, and other utilities as "business powers"); *cf.* DeFazio v. Wash. Pub. Power Supply Sys. 679 P.2d 1316, 1338 (Or. 1984) (explaining that the fact that city engages in extraterritorial contracts or "other consensual transactions in goods or services" has little relevance to the question of whether the city can exert "coercive authority over people or property beyond its boundaries").

24. Anderson, *supra* note 16, at 572.

25. MADDOX, *supra* note 10, at 10, 13.

26. *Id.* at 51.

27. *See, e.g.*, Louis F. Bartelt, Jr., *Extraterritorial Zoning: Reflections on its Validity*, 32 NOTRE DAME LAW. 367, 386 (1957).

wielded extraterritorially. Some courts have found broad grants of extraterritorial authority troublesome,[28] and extraterritorial regulatory authority typically has to be express, and not implied. But, notwithstanding the tension with the idea of local government as territorially limited government, some extraterritorial police power has long existed and continues to be found in most states.[29]

Finally, extraterritorial authority has long included eminent domain. Although eminent domain seems like the most coercive and therefore the most governmental power of all, early commentators thought about it primarily in terms of its connection to the proprietary power of operating physical infrastructure to provide necessary goods and services, rather than as a form of police power. According to William Anderson, the author of the leading 1925 study of municipal extraterritoriality,

> The eminent domain cases give us least trouble of all. If it be once conceded that water supplies, parks, and similar facilities are for public purposes, and even for municipal purposes although located outside of city limits, then there can be little legal objection to the use of condemnation proceedings in the furtherance of the public purpose.[30]

Similarly, a study undertaken by a scholar at Oregon State College thirty years after Anderson's work found that extraterritorial eminent domain was frequently used to obtain land for water supply facilities, sewage and garbage disposal plants, and other utilities.[31] Although typically the authority for extraterritorial eminent domain was explicitly provided by constitutional provision or statute, courts on occasion were willing to imply it by combining the authority to acquire land externally with the power to condemn land internally.[32] Even today, when most courts require that extraterritorial condemnation authority be expressly granted, at least some find it implicit in the power to acquire land to construct or maintain key infrastructure facilities.[33]

Although in the discussions of extraterritorial police and condemnation authority I have distinguished between express and implied powers, I have so far not said much about the source of this local government power. As with all local powers, extraterritorial authority has to be traced back to some grant from the state, whether in the state constitution, a general enabling statute, a home rule provision (constitutional or statutory), a specific statutory grant, or a state-issued charter. There is no inherent right of local self-government in American local government

28. *See* Malone v. Williams, 103 S.W. 798, 804-06 (Tenn. 1907).
29. *See* Hunt, *supra* note 6, at 151-57.
30. Anderson, *supra* note 16, at 564.
31. MADDOX, *supra* note 10, at 2, 11, 24.
32. *Id.* at 11, 24, 83; Anderson, *supra* note 16, at 564-65.
33. *See, e.g.*, Kelley v. City of Griffin, 359 S.E.2d 644, 645-46 (Ga. 1987).

law,[34] and all local powers—even home rule powers—derive from the state. In *Telluride*, for example, the Colorado Supreme Court's vindication of the power of extraterritorial eminent domain emerged out of an interpretation of the home rule article of the state constitution,[35] not a claim of any inherent power of extraterritorial eminent domain. The state source of this local power tells us that key state decision-makers—constitution writers and ratifiers, legislatures, and courts—have long concluded that due to the lack of fit between local boundaries and local needs effective local government requires extraterritorial action on some occasions and for some purposes. Local authority need not be inherent in order to be powerful. As the next section suggests, however, different views of the nature of local government can affect the type and scope of the extraterritorial powers granted.

II. EXTRATERRITORIALITY AND THE LEGAL THEORY OF LOCAL GOVERNMENT

American local government law has evolved as a dialectic between two competing theories of local government: local government as delegate of the state, and local government as a democratically accountable representative of its local constituency.[36] In effect, a local government is an agent of two principals—the state that creates it, defines its boundaries, and vests it with public powers, and the local people who elect (and can vote out) local officials and whose health, safety and welfare are the touchstone of local action. Local government as arm-of-the-state has long been the dominant legal model reflected in constitutional doctrine,[37] a host of state cases, and academic criticism.[38] Local government as "American polis"[39] has also had a long, if subordinate, tradition, as indicated by the expanded, even if still limited, scope of local home rule,[40] occasional controls on state legislation targeting localities,[41] and federal constitutional protection for the rights of local residents to vote in local elections.[42] Local government as arm-of-the-state continues to be the blackletter law in virtually all states, and state governments generally prevail in state-local conflicts. But the growing state constitutional, legislative, and judicial respect for the local democratic roots of local self-

34. *See* BRIFFAULT & REYNOLDS, *supra* note 9, at 278-81.

35. Town of Telluride v. San Miguiel Valley Corp., 185 P.3d 161, 164-69 (Colo. 2008).

36. *See* BRIFFAULT & REYNOLDS, *supra* note 9, at 70-144. A third model of local government—local government as quasi-proprietary firm—applies primarily to special districts and special purpose governments, and not to general purpose governments like counties or municipalities. *See id.* at 147-73.

37. *See, e.g.*, Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907).

38. *See, e.g.*, Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1062 (1980).

39. *See* BRIFFAULT & REYNOLDS, *supra* note 9, at 98-146.

40. *See id.* at 314-449.

41. *See id.* at 281-314.

42. *See, e.g.*, City of Phoenix v. Kolodziejski, 399 U.S. 204, 209 (1970); Avery v. Midland County, 390 U.S. 474, 480 (1968).

government has resulted in greater attention to the value of local autonomy in local government law.

This has had a somewhat paradoxical consequence for the legitimacy, if not the legality, of extraterritorial local government action. Although state measures granting local governments extraterritorial authority would seem to reflect a growing valuation of local power and of the local role in providing services and meeting the needs of local residents, in fact the rise of the polis model has created difficulties for local extraterritoriality, particularly coercive extraterritorial measures like police power regulation and eminent domain.

When local power is seen as state-delegated power, extraterritoriality presents few conceptual problems. Formally, the only question is whether the extraterritorial power has been delegated. The lack of representation of residents of the extraterritorial area in the government of the local government acting territorially is not a problem since the acting locality is merely an agent of the state and the extraterritorial residents are deemed to "have given their consent though their representatives in the [state] legislature."[43]

As the 1928 Harvard Law Review Note explained,

> [T]he delegation of such [extraterritorial] powers would seem unimpeachable, for the municipal corporation would exist solely for the purpose of carrying on locally the government of the state. When, therefore, it is deemed convenient to carry out that purpose by granting extraterritorial powers to a particular municipality, individuals without its boundaries cannot complain; in theory they are being controlled, not by their neighbors' representatives, but by the state through its functionaries.[44]

Similarly, in early-twentieth-century political scientist William Anderson's view the rejection of the doctrine of an inherent right of local self-government undermined the conceptual basis for any challenge to even very broad grants of extraterritorial police power. With the state as the font of all local power, extraterritorial regulation was not on any weaker legal footing than internal municipal action:

> If we bear in mind . . . that the city acts in governmental matters only as the agent of the state, and that it has no power to act governmentally either within or without its ordinary boundaries without state legislative authorization, we can properly argue that the act is, however indirectly, the act of the state legislature, in which all residents of the state have representation. If the consent of the governed is a

43. Otis J. Bouwsma, *The Validity of Extraterritorial Municipal Zoning*, 8 VAND. L. REV. 806, 814 (1955).

44. Note, *supra* note 15, at 897-98.

> prerequisite to a valid act of legislation, that consent has been given by the voters' representatives in the legislature.[45]

To be sure, some early court decisions found broad extraterritorial police power troubling; the notion of local government accountability for its actions to local people had some purchase on legal thinking even when it was rejected as doctrine.[46] Broad extraterritorial regulatory authority was (and remains) relatively unusual. But, until at least the middle of the twentieth century, most local government law scholars had little difficulty with local extraterritorial regulation as a matter of legal theory. Indeed, the arm-of-the-state model was repeatedly invoked to justify the application of extraterritorial regulation to land use planning, zoning, and subdivision controls to enable cities to deal with the booming suburbanization beyond their corporate borders.[47]

That easy acceptance of local extraterritorial action began to change as the conceptual basis for local power began to evolve and more weight was given to local government as representative of, and accountable to, local residents. Frank Sengstock's 1962 study of extraterritorial powers for the University of Michigan Law School had little difficulty with the extraterritorial purchase of land for utility purposes or the sale of utility services to nonresidents, but was quite troubled by extraterritorial police power regulations as these had the effect of imposing government without representation. The idea that nonresidents on the urban fringe had a voice in extraterritorial municipal action through their representatives at the state level began to seem less persuasive to some commentators, who concluded that "[t]he condition that extraterritorial power constitute[s] government without the consent of the governed is the chief and fatal weakness in using such powers."[48] Limited extraterritorial regulation might be expedient as a temporary solution to the governance needs of growing fringe areas, but a broad grant of police power was seen as "treading on dangerous grounds"[49] and an "unwarrantable interference with local government in fringe communities."[50]

The Supreme Court's application of the Equal Protection Clause of the Fourteenth Amendment to apportionment systems and to limits on the right to vote in local elections bolstered the view of local government as agent of its people. As the Court explained in 1968 in *Avery v. Midland County*[51] when it applied the "one person, one vote" doctrine to local elections, "in providing for the governments of their cities, coun-

45. Anderson, *supra* note 16, at 581.
46. *See, e.g.*, Malone v. Williams, 103 S.W. 798 (Tenn. 1907).
47. *See, e.g.*, MADDOX, *supra* note 10, at 80-82; Bartelt, *supra* note 27; Bouwsma, *supra* note 43.
48. SENGSTOCK, *supra* note 20, at 72.
49. *Id.* at 50-51.
50. *Id.* at 72.
51. 390 U.S. 474 (1968).

ties, towns, and districts, the States characteristically provided for representative government—for decision making at the local level by representatives elected by the people."[52] Even a properly apportioned state legislature cannot authorize a local governance structure that violates the one person, one vote requirement.[53] Nor can a state legislature chosen by an electorate properly composed of adult resident citizens authorize local government elections (at least the elections of general purpose local governments like cities or counties) in which the electorate is limited to, or skewed in favor of, taxpayers or property owners.[54] The Court has rejected the notion that the locally underrepresented or disenfranchised have consented to these rules through their participation in the election of the state legislature that adopted these voting arrangements and that has the power to change them. "Government—National, State, and local—must grant to each citizen the equal protection of its laws, which includes an equal opportunity to influence the election of its lawmakers . . . ."[55] Accordingly, as commentators in the 1970s recognized, *Avery* and its progeny threatened the viability of municipal extraterritorial regulation. Relying on "[m]odern equal protection developments," the author of a University of Chicago Law Review Note concluded in 1977 that "all but de minimis forms of extraterritorial control are in danger of invalidation."[56]

In fact, in the year after that Note was published, municipal extraterritorial regulation received its most significant constitutional challenge. Extraterritorial action was upheld, however, but only because the Supreme Court re-emphasized the state-delegate roots of local authority. In *Holt Civic Club v. City of Tuscaloosa*,[57] a divided Supreme Court rejected the claim that an Alabama law entrusting municipalities with a population of 6,000 or more with "police jurisdiction" over a three-mile extraterritorial zone around those cities violated the Equal Protection Clause.

In particular, the Court noted, the extraterritorial power did not include "the vital and traditional authorities of cities and towns to levy ad valorem taxes, invoke the power of eminent domain, and zone property for various types of uses."[58] As a result, the extraterritorial residents did not bear the same relationship to the Tuscaloosa government as the city

52. *Id.* at 481.
53. *See id.* at 491.
54. *See* Hill v. Stone, 421 U.S. 289, 300-01 (1975); City of Phoenix v. Kolodziejski, 399 U.S. 204, 213 (1970). Limiting the electorate to special constituencies like taxpayers or land owners may be permissible in elections for the governments of special limited purpose districts. *See, e.g.*, Ball v. James, 451 U.S. 355, 370-71 (1981); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 728 (1973).
55. *Avery*, 390 U.S. at 481 n.6.
56. Hunt, *supra* note 6, at 178-79.
57. 439 U.S. 60 (1978).
58. *Id.* at 72 n.8.

residents, so denying the municipal vote to the former while extending it to the latter did not violate the Equal Protection Clause.

Holt Civic Club then went on to affirm and acknowledge the legitimacy of some extraterritorial governance and, in so doing, embraced the vision of local governments as agents of the states that created them.[59] The Court emphasized the wide extent of extraterritorial arrangements, how many of these involved the granting of "more extensive or intrusive powers over bordering areas" than conferred by Alabama, including zoning,[60] and how reluctant it was to intrude into an area traditionally left to the states. Most importantly, the Court implicitly invoked the older argument that surrounding area residents consented to extraterritorial regulation through their representatives at the state level. In response to arguments that there are arrangements other than extraterritorial municipal action for providing basic police regulation on the urban fringe that would be more representative or accountable to the residents of the extraterritorial zone, Justice Rehnquist emphasized that "[a]uthority to make those judgments resides in the state legislature, and Alabama citizens are free to urge their proposals to that body."[61] Justice Stevens, in his concurring opinion, underscored that the Alabama legislature "is elected by all of the citizens of the State including the individual appellants."[62]

In *Holt Civic Club*, extraterritoriality was seen as a mechanism created by the state to enable Tuscaloosa and other cities to deal with health and safety issues just beyond their borders and to provide some basic governance for those fringe areas. The democratic legitimacy of this action was satisfied by the state legislature's representation of the residents of the extraterritorial zone, although the legitimacy need was also seen as mitigated by the relatively limited scope of municipal extraterritorial power.

Contemporary extraterritorial cases reflect the mixed consequences of *Avery* and *Holt* and, more generally, the efforts of state courts and legislatures to hold together the arm-of-the-state and local self-government ideas. Extraterritorial regulation, including both police power health and safety measures and eminent domain, have been authorized by legislatures and upheld by courts. Often, courts refer to either the municipal need for extra-local action to meet important municipal concerns like water supply, waste removal, and parks, or to the municipal interest in regulating conditions, such as the form of land development, in fringe and potential growth areas. Many contemporary decisions seem ambivalent about extraterritoriality. Looking to the state-

59. *See id.* at 71 (citing Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907)).
60. *Id.* at 72; *see also id.* at 72 n.8.
61. *Id.* at 74.
62. *Id.* at 76 (Stevens, J., concurring).

delegation roots of municipal extraterritorial action,[63] courts have little difficulty with the ultimate question of whether states may authorize municipalities to act extraterritorially. Nonetheless, courts often appear troubled by extraterritorial action.

Courts frequently require that the grant of extraterritorial authority be express,[64] and they are likely to resolve cases of uncertainty or ambiguity against the locality claiming extraterritorial power.[65] Extraterritorial actions may draw closer judicial scrutiny. In California, for example, courts are required to defer to the judgment of the local legislature with respect to the necessity of a taking within local boundaries, but are, in contrast, required to review the need for an extraterritorial condemnation.[66]

A central theme in these cases is the challenge that coercive extraterritorial action poses for the local self-government principle in the extraterritorial area. Courts have emphasized that consensual or contractual extraterritorial measures—the sale of services, for example—pose little difficulty because they do not involve any coercion of those not represented in local elections.[67] But more coercive measures are seen as troublesome from a local democracy perspective.

Coercive extraterritorial actions threaten both the extralocal individuals subject to the locality's regulation and the collective interest of the people of the extraterritorial area in governing themselves. A California court looked to the first interest in explaining the different legislatively-prescribed standards of review for internal and external eminent domain actions. When engaged in an internal taking, a local government will be politically "accountable to . . . property owners and . . . taxpayers" affected, but such accountability is missing for an extraterritorial taking.[68] As a result, under California law a reviewing court ought to be less deferential to a municipality's claim that a condemnation is necessary to achieve its goals when it is taking land beyond its borders, as opposed to land within the city limits.

Similarly, courts have expressed concern about the interlocal consequences of extralocal action. As an Ohio court explained in denying a municipality the right to apply its zoning ordinance extraterritorially in the absence of express state authorization, "[a]llowing one city to pass

63. *See, e.g.*, Costco Wholesale Corp. v. City of Beaverton, 161 P.3d 926, 931 (Or. 2007) ("[I]t is legislative, and not home rule, authority that a city exercises when it acts extraterritorially."); Philip v. Daley, 790 N.E.2d 961, 969 (Ill. App. Ct. 2003); St. Andrews Pub. Serv. Dist. Comm'n v. Comm'rs of Pub. Works of Charleston, 344 S.E.2d 857, 858-59 (S.C. Ct. App. 1986).

64. *See, e.g.*, Seigles, Inc. v. City of St. Charles, 849 N.E.2d 456, 458 (Ill. App. Ct. 2006).

65. *See, e.g.*, City of Phoenix v. Harnish, 150 P.3d 245, 249-50 (Ariz. Ct. App. 2006); Kenneth Mebane Ranches v. Superior Court, 12 Cal. Rptr. 2d 562, 570 (Cal. Ct. App. 1992).

66. *See, e.g.*, City of Los Angeles v. Keck, 92 Cal. Rptr. 599, 602 (Cal. Ct. App. 1971).

67. *See, e.g.*, GTE Nw. Inc. v. Or. Pub. Util. Comm'n, 39 P.3d 201, 208 (Or. Ct. App. 2002).

68. *Keck*, 92 Cal. Rptr. at 602.

laws which affect residents of another jurisdiction would cause significant animosity and unnecessary litigation . . . . Obviously, harmony of standards in adjoining areas is desirable, and cities should co-operate to achieve the best results for all. . . . [But] one jurisdiction cannot impose its will on another."[69] Other courts have noted the difficulties of coordinating extraterritorial eminent domain with the land use regulations of the communities in which the extraterritorial action occurs, a problem which is exacerbated when the home rule vision requires that both localities be treated as "co-ordinate sovereign[s]."[70] The *Telluride* decision is less striking for its affirmation of municipal extraterritorial eminent domain—such action is authorized in many states and upheld by many courts—than for its apparent lack of concern about the democratic legitimacy question posed by municipal extraterritorial action.

III. EXTRATERRITORIALITY IN THE INTERLOCAL SETTING

Extraterritorial municipal action, particularly regulation of residents in the extraterritorial area who are not authorized to vote in municipal elections, is not only an extension of the theory of local self-government but is also a problem for it. The need for extraterritorial action grows out of the lack of fit between ordinary local authority and the scope of local needs and concerns. Many localities are simply too small to address all their requirements within their boundaries, yet they may be unable or unwilling to expand the size of their cities. Moreover, the authority for extraterritorial action is not inherent in local power but comes as a delegation from the state. Indeed, the lack of consent of the "extraterritorial governed" and the need to coordinate the actions of overlapping local governments would be serious problems for a theory of extraterritoriality rooted in local self-government. But these concerns diminish somewhat when local powers are seen as deriving from the state government, which is both accountable to a statewide electorate (including those in extraterritorial zones) and has the power to coordinate the actions and policies of adjacent local governments.

Given the contemporary power of the local autonomy model in shaping both popular and legal thinking about local government—even if the state-delegation model remains formally dominant doctrinally—extraterritorial action, particularly coercive measures like eminent domain, necessarily seems problematic. As I suggested, extraterritoriality raises two distinct, albeit related, difficulties. First, there is the political accountability problem; that is, the question of regulation without equal

69. Tatco Dev., Ltd. v. Montgomery County, No. 18387, 2001 WL 28674, at *6 (Ohio Ct. App. Jan. 12, 2001).

70. City of Scottsdale v. Mun. Court, 368 P.2d 637, 643 (Ariz. 1962); *see also* Valley Twp. v. City of Coatesville, 894 A.2d 885, 889-90 (Pa. Commw. Ct. 2006) (discussing interaction of extraterritorial eminent domain and subdivision controls of community in which eminent domain power was exercised).

representation of those regulated in the political process of the government doing the regulating. Although this has probably received more attention from academics troubled about extraterritorial municipal action,[71] I think the more serious issue, particularly when eminent domain is at stake, is the second problem—the potential for interlocal conflict. Most instances of municipal regulatory authority, apart from eminent domain, involve municipal action in *unincorporated* areas, rather than in other formally organized localities. There is unlikely to be much of a clash between governmental policies when a municipality acts extraterritorially in an unincorporated area. Moreover, extraterritorial regulation may actually benefit the extraterritorial area by providing basic police, fire, and health protections to fringe area residents at relatively low cost to them.[72] In addition, *Holt Civic Club* indicates there is an outer bound on how far a municipality can regulate beyond its borders without triggering constitutional protection, particularly the right to vote in municipal elections, for residents of the extraterritorial area.

But extraterritorial eminent domain authority can, and often is, exercised within incorporated municipalities. This means that one municipality may be taking from another the decision concerning how a specific parcel of land is to be used. This can be a direct challenge to the zoning, planning, or land use policies of the host locality. Indeed, given that counties or townships in some states enjoy planning or zoning powers over unincorporated areas, the interlocal conflict over land use policy provoked by eminent domain can occur even with respect to the condemnation of land in an unincorporated area. Extraterritorial regulation of individuals may raise questions about the democratic basis of local action, but extraterritorial eminent domain can generate a conflict between local governments, each of which has formal legal authority over the same parcel of land and each of which is pursuing a different vision of the proper use of that parcel as part its quest for local self-determination. This makes the potential for conflict between extraterritoriality and local self-government in the eminent domain setting especially pointed.

States have not been unaware of this clash of local powers and local governments when one is acting extraterritorially within the borders of the other. Some states expressly provide by law which actor prevails when a conflict occurs.[73] Courts have sometimes sought to deal with these problems by interpreting the powers in question to avoid a direct

71. For a recent and particularly fevered example, see Ryan A. Kriegshauser, Note, *E.T. Take Home: The Out-of-This-World Rationale for Extraterritorial Takings and Ignoring Their Inherent Conflict with the Fifth Amendment*, 73 UMKC L. REV. 925, 935 (2007).

72. *See* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 74 (1978).

73. *See, e.g.*, Ware v. Henry County Water & Sewerage Auth., 575 S.E.2d 654, 780 (Ga. Ct. App. 2002).

conflict.[74] But, however the matter is addressed, some rule or procedure is necessary to accommodate the competing goals of the affected local governments. That resolution is going to require some determination at the state level, whether by general rule or on a case-by-case basis, and whether by an administrative agency (which could be a regional body), a court, the legislature, or the state constitution.

The *Telluride* decision seems to recognize the need for some state action to deal with interlocal conflict. The majority opinion notes that although the legislature may not prohibit extraterritorial eminent domain, "it may *regulate* the exercise of those powers."[75] The point was made more explicitly by Justice Coats who, in his concurring opinion, emphasized that "the state has a cognizable interest in regulating the acquisition of property, beyond their own boundaries, by so many home rule cities."[76] While neither the majority nor the concurrence stated what the statewide interest would be, surely the state has an interest in protecting the land use regulatory authority and, more broadly, the policy-making autonomy of the local governments in which extraterritorially condemned land is located.

Where the *Telluride* Court may have erred is in summarily treating the Colorado law in question as a prohibition and not a regulation. Colorado Revised Statute § 38-1-101(4)(b) conditions extraterritorial eminent domain for parks and open space on the "consent of both the owner of the property to be acquired by condemnation and the governing body of the local government in which territorial boundaries the property is located." Although requiring the consent of the landowner is tantamount to a prohibition—the whole point of eminent domain is to permit the government to take property without the owner's consent—the requirement of the consent of the host local government should have been treated as a regulation and not a prohibition. It is not antithetical to the idea of eminent domain in the way that a requirement of landowner consent would be, and it provides a means of harmonizing the policies of the taking and host communities. The requirement of host community consent is a feature of the laws of some states that permit extraterritorial action.[77] Indeed, Pennsylvania recently adopted such a requirement in the aftermath of a court decision that allowed an extraterritorial condemnation in apparent violation of the subdivision controls of the host locality.[78]

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74. *See, e.g.*, Kenneth Mebane Ranches v. Superior Court, 12 Cal. Rptr. 2d 562, 570 (Cal. Ct. App. 1992); City of N. Vernon v. Jennings Nw. Reg'l Utils., 829 N.E.2d 1, 7 (Ind. 2005); *Valley Twp.*, 894 A.2d at 890; Provo City v. Ivie, 94 P.3d 206, 209 (Utah 2004).

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

76. *Id.* at 172.

77. *See, e.g.*, *Provo*, 94 P.3d at 211.

78. *See* Brian P. Gregg, Comment, Valley Township v. City of Coatesville*: The Future of Extraterritorial Takings*, 17 WIDENER L.J. 629, 636-37 (2008).

The *Telluride* Court may have failed to adequately consider the legitimate interest of the host community in the case before it because the only objection to the taking came from the property owner. Indeed, the host community, San Miguel County, endorsed Telluride's action and filed an amicus brief that supported the condemnation. The land in question was literally at Telluride's doorstep, and the park and open space planned by Telluride would have benefitted San Miguel County, too. As a result, the issue of whether state legislation could seek to harmonize the interests of the host locality with those of the municipality engaged in extraterritorial eminent domain was not squarely presented. Nevertheless, *Telluride* struck down all of subsection (4)(b), not just the landowner rights component. Given San Miguel County's support for Telluride, the court's action was unnecessary to resolve the question presented by the case. More importantly, it may constrain the state's ability to coordinate interlocal relations in future extraterritorial eminent domain situations.

To be sure, the court may not have erred after all. It could be argued that the requirement of host community consent is tantamount to a prohibition. Although many academic advocates of local autonomy have expressed doubts about greater state oversight of local actions as a means of addressing the external effects of local decisions, and have instead suggested that interlocal contracts, interlocal agreements, and, more generally, interlocal collaboration is the way to go,[79] the requirement of host locality consent could indeed prove to be an absolute barrier to extraterritorial action. Neighboring communities do not always get along, and consent may be denied because of "local pride and envy," the bad blood accumulated from past conflicts, disagreement over how to divide the benefits from a project, or a myriad of other bargaining difficulties.[80] If the host locality actually exercises its power to veto, then the requirement of consent would operate as a prohibition.

Perhaps the prohibition/regulation distinction could be addressed by revising state law so that the host locality's veto would be subject to judicial or administrative review on some sort of reasonableness or best-interests-of-the-entire-area standard. Or perhaps the taking locality could be required to obtain the consent of a regional land use body which would include representatives of the taking locality, the host locality, and other affected adjacent localities. Alternatively, the state might not give the host locality a veto but, instead, make it more difficult for the taking locality to act if the host locality objects. A bill currently pending in the Colorado legislature, for example, provides that if the host locality objects to the proposed condemnation the taking community can act only if

79. *See, e.g.*, Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190, 191 (2001).

80. Minor Myers III, *Obstacles to Bargaining Between Local Governments: The Case of West Haven and Orange, Connecticut*, 37 URB. LAW. 853, 854 (2005).

a supermajority of its governing body votes for the action and that in any judicial review of the taking, the condemning government must prove by "clear and convincing evidence" that the proposed public use of the property outweighs the benefits of other planned or potential uses of the property by the host locality or the landowner. Of course, if the state supreme court concludes that the possibility that an entity—whether the host locality, a reviewing court, or a regional agency—could deny permission for the extraterritorial condemnation constitutes a prohibition rather than a regulation, then the only way to assure that extraterritorial eminent domain accommodates the interests of host localities would be a state constitutional amendment.

But without some way of taking into account the interests of the host locality, the Colorado Supreme Court's *Telluride* analysis would have the effect of preferring the extraterritorial power of some local governments over the internal regulatory authority of others in the name of home rule. That does not seem to make sense from either the perspective of local government as delegate of the state or from the perspective of local government as grass-roots democracy.

CONCLUSION

Reconciling extraterritorial eminent domain with the land use regulations and other policies of host localities is simply one facet of a broader question—indeed, perhaps the central question facing American local government law today—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 topographical areas. Local government needs cannot be satisfied entirely within local borders. Local government regulatory actions, as well as tax and service delivery decisions, inevitably have extralocal effects. Local governments are agents of their people, but they affect the lives of people beyond their borders who do not participate in local governance. The more autonomy local governments enjoy the more difficult the problem is likely to become, as the more actions local governments are able to take the more impacts they will have on other localities and on nonresidents.

To some extent these issues can be addressed by voluntary interlocal agreements, joint ventures, and councils of government. But the more we speak of the rights and powers of local governments—including the right not to cooperate with neighbors—the more difficult it will likely be to resolve these issues at the local level. 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. This could involve regional rather than statewide bodies, as well as courts and administrative agencies, in addition to, or instead of, the state legislature. But whichever of these many alternative forms it takes, state regulation will be necessary to make local autonomy effec-

tive and legitimate. That is especially likely when local autonomy entails the formal projection of local government beyond local borders onto land subject to the jurisdiction of other localities.

As a result, the *Telluride* decision and extraterritorial eminent domain more generally suggest that a great paradox is at the heart of local government law: At least some reliance on the model of local government as delegate of the state will be necessary to legitimate the actions of local government as a locally elected representative of local people. Or perhaps this is not a paradox at all, but instead a resolution of the great arm-of-the-state/local autonomy divide that has been central to contemporary legal academic debates about local government law.