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Telluride's Tale of Eminent Domain, Home Rule, and Retroactivity

TELLURIDE'S TALE OF EMINENT DOMAIN, HOME RULE, AND RETROACTIVITY

RICHARD B. COLLINS[†]

Telluride is an upscale ski town located at the closed end of a box canyon in southwestern Colorado. In 2000, the town began to set aside twenty percent of annual revenue in a fund to acquire private land between the town boundary and the canyon's mouth, the area known as the Valley Floor.¹ The landowner was determined to develop the property commercially; town residents were equally determined to acquire it for parks, recreation, and open space. The principal landowner was the San Miguel Valley Corporation.² Its main owner is billionaire Neal Blue, CEO of General Atomics Corporation of San Diego, a major defense contractor.³ Blue is a Denver native whose parents were successful investors and financiers. His mother, a state treasurer and University of Colorado Regent, is honored in a stained glass window in the State Capitol.⁴ Neal Blue bought the Valley Floor in 1983 for a reported six to seven million dollars.⁵ General Atomics is best known as maker of the Predator drone aircraft.⁶ A Fortune magazine article about Blue said that his take-no-prisoners style in business gave him the personal nickname of "The Predator."⁷

In 2002, town voters by popular initiative adopted Ordinance No. 1174 to condemn 572 acres of the Valley Floor next to the town owned by San Miguel Valley Corporation.⁸ A Notice of Intent to Acquire was

† Professor, University of Colorado. Thanks to faculty colleagues who made useful suggestions at a faculty workshop on a draft of this paper. Ben Schler and Brad Watts, both University of Colorado class of 2010, provided valuable research assistance.

1. Town of Telluride v. San Miguel Valley Corp., 185 P.3d 161, 164 (Colo. 2008).

2. Bruce V. Bigelow, *A Rockies Saga*, SAN DIEGO UNION TRIB., Mar. 25, 2007, at F1, available at http://www.signonsandiego.com/uniontrib/20070325/news_lz1b25bigelow.html.

3. See *id.*

4. See Matt Potter, *General Atomics: Color it Blue*, SAN DIEGO WKLY. READER, July 12, 2001, available at <http://www.sandiegoreader.com/news/2001/jul/12/general-atomics-color-it-blue>; Colo. State Archives, Colorado State Capitol Virtual Tour, <http://www.colorado.gov/dpa/doit/archives/cap/blue.htm> (last visited Apr. 25, 2009).

5. See Bigelow, *supra* note 2, at F1.

6. See Potter, *supra* note 4.

7. See Barney Gimbel, *The Predator*, FORTUNE, Nov. 10, 2008, at 122, available at http://money.cnn.com/2008/10/28/magazines/fortune/predator_gimbel.fortune/index.htm.

8. See Town of Telluride v. San Miguel Valley Corp., 185 P.3d 161, 164 (Colo. 2008). The parcel taken was reported to be "almost two-thirds" of Blue's holdings in the valley. Bruce V. Bigelow, *Setback for S.D. Industrialist*, SAN DIEGO UNION TRIB., May 10, 2007, at C1, available at http://www.signonsandiego.com/uniontrib/20070510/news_1b10blue.html. The trial record showed that the corporation retained 233 acres and related water rights. See Appellee's Answer Brief at 3 n.2, *Telluride*, 185 P.3d 161 (No. 07SA101), 2007 WL 4312700; see also *Telluride Town Council Res. No. 1, ex.a (2006)* (on file with author) (describing the larger holding involved in the proposed settlement of the dispute).

served on the landowner the following July, followed by an offer to purchase that the landowner rejected. The town filed its condemnation action on March 26, 2004.⁹ Shortly before that, the landowner procured an amendment to a pending bill in the legislature on regulating eminent domain in urban renewal.¹⁰ The amendment became law the following June. It forbids extraterritorial eminent domain by Colorado municipalities for purposes of parks, recreation, and open space.¹¹ This provision was expressly retroactive to January 1 of that year and was popularly called the Telluride Amendment.¹² The landowner moved to dismiss the condemnation action based on the statute, but the district court held the statute invalid under the Colorado Home Rule Amendment and denied the motion.¹³ As discussed below, this ruling was reasonably faithful to Colorado precedents.

The district court ordered mediation, and negotiations were held for over a year under guidance of a retired judge.¹⁴ In December 2005, town officials reached a tentative compromise with the landowner, which would have provided for annexation of all of respondent's Valley Floor land, allowed development of about nine percent of it, and preserved the rest.¹⁵ But the condemnation ordinance had been adopted by popular vote, so the proposed compromise had to go back to the voters. After a vigorous public debate, they turned it down.¹⁶

I. VENUE AND JURORS FOR EMINENT DOMAIN TRIALS

The next phase of the eminent domain action was valuation. The landowner demanded a jury, all members of which by Colorado statute

9. Appellants' Opening Brief at 2, *Telluride*, 185 P.3d 161 (No. 07SA101), 2007 WL 2813743.

10. See COLO. H. JOURNAL, Feb. 25, 2004, 649-53 (describing the proposed amendment).

11. H.B. 04-1203, 64th Gen. Assem., 2d Reg. Sess. sec. 6, 2004 Colo. Sess. Laws 1747, (codified as amended at COLO. REV. STAT. ANN. § 38-1-101(4) (West 2009)). The statute provides that land cannot be condemned for these purposes without the landowner's consent, which is another way to say that it is forbidden.

12. See Pat Healy, *In VF Appeal, These Are the Deciders*, TELLURIDE DAILY PLANET, Aug. 15, 2007, available at <http://www.telluridegateway.com/articles/2007/08/16/news/news01.txt>.

13. See Appellants' Opening Brief, *supra* note 9, at 2-4. The Home Rule Amendment appears in article XX of the Colorado Constitution. The landowner's motion in the alternative asked for a change of venue for the valuation trial. The court denied this motion but later granted a second request. See *Town of Telluride v. San Miguel Valley Corp.*, No. 04CV22, at 2-3 (San Miguel Dist. Ct. Nov. 2, 2006) (memorandum opinion and order granting respondent's renewed motion to change venue).

14. See *Town of Telluride v. San Miguel Valley Corp.*, No. 04CV22, at 2-3 (San Miguel Dist. Ct. Nov. 2, 2006) (memorandum opinion and order granting respondents' renewed motion to change venue); Respondents' Renewed Motion to Change Venue at 2, *Town of Telluride v. San Miguel Valley Corp.*, No. 04CV22 (San Miguel Dist. Ct. Mar. 14, 2006). Authority to order mediation is conferred by COLO. REV. STAT. ANN. § 13-22-311 (West 2009).

15. See Telluride Town Council Res. No. 1, ex. a (2006) (on file with author); see also Telluride Town Council Res. No. 2, ex. a (2006) (on file with author).

16. See Appellants' Opening Brief at 8 n.3, *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161 (Colo. 2008) (No. 07SA101), 2007 WL 2813743.

had to be freeholders.¹⁷ It also filed a renewed motion for change of venue.¹⁸ This could have raised a constitutional issue. The statute guaranteeing landowners a jury of freeholders also requires that they be residents of the county where the petition is filed, which usually must be where the land is located, and the town argued that the statute precluded changing venue.¹⁹ The landowner claimed that the vote against the compromise, although confined to the town, showed that it could not get a fair jury in San Miguel County.²⁰ It argued that obeying the statute would therefore be unconstitutional as applied, and it invoked the general Colorado court rule governing changes of venue in civil cases, which allows changes for jury bias.²¹

The district court agreed with the landowner on the fair trial claim and granted its motion, but not on constitutional grounds. Instead, the court invoked a 1925 decision not cited by the parties. Denver had filed an action to condemn land in Jefferson County to use for a park based on a statute that required the eminent domain petition to be filed in Denver.²² The Colorado Supreme Court ordered venue moved to Jefferson County based on the general venue statute then in force, noting that the

17. COLO. REV. STAT. ANN. § 38-1-106 (West 2009) (requiring at least six freeholders); see also COLO. CONST. art. II, § 15 (requiring valuation in eminent domain by a commission of three freeholders or by a jury). Five other states provide for valuation by commissions of three (in some cases three or more) freeholders, two by constitution, three by statute. MO. CONST. art. I, § 26; OKLA. CONST. art. II, § 24; MICH. COMP. LAWS ANN. § 213.3 (West 2009); NEB. REV. STAT. ANN. § 76-706 (LexisNexis 2009); TEX. PROP. CODE ANN. § 21.014 (Vernon 2007). Only one other state—West Virginia—limits eminent domain juries to landowners. W. VA. CONST. art. III, § 9. Limiting voting and jury service to landowners (and to men) was once common everywhere, but politics gradually broadened juror qualifications. See Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 432-34, (1996). More recently, Supreme Court constitutional decisions eliminated most other laws restricting voting and jury service to property owners. See *id.* at 462-69. The eminent domain rules appear to be the only remaining instance of blue-ribbon juries. It is conceivable that the Constitution forbids limiting eminent domain juries to freeholders. Cf. *Quinn v. Millsap*, 491 U.S. 95, 106-09 (1989) (invalidating restriction of state board to freeholders). However, challenges to the practice are unlikely for political reasons.

18. Respondents' Renewed Motion to Change Venue at 1, *Town of Telluride v. San Miguel Valley Corp.*, No. 04CV22 (San Miguel Dist. Ct. Mar. 14, 2006).

19. COLO. REV. STAT. ANN. § 38-1-106 (West 2009) (requiring "a jury of freeholders residing in the county in which the petition is filed"). The basic provision for a taking requires the condemnor to file in the county in which the property or part if it is located. *Id.* § 38-1-102.

20. Respondents' Renewed Motion to Change Venue at 2, *Town of Telluride v. San Miguel Valley Corp.*, No. 04CV22 (San Miguel Dist. Ct. Mar. 14, 2006).

21. COLO. R. CIV. P. 98(g).

22. *People ex rel. Bear Creek Dev. Corp. v. Dist. Court*, 242 P. 997, 997-98 (Colo. 1925); see *Town of Telluride v. San Miguel Valley Corp.*, No. 04CV22, at 9-10 (San Miguel Dist. Ct. Nov. 2, 2006) (memorandum opinion and order granting respondents' renewed motion to change venue). The statute Denver relied on in *Bear Creek Dev. Corp.* for power to condemn was the Act of June 3, 1911, ch. 129, 1911 Colo. Sess. Laws 373-82. The Act gave cities explicit extraterritorial power to condemn for "boulevard, parkway, or park purposes." *Id.* at 377, § 10 (codified as amended at COLO. REV. STAT. ANN. § 38-6-110 (West 2009)). The section was amended in 1983 to limit extraterritorial power to land within five miles of city boundaries subject to stated exceptions, one of which is condemnation with county consent. In 1959, § 1 of the 1911 statute was amended to state that extraterritorial eminent domain is forbidden unless "specifically authorized by law." Act of May 18, 1959, ch. 118, 1959 Colo. Sess. Laws 423 (1959) (codified as amended at COLO. REV. STAT. ANN. § 38-6-101 (West 2009)).

eminent domain statute relied on by Denver did not forbid changing venue.²³ The statute requiring that jurors reside in the county in which the petition is filed was then in force, though not mentioned in the court's opinion.²⁴ The general venue statute of 1925 is the direct ancestor of today's Colorado court rule governing civil case venue;²⁵ hence the 1925 decision, by implication, supported the *Telluride* court's decision that the court rule on venue prevailed over the eminent domain jury statute. Decisions to change venue are often made only after jury selection fails to seat a suitably unbiased jury, but the district judge in *Telluride* declined to make the attempt.²⁶

Whether there is a constitutional right to change venue in an eminent domain action based on potential jury bias was thus avoided. It would be an interesting question. Criminal defendants often seek changes of venue for potential jury bias, and volumes of reported appellate decisions and academic commentaries parse the issue.²⁷ By contrast, reported cases on requests to move civil cases for jury bias are rare.²⁸ When the issue arises, courts usually apply the same kind of reasoning as in criminal cases. However, constitutional rights to juries in criminal prosecutions are separate from those for civil actions and more strictly applied. The Sixth Amendment jury right of criminal defendants is fully applicable against the states, while the Seventh Amendment right to a civil jury is not.²⁹ Thus civil jury rights depend on state law. Lacking much in the way of jury trial precedents to rely on, the *Telluride* landowner argued that the federal and state constitutional right to just compensation for takings requires the right to be heard by an impartial jury.³⁰ There is no direct federal support for this claim. The landowner cited several decisions from other states, but all were based on statutes or court rules rather than constitutional grounds.³¹

23. *Bear Creek Dev. Corp.*, 242 P. at 998.

24. See COMP. LAW. COLO. § 6317 (1921) (current version at COLO. REV. STAT. ANN. § 38-1-106 (West 2009)).

25. See COLO. R. CIV. P. 98(g), in COLO. STAT. ANN. vol. 1 (1935 & Supp. 1941). The 1925 *Bear Creek Dev. Corp.* decision is the only reported case in which a Colorado appellate court ordered a change of venue in a civil case.

26. See *Town of Telluride v. San Miguel Valley Corp.*, No. 04CV22, at 3-9 (San Miguel Dist. Ct. Nov. 2, 2006) (memorandum opinion and order granting respondents' renewed motion to change venue).

27. See, e.g., Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 S. CAL. L. REV. 1533, 1535 (1993).

28. For example, among hundreds of annotations to the federal civil venue statute in 28 U.S.C.A. § 1404 (West 2009), none reported granting a change of venue for jury bias. Colorado has only the 1925 decision relied on by the *Telluride* district court. See *supra* note 22, 25. The landowner in *Telluride* cited *Colorado Fuel & Iron Co. v. Four Mile Railway Co.*, 66 P. 902 (Colo. 1901), where a change of venue was unsuccessfully sought based on alleged bias of the judge.

29. WILLIAM COHEN, JONATHAN D. VARAT & VIKRAM AMAR, *CONSTITUTIONAL LAW* 511-12 (12th ed. 2005).

30. See Respondents' Renewed Motion to Change Venue at 24, *Town of Telluride v. San Miguel Valley Corp.*, No. 04CV22 (San Miguel Dist. Ct. Mar. 14, 2006).

31. See *id.* at 25.

Unlike most states, the Colorado Constitution has no general guarantee of a civil jury.³² There is a specific guarantee for eminent domain actions, which provides for valuation by three commissioners who must be freeholders or by a jury, although it does not require that jurors be freeholders or residents of the local county.³³ As noted above, the statute does require that jurors be both freeholders and residents. Therefore, the landowner in *Telluride* wanted a ruling that the statute's requirement that jurors be residents was inapplicable or unconstitutional as applied but fully severable from the requirement that they be freeholders. The court's ruling granted exactly that but without analyzing these points.

The district court moved the valuation trial to neighboring Delta County, a more favorable venue for the landowner as the ensuing verdict reflected.³⁴ 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.³⁵ After the verdict, the town had three months to raise the extra funds.³⁶ Many thought this would end the town's quest for the Valley Floor, but Telluride is home or second home to many wealthy (and celebrated) citizens, including Tom Cruise, Christie Brinkley, Daryl Hannah, and Oprah Winfrey.³⁷ The town not only raised the money, it did so eleven days early.³⁸ Furthermore, because Colorado requires a condemning town to reimburse attorneys fees when

32. Garhart *ex rel.* Tinsman v. Columbia/HealthONE, L.L.C., 95 P.3d 571, 580-81 (Colo. 2004).

33. COLO. CONST. art. II, § 15.

34. Delta County is in the same judicial district as San Miguel County, and the district judge who heard the *Telluride* case normally sits there, so it was a natural choice for him. See Seventh Judicial District, <http://www.7thjudicialdistrictco.org/index.html> (last visited Apr. 18, 2009). However, Delta is considered one of Colorado's most politically conservative counties, much more so than San Miguel. For example, 2009 voter registrations for the two counties included 9,397 Republicans and 4,513 Democrats in Delta County, compared to 1,108 Republicans and 2,719 Democrats in San Miguel County. See COLO. SEC'Y OF STATE, TOTAL REGISTERED VOTERS BY PARTY AFFILIATION AND STATUS (2009), http://www.elections.colorado.gov/WWW/default/2009%20Voter%20Registration%20Numbers/January/by_party.pdf. On the relevance of party affiliation to eminent domain, see *infra* text accompanying notes 168-70.

35. Town of Telluride v. San Miguel Valley Corp., 185 P.3d 161, 164 (Colo. 2008); cf. City of Black Hawk v. Ficke, No. 06CA1302, 2008 WL 732043, at *1 (Colo. App. Mar. 20, 2008) ("Following a valuation trial, the jury determined that \$637,500 was just compensation for the taking, which was over six times higher than the City appraiser's opinion of value, and \$100,000 more than the valuation opinion of respondents' appraiser."). The city abandoned the condemnation, and the court upheld the abandonment but awarded respondents their attorneys' fees. *Id.*

36. The jury's verdict was entered on February 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.

37. Wikipedia, Telluride, Colorado, http://en.wikipedia.org/wiki/Telluride,_Colorado (last visited April 17, 2009) (listing notable residents).

38. See Bigelow, *supra* note 2, at F1.

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.³⁹

The eminent domain action at last had a final judgment that could be appealed, and the landowner did so, seeking to enforce the 2004 Telluride Amendment. The town did not challenge the venue decision. Under Colorado law, a trial court judgment holding a state statute to be unconstitutional is reviewed directly by the Colorado Supreme Court.⁴⁰ In June 2008, that court affirmed the judgment, holding the statute to be an unconstitutional interference with Telluride's home rule powers.⁴¹ The validity of the statute depended entirely on the Home Rule Amendment because the town declined to argue that the statute was invalid as applied retroactively to the condemnation action.⁴² However, both questions are interesting issues of state constitutional law.

II. TELLURIDE'S HOME RULE POWER OF EMINENT DOMAIN

Constitutional home rule began in Colorado with adoption of the 1902 amendment to the Colorado Constitution that made Denver a consolidated city and county, gave it home rule powers, and offered like powers to other municipalities.⁴³ The original amendment included the power at issue in the *Telluride* case. It provides that a home rule city or town "shall have the power, within or without its territorial limits, to construct, condemn and purchase . . . water works, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent . . . for public use by right of eminent domain . . ." ⁴⁴ Of course, to take advantage of this provision, a municipal charter must claim the power, but Telluride's charter, adopted in 1978, does so.⁴⁵

A. *The Precedent*

The landowner's counsel built their legal strategy around avoidance of the Colorado Supreme Court's 1978 decision in *City of Thornton v. Farmers Reservoir and Irrigation Co.*⁴⁶ In 1973, Thornton filed an ac-

39. *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) (2007)). The statute applies only if the award is at least \$10,000. COLO. REV. STAT. ANN. § 38-1-122(1.5) (West 2009). After unsuccessful appeal of denial of its motion to dismiss, the landowner sought attorneys fees for that proceeding as well, but the court denied the claim. *Telluride*, 197 P.3d at 262.

40. The Colorado Supreme Court's appellate jurisdiction is provided in the Colorado Constitution. COLO. CONST. art. VI, § 2(1). When a district or county court has declared a state law to be unconstitutional, intermediate jurisdiction of the Colorado Court of Appeals is barred. COLO. REV. STAT. ANN. §13-4-102(1)(b) (West 2009).

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

42. *Cf. infra* Part III.

43. COLO. CONST. art. XX.

44. *Id.* art. XX, § 1.

45. HOME RULE CHARTER OF THE TOWN OF TELLURIDE art. XIV, § 14.1 (1978), available at http://www.telluride-co.gov/docs/00_charter_final_telluride_s_1_rev_clc.pdf.

46. 575 P.2d 382 (Colo. 1978).

tion to condemn a large part of the water rights owned by the company. The rights in question were sited in a lake outside the city, so the condemnation was extraterritorial. The action was filed based on existing statutes that allowed Thornton to decide on necessity for the taking and provided for valuation to be done in the same manner as in most other eminent domain actions.⁴⁷ Nineteen months later the legislature passed a new statute that would have made Thornton's acquisition much more difficult. It applied only to condemnation of water rights and required convening a special commission to determine whether condemnation was necessary and if so to determine just compensation.⁴⁸ The statute also limited condemnation to water needed within a horizon of fifteen years.⁴⁹ Defendants moved to dismiss based on Thornton's failure to comply with the new statute, and the district court granted the motion.⁵⁰

The supreme court reversed. Oddly, its opinion never discussed whether the new statute was intended to apply retroactively to Thornton's pending case. The terms of the statute, unlike those of the Telluride Amendment, were not expressly retroactive, and the usual rule presumes a new statute to be prospective in operation.⁵¹ It is likely that the statute would never have been applied to a completed condemnation action, but Thornton's was in mid-stream.

Instead, the court held the statute's two main features—commitment of decision to a special commission and limiting future needs to a fifteen-year period—to be unconstitutional as applied to Thornton based on the Home Rule Amendment. The court concluded:

By the adoption of Article XX [Section 1], . . . the people of Colorado intended to, and in effect did, delegate to home rule municipalities full power to exercise the right of eminent domain in the effectuation of any lawful, public and municipal purpose, including particularly the acquisition of water rights.

...

. . . We fully recognize that, generally, the legislative powers of a home rule municipality are superior with respect to local and municipal matters; and that, in cases of conflict between a statute and the ordinance of a home rule city relating to a matter of statewide concern, the statute must govern. Here, however, there is involved a specific constitutional power granted to home rule municipalities and, even though the matter may be of statewide concern, the Gener-

47. *Id.* at 386.

48. *See id.* at 386 (citing COLO. REV. STAT. §§ 38-6-201 to -216 (1973 & Supp. 1976)).

49. COLO. REV. STAT. ANN. § 38-6-202(2) (West 2009); *Thornton*, 575 P.2d at 390.

50. *Thornton*, 575 P.2d at 386.

51. *See infra* note 138 and accompanying text.

al Assembly has no power to enact any law that denies a right specifically granted by the Colorado Constitution.⁵²

The court's opinion appeared to recognize that Thornton was subject to other state statutes governing eminent domain, but none of these would have placed the condemnation in jeopardy, and Thornton did not oppose them.⁵³ However, application of these statutes created doubt about the scope of the decision. A 1989 decision clarified the issue to some extent, holding that a state statute known as the Land Use Act "gives Grand County and Eagle County the power to regulate, but not to prohibit, Denver's operation of extraterritorial waterworks projects."⁵⁴

B. How to Deal with It?

The *Thornton* decision was a major obstacle for the landowner in *Telluride*. The case upheld extraterritorial eminent domain in apparent conflict with a governing state statute, the very power claimed by Telluride. The usual options were to distinguish the case or to ask the court to overrule or limit it. If the decision were to be distinguished, how should it be done? The landowner's counsel based its case mostly on distinguishing different objects of extraterritorial condemnation, between Thornton's water rights and Telluride's proposed parks, open space, and recreational uses. The core basis for this claim was the text of article XX, section 1, which explicitly gives eminent domain power for a list of public utilities purposes or other "works or ways local in use and extent."⁵⁵ The *Thornton* opinion held that water rights came within the specific power to condemn for "water works."⁵⁶ Telluride's condemnation was unrelated to any of the specific subjects in section 1.

The landowner's plea to read article XX strictly was supported by the argument that eminent domain power is distinctive and disfavored, so it should be implied to have a more restricted scope than others. This claim had force in the abstract, as the Colorado Supreme Court has often said that legislative grants of the power must be clearly expressed or necessarily implied.⁵⁷ The difficulty was that the court's prior decisions had

52. *Thornton*, 575 P.2d at 389 (citations omitted).

53. *See id.* at 386.

54. *City & County of Denver v. Bd. of County Comm'rs*, 782 P.2d 753, 762 (Colo. 1989); *see also* Land Use Act, COLO. REV. STAT. ANN. §§ 24-65.1-101 to -502 (West 2009).

55. COLO. CONST. art. XX, § 1.

56. *Thornton*, 575 P.2d at 535-36; *see also* *Toll v. City & County of Denver*, 340 P.2d 862, 865 (Colo. 1959) (sustaining extraterritorial eminent domain to take flowage easements and channel improvement rights based on the "water works" power in the Colorado Constitution); *Town of Glendale v. City & County of Denver*, 322 P.2d 1053, 1056-57 (Colo. 1958) (same issue for sewer right of way).

57. *See, e.g.*, *Dep't of Transp. v. Stapleton*, 97 P.3d 938, 941-42 (Colo. 2004). Several early decisions applied this rule to invalidate attempts at extraterritorial eminent domain by statutory municipalities. *See, e.g.*, *Mack v. Town of Craig*, 191 P. 101, 101 (Colo. 1920) (sewage outlet); *Healy v. City of Delta*, 147 P. 662, 662 (Colo. 1915) (sewage outlet); *Warner v. Town of Gunnison*, 31 P. 238, 239 (Colo. App. 1892) (right-of-way for water supply ditch). In reaction to *Mack* and

found article XX, section 1 explicit enough to sustain other unenumerated powers of eminent domain.⁵⁸ Thus, there was no reasonable basis to distinguish parks, recreation, and open space. Another way to articulate the issue is to ask at what level the requirement for explicit legislative action applies. The Colorado court rulings that interpreted article XX broadly had the effect of locating the requirement for an explicit legislative act within home rule municipalities unless the state legislature has power to override them.

1. The Claim That Municipal Eminent Domain Power is Limited to Utilities Purposes

The landowner first argued that article XX, section 1 restricts municipal powers of eminent domain to the itemized list and analogous public utilities uses and does not extend to parks, recreation, and open space.⁵⁹ This claim faced difficulties. The constitutional text bundles all active powers of a municipality with eminent domain powers. To restrict a town to the specified powers even within its borders would limit home rule to far fewer powers than Denver had exercised before 1902 as a statutory city. For this reason, the Colorado Supreme Court's first opinion on the subject rejected a claim that Denver could not build a municipal auditorium. The court stated:

[W]e do not agree . . . that the stunted grant of power contained in section 1 and other parts of the article is the only power possessed by Denver. It seems very clear that the statement contained in the first section was not intended to be an enumeration of powers conferred, but simply the expression of a few of the more prominent powers which municipal corporations are frequently granted. The purpose of the twentieth article was to grant home rule to Denver and the other municipalities of the state, and it was intended to enlarge the powers beyond those usually granted by the legislature⁶⁰

Six years later, the court applied similar reasoning to sustain Denver's power to condemn land for parks.⁶¹

Notwithstanding these decisions in Denver's favor, in other early cases the Colorado Supreme Court interpreted home rule powers narrowly.⁶² In reaction, voters used the new power of initiative in 1912 to replace 1902's article XX, section 6 with a broader text that grants home

Healy, the legislature passed a statute to authorize extraterritorial eminent domain for specified utilities purposes. 1921 Colo. Sess. Laws 773 (codified at COLO. REV. STAT. ANN. § 38-6-122 (West 2009)).

58. See *infra* note 72 and accompanying text.

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

60. *City & County of Denver v. Hallett*, 83 P. 1066, 1068 (Colo. 1905).

61. *Londoner v. City & County of Denver*, 119 P. 156, 158-59 (Colo. 1911). The condemnations at issue in *Londoner* were within Denver. *Id.* at 158.

62. See DALE A. OESTERLE & RICHARD B. COLLINS, *THE COLORADO STATE CONSTITUTION* 390 (2002).

rule municipalities all powers set out in the original sections of article XX, as well as “all other powers necessary, requisite or proper for the government and administration of its local and municipal matters.” This section was the focus of a 1971 decision in which challengers argued that Denver lacked urban renewal powers because they were not itemized in article XX, section 1.⁶³ The court responded: “The enumerated purposes of § 1 were superseded by the general § 6 standard of ‘local and municipal matters.’”⁶⁴

2. The Claim That Municipalities Have No Extraterritorial Power to Condemn for Parks and Open Space

The landowner next argued that constitutional power outside municipal boundaries should be restricted to the itemized list and similar utilities purposes, or at least should exclude power to condemn land for parks and open space. In addressing this claim, the Colorado Supreme Court stated that extraterritorial condemnation for parks and open space was a question of first impression that depended on whether this was “a lawful, public, local, and municipal purpose within the scope of article XX.”⁶⁵

This claim again conflicted with the constitutional text that equates internal with external powers and eminent domain with all other powers. The landowner answered this point by invoking a clause in article XX, section 6, added in 1912, which differentiates between internal and external powers:

Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.⁶⁶

This provision is relevant to validity of the 2004 Telluride Amendment, as discussed below. As a basis to claim that Telluride lacked external power of eminent domain in the absence of a conflicting state statute, it was weak. By its terms, the provision takes in the “other jurisdiction” of the municipality.⁶⁷ On parks in particular, section 6 grants explicit power over park districts “in such cities or towns or within the jurisdiction thereof.”⁶⁸ And the part of section 6 quoted above made it clear that the section was intended to add to, not subtract from, the home rule powers granted in 1902. The supreme court made these points in rejecting the claim.⁶⁹

63. *Karsh v. City & County of Denver*, 490 P.2d 936, 937 (Colo. 1971).

64. *Id.* at 939.

65. *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161, 167 (Colo. 2008).

66. COLO. CONST. art. XX, § 6.

67. *Id.*

68. *Id.*

69. *Telluride*, 185 P.3d at 166.

The court went on to sustain the power, based again on the 1905 *Hallett* decision quoted above.⁷⁰ That decision interpreted section 1 to confer all powers that the legislature could have delegated to municipalities. The *Hallett* court cited several statutes that had delegated extraterritorial powers of eminent domain for various purposes, including parks and open space, to municipal governments.⁷¹

Both of the landowner's claims based on pre-2004 law had been rejected in at least two previous decisions of the supreme court that sustained extraterritorial condemnations for purposes not enumerated in article, XX section 1.⁷² Moreover, there was a long-established legislative practice of granting eminent domain powers to private companies for many purposes⁷³ and of granting extraterritorial powers to statutory municipalities;⁷⁴ thus, municipal boundaries had not previously been an important criterion. In rejecting a 1926 attack on a statutory city's extraterritorial condemnation, the supreme court minimized the point by stating: "The condemnation statutes do not limit the rights of the city to take property only within its municipal borders."⁷⁵

Both of these claims faced yet another obstacle that was argued to the court but not mentioned in its opinion. The Colorado Constitution was amended in 1998 to create the City and County of Broomfield.⁷⁶ The amendment includes an updated version of the list of powers, including the eminent domain power, in the original Home Rule Amendment. The Broomfield provision expressly allows condemnation of land "within and without its territorial limits" to establish "parks, recreation facilities, [and] open space lands."⁷⁷ Because the Broomfield amendment was intended to imitate, not add to, home rule status of other municipalities, this provision implies the view that these uses were within the general

70. *Id.* at 168 (citing *City & County of Denver v. Hallett*, 83 P. 1066, 1068 (1905)).

71. *Id.* It could also have referred to the decision relied on by the district court to order change of venue, which involved extraterritorial eminent domain for park purposes. *See supra* note 22 and accompanying text.

72. *City & County of Denver v. Bd. of County Comm'rs*, 156 P.2d 101, 108-09 (Colo. 1945) (airport); *Fishel v. City & County of Denver*, 108 P.2d 236, 242 (Colo. 1940) (military use). Moreover, the decisions sustaining extraterritorial powers arguably within those enumerated in article XX, section 1 articulated the power in broad terms. In addition to *Thornton*, *see Toll v. City & County of Denver*, 340 P.2d 862, 865-66 (Colo. 1959) (flowage easements); *Town of Glendale v. City & County of Denver*, 322 P.2d 1053, 1056-57 (Colo. 1958) (utilities easement). The Colorado Court of Appeals made a yet more explicit ruling in *Town of Parker v. Norton*, sustaining extraterritorial eminent domain by a home-rule town for a recreational trail. 939 P.2d 535, 536-37 (Colo. App. 1997), *cert. denied*, *Norton v. Town of Parker*, No. 97SC567, 1997 Colo. LEXIS 1112 (Colo. Dec. 22, 1997).

73. *See* COLO. REV. STAT. ANN. § 38-1-202(2) (West 2009).

74. The *Telluride* court relied on two such statutes. *See* 185 P.3d at 168 (citing COLO. REV. STAT. § 31-25-201(1) (2007) (park or recreational purposes, parkways, open space, conservation easements), § 38-6-110 (2007) (boulevard, parkway, and park purposes)). Both statutes remain on the books though partially repealed by inconsistency with the Telluride Amendment. *See id.* §§ 31-25-201(1), 38-6-110.

75. *Pub. Serv. Co. v. City of Loveland*, 245 P. 493, 499 (Colo. 1926).

76. COLO. CONST. art. XX, §§ 10-13.

77. *Id.* § 10.

power of other home rule governments.⁷⁸ Of course, the opposite inference is possible, though much less likely.

3. The Claim that the 2004 Telluride Amendment Repealed Extraterritorial Power to Condemn for Parks and Open Space

The landowner's last claim, oddly deferred to the end of its opening brief, was its strongest: even if extraterritorial eminent domain for parks and open space had been valid, the 2004 statute took away the power. The statute, which the court called the landowner's "proposed amendment" for which it had "lobbied the state legislature,"⁷⁹ was based on the same strategy as the arguments discussed above. It preserved extraterritorial eminent domain for the purposes itemized in article XX, section 1 and related public utilities uses and forbade it for all other purposes. For good measure, it explicitly prohibited the power for parks, open space, and recreation. It also disallowed use of municipal funds for that purpose by any other entity,⁸⁰ an apparent attempt to head off creation of a special district to achieve Telluride's purpose.⁸¹

The Telluride Amendment was tacked onto a statute to restrict use of eminent domain for urban renewal that had been introduced at the beginning of the legislative session.⁸² This was a year before the U.S. Supreme Court's decision in *Kelo v. City of New London*⁸³ generated a national reaction against that subject.⁸⁴ In Colorado, the urban renewal change was provoked by a controversial proposal to condemn a lake as a site for Wal-Mart.⁸⁵ Ironically, the Colorado Supreme Court held that proposed taking to be illegal about the same time as Telluride filed its eminent domain action.⁸⁶ In any case, the decision against Wal-Mart did not derail the anti-urban renewal statute.

78. The 1998 "blue book" informing voters about ballot measures stated nothing relevant to this question. See LEGISLATIVE COUNCIL, COLO. GEN. ASSEMBLY, ANALYSIS OF 1998 BALLOT PROPOSALS (1998), http://www.state.co.us/gov_dir/leg_dir/csstaff/ballot/analy-c.htm. Nor do the published records of passage of the measure through the legislature. See Colo. Gen. Assembly, 1998 Senate Resolutions and Memorials, http://www.state.co.us/gov_dir/leg_dir/house/sres98.htm (last visited Apr. 17, 2009) (reporting on S. Con. Res. 98-013, 61st Gen. Assem., 2d Reg. Sess. (Colo. 1998)). Nor do any of the newspaper accounts of the measure. Therefore, the statement in the text is the author's opinion. Of course, in light of the result in the *Telluride* case, the powers of other home-rule municipalities are comparable to those of Broomfield.

79. *Telluride*, 185 P.3d at 164.

80. COLO. REV. STAT. ANN. § 38-1-101(4)(b) (West 2009).

81. See *id.*; see also *id.* § 38-1-202(1)(f)(VII) (eminent domain power of park and recreation districts).

82. See H.B. 04-1203, 64th Gen. Assem., 2d Reg. Sess. (Colo. 2004) (codified as amended at COLO. REV. STAT. ANN. §§ 31-25-105.5, 38-1-101(4) (West 2009)).

83. 545 U.S. 469 (2005).

84. See Linda Greenhouse, *Justices Uphold Taking Property for Development*, N.Y. TIMES, June 24, 2005, at A1, available at http://www.nytimes.com/2005/06/24/politics/24scotus.html?_r=1&emc=eta1; Jonathan V. Last, *The Kelo Backlash: What the Supreme Court Touched off With Its Eminent Domain Decision*, THE WKLY. STANDARD, Aug. 21, 2006, at 14.

85. See *Arvada Urban Renewal Auth. v. Columbine Prof'l Plaza Ass'n*, 85 P.3d 1066, 1067-68 (Colo. 2004).

86. *Id.* at 1073.

The Telluride 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.⁸⁷ It also made no attempt to harmonize its requirements with the state's general Land Use Act, which had been applied to limit home rule powers.⁸⁸ Moreover, the text of the Telluride Amendment appears to give counties a veto power over agreed settlements of eminent domain cases where a municipality seeks land for parks, open space, or recreation outside its boundaries.⁸⁹ If this reading is correct, it made the landowner's attempted compromise with Telluride contingent on the consent of San Miguel County.⁹⁰

For its claim based on the Telluride Amendment, the landowner tried to work around the *Thornton* case in two ways. One was an application of its utilities theory of section 1, asking the court to decide that even if the itemized list in section 1 were not a closed set when no state law tried to override municipal power, it should be so held for extraterritorial eminent domain in conflict with a state statute. In other words, the state could override the town for all purposes save those specified. Because *Thornton* involved one of those powers, it was distinguishable.

Second, *Thornton* was decided at a time when the Colorado Supreme Court's home rule jurisprudence had not yet crystallized into a coherent scheme.⁹¹ The court subsequently adopted a doctrine that allocates claims of municipal power into three categories: purely local, purely statewide, and mixed. Under this doctrine, only purely local claims are immune from override by the state legislature.⁹² The landowner argued that extraterritorial eminent domain should be categorized as mixed and thus subject to legislative override.⁹³

The court rejected the latter argument based on the *Thornton* precedent. It held that the local-mixed-statewide form of analysis did not apply, relying on reasoning lifted from the *Thornton* opinion:

Where the constitution specifically authorizes a municipal action which potentially implicates statewide concerns, the municipality's exercise of that prerogative is not outside the bounds of its authority. . . . We therefore conclude that the extraterritorial condemnation of

87. COLO. REV. STAT. ANN. § 31-25-201(1) (West 2009); see also *supra* note 22 (outlining history of Colorado statutes allowing extraterritorial eminent domain by municipalities).

88. See *supra* note 54 and accompanying text.

89. See COLO. REV. STAT. ANN. § 38-1-101(4)(b)(II) (West 2009).

90. See *supra* text accompanying notes 14-16 (discussing the proposed compromise).

91. One can trace the modern doctrine to *Woolverton v. City & County of Denver*, 361 P.2d 982, 984 (Colo. 1961), *overruled in part* by *Vela v. People*, 484 P.2d 1204, 1206 (Colo. 1971). But the court did not articulate a consistent formal test until *City & County of Denver v. State*, 788 P.2d 764, 768 (Colo. 1990).

92. See *City & County of Denver v. State*, 788 P.2d at 767.

93. *Telluride*, 185 P.3d at 167; Appellants' Opening Brief, *supra* note 9, at 18-19, 34-40.

property need not be pursuant to a purpose that is purely local and municipal.⁹⁴

To reject the first claim the court again refused to read the itemized list in article XX, section 1 to create distinctively stronger powers. It invoked the many prior decisions that had treated the list as merely illustrative of broader powers. In particular, it invoked decisions that had sustained extraterritorial condemnations of land for an army base⁹⁵ and for airport use.⁹⁶ Therefore, the *Thornton* case could not be distinguished, and the court ruled for Telluride based on that precedent.⁹⁷ The landowner did not ask the court to overrule or limit *Thornton*, so the court did not address that subject.

4. The Dissent

Justice Eid was the sole dissenter. The basis for her dissent is not entirely clear. Her opinion embraced the landowner's proffered distinction between the enumerated powers in article XX, section 1 and powers to acquire land for parks and open space.⁹⁸ Some passages appeared to argue from that premise that home rule towns have never had constitutional power of extraterritorial eminent domain for purposes other than those enumerated—the landowner's second claim discussed above.⁹⁹ Other parts of her opinion appeared to assume that the power exists absent a conflicting statute, but concluded that the 2004 Telluride Amendment validly overrode it. She distinguished the *Thornton* precedent as an exercise of an itemized power.¹⁰⁰

C. How Broad Was the Ruling? Was It Correct?

The press reported that the *Telluride* decision gave Colorado's home-rule municipalities unlimited power to condemn land anywhere in the state for any purpose, a power the press strongly criticized.¹⁰¹ Journalists noted a prior situation where the City of Golden had threatened to use its power of eminent domain to block installation of a digital broadcasting tower outside the city.¹⁰² Golden was thwarted by federal

94. *Telluride*, 185 P.3d at 167 (citation omitted).

95. *Id.* at 166 (citing *Fishel v. City & County of Denver*, 108 P.2d 236, 241 (Colo. 1940)).

96. *Id.* (citing *City & County of Denver v. Bd. of Comm'rs*, 156 P.2d 101, 103 (Colo. 1945)).

97. *Id.*

98. *Id.* at 172-73 (Eid, J., dissenting).

99. *See supra* Part II.B.2.

100. *See Telluride*, 185 P.3d at 173 (Eid, J., dissenting).

101. *See* Vincent Carroll, Editorial, *Unleashing Mischief*, DENVER ROCKY MOUNTAIN NEWS, June 6, 2008, at 39; Editorial, *A Ruling Too Far: Supreme Court Gives Home-Rule Cities Alarming Power*, DENVER ROCKY MOUNTAIN NEWS, June 5, 2008, at 38; Editorial, *Wrong Course on Eminent Domain*, DENVER POST, June 4, 2008, at B12.

102. Michael Roberts, *Golden Showers: A City's Plans Rain on Local TV Powerhouses*, DENVER WESTWORD, Apr. 13, 2006, available at <http://www.westword.com/2006-04-13/news/golden-showers>.

preemption, and the facility was built; it mostly serves persons residing outside of Golden.¹⁰³

The journalists surely overstated the case. Three limits can be found in the opinion, although all are quite uncertain in scope. The most basic point is the court's embrace of the phrase "local and municipal matters" to define the "plenary power" of municipalities that the legislature cannot override.¹⁰⁴ The court can declare any future action by a city or town to fall outside that definition. But of course the phrase is vague, and uncertainty is increased by its use to mean quite different things. When Article XX was adopted in 1902 and amended in 1912, drafters of the texts did not address the question of whether and when a home rule city can act unless a state statute lawfully overrides the city, the category the supreme court later dubbed mixed. The text of section 6 defines municipal jurisdiction generally as "local and municipal matters" and adds a list of specific powers and other terms that appear to define municipal powers very broadly.¹⁰⁵ It then states that laws passed by a home-rule city within the scope of its powers "supersede" a conflicting state law.¹⁰⁶ The text led some supreme court justices to conceive of municipal and state powers as two exclusive kinds with no overlap, a viewpoint not expressly rejected until 1961.¹⁰⁷

Thereafter, doctrine evolved into the current system of local, mixed, and statewide powers. Under this system, a home-rule city's powers absent a conflicting state statute are a very broad swath of actions covering both local and mixed powers. The supreme court now often uses the phrase "local and municipal matters" to define only those local powers that trump conflicting state laws.¹⁰⁸ This usage is consistent with the "supersedes" clause of article XX, section 6, but not with the section's definition of the full range of municipal powers. The practice is not consistent because the court often quotes the phrase from section 6 when the context means to refer to *all* local powers, including those subject to override by the legislature.¹⁰⁹ The more precise term in current use is

103. See Ann Schrader & Anne Mulkern, *Congress OKs TV Tower*, DENVER POST, Dec. 10, 2006, at C1.

104. *Telluride*, 185 P.3d at 166.

105. COLO. CONST. art. XX, § 6.

106. *Id.*; see also *supra* text accompanying note 66.

107. See *Woolverton v. City & County of Denver*, 361 P.2d 982, 990 (Colo. 1961), *overruled in part by Vela v. People*, 484 P.2d 1204, 1206 (Colo. 1971). As is well known, the same question plagued the federal Constitution for many years. See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1, 11 (1895) (discussing the distinction between the "essentially exclusive" police power of the states and the "also exclusive" power of Congress to regulate interstate commerce).

108. See, e.g., *City & County of Denver v. State*, 788 P.2d 764, 767 (Colo. 1990). *City & County of Denver* is the court's leading case on point.

109. Indeed, this is true of the *Telluride* opinion itself. The first uses of the phrase appeared to describe the full range of local powers. See *Telluride*, 185 P.3d at 165. Later, the opinion rejected a claim by the landowner that *Telluride's* external eminent domain power was not "purely local and municipal." *Id.* at 167. Later yet, the phrase was repeatedly used with both its broad and restricted meanings.

“matters of local concern” to define local power to oust the state, in contrast to matters of “mixed local and state concern” to define powers that municipalities can exercise subject to state override.¹¹⁰ However, because the *Telluride* court rejected application of the local-mixed-statewide test, these more exact terms only appeared in the opinion’s reasoning for *not* applying the test.¹¹¹

The second potential limit in the opinion is found in footnote 8 and elaborated in the concurring opinion of Justice Coats.¹¹² The footnote states in part:

Our past cases indicate that, although the legislature may not *prohibit* the exercise of article XX powers, it may *regulate* the exercise of those powers in areas of statewide or mixed state and local concern. Therefore, the analysis of competing state and local interests would be appropriate in a case involving a statute which merely regulates home rule municipalities’ exercise of their constitutional powers. . . . However, this line of cases does not compel us to analyze competing state and local concerns in the case at hand, where the legislature purports to abrogate, not regulate, home rule powers granted by the constitution.¹¹³

A similar point arises from the court’s strong reliance on the *Thornton* precedent because that opinion applied some state statutes to Thornton’s condemnation action even as it held others unconstitutional.¹¹⁴

These points clearly approve of procedural laws that do not forbid an action; this describes the statutes specifically sustained in the *Thornton* opinion.¹¹⁵ In the *Telluride* case itself, the town obeyed state statutes defining the procedures for eminent domain, including the laws allowing the court to order mediation, allowing change of venue, limiting the jury to freeholders, and paying the landowner’s attorneys’ fees.

But the focus of criticism is the substantive reach of the decision. Its limits appear to depend on defining the section 6 phrase “local and municipal matters.” On this point, the court’s opinion created confusion and uncertainty by rejecting application of the local-mixed-statewide powers test that it uses to define local powers in most other situations.¹¹⁶ The court appeared to do this because it assumed that any extraterritorial action by a municipality must *ipso facto* involve statewide interest, be-

110. See *City & County of Denver*, 788 P.2d at 767.

111. *Telluride*, 185 P.3d at 169.

112. *Id.* at 170 n.8; *id.* at 171-72 (Coats, J., concurring).

113. *Id.* at 170 n.8 (majority opinion).

114. *City of Thornton v. Farmers Reservoir & Irrigation Co.*, 575 P.2d 382, 387-88, 392 (Colo. 1978).

115. *Id.* at 392 (upholding COLO. REV. STAT. §§ 38-1-101 to -120, 38-6-101 to -122 (1973), 38-6-201 to -216 (1973 & Supp. 1976)).

116. See *Telluride*, 185 P.3d at 167.

long in the mixed interest category, and be subject to state control. It therefore rejected application of this scheme in favor of the view it had taken in *Thornton* and other prior decisions, that extraterritorial eminent domain is a specific power that is exempt from any balancing of statewide interests unless a statute regulates—but does not prohibit—an action.¹¹⁷ This in turn gave rise to the inference that the power is unlimited, despite the vague denial in footnote 8.

The court's precedents did not compel that analysis. As noted above, the text of article XX, section 6 appears to give home rule governments exclusive power within their boundaries "and other jurisdiction."¹¹⁸ Yet the court has often allowed the state to override municipal actions inside corporate boundaries,¹¹⁹ and in the precedents reviewed in the *Telluride* decision, it found extraterritorial actions to be immune from state authority.¹²⁰ Any action by a municipal government has some effect outside its borders, so deciding on a constitutional line between local and mixed powers requires a judgment about each situation that comes down to a determination whether the statewide interest is important enough to classify a power as mixed. In cases arising within municipal borders, the court's precedents said as much, applied a four-part test to make the determination, and opined that each case depends on its facts.¹²¹

In *Telluride*, the crucial factor that negated use of this analysis was the assumption that any action outside municipal boundaries was *ipso facto* of statewide concern.¹²² That would be correct in many circumstances, perhaps most, but on the *Telluride* record, ownership and use of the Valley Floor land did not fairly present any issue of statewide concern. The land abuts the town and surrounds its highway access. The one reasonable claim for statewide concern was to protect the interest of San Miguel County, the territorial local government for the Valley Floor, but the county sided with *Telluride*, declaring that the issue was local to

117. See *id.* at 171.

118. See discussion *supra* Part.II.B.2.

119. See *e.g.*, *City of Commerce City v. State*, 40 P.3d 1273, 1284 (Colo. 2002) (regarding photo radar and red light cameras); *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 39 (Colo. 2000) (regarding rent control).

120. See *supra* note 72; see also *Town of Frisco v. Baum*, 90 P.3d 845, 849 (Colo. 2004) (regarding powers of a municipal court).

121. See, *e.g.*, *City & County of Denver v. State*, 788 P.2d 764, 768-72 (Colo. 1990).

122. The text of the *Telluride* Amendment asserts: "The acquisition by condemnation by a home rule or statutory municipality of property outside of its territorial boundaries involves matters of both statewide and local concern because such acquisition by condemnation may interfere with the plans and operations of other local governments and of the state." COLO. REV. STAT. ANN. § 38-1-101(4)(a)(I) (West 2009). However, if the legislature can override home-rule towns by including such a finding in a statute, constitutional home rule is at an end. See Richard B. Collins, *The Colorado Constitution in the New Century*, 78 U. COLO. L. REV. 1265, 1334 (2007).

Telluride.¹²³ The Valley Floor is a uniquely isolated piece of land that affects few outsiders.

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. Neither has any particular relation to the question whether Telluride's action should be characterized as involving a statewide concern; land inside Telluride's borders would present the same question. If the state had made its decision pursuant to a general plan for land use statewide, such as the Land Use Act, there might have been a reasonable claim of statewide interest, even for the Valley Floor.¹²⁴ Instead, the Telluride Amendment was an ad hoc measure adopted in great haste.

It is difficult to imagine a set of facts less favorable to state override of local preferences. Strong views of those who live next to the land were opposed by the ego of a nonresident billionaire owner who had never lived there or had any ancestral tie to it. The jury awarded him his full claimed value and attorneys' fees. The basis for the decision suggested here would have allowed many other cases to be decided the other way, such as Golden's plan to condemn the broadcasting site. 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. In a future case, the court might hold the Telluride Amendment to be severable and sustain its requirement for consent of the county, which was not at issue in the case.¹²⁵

Even if the modified analysis of the last four paragraphs were used, the court's broad opinion raised a number of concerns. *Telluride* is one of the most far-reaching decisions in favor of exclusive local power reported for any state. Moreover, a *per se* rule that extraterritorial jurisdiction is always subject to explicit state override (including home rule municipal laws) would furnish a bright-line rule that would avoid ad hoc adjudication. Many extraterritorial actions will conflict with local territorial governments and with local majority opinion. Some municipal actions are elitist and exclusionary, and thus in need of tempering.¹²⁶ These concerns show that the legal issues in *Telluride* were something of a sideshow because extraterritorial actions in pursuit of the itemized utili-

123. Town of Telluride v. San Miguel Valley Corp., 185 P.3d 161, 169 & n.6 (Colo. 2008).

124. See *supra* note 54 and accompanying text.

125. See COLO. REV. STAT. ANN. § 38-1-101(4)(b)(II) (West 2008).

126. Criticism of cities on this account has focused on such issues as exclusionary zoning, racial segregation, and tax resources of public schools. See generally Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985 (2000); Edward A. Zelinsky, *Metropolitanism, Progressivism, and Race*, 98 COLUM. L. REV. 665 (1998) (book review).

ties purposes in article XX, section 1 are not inherently more worthy than others. This is implicitly conceded by the terms of the first legislative bill introduced to try to undo the decision by making extraterritorial condemnations impossibly expensive—it would apply to takings for any purpose.¹²⁷

III. WAS THE TELLURIDE AMENDMENT'S RETROACTIVE APPLICATION INVALID?

[A] retroactive law is truly a monstrosity. Law has to do with the governance of human conduct by rules. To speak of governing or directing conduct today by rules that will be enacted tomorrow is to talk in blank prose.¹²⁸

All laws should be therefore made to commence *in futuro*, and be notified before their commencement; which is implied in the term "*prescribed*."¹²⁹

Retroactive criminal laws are forbidden absolutely by the Ex Post Facto and Bill of Attainder Clauses that were imposed by the original Constitution on all American governments, state and federal.¹³⁰ The clause that forbids state laws impairing the obligation of contracts outlaws one kind of retroactive civil laws.¹³¹ Another is restricted by the requirements of the Takings Clause.¹³² Laws that attempt to overturn final judgments of courts violate separation of powers.¹³³ Beyond these, the only constitutional limit on retroactive civil laws in most jurisdictions is the Due Process Clause.¹³⁴ However, every jurisdiction recognizes Professor Fuller's concern, quoted above, by erecting a strong presumption that all new legislation is intended to be applied only prospectively.¹³⁵

During the Twentieth Century, the problem of retroactivity became a concern regarding some judicial decisions. Traditional law had treated all judicial decisions as inherently retroactive on the theory that courts

127. H.B. 09-1258, 67th Gen. Assem., 1st Reg. Sess. (Colo. 2009). The bill's lead sponsor, Senator Shawn Mitchell, was also a lead sponsor of the Telluride Amendment. See COLO. H. JOURNAL, Feb. 25, 2004, 649-53.

128. LON L. FULLER, *THE MORALITY OF LAW* 53 (rev. ed. 1969).

129. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *46.

130. U.S. CONST. art. I, § 9, cl. 3 & § 10 cl. 1.

131. *Id.* art. I, § 10, cl. 1.

132. *Id.* amend. V.

133. *E.g.*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 225-26 (1995).

134. U.S. CONST. amends. V, XIV, § 1; see also JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 486 (7th ed. 2004).

135. For Colorado, see *City of Colorado Springs v. Powell*. 156 P.3d 461, 464-65 (Colo. 2007); see also COLO. REV. STAT. ANN. § 2-4-202 (West 2009) ("A statute is presumed to be prospective in its operation."). For Federal statutes, see *United States v. Security Industrial Bank*. 459 U.S. 70, 79 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student."); see also 73 AM. JUR. 2D *Statutes* § 245 (2008).

merely declare the law and do not create new laws.¹³⁶ But when a court overrules a prior decision, this theory is at least sorely strained. Some other rulings are so novel as to raise like concerns. Publication of *The Nature of the Judicial Process*, Judge Cardozo's celebrated work, provided the catalyst for courts to begin to issue rulings applying decisions only prospectively.¹³⁷ After undertaking detailed enforcement of the bill of rights in state criminal trials, the Supreme Court adopted prospective overruling for many of its decisions that added to the rights of accused persons. The Court's decisions in this field have generated volumes of scholarship.¹³⁸ All of these rulings were made in the name of some notion of due process or fundamental fairness.

Colorado is one of seven states that add further constitutional barriers to retroactive civil laws:

[No law] retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly.¹³⁹

The general assembly shall pass no law for the benefit of a railroad or other corporation, or any individual or association of individuals, retrospective in its operation, or which imposes on the people of any county or municipal subdivision of the state, a new liability in respect to transactions or considerations already past.¹⁴⁰

The first provision was copied verbatim by Colorado's 1876 constitutional convention from the 1875 Missouri Constitution.¹⁴¹ Its ancestor was probably the New Hampshire Constitution, which uses somewhat stronger words.¹⁴² Four other states have similar provisions.¹⁴³ The second quoted provision was also copied from the 1875 Missouri Constitution and was later adopted in Montana, but it was subsequently re-

136. See 1 WILLIAM BLACKSTONE, COMMENTARIES *69.

137. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 146-49 (1921); see also *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364-66 (1932). See generally Walter V. Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U. L. REV. 631 (1967).

138. See, e.g., Note, *Rethinking Retroactivity*, 118 HARV. L. REV. 1642 (2005).

139. COLO. CONST. art. II, § 11.

140. *Id.* art. XV, § 12; see also *id.* art. XV, § 8 (preserving the power of eminent domain over the property of corporations).

141. See MO. CONST. of 1875 art. II, § 15.

142. See N.H. CONST. pt. 1, art. 23 ("Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses.").

143. Tennessee forbids "retrospective" laws. TENN. CONST. art. I, § 20. Three states forbid "retroactive" laws. GA. CONST. art. I, § 1, ¶ X; OHIO CONST. art. II, § 28; TEX. CONST. art. I, § 16. The Montana Constitution forbids any "retrospective law" that imposes a "new liability" on past events. MONT. CONST. art. XIII, § 1(3). The Alabama Constitution requires the title of a law to indicate any intended retroactive effect. ALA. CONST. art. IV, § 45, construed in *Ala. Educ. Ass'n v. Grayson*, 382 So. 2d 501, 505 (Ala. 1980).

pealed in both states.¹⁴⁴ Nothing in the Colorado Convention records explained or elaborated the meaning of either clause.¹⁴⁵

The Colorado Supreme Court's first application of the article II clause arose when a wrongful death judgment against a railroad was based on a statute that was repealed during the railroad's appeal. The court rejected the railroad's claim that this absolved it of liability retroactively, invoking both the barrier of article II, section 11, and the presumed legislative intent that a new statute operate prospectively.¹⁴⁶ Thereafter, the court chose a verbal device to apply these sections, which declared a retroactive law valid unless retrospective.¹⁴⁷ Because the two words are dictionary synonyms, this simply attaches the retrospective label to laws found to be invalid. The main substantive rule the court has applied forbids retroactive laws that impair vested rights or impose new obligations on past transactions.¹⁴⁸ Interpretations of other states' clauses are similar.¹⁴⁹ This formulation traces to an 1814 opinion of Justice Story on Circuit that is also followed in determining due process attacks on retroactive laws.¹⁵⁰ On the other side of the ledger, the courts say that retroactive laws that are remedial or procedural in character are valid.¹⁵¹

The Colorado court's most recent application of the article II clause showed willingness to broaden its reach. In 1998-99, Golden made five agreements with developers that included incentives to invest in the city in the form of tax rebates and subsidies that were reviewable each year.¹⁵² A 2001 city law (adopted by citizens' initiative) revoked this commitment. Its purported retroactive application was marginal: elimi-

144. MO. CONST. of 1875, art. XII, § 19. The former Montana Constitution was worded similarly to Colorado's article XV provision. See MONT. CONST. of 1889, art. XV, § 13, *construed in State ex rel. Souders v. Dist. Court*, 12 P.2d 852, 855 (1932). The same text was proposed in California in 1878 but was not adopted. CAL. CONST. proposed amend. 298, § 8 (1878), available at <http://www.sos.ca.gov/archives/1879/archive/F3956-111.pdf>.

145. See TIMOTHY O'CONNOR, SEC'Y OF STATE, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION HELD IN DENVER, DECEMBER 20, 1875 TO FRAME A CONSTITUTION FOR THE STATE OF COLORADO at 90, 143, 204, 487 (1907) (reciting the text of both sections repeatedly without interpreting or explaining either of them). However, the convention delegates' intent to restrict the power of corporations was manifest. See OESTERLE & COLLINS, *supra* note 62, at 6-7, 313-16; Donald Wayne Hensel, A History of the Colorado Constitution in the Nineteenth Century, 134-55 (1957) (unpublished Ph.D. dissertation, University of Colorado) (on file with the Wise Law Library, University of Colorado, Boulder).

146. *Denver, South Park & Pacific Ry. Co. v. Woodward*, 4 Colo. 162, 168-69 (1878).

147. See OESTERLE & COLLINS, *supra* note 62, at 44-45.

148. See *id.*

149. See, e.g., *Goldrush II v. City of Marietta*, 482 S.E.2d 347, 358 (Ga. 1997); *Dep't of Soc. Servs. v. Villa Capri Homes, Inc.*, 684 S.W.2d 327, 332-33 (Mo. 1985); *Wallace v. Mont. Dep't of Fish, Wildlife & Parks*, 889 P.2d 817, 819-22 (Mont. 1995); *Socha v. City of Manchester*, 490 A.2d 794, 795 (N.H. 1985); *Vogel v. Wells*, 566 N.E.2d 154, 161-62 (Ohio 1991); *Dark Tobacco Growers' Coop. Ass'n v. Dunn*, 266 S.W. 308, 312 (Tenn. 1924); *McCain v. Yost*, 284 S.W.2d 898, 900 (Tex. 1955). There does not appear to be a decision under any of these provisions that departs from the "vested rights" formulation.

150. *Soc'y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767-69 (Cir. Ct. D.N.H. 1814); see also *Landgraf v. USI Film Prods.*, 511 U.S. 244, 268-69 (1994).

151. See, e.g., *Cont'l Title Co. v. Dist. Court*, 645 P.2d 1310, 1315 (Colo. 1982).

152. *City of Golden v. Parker*, 138 P.3d 285, 288 (Colo. 2006).

nation of future subsidies and rebates to developers who had invested previously in expectation of continued annual consideration of rebates and subsidies. The 2001 law did not impair any vested rights in the traditional sense; the repudiated commitment was not to give rebates and subsidies, only to consider giving them each year. The court nevertheless invalidated application of the 2001 law to pre-2001 investors on the theory that they had a vested right to annual consideration of rebates and subsidies.¹⁵³

The 2004 Telluride Amendment did not impair vested rights, not even in the attenuated sense of the *Golden* case. Nor did it impose new obligations on a completed past transaction because the condemnation action had been filed shortly before the enactment. It did overturn expectations of Telluride residents that they could preserve the Valley Floor, but that is a public expectation, and past decisions have protected only private rights.¹⁵⁴ On the other hand, the Amendment was in no sense remedial or procedural in character. Therefore, an attack on its retroactive application would have presented a novel issue.

A further problem for Telluride might have been the traditional rule that denies local governments standing or capacity to claim rights against their states on the theory that they are but arms of the state, unless the state gives express permission.¹⁵⁵ However, constitutional home rule is often held to allow municipalities to sue their states to challenge invasion of home-rule powers.¹⁵⁶ Colorado decisions appear to assume this, though no explicit ruling has been reported.¹⁵⁷

Telluride's case for invalidation would focus not on the kind of injury caused, but on the claim that the statute's retroactive application was a special accommodation to a single, powerful party. Many state consti-

153. *Id.* at 296. The annual consideration ritual was necessary to comply with Colorado's constitutional debt restriction. See COLO. CONST. art. X, § 20(4)(b); see also *Golden*, 138 P.2d at 291-92.

154. See OESTERLE & COLLINS, *supra* note 62, at 44-45.

155. See Harold A. Olsen, Note, *Procedural Barriers to Suits Against the State by Local Government*, 62 BROOK. L. REV. 431, 437 (1996). In Colorado, see *Board of County Commissioners v. Vail Associates*, 19 P.3d 1263, 1270 (Colo. 2001). Colorado law gives counties that are sued authority to challenge the constitutional validity of a statute as a defense to the action, but there is no general authority to initiate a constitutional challenge. See COLO. REV. STAT. ANN. § 30-11-105.1 (West 2009).

The Colorado authorities use the term "standing" to describe the authority at issue. Olsen explains that "capacity" is a more accurate term. See Olsen, *supra*, at 437-40. A similar rule forbids unauthorized suits by officers to challenge the constitutionality of laws defining their duties. See, e.g., *Lamm v. Barber*, 565 P.2d 538, 544 (Colo. 1977), *questioned on other grounds in Bd. of County Comm'rs v. Fifty-First Gen. Assembly*, 599 P.2d 887, 890-91 (Colo. 1979).

156. See, e.g., Olsen, *supra* note 155, at 447.

157. See, e.g., *City & County of Denver v. State*, 788 P.2d 764 (Colo. 1990) (allowing suit against the state to enforce home rule with no discussion of city's standing or capacity). No challenge was made in *Telluride* to the town's capacity or standing to challenge the constitutional validity of the Telluride Amendment as a defense. See *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161 (Colo. 2008).

tutions include a provision forbidding "local or special laws."¹⁵⁸ These provisions achieved their procedural goal of forcing legislatures to act by general and uniform laws, but any substantive aim to prevent unfair favoritism has not succeeded because there is no good way to define which laws should be overturned.¹⁵⁹ All laws require majority support, and achieving that support is the essence of democracy. All laws are in some sense special, and many perfectly good laws are local in some sense or another. But retroactivity is an important additional factor. 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. Colorado's article II ban on retrospective laws condemns "special privileges." Article XV's unique ban expressly forbids retrospective laws that benefit a single corporation. It also seems to give municipalities standing to invoke the provision.

When applied to complex statutory schemes with broad social impact, such as tax and welfare laws, retroactivity can raise complex issues of intertemporal equity that have generated sophisticated academic analyses.¹⁶⁰ However, the sort of retroactivity involved in the *Telluride* case raised no such concern. A shift in policy to forbid use of eminent domain to create parks and open space is exactly the sort of change that can and ought to be prospective only. The legislature implicitly recognized this in the bill on urban renewal to which the *Telluride* Amendment was attached: the rest of the bill was entirely prospective in operation.¹⁶¹

IV. LITIGATION, LEGISLATION, PUBLIC POLICY, AND THE PROPERTY RIGHTS MOVEMENT

The *Telluride* eminent domain case is a dramatic illustration of the distortions litigation can create for orderly public policy. The case was quite unusual. 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 lan-

158. See, e.g., COLO. CONST. art. V, § 25; see also Thomas F. Green, Jr., *A Malapropian Provision of State Constitutions*, 24 WASH. U. L.Q. 359, 359 & n.2 (1939) (stating that half the states had such provisions at that time).

159. This statement is illustrated by any published discussion of the workings of these provisions; all show their limited effects. See, e.g., OSBORNE M. REYNOLDS, JR., *HANDBOOK OF LOCAL GOVERNMENT LAW* 96-103 (2d ed. 2001); Green, *supra* note 158, at 362-66. A sophisticated proposal to define this limit in terms of good and bad logrolling concluded that the determination would be very difficult. The key part of such a rule would be whether logrolls producing allegedly special or local laws should be presumed valid or invalid. The proposal concluded that they should be presumed valid. See Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law*, 80 VA. L. REV. 625, 642-57 (1994).

160. See, e.g., DANIEL SHAVIRO, *WHEN RULES CHANGE: AN ECONOMIC AND POLITICAL ANALYSIS OF TRANSITION RELIEF AND RETROACTIVITY* 43-52 (2000); Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1056-58 (1997).

161. See H.B. 04-1203, 64th Gen. Assem., 2d Reg. Sess. (Colo. 2004).

downer had never lived on the land,¹⁶² 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.¹⁶³ The amendment's legal theory was the same as the litigation strategy of the eminent domain defendants, a theory with little relation to the policies at stake. The amendment may have hardened Telluride's voters against a compromise with the landowner. As discussed above, there was no significant statewide interest in the condemnation, contrary to most such cases.¹⁶⁴ The Colorado Supreme Court reached a defensible result on the facts of this unusual case but generated uncertainty and criticism by its vague and overbroad opinion.

The Telluride Amendment was inspired by loosely aligned groups known to supporters and opponents alike as the property rights movement.¹⁶⁵ The movement places a high priority on restricting use of eminent domain, a goal pursued both politically and in litigation.¹⁶⁶ The movement's principal opponents are organizations often described as the environmental movement.¹⁶⁷ The major political parties claim to support both property rights and the environment, but when environmental policies conflict with landowners' interests, there are rather clear differences between them. Republicans typically side with landowners against environmental preservation, while Democrats favor the environment.¹⁶⁸ A concrete example is current battles over the Endangered Species Act.¹⁶⁹

162. The San Miguel Valley Corporation owns a handsome house inside Telluride that is occasionally used by members of the Blue family. Telephone Interview with Kevin J. Geiger, Telluride Town Attorney (Feb. 9, 2009). However, very few people have resided on the condemned land since abandonment of the early mining settlement of San Miguel City. See Telluride and Mountain Village Official Visitor Guide, The Valley Floor Legacy, <http://www.telluridevisitorguide.com/towns/ValleyFloor.asp> (last visited Apr. 18, 2009).

On the valuation issue, see generally Janice Nadler & Shari Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 5 J. EMPIRICAL L. STUD. 713, 739-42 (2008); Jeffrey J. Rachlinski & Forest Jourden, *Remedies and the Psychology of Ownership*, 51 VAND. L. REV. 1541, 1542-53 (1998) (arguing for higher eminent domain valuations based on the so-called endowment effect when owner-occupiers are displaced by takings). A recent study argued that claims of undercompensation resulting from non-monetary values of residents displaced by eminent domain may be overstated. See Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101 (2006).

163. See *supra* notes 10-12 and accompanying text.

164. See *supra* text accompanying notes 116-25.

165. See, e.g., Steven J. Eagle, *The Birth of the Property Rights Movement*, POL'Y ANALYSIS, Dec. 15, 2005, at 3, available at <http://www.cato.org/pubs/pas/pa558.pdf>.

166. See *id.* at 25-34.

167. See MARK E. RUSHEFSKY, PUBLIC POLICY IN THE UNITED STATES: AT THE DAWN OF THE TWENTY-FIRST CENTURY 284-85 (3d ed. 2002).

168. Party platforms try to straddle these issues, but the differences stated in the text are there. Compare COMM. ON ARRANGEMENTS FOR THE 2008 REPUBLICAN NATIONAL CONVENTION, 2008 REPUBLICAN PLATFORM 36, 54, available at <http://platform.gop.com/2008Platform.pdf> (last visited Apr. 18, 2009), with 2008 DEMOCRATIC NAT'L CONVENTION COMM., THE 2008 DEMOCRATIC NATIONAL PLATFORM 42 (2008), available at http://s3.amazonaws.com/apache.3cdn.net/8a738445026d1d5f0f_bcm6b517a.pdf.

169. See, e.g., Bryan Walsh, *Endangered Species: In More Danger*, TIME, Aug. 12, 2008, available at <http://www.time.com/time/nation/article/0,8599,1832164,00.html?xid=rss-nation>.

Another is the Telluride Amendment, passed when Republicans controlled all three political branches of Colorado government.¹⁷⁰

A second policy that may have driven the Telluride Amendment was economic development. The stormy debate about the *Kelo* case decried use of eminent domain for urban renewal, an anti-development view.¹⁷¹ Nevertheless, 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, but only in recent years has the power been used to preserve open space and other ambient resources.¹⁷² For some policy makers, that is a negative use that they wish to limit or forbid.¹⁷³ This is another important question of public policy that was poorly served by chasing a pending lawsuit of peripheral relevance.

170. See Julia C. Martinez, *Governor Owens Cheers on GOP, Says Economy a Priority*, DENVER POST, Nov. 7, 2002, at E3.

171. See *supra* notes 83-84 and accompanying text. Political opposition to *Kelo* has been very broad, from Ralph Nader to Rush Limbaugh. See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. (forthcoming 2009), available at <https://www.law.northwestern.edu/colloquium/constitutionallaw/PostKeloReform.pdf>.

172. See Joseph L. Sax, *Why American Has a Property Rights Movement*, 2005 U. ILL. L. REV. 513, 514-16 (2005). Older treatises on eminent domain made no mention of its use for open space other than parks. See, e.g., 1 JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 405-95 (2d ed. 1900). By contrast, current treatises prominently discuss the subject, relying entirely on recent authorities. See, e.g., 8 NICHOLS ON EMINENT DOMAIN § G14D (2008).

173. A frequent issue in debates about takings law and policy is whether government regulation that limits private development should be valid without just compensation. The property rights movement strongly seeks to restrict governments' power to impose such regulations. See, e.g., Eagle, *supra* note 165, at 14-15.

