

Inconsistent Eminent Domain Laws Preventing Important Infrastructure: Iowa May Have the Solution

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ABSTRACT: The landmark case of Kelo v. City of New London in 2005 sparked public outrage. Following the case, legislators, legal scholars, and activists hounded the courts, academics, and public with endless opinions and critiques of the decision. State legislatures subsequently took the matter into their own hands, drafting statutes and revisiting existing ones to combat the fear of government overreach that Kelo generated. States' differing responses generated problematic inconsistencies, specifically as technology propels large-scale, multi-state infrastructure and energy projects. Eminent domain law should carefully balance the interests of private landowners and the public's interests, but the current inconsistency between states is inefficient and harming them both. This Note emphasizes the increasing need for a more coherent system of eminent domain law throughout the United States regarding large-scale energy infrastructure. Instead of proposing an additional federal agency to oversee the administration and regulation of large projects requiring the use of eminent domain, this Note argues that Iowa's statutory framework and recently established jurisprudence through Punttenney v. Iowa Utilities Board offers a solution that other states should adopt.

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I. INTRODUCTION

The ability to own, sell, and take care of private property is one of the most basic liberties a person can possess.¹ In fact, “[t]he Founders recognized that the protection of private property is indispensable to the promotion of individual freedom.”² It is a longstanding right that does not rely on a changing world to render itself necessary. Because of this cherished philosophy, the U.S. government was built on the cornerstone right of citizens’ ability to acquire, use, and dispose of property freely.³

But that is not the end of the analysis. There are times, however, when the government desires to use privately owned property for a purpose beyond the private party’s capability and for society’s benefit. This process is called condemnation: when the government formally takes private property for public

1. U.S. CONST. amend. V, XIV, § 1; Herbert Gintis, *The Evolution of Private Property*, 64 J. ECON. BEHAV. & ORG. 1, 5 (2007).

2. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021).

3. *Id.* (“As John Adams tersely put it, ‘[p]roperty must be secured, or liberty cannot exist.’”) (quoting JOHN ADAMS, *Discourses on Davila*, in 6 WORKS OF JOHN ADAMS 280 (C. Adams ed. 1851)); CATO INST., CATO HANDBOOK FOR POLICYMAKERS: PROPERTY RIGHTS AND THE CONSTITUTION 345 (7th ed. 2009), <https://www.cato.org/sites/cato.org/files/serials/files/cato-handbook-policy-makers/2009/9/hb111-34.pdf> [<https://perma.cc/gGXF-F6GT>] (“America’s Founders understood clearly that private property is the foundation not only of prosperity but of freedom itself.”).

benefit.⁴ The U.S. Supreme Court controversially ruled in the government's favor in a 2005 eminent domain case, *Kelo v. City of New London*. Much of the public disagreed with the ruling, and today it is considered one of the most unpopular decisions in Supreme Court history.⁵ This decision led to much debate concerning the process and justification of condemnation.⁶ In other words, *Kelo* brought eminent domain law to the forefront of state legislature discussions and led to the revisitation of many states' eminent domain laws. Because of this response, states currently protect the right of the government to condemn private property—and inversely, the right of an individual to be free from the taking of its private property—to varying degrees.

As opposed to other state constitutional rights, eminent domain is unique because it is often delegated to political subdivisions, like local jurisdictions or agencies, or to public and private companies, usually utilities companies.⁷ The interstate inconsistency of eminent domain law produces inefficiencies and obstacles to innovation, which require a solution as technological advances press states to adopt large-scale projects. Through its statutory framework and recent ruling in *Puntenney v. Iowa Utilities Board*, the Iowa legislature and Supreme Court highlighted aspects of eminent domain law that are important enough to be more consistent between states.

This Note argues that states should revisit and revise their eminent domain laws to mirror Iowa's approach, which properly balances private and government rights. By doing so, neighboring states would have cohesive procedures that encourage increasingly important infrastructure projects. Part II of this Note explains the history of eminent domain law, mostly focusing on the modern

4. IOWA UTILS. BD., FREQUENTLY ASKED QUESTIONS ABOUT EMINENT DOMAIN 1, https://iub.iowa.gov/sites/default/files/files/regulated_industries/engineering/faq-eminant-domain.pdf [<https://perma.cc/6GTH-7AYC>].

5. *Kelo v. City of New London* is often found on “Worst Supreme Court Decisions” lists. See ROBERT A. LEVY & WILLIAM MELLOR, THE DIRTY DOZEN: HOW TWELVE SUPREME COURT CASES RADICALLY EXPANDED GOVERNMENT AND ERODED FREEDOM, at xxviii (2009) (“No catalog of Supreme Court outrages would be complete without *Kelo v. City of New London*.”); Casey C. Sullivan, 13 *Worst Supreme Court Decisions of All Time*, FINDLAW (Oct. 14, 2015, 12:51 PM), <https://www.findlaw.com/legalblogs/supreme-court/13-worst-supreme-court-decisions-of-all-time> [<https://perma.cc/MYA2-UT8S>]; Damon Root, *The 5 Worst Supreme Court Rulings of the Last 50 Years*, REASON (Dec. 2018), <https://reason.com/2018/11/18/the-5-worst-supreme-court-ruli> [<https://perma.cc/8P HA-3LNV>]; David G. Savage, *How Did They Get It So Wrong?*, ABA J. (Jan. 1, 2009, 6:30 AM), https://www.abajournal.com/magazine/article/how_did_they_get_it_so_wrong [<https://perma.cc/ZP D5-Y2RC>].

6. Colin A. Young, *Mass. Among Few States that Didn't Respond to Eminent Domain Ruling*, METROWEST DAILY NEWS (June 22, 2018, 9:57 AM), <https://www.metrowestdailynews.com/news/20180622/mass-among-few-states-that-didnt-respond-to-eminant-domain-ruling> [<https://perma.cc/5U7Y-BWVQ>]; James W. Coleman & Alexandra B. Klass, *Energy and Eminent Domain*, 104 MINN. L. REV. 659, 669 (2019) (noting how “[t]he public, legislative, and judicial reaction to the Court's decision in *Kelo* was unprecedented”).

7. See *State Laws on Eminent Domain*, USLEGAL, <https://eminentdomain.uslegal.com/state-laws-on-eminant-domain> [<https://perma.cc/Q9Q6-KMNN>] (“Eminent domain law and legal procedures vary, sometimes significantly, between jurisdictions.”).

era. It briefly addresses the controversial *Kelo* case, discusses states' reactions to it, and highlights Iowa's most recent cementing of its eminent domain jurisprudence through its statutory framework and decision in *Puntenney v. Iowa Utilities Board*. Next, Part III analyzes the current inconsistency of eminent domain law among states, the benefits of cohesive eminent domain laws, and the harmfulness of overly broad and overly strict eminent domain laws. Finally, Part IV suggests that Iowa's approach to eminent domain law should be the national standard used by states because it properly defines "public use" and offers a middle-ground solution that caters to all interests.

II. THE HISTORY OF EMINENT DOMAIN LAW AND RECENT RULINGS THAT SHOOK IT UP

To better understand the current climate of eminent domain law, it is helpful to examine the history of this governmental power and the effects of the landmark U.S. Supreme Court case of *Kelo* in 2005. After *Kelo*, eminent domain's operation in the U.S. sprang to the country's attention, and many states took closer looks at their own eminent domain laws. Now over fifteen years after the Supreme Court's decision, states continue to tweak and solidify their eminent domain law. In response to *Kelo* and evolving technology, Iowa was one of those states.

A. WHAT IS EMINENT DOMAIN AND HOW DOES IT OPERATE IN THE UNITED STATES?

Many people have heard of eminent domain, but less are familiar with how it actually works. Although jurisdictions treat it differently, at its most basic level eminent domain is "the power of the government to take private property and convert it into public use."⁸ It is also described as "a right of a government to take private property for public use by virtue of the superior dominion of the sovereign power over all lands within its jurisdiction."⁹ This governmental right is based in the Fifth Amendment of the U.S. Constitution as well as state constitutions.¹⁰ The Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation."¹¹ This is commonly referred to as the "Takings Clause," and "[m]ost courts have

8. *Eminent Domain*, LEGAL INFO. INST. (2020), https://www.law.cornell.edu/wex/eminent_domain [<https://perma.cc/698M-CAEQ>]; *Eminent Domain*, BLACK'S LAW DICTIONARY (11th ed. 2019).

9. *Eminent domain*, MERRIAM-WEBSTER (2020), <https://www.merriam-webster.com/dictionary/eminent%20domain> [<https://perma.cc/8KYC-3ULQ>].

10. LEGAL INFO. INST., *supra* note 8; *Eminent Domain and Just Compensation*, LAWSHELF (2020), <https://lawshef.com/coursewarecontentview/eminent-domain-and-just-compensation> [<https://perma.cc/987V-YD7E>] (explaining briefly the legal basis for eminent domain and providing examples).

11. U.S. CONST. amend. V.

equated just compensation with a property's fair market value."¹² At its adoption, this protection only applied to takings by the federal government. In fact, the U.S. Supreme Court "explicitly found that state laws could provide fewer private property protections than those embodied in the Fifth Amendment."¹³ Even after Congress passed the Fourteenth Amendment, it took years before there was explicit incorporation—application to the states—of U.S. constitutional rights.¹⁴

The U.S. Supreme Court analyzed federal eminent domain power for the first major time in *Kohl v. United States* in 1875, seven years after the adoption of the Fourteenth Amendment.¹⁵ The Court explained how the power is deeply and clearly rooted in the U.S. Constitution:

The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned. The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The fifth amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken?¹⁶

As one entry in a long series of cases that eventually incorporated most of the Bill of Rights amendments, *Chicago, Burlington & Quincy Railroad Co. v. Chicago* ruled in 1897 that the Takings Clause applies to state governments.¹⁷

12. Thomas A. Garrett & Paul Rothstein, *The Taking of Prosperity?: Kelo vs. New London and the Economics of Eminent Domain*, REG'L ECONOMIST 5, 7 (Jan. 1, 2007), https://www.stlouisfed.org/~media/files/pdfs/publications/pub_assets/pdf/re/2007/a/eminent_domain.pdf [<https://perma.cc/SBQ2-4UUC>].

13. Anastasia C. Sheffler-Wood, Comment, *Where Do We Go from Here? States Revise Eminent Domain Legislation in Response to Kelo*, 79 TEMP. L. REV. 617, 618 (2006).

14. *Incorporation Doctrine*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/incorporation_doctrine [<https://perma.cc/84DK-RR82>] ("The incorporation doctrine is a constitutional doctrine through which the first ten amendments of the United States Constitution (known as the Bill of Rights) are made applicable to the states through the Due Process clause of the Fourteenth Amendment.")

15. *Kohl v. United States*, 91 U.S. 367, 370 (1875); *History of the Federal Use of Eminent Domain*, U.S. DEP'T JUST. (Jan. 24, 2022), <https://www.justice.gov/enrd/history-federal-use-eminent-domain> [<https://perma.cc/7D5Q-V95T>].

16. *Kohl*, 91 U.S. at 372–73.

17. *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 234–35 (1897); *Amdt5.5.1.1 Takings Clause: Overview*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt5-5-1-1/ALDE_00000920 [<https://perma.cc/JBE5-FT8G>] (explaining that state governments' eminent domain power was unrestrained by federal authority prior to Congress's adoption of the Fourteenth Amendment); *Incorporation Doctrine*, *supra* note 14 (listing the subsections of the Fifth Amendment that were incorporated, the year of incorporation, and the case in which it took place); *Incorporation*, BILL RTS. INST., <https://billofrightsinstitute.org/educate/educator-resources/landmark-cases/incorporation> [<https://perma.cc/62NE-EJ9D>] ("The Court never actually said

Because the Fourteenth Amendment includes “property” as a constitutional right that the government cannot infringe upon without due process of law,¹⁸ a state law is unconstitutional under the Due Process Clause if it allows governmental takings of private property “without just compensation.”¹⁹ Although scholars disagree about the details of incorporation, “virtually all scholars who endorse incorporation at all conclude that the Takings Clause of the Fifth Amendment was one of the rights that was in fact incorporated.”²⁰ State and federal governments’ eminent domain powers are limited in multiple facets, such as requiring just compensation and restricting takings of private land for any purposes. The Fifth Amendment does the latter through the law’s qualifier: “for public use.”²¹ That phrase is the source of the majority of eminent domain disputes, scholarship, and legislation.²²

State constitutions generally mirror the federal Takings Clause, and thus the interpretation of “public use” at the state level is similarly where conflict often arises.²³ The Iowa Constitution’s Takings Clause, like other state constitutions, expressly prohibits any “private property . . . tak[ing] for public use without just compensation”²⁴ In Iowa condemnation cases, the private property is generally not taken in full, and the owner does not lose as many rights as is generally believed.²⁵ The landowner typically retains title to the property and can use the property in any way that does not interfere with the easement.²⁶ Also, Iowa law requires that any entity given the power of

Illinois had to abide by the Fifth Amendment’s just compensation clause, but by using the Fourteenth Amendment to apply part of the Bill of Rights to a state action, the Court opened the door for similar protection of other provisions.”).

18. U.S. CONST. amend. XIV, § 1.

19. *Id.*; U.S. CONST. amend. V.

20. Ilya Somin, *Debating the Original Meaning of “Public Use,”* WASH. POST (Feb. 27, 2014, 7:27 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/27/debating-the-e-original-meaning-of-public-use> [<https://perma.cc/4ZKD-XCGK>].

21. U.S. CONST. amend. V.

22. See Dana Berliner, *Looking Back Ten Years After Kelo*, 125 YALE L.J. FORUM 82, 85 (2015), <http://www.yalelawjournal.org/forum/looking-back-ten-years-after-keho> [<https://perma.cc/6D5V-843Q>]; Will Kenton, *Eminent Domain*, INVESTOPEDIA (Feb. 6, 2022), <https://www.investopedia.com/terms/e/eminent-domain.asp> [<https://perma.cc/W5YB-L8QS>] (noting the controversial fact that in recent decades “eminent domain [has] begun to encompass big business interests”).

23. See Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 61 (1986); U.S. CONST. amend. V; IOWA CONST. art. I, § 18.

24. IOWA CONST. art. I, § 18.

25. See IOWA UTILS. BD., *supra* note 4, at 3. In fact, Iowa private landowners receive stronger protection under the Iowa Constitution than the U.S. Constitution. Kristine A. Tidgren, *Iowa Supreme Court Says Condemnation of Farmland for Dakota Access Pipeline Was Constitutional*, IOWA STATE UNIV.: CTR. FOR AGRIC. L. & TAX’N (May 31, 2019), <https://www.calt.iastate.edu/blogpost/iowa-supreme-court-says-condemnation-farmland-dakota-access-pipeline-was-constitutional> [<https://perma.cc/58V5-RB69>].

26. IOWA UTILS. BD., *supra* note 4, at 3.

eminent domain use it only for the specified parcels in its application, and each easement right is scrutinized to determine its necessity.²⁷

Although the interpretation of “public use” can be inconsistent between jurisdictions, the United States nonetheless has a long history of utilizing its eminent domain right.²⁸ During specific times throughout U.S. history, the federal Takings Clause has been instrumental in realizing the policy goals of the given period, doing whatever is necessary or appropriate in serving the general public.²⁹ Traditional uses of this power have enabled the government “to facilitate transportation, supply water, construct public buildings, and aid in defense readiness.”³⁰ Further, the government’s exercise of eminent domain power commonly correlated with major U.S. projects and developments throughout the twentieth century.³¹ For example, advancing technology, the growing population, and the need for updated modes of transportation triggered many additional acquisitions by the government during the early 1900s.³² Projects included the construction and maintenance of railroads and navigable waters, such as canals.³³

Later, as a result of the New Deal policies, an increased number of federal takings occurred to accomplish projects for impoverished farmers, large-scale irrigation systems, and new national parks.³⁴ Soon thereafter, World War II required the transformation of many of the nation’s industries to help with war efforts.³⁵ Throughout the war, the Land Division “oversaw the acquisition of more than 20 million acres of land,” which the government used to build airports, naval stations, storage and manufacturing facilities for war materials, and other defense necessities.³⁶ More recent federal takings include projects focused on conservation efforts, transportation infrastructure, housing government services, and national defense and security.³⁷

B. *THE SPARK THAT LIT THE FIRE: KELO V. CITY OF NEW LONDON*

Although the government’s utilization of its eminent domain power is not new or surprising, the particular interpretation of “public use” decided in *Kelo v. City of New London* moved eminent domain questions to a more

27. *Id.*

28. U.S. DEP’T OF JUST., *supra* note 15.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*; see *Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 583–84 (1923).

34. U.S. DEP’T OF JUST., *supra* note 15.

35. *Id.*

36. *Id.*; see *Cameron Dev. Co. v. United States*, 145 F.2d 209, 209 (5th Cir. 1944); *Gen. Motors Corp. v. United States*, 140 F.2d 873, 873 (7th Cir. 1944).

37. U.S. DEP’T OF JUST., *supra* note 15.

prominent position within policy debates.³⁸ A full analysis of *Kelo* is beyond the scope of this Note, but a general understanding of the case is a necessary backdrop to states' subsequent legislative and judicial decisions. *Kelo* held that the Fifth Amendment allows the government to take private property and distribute it to another private party for the purpose of "economic development."³⁹ Compared with past precedent and traditional understandings of the Fifth Amendment, this was new.⁴⁰ In a 5-4 split, Justice Stevens authored the majority decision, which was criticized by the media, politicians, dissenting justices, and perhaps most importantly, by the American public.⁴¹

The city of New London, Connecticut was struggling from an economic downturn, so the New London Development Corporation created a plan that it hoped would stimulate the local economy.⁴² The plan was to take property—115 privately owned pieces of land—and transfer it to a private developer in the hopes of "draw[ing] new business to the area" and convincing the pharmaceutical company Pfizer to stay in the community.⁴³ The city authorized the Development Corporation to use eminent domain power to acquire the privately held land.⁴⁴ Susette Kelo was a homeowner in the area soon to be condemned, and she and other plaintiffs challenged this exercise of eminent

38. *Kelo v. City of New London*, 545 U.S. 469, 489–90 (2005); Alexandra B. Klass, *The Frontier of Eminent Domain*, 79 U. COLO. L. REV. 651, 669 (2008) ("Prior to *Kelo v. City of New London*, what constituted a public use under the Fifth and Fourteenth Amendments was far from a 'hot topic.'"); see Chip Mellor, *Americans Say "Hands Off My Home"*, INST. FOR JUST. (Aug. 1, 2005), <https://ij.org/ll/august-2005-volume-14-number-4/americans-say-qhands-off-my-home> [<https://perma.cc/9X34-N26D>] (explaining the Institute for Justice's response to *Kelo*, which consisted of a \$3 million campaign titled "Hands Off My Home" in order to halt private profit eminent domain power).

39. *Kelo*, 545 U.S. at 490.

40. For a more comprehensive look at historical U.S. Supreme Court decisions regarding eminent domain, see the following cases: *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (affirming a transfer of private property to private holders); *Berman v. Parker*, 348 U.S. 26 (1954) (affirming the state's ability to take property for the purpose of economic development); *Kohl v. United States*, 91 U.S. 367 (1875); *Calder v. Bull*, 3 U.S. 386 (1798).

41. Andrew Yaphe, *Assessments of Backlash: Evaluating the Response of the Property Rights Movement to Kelo v. City of New London*, 2 ELON L. REV. 223, 223 (2011). The U.S. House of Representatives immediately passed a resolution condemning the Court. See H.R. Res. 340, 109th Cong. (2005). The *Kelo* case had such a big impact on the United States that 13 years after its decision, it was dramatized in a feature film titled "Little Pink House." *'Little Pink House' Brings Kelo v. City of New London to the Big Screen*, ATLAS NETWORK (Mar. 5, 2018), <https://www.atlasnetwork.org/news/article/little-pink-house-brings-kelo-v.-city-of-new-london-to-the-big-screen> [<https://perma.cc/EZM3-3WSX>].

42. *Kelo*, 545 U.S. at 473–74; *Summary of Kelo v. New London*, NAT. CONF. STATE LEGISLATURES (Mar. 19, 2014), <https://www.ncsl.org/research/environment-and-natural-resources/summary-of-kelo-v-new-london635308174.aspx> [<https://perma.cc/TL2K-GUYU>] (explaining how the city formed the New London Development Corporation (NLDC) to assist the city in economic development planning, and the city authorized NLDC to create a plan for 90 acres in Fort Trumbull).

43. *Kelo*, 545 U.S. at 473.

44. *Id.* at 474–75.

domain.⁴⁵ They argued “that the taking of their” land violated the “public use” limitation of the Fifth Amendment.⁴⁶

The U.S. Supreme Court ruled against the petitioners, holding that the City’s development plan and subsequent takings “satisf[ied] the public use requirement.”⁴⁷ The majority deferred to the City, emphasizing the “carefully formulated . . . economic development plan that” promised positive economic trickle-down effects for the community as a whole.⁴⁸ The Court also justified its conclusion by stating “[t]here is, moreover, no principled way of distinguishing economic development from the other public purposes that [the Court has] recognized.”⁴⁹ However, the majority stated that “nothing in [their] opinion precludes any State from placing further restrictions on its exercise of the takings power.”⁵⁰

Both Justices O’Connor and Thomas wrote passionate dissents. Justice O’Connor argued that the majority “abandon[ed the] long-held, basic limitation on government power” that protects against government overreach and effectively “delete[d] the words ‘for public use’ from the Takings Clause of the Fifth Amendment.”⁵¹ O’Connor thought that although the government may legally take an individual’s property for the public’s use, in no way has the government been allowed to take it “for the benefit of another private person.”⁵² She established three categories of takings that satisfy the public use requirement: (1) private-to-public ownership (e.g., “for a road, a hospital, or a military base”); (2) private-to-private ownership (e.g., “common carriers[] who make the property available for the public’s use—such as with a railroad, a public utility, or a stadium”); and (3) takings that serve a public purpose, “even if the property is destined for subsequent private use.”⁵³ O’Connor argued that the majority improperly expanded “public purpose” to include “any lawful use of real private property” that can “generate some incidental benefit to the public.”⁵⁴ Because *any* predicted “positive side effects [to the public] are enough to render transfer from one private party to another” lawful, and *any* use of real property could create “some incidental benefit to the public,” the words “for public use” essentially “do not exert any constraint on the eminent domain power.”⁵⁵

45. *Id.* at 475.

46. *Id.*

47. *Id.* at 484.

48. *Id.* at 483 (listing “new jobs and increased tax revenue” as benefits to the community).

49. *Id.* at 484.

50. *Id.* at 489.

51. *Id.* at 494 (O’Connor, J., dissenting).

52. *Id.* at 497.

53. *Id.* at 497–98.

54. *Id.* at 501.

55. *Id.*

Justice Thomas agreed with Justice O'Connor and explained that the majority's reasoning—justifying takings for a “public use” under the umbrella of “economic development”—opens the floodgates to allow any taking.⁵⁶ Worse yet, as the government uproots families from their homes, “these losses will fall disproportionately on poor communities” where they are “less likely to put their lands to the highest and best social use, [and] are also the least politically powerful.”⁵⁷ He argued that this is “the latest in a string of [Supreme Court] cases construing the Public Use Clause to be a virtual nullity,” and the Court should revisit its recent eminent domain jurisprudence to seek out the Clause's original meaning.⁵⁸ In his opinion, the constitutional limits provide “that the government may take property only if it actually uses or gives the public a legal right to use the property.”⁵⁹

C. STATES' RESPONSES TO KELO

The *Kelo* decision caught the eye of federal, state, and local legislators, along with many passionate individuals and activists.⁶⁰ The focus of this Note is on states' responses and, more specifically, Iowa's response. Reactions by state legislatures throughout the country led to varying levels of reform. Nearly every state, 44 of them, enacted some sort of legislative reform in response to *Kelo*—some immediately and some in the near subsequent years.⁶¹ States that did respond enacted explicit regulations pushing back against *Kelo*, or passed laws that on their face attempted to address *Kelo* but were fruitless as applied.⁶² This intense wave of state legislation focused mainly on expanding state laws to prohibit the taking of private property and distributing it specifically to another private party in the name of “economic development.”⁶³

56. *Id.* at 506 (Thomas, J., dissenting).

57. *Id.* at 521.

58. *Id.* at 506.

59. *Id.* at 521.

60. Ilya Somin, *The 15th Anniversary of Kelo v. City of New London*, REASON (June 23, 2020, 10:30 AM), <https://reason.com/2020/06/23/the-15th-anniversary-of-kelo-v-city-of-new-london> [<https://perma.cc/FS5U-233H>] (“In addition to the controversy *Kelo* generated among lawyers and legal scholars, the decision is also notable for generating a broader political backlash than virtually any other Supreme Court decision in modern history.”). Interestingly, some of the strongest opposers came from opposite ends of the political spectrum. *Id.* For example, “[t]his was a rare issue on which Rush Limbaugh, Ralph Nader, libertarians, and the NAACP were all on the same side.” *Id.*

61. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2115 tbl.3 (2009); Berliner, *supra* note 22, at 84 (explaining that “[e]ven [states] changed their constitutions” and “forty enacted a broad range of statutory changes”).

62. See Steven J. Eagle & Lauren A. Perotti, *Coping with Kelo: A Potpourri of Legislative and Judicial Responses*, 42 REAL PROP. PROB. & TR. J. 799, 803 (2008).

63. Yaphe, *supra* note 41, at 232.

States took different approaches to address the post-*Kelo* chaos, and there was no completely uniform action across the country.⁶⁴ States that chose to pass responsive legislation did so in three main ways: they limited the scope of “public use,” increased “just compensation” requirements, and bolstered eminent domain procedures.⁶⁵ Alabama was the first state to react and passed a law barely a month after the Court decided *Kelo*.⁶⁶ Other states that were quick to enact legislation clearly cabining *Kelo*’s reach were Kansas, Alaska, and Tennessee.⁶⁷ While this is just a sample of some immediate and targeted state responses, there were plenty more.⁶⁸

In contrast, several states did nothing in response to *Kelo*. However, many of these states had already prohibited what *Kelo* deemed legal through increased protections against takings.⁶⁹ For example, Utah had already enacted a statute that banned economic development takings several months before *Kelo*.⁷⁰ Combining the different means of responding to “*Kelo*,” a grand total of forty-seven states increased protection against takings for private use.⁷¹

For the 80 percent of states that passed eminent domain clarification laws post-*Kelo*, however, legal scholars, legislatures, and the public wrestled with the actual effectiveness of these laws.⁷² In other words, there was “concern[] about differentiating legislative measures, which were mere rhetoric, from those which constituted meaningful reform.”⁷³ The most common reforms enacted by state legislatures were those that prohibited “economic development” takings. But some of these statutes failed to account for essentially the same type of taking “under another name, such as ‘blight’ and ‘community

64. Many scholars researched individual state responses to *Kelo* in the years immediately after the case and provided an in-depth look at each piece of legislation. See Edward J. López, R. Todd Jewell & Noel D. Campbell, *Pass a Law, Any Law, Fast! State Legislative Responses to the Kelo Backlash*, 5 REV. L. & ECON. 101, 116–32 (2009); Eagle & Perotti, *supra* note 62, at 803–45; Christopher W. Smart, *Legislative and Judicial Reactions to Kelo: Eminent Domain’s Continuing Role in Redevelopment*, 22 PROB. & PROP. 60, 61–64 (2008).

65. Eagle & Perotti, *supra* note 62, at 803, 816, 823.

66. Yaphe, *supra* note 41, at 232, 232 n.53.

67. *Id.* at 232–33. These legislative bills specified the limited situations in which the government can use eminent domain and emphasized that it should be used sparingly. *Id.* at 232–33 nn.55–59. The bills oftentimes included the exception for blight condemnations while using this as an opportunity to narrowly define “blight.” *Id.*

68. Eagle & Perotti, *supra* note 62, at 829–45 (describing post-*Kelo* laws state-by-state).

69. Berliner, *supra* note 22, at 84–88.

70. Somin, *supra* note 61, at 2120 n.19; see UTAH CODE ANN. § 17B-4-202 (2004) (Utah amended its law on blight condemnation in Spring 2006, and Utah’s eminent domain law as of 2022 is found in §§ 17C and 78B-6-5.).

71. Berliner, *supra* note 22, at 89. Three states (Arkansas, Massachusetts, and New York), the District of Columbia, and the U.S. territories have not provided any additional protection against takings beyond what the U.S. Supreme Court offered in *Kelo*. *Id.*

72. Yaphe, *supra* note 41, at 233–34.

73. *Id.* at 234.

development' condemnations."⁷⁴ Interestingly, in the years immediately following *Kelo*, "enactment of effective [eminent domain] reform seem[ed] unrelated to the degree to which the state in question had previously engaged in private-to-private condemnation."⁷⁵ Comparing the effectiveness between the states' responses proves difficult because "[e]ven among the many states that made changes, every state did something different," and "[n]o two states adopted the same legal changes."⁷⁶ *Kelo* has not been revisited at the federal level, and thus, states "continue to be the main fora for legislative reform and constitutional litigation" in this area.⁷⁷

D. IOWA'S RESPONSE TO KELO

As an agriculture-focused state, it is no surprise that Iowa takes eminent domain law seriously. In fact, Iowa has one of the highest percentages of privately-owned land in the country.⁷⁸ In 1991, Iowa tied for holding the third largest percentage of private land at 97.2 percent.⁷⁹ The national average consisted of 60.2 percent privately-owned land.⁸⁰ This ranking has remained steady over time. As of 2018, Iowa tied for the state with the *least* amount of federally owned land in the nation: the federal government owned a mere 0.3 percent of Iowa acreage.⁸¹ This ranking barely changes once state and local government ownerships are included. "Iowa ranks 49th in the country in the amount of public land owned by federal, state, and local governments, with slightly more than one percent of the land owned by state and federal governments."⁸² Because the state of Iowa has extremely high rates of private land ownership, its constituents are highly sensitive to any change in eminent domain law.

74. Somin, *supra* note 61, at 2120.

75. *Id.* at 2116–17.

76. Berliner, *supra* note 22, at 90.

77. *Id.*

78. Scott, *Public and Private Land Percentages by US States*, SUMMITPOST, <https://www.summitpost.org/public-and-private-land-percentages-by-us-states/186111> [<https://perma.cc/D7NV-gGYX>] (citing U.S. DEP'T OF COM., STATISTICAL ABSTRACT OF THE UNITED STATES 1991 201 (111th ed. 1991), <https://www2.census.gov/library/publications/1991/compendia/statab/111ed/1991-01.pdf> [<https://perma.cc/Y476-FKDW>]).

79. *Id.*

80. *Id.*

81. CAROL HARDY VINCENT, LAURA A. HANSON & LUCAS F. BERMEJO, CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 8 (2020).

82. SIERRA CLUB: IOWA CHAPTER, IOWA PUBLIC LAND – BY THE NUMBERS 2, <https://www.sierraclub.org/sites/www.sierraclub.org/files/sce/iowa-chapter/wildlands-wildlife/IAPublicLand.pdf> [<https://perma.cc/362H-6CSU>]. Interestingly, the Iowa Department of Natural Resources does not use eminent domain when acquiring public land. *Id.* When making its decisions, the DNR requires the land to have a public benefit and public access, and it will "not take land with high corn suitability ratings." *Id.* at 3.

Following *Kelo*, the Iowa legislature amended its eminent domain statutes, sections 6A and 6B, in the subsequent legislative session.⁸³ It joined the group of states that sought to increase private property protection. The changes reflected the *Kelo* dissenters' "approach by prohibiting all takings of property from one private owner for transfer to another unless the property is open for public 'use,' meaning public ownership or access."⁸⁴ Although the statute left the definition of "public use," "ownership," or "access" to be interpreted, this legislative activity communicated the Iowa legislature's desire to revisit the state's eminent domain law due to post-*Kelo* worries of government overreach. This value was further effectuated through the legislature's addition of section 6A.22, which provides a whole swath of limitations on and explanations of the exercise of eminent domain power.⁸⁵

In addition to the state legislature, the Iowa Supreme Court took up the issue almost 15 years after *Kelo* and solidified its eminent domain jurisprudence in *Punttenney v. Iowa Utilities Board* in May 2019.⁸⁶ The Court adopted an approach more similar to Justice O'Connor's dissent,⁸⁷ which classifies takings into three main categories.⁸⁸ The Iowa Supreme Court declared that the power of eminent domain can only be exercised for the following purposes: 1) public ownership, 2) private ownership—often of "common carriers"—that makes the property available for public use, or 3) private ownership that serves a public purpose, even if "destined for subsequent private use."⁸⁹ The Iowa Court reiterated that the power of "[e]minent domain cannot be used to take property from one person purely in order to favor another person," but it also limited those protections in order to encourage public interest projects.⁹⁰

83. H.F. 2351, 81st Gen. Assemb., Reg. Sess. (Iowa 2006).

84. Joseph William Singer, *Legislative Responses to Kelo*, HARV. UNIV. (Sept. 26, 2009), <https://scholar.harvard.edu/jsinger/legislative-responses-to-kelo> [<https://perma.cc/5X4W-VMFY>].

85. IOWA CODE § 6A.22 (2022); H.F. 2351, 81st Leg., Reg. Sess. (Iowa 2006).

86. *Punttenney v. Iowa Utils. Bd.*, 928 N.W.2d 829 (Iowa 2019). The Iowa Legislature enacted House File 2351 in 2006, mostly in reaction to *Kelo*, which provided several definitions of "public use," increased procedural burdens of eminent domain, and implemented a buy-back provision. Mary Massaron Ross & Kristen Tolan, *Legislative Responses to Kelo v. City of New London and Subsequent Court Decisions—One Year Later*, 16 J. AFFORDABLE HOUS. & CMTY. DEV. L. 52, 58 (2006); see also LEGAL SERVS. AGENCY, IOWA SUPREME COURT DECISION – DAKOTA ACCESS PIPELINE 1–2 (2019), <https://www.legis.iowa.gov/docs/publications/LU/1061833.pdf> [<https://perma.cc/FJ7J-RLRU>] (providing a summary of the case's facts, procedural background, and the Court's decision and analyses).

87. See *Kelo v. City of New London*, 545 U.S. 469, 494–506 (2005) (O'Connor, J., dissenting). The dissenting opinion in *Punttenney* stated the case should have been dismissed on mootness grounds. *Punttenney*, 928 N.W.2d at 855 (McDonald, J., dissenting) ("The completion of the pipeline and the appellants' acceptance of the condemnation awards are established facts that render their claim moot.").

88. *Kelo*, 545 U.S. at 497–98.

89. *Id.*; *Punttenney*, 928 N.W.2d at 848; IOWA UTILS. BD., *supra* note 4, at 1–2.

90. IOWA UTILS. BD., *supra* note 4, at 2; Tidgren, *supra* note 25.

In *Puntenney*, a \$3.8 billion, 1,172-mile underground crude oil pipeline project would cross through 18 Iowa counties on its way from western North Dakota to southern Illinois.⁹¹ Effectuating the power the Iowa Legislature gave it under Iowa Code § 6A.21, the Iowa Utilities Board (“IUB”) authorized the private pipeline company, Dakota Access, to acquire any property necessary to the project’s completion.⁹² Following this approval and subsequent condemnation of land by Dakota Access, “landowners and an environmental organization sought judicial review” of this administrative ruling.⁹³ They claimed that the condemnation violated Iowa law and was unconstitutional because “the pipeline [1]) did not serve the ‘public convenience and necessity’ as required by law;⁹⁴ [2]) did not meet the statutory standard required for a taking of agricultural land;⁹⁵ and [3]) did not meet the constitutional definition of ‘public use’ set forth in article I, section 18 of the Iowa Constitution and the Fifth Amendment to the United States Constitution.”⁹⁶

The Iowa Supreme Court disagreed. It rejected each of these claims, holding that: 1) the IUB properly determined the pipeline serves the public through convenience and necessity under Iowa Code section 479B.9; 2) the pipeline qualifies as a common carrier under the jurisdiction of the IUB under Iowa Code sections 6A.21 and 6A.22; and 3) it does not violate either the Iowa or U.S. Constitutions because it has a valid public use even though it does not take in or let off oil while passing through the state.⁹⁷ In other words, the Court found that all parties acted properly—the IUB did not err in determining the pipeline was worthy of a permit nor did the pipeline company violate the Iowa Code or the Iowa and U.S. Constitutions by its exercise of eminent domain.

91. *Puntenney*, 928 N.W.2d at 832; The Associated Press & Donnelle Eller, *Judge Orders Dakota Access Oil Pipeline, Which Cuts Through Iowa, Shut Sown Pending Environmental Review*, DES MOINES REG. (July 6, 2020, 5:17 PM), <https://www.desmoinesregister.com/story/news/2020/07/06/dakota-access-pipeline-shut-down-pending-environmental-review/5383272002> [<https://perma.cc/5ZCD-8AC8>]. This is just one piece of a complex and multi-jurisdiction lawsuit. A full review of the Dakota Access Pipeline litigation involves an ongoing suit, mainly focused on the environmental impacts of the pipeline. Brooksany Barrowes, Matt Gibson, Chris Heasley, Danny Nappier & Paul D. Tanaka, *Dakota Access Pipeline Shutdown Order: What Happened and What’s Next*, KIRKLAND & ELLIS (Aug. 21, 2020), <https://www.kirkland.com/publications/blog-post/2020/08/dakota-access-pipeline-shutdown> [<https://perma.cc/MF3F-FKB2>]. The pipeline has been operating since 2017, but its future remains uncertain “until the U.S. Army Corps of Engineers (“USACE”) completes an environmental impact statement (“EIS”) under the National Environmental Policy Act (“NEPA”).” *Id.* This is the backdrop for *Puntenney v. Iowa Utilities Board*; however, the outcome of the EIS and subsequent litigation does not affect the Iowa Court’s eminent domain ruling in *Puntenney* or its interpretation and application of the taking clauses’ requirements.

92. *Puntenney*, 928 N.W.2d at 832.

93. *Id.*

94. *Id.*; see IOWA CODE § 479B.9 (2022).

95. *Puntenney*, 928 N.W.2d at 832–33; see IOWA CODE §§ 6A.21(1)(c), 6A.22(1) (2022).

96. *Puntenney*, 928 N.W.2d at 833 (citations omitted); see IOWA CONST. art. I, § 18; U.S. CONST. amend. V.

97. *Puntenney*, 928 N.W.2d at 833.

For the first holding, the Court was quite deferential when analyzing the IUB's actions. Because the Iowa legislature gave the IUB the decision-making authority to grant or deny pipeline permits based on its own determination of "public convenience and necessity" in Iowa Code section 479B.9, the Court was not to interfere in this decision because the IUB's approach was not "an irrational, illogical, or wholly unjustifiable application of law" and its factual determinations were supported by "substantial evidence."⁹⁸ This is a high bar for plaintiffs; the legislature gave the agency wide discretion. The balancing approach the IUB used in making its permit determination was rational and did not rise to a level that would justify judicial intervention.⁹⁹

The second holding was a more controversial issue: how to classify the pipeline and its supposed benefits under the Iowa Code. The analysis determined whether the pipeline fell under the "common carrier" definition in the Iowa Code and thus justified the government's use of eminent domain power. The Court reasoned that the Dakota Access pipeline was not a purely economic project and is a common carrier akin to a railroad or public utility—a private entity that supplies a public good.¹⁰⁰ Because the pipeline was under the jurisdiction of the IUB and was a common carrier, it did not need landowner consent to condemn the land necessary to its function and did not violate the Iowa Code in its exercise of eminent domain.

The most significant issue, and third holding, in the case was the constitutionality of the pipeline's use of eminent domain. More specifically, the question was whether the exercise violated the Takings Clause of both the Iowa and U.S. Constitutions, which require the condemnation to fulfill a valid public use. The Court rejected *Kelo's* majority approach and required more than mere *economic* benefits to satisfy the public use requirement.¹⁰¹ This departure from *Kelo* aligned Iowa with other Midwestern states, such as Illinois, Michigan, Ohio, and Oklahoma.¹⁰² In this case, the Court found that the Dakota Access pipeline offered benefits that better aligned with a common carrier than with a project that only provided trickle-down economic effects like in *Kelo*. Here, the pipeline furthered a valid public use and was constitutional under both the Iowa and U.S. Constitutions.¹⁰³ If Dakota Access relied solely on the economic development benefits of the pipeline, the Court would have been unmoved; however, the Court found enough additional

98. *Id.* at 842 (quoting IOWA CODE § 17A.19(10)(f), (b)).

99. *Id.*

100. *Id.*; *Moving America's Energy: The Dakota Access Pipeline*, DAKOTA ACCESS PIPELINE, <https://dapipelinefacts.com/index.html> [<https://perma.cc/H4ZZ-7EEX>] (listing benefits of the pipeline, such as lower oil transportation costs, safer transportation, increased domestic crude oil production, job creation, and millions of dollars in property taxes to states).

101. *Puntenney*, 928 N.W.2d at 848.

102. *Id.*

103. *Id.* at 851.

public benefits to justify the project.¹⁰⁴ Some of these included “cheaper and safer transportation of oil, . . . lower prices for petroleum products,” and long-term price reduction for products dependent on crude oil—all things that are especially important to a state that is focused on agriculture and a huge consumer of petroleum products.¹⁰⁵

Although the Iowa Supreme Court chose to be more restrictive than *Kelo*, requiring more than mere economic benefits to justify “public use,” its constitutional interpretation still made room for multi-state, multibillion-dollar infrastructure projects like the Dakota Access pipeline. However, because this is a multi-state project, litigation over the pipeline has sparked varying, persistent issues in different jurisdictions for more than three years after the pipeline began operation in 2017 and litigation first ensued. For instance, in July 2020, U.S. District Judge for the District of Columbia, James Boasberg, “ordered the . . . pipeline shut down pending a more thorough environmental review,” which, consistent with the nature of the case, sparked much controversy.¹⁰⁶ While some constituents “cheered” the ruling and claimed it as “a big victory,” others condemned the decision, noting “[a] robust energy infrastructure network is the linchpin to our nation’s energy and economic success.”¹⁰⁷

Not more than a month later, a federal appeals court overruled the district court’s order.¹⁰⁸ Most of the ongoing strife, however, stems from environmental and tribal concerns—the question of Dakota Access’s legal authority to take land in Iowa through eminent domain is mostly unchallenged.¹⁰⁹ The future of the Dakota Access pipeline depends on the Environmental Impact Study by the Army Corps and potential changes in permit status.¹¹⁰

104. *Id.* at 849.

105. *Id.*

106. The Associated Press & Eller, *supra* note 91.

107. *Id.* (quoting Ed Fallon, the founder of Bold Iowa, a group that opposed the project, and Craig Stevens, the spokesman for the Grow America’s Infrastructure Now Coalition).

108. Reuters Staff, *U.S. Court Allows Dakota Access Oil Pipeline to Stay Open, but Permit Status Unclear*, REUTERS (Aug. 5, 2020, 3:03 PM), <https://www.reuters.com/article/us-usa-pipeline-dakota-access/u-s-court-allows-dakota-access-oil-pipeline-to-stay-open-but-permit-status-unclear-id-USKCN2512X8> [<https://perma.cc/GL95-CEY4>].

109. *See id.* Although the overarching litigation of Dakota Access’s ability to continue operation presses on, the Iowa Supreme Court’s affirmation of the Iowa Utilities Board’s authority to grant eminent domain power to Dakota Access is not up for reconsideration.

110. *Dakota Access Pipeline*, HARV. L. SCH.: ENV’T & ENERGY L. PROGRAM, <https://eelp.law.harvard.edu/2017/10/dakota-access-pipeline> [<https://perma.cc/UJ8A-NRC8>] (“The Corps is currently preparing a new environmental review, to be completed by November 2022.”); Gregory Wallace, *Judge Allows Dakota Access Pipeline to Continue Operating During Environmental Review*, CNN (May 21, 2021, 5:35 PM), <https://www.cnn.com/2021/05/21/politics/dakota-access-pipeline-continue-operation/index.html> [<https://perma.cc/J97Q-266Q>] (explaining the initial environmental review was expected to be completed around the spring of 2022).

Neither the post-*Kelo* state legislative changes nor the *Puntenney* decision upset the long tradition of eminent domain being used by private companies who will make a private profit. Instead, it emphasized that the legality of the taking centers on public benefits.¹¹¹ Where the Iowa Code's statutory framework laid the foundation for Iowa's eminent domain law, *Puntenney* stabilized and clarified Iowa's approach.

III. INCONSISTENT & INEFFICIENT EMINENT DOMAIN LAW THROUGHOUT THE UNITED STATES

Eminent domain law affects one of the United States' most foundational rights—property. The U.S. Constitution mentions “property” several times, including in the Fifth and Fourteenth Amendments, and all state constitutions include some version of the “Takings Clause” as well.¹¹² American culture places a strong emphasis on individuality; this deeply rooted desire for independence and the corresponding motivation to work can be traced back to property acquisition and ownership.¹¹³ A constitutional liberty necessitates the utmost protection, but when there is no general federal statute that specifies the constitutional rights given to property owners under the Takings Clause of the Fifth Amendment, it is difficult for property owners to understand their rights.¹¹⁴ This is also complicated by differences between federal and state constitutions concerning the same right, as well as varying state statutes and judicial interpretations in different jurisdictions. A lack of clarity and consistency in takings jurisprudence diminishes the weight of a right that so heavily influenced the foundation of the country.

Further, the combination of the sensitive nature of a person's right to private property and the government's interest in providing public goods creates complex policy decisions. Although not new to the country, these issues have recently gained traction due to evolving jurisprudence and large, multi-state projects. The U.S. Supreme Court has not created a comprehensive rule for handling eminent domain violations, and thus, property rights movements have sprung up in state after state.¹¹⁵ Unsurprisingly, states do not treat the claims identically, and the U.S. is left with vastly different eminent

111. See Suzanne LaBerge, *The Public Use Requirement in Eminent Domain: A Constantly Evolving Doctrine*, 14 STETSON L. REV. 649, 651–53 (1985) (showing that throughout the centuries of U.S. eminent domain law, the focus has consistently been on the end-use availability to the public; the legality of the taking is not necessarily dependent on the public-versus-private identity of the party taking the property).

112. U.S. CONST. amend. V, XIV; see, e.g., IOWA CONST. art. I, § 18; TEX. CONST. art. I, § 17; N.Y. CONST. art. I, § 7; FLA. CONST. art. X, § 6; CAL. CONST. art. I, § 19.

113. See CATO INST., *supra* note 3, at 347. See generally Samuel Bazzi, Martin Fiszbein & Mesay Gebresilasie, *Frontier Culture: The Roots and Persistence of “Rugged Individualism” in the United States*, 88 ECONOMETRICA 2329 (2020) (explaining how the settlement of the frontier in America fostered individualism and the ways in which it continues to shape behavior in America).

114. CATO INST., *supra* note 3, at 355.

115. *Id.* at 345.

domain laws throughout the country.¹¹⁶ While leaving certain decisions to the states is a bedrock principle to the U.S. federalism system, inconsistency in eminent domain laws between states obstructs multi-state public goods, such as large technology and energy infrastructure projects.

In order to address this problem, Section III.A describes the inconsistency of current eminent domain law between states and why that is especially troubling for technology and energy infrastructure. Section III.B discusses the benefits of consistent and coherent eminent domain law between states and the increasing importance to harmonize laws with surrounding states. Section III.B also explains how other infrastructure industries currently use and benefit from a more unified system of law. Next, Section III.C discusses why *Kelo's* majority opinion is harmful due to its overbreadth. Conversely, Section III.D warns of the dangers that arise when states enact overly strict eminent domain laws.

A. *THE CURRENT INCONSISTENCY BETWEEN STATES' EMINENT
DOMAIN LAWS*

An increasingly material fault in current U.S. eminent domain law is the lack of consistency between state jurisdictions. This is harmful because it creates ambiguity regarding constitutional rights when building projects that cross state lines, and it discourages the development of technology and energy infrastructure.

1. Various Approaches to a Constitutional Right

State constitutions generally give the state the right to condemnation and the citizen the right to be free from unqualified takings, which mirrors the U.S. Constitution. It is beyond the scope of this Note to analyze the interaction between federal and state Takings Clauses; rather, the focus is on the potential harm that occurs when states treat these constitutional rights regarding eminent domain, found in all state constitutions, differently. The consistency between states' Takings Clauses, especially neighboring states, affects the ability and incentive to create multi-state technology and energy projects that must work within the laws of the physical location it is bound to.

The benefits of state independence and flexibility in defining "public use" for energy transmission projects are complicated by a "growing diversity of state preferences in this arena."¹¹⁷ Although a state's right to determine the law of the land within its boundaries is generally indispensable, the boundaries of that right become more complex when intrastate decisions begin to affect interstate commerce and resources. This makes eminent domain law unique

116. Coleman & Klass, *supra* note 6, at 718 (discussing how different interpretations of "public use" lead to tricky questions, such as what constitutes as profitable, what quantity of customers justify the use, and how should a public benefit be measured).

117. *Id.* at 725.

from other federal and state constitutional rights. Neighboring states that have widely divergent eminent domain policies for infrastructure developments can hinder technological progress by creating analysis paralysis. Where an advanced multi-state energy project would otherwise be pursued, messy and conflicting eminent domain laws between neighboring states is likely to discourage the project's progress. In some ways, this can be compared to the consequences of the "chilling effect" commonly discussed in First Amendment jurisprudence.¹¹⁸ "[R]egulations are sometimes unclear, uncertain, or overbroad, which can lead people to refrain from engaging in permissible actions because they are unsure whether they will be legally sanctioned."¹¹⁹

Especially regarding the granting of eminent domain power to private companies like oil pipelines, states take different approaches.¹²⁰ State courts and legislatures should have the freedom to govern in ways that are most appropriate for their constituencies; however, some rights, both for the citizen and government, are so fundamental that they should not greatly vary among jurisdictions.¹²¹ For example,

[d]o we want the right to free speech, or the right to be free from unreasonable searches and seizures, to vary by state, with some states providing strong protection and others virtually none? Highly varied and uneven protections would certainly allow for an interesting comparison of different policy approaches. But having such variability in the treatment of significant rights would defeat the purpose of having a federal constitution.¹²²

To think that the freedom of speech could dramatically change depending on local or state boundaries seems absurd. Yet, that variability is the shaky reality of eminent domain law in the U.S., which may breed future consequences as "secure and stable property rights are critical for long-term economic development."¹²³ There are drastic differences throughout the nation regarding this area of law; "[s]ome states heavily regulate [a common carrier's] . . . siting process" while other states essentially allow "oil companies . . . unlimited access

118. Note, *The Establishment Clause and the Chilling Effect*, 133 HARV. L. REV. 1338, 1339-41 (2020).

119. *Id.* at 1338.

120. Natalie Jensen, Note, *Eminent Domain and Oil Pipelines: A Slippery Path for Federal Regulation*, 29 FORDHAM ENV'T L. REV. 320, 334 (2017); Yaphe, *supra* note 41, at 224.

121. See Linda R. Monk, *State Powers*, PBS, <https://www.pbs.org/tpt/constitution-usa-peter-sagal/federalism/state-powers> [<https://perma.cc/9EPR-JMUC>] (explaining "many Americans believe that states should be free to experiment with their own standards for social problems"). *But see* Dmytro Taranovsky, *Fundamental Rights*, MIT (May 7, 2003), <http://web.mit.edu/dmytro/www/FundamentalRights.htm> [<https://perma.cc/D8D6-LQCX>] (discussing the importance of keeping fundamental rights equally protected throughout the country).

122. Berliner, *supra* note 22, at 90.

123. Ilya Somin, *How Eminent Domain Abuse Harms the Poor*, SPOTLIGHT ON POVERTY & OPPORTUNITY (May 26, 2015), <https://spotlightonpoverty.org/spotlight-exclusives/how-eminent-domain-abuse-harms-the-poor> [<https://perma.cc/RS4Y-5CC9>].

to land.”¹²⁴ This inconsistency is problematic as technology advances and demand for energy projects grows.

2. Harm to Technology and Energy Infrastructure

The lack of consistent eminent domain law between states produces more problems than just constitutional convictions—it creates serious obstacles for critical infrastructure. The necessary services that have traditionally justified eminent domain use include “[t]ransport, power, heating, education, and healthcare,” but each of these categories’ level of societal importance changes over time and between places.¹²⁵ In other words, the needs of the era shape how much and in what way society requires the service or infrastructure. And because of evolving priorities throughout each generation, proposed takings for various industries receive little guidance. Throughout the 21st century, the renewable energy sector has become increasingly popular, and thus, the question is how eminent domain law should respond to the demand for this industry.

As technology keeps evolving and our world becomes more connected, large-scale projects that span greater distances and cross multiple state boundaries are likely to increase.¹²⁶ This heightens the need for states to be on the same legal page with eminent domain because major differences between neighboring states make it hard to plan and effectuate sizable projects, especially those aimed at renewable energy sources.¹²⁷ More specifically, land usage and availability are vital to newly developed environmentally conscious projects.¹²⁸ Multi-state projects are becoming more prevalent with technological advancements, and the law should keep up with this trend in order to ensure efficient and effective processes.¹²⁹

124. Jensen, *supra* note 120, at 334.

125. Coleman & Klass, *supra* note 6, at 719.

126. *Eminent Domain & Energy Infrastructure*, PROP. & ENV'T RSCH. CTR. (May 14, 2014), <https://www.perc.org/2014/05/14/eminent-domain-energy-infrastructure> [https://perma.cc/6UH6-ULCZ] (contrasting traditional state eminent domain laws built for highway and school construction in the 1930s and 1940s with today's infrastructure projects, which are much larger and more powerful); Andrew P. Morriss, Roy Brandys & Michael M. Barron, *Involuntary Cotenants: Eminent Domain and Energy and Communications Infrastructure Growth*, 3 LSU J. ENERGY L. & RES. 29, 29–30 (2014).

127. Coleman & Klass, *supra* note 6, at 663–64 (“[I]t is notable that many states and advocates that do support such a transition have often been on the front lines of limiting eminent domain.”); *A Greener Grid? Not Without Eminent Domain Laws*, IBEW SAYS, ELEC. WORKER ONLINE (July 2011) [hereinafter *A Greener Grid?*], <http://www.ibew.org/articles/11electricalworker/ew1107/03.0711.html> [https://perma.cc/34KG-9U5G] (explaining how ironic friction persists between those in the environmental community who celebrate renewable energy sources but “oppose large construction projects to expand transmission lines to carry such power”).

128. See *A Greener Grid?*, *supra* note 127 (noting the “graspable reality for the thousands of union members eager for work in the growing green sector”).

129. See David J. Hurlbut, *Multistate Decision Making for Renewable Energy and Transmission: An Overview*, 81 U. COLO. L. REV. 677, 678 (2010).

A major catalyst of large, multi-state projects is the “fracking revolution” that turned the United States into a leading oil exporter throughout the world.¹³⁰ The change in the oil market, and especially the evolution of the United States’ role, “ha[s] powered a drive for new transport capacity—new oil and gas pipelines to take this new onshore production to market.”¹³¹ Part of this is due to newly tapped sources of oil in North Dakota that made the Midwest a recent and increasing hotspot for transportation services.¹³² State laws and eminent domain process typically govern whether and how oil pipelines can be built, so regulations of the pipelines may look different from state to state.¹³³ This is a problem for planning and effectuating multi-state projects, and it causes serious instability.¹³⁴ “Because state and local governments are completely uncoordinated in the oil pipeline siting process, neither landowners nor oil companies can adequately prepare or anticipate consistency.”¹³⁵

In addition to pipelines, electric transmission line providers are experiencing eminent domain challenges in conjunction with quickly evolving energy resources.¹³⁶ Because utility and common carrier projects, like the Dakota Access pipeline, depend upon interstate transmission lines, increasing litigation over transmission lines further hinders the development of pipelines and similar projects.¹³⁷ Additionally, solar and wind energy technologies are rapidly advancing, and “[p]ower providers are ramping up production from utility-scale solar and onshore wind energy,” which heightens the importance of grid-like planning.¹³⁸ Especially because most large-scale wind farms are located in rural areas, the United States will need

130. Coleman & Klass, *supra* note 6, at 674; see Sherry Listgarten, *Power Lines, Pipelines, and the Limits of Eminent Domain*, PALO ALTO ONLINE (May 31, 2020), <https://www.paloaltoonline.com/blogs/p/2020/05/31/power-lines-pipelines-and-the-limits-of-eminent-domain> [<https://perma.cc/BTS9-KNED>]; Phil McKenna, *Courts Question Pipeline Builders’ Use of Eminent Domain to Take Land*, INSIDE CLIMATE NEWS (Oct. 2, 2019), <https://insideclimatenews.org/news/02102019/courts-question-pipeline-builders-use-eminent-domain-giving-states-way-stop-them> [<https://perma.cc/H3QL-WT5U>].

131. Coleman & Klass, *supra* note 6, at 675 (explaining how new opposition has emerged in regard to this new means of investment that pushes against the energy transport and eminent domain norms).

132. *Id.* at 678. The typical oil and gas transport route went from the Gulf Coast to the Midwest, but now the Midwest is a necessary chain in the exportation process. See *id.*; Listgarten, *supra* note 130.

133. Coleman & Klass, *supra* note 6, at 681.

134. Jensen, *supra* note 120, at 341.

135. *Id.*

136. Coleman & Klass, *supra* note 6, at 692.

137. *Id.* at 711–12. The question of who or what decides the scope of “public use” is almost as disruptive as the substantive debate over “public use.” *Id.* at 714–15.

138. *Id.* at 697–98. The percentage of renewable energy in the United States is only about eight percent currently, but in 2017 it was as high as 30 percent in Great Plains states, such as Iowa. *Id.*

expansive transmission networks in order to best utilize such resources.¹³⁹ As the push for reduced carbon energy sources and renewable energy technology increases, the demand for infrastructure that supports both interests will intensify.¹⁴⁰

Despite the growing number of technologically-advanced interstate and multi-regional projects requiring the eminent domain process, a more uniform approach is not popular among Congress or the states.¹⁴¹ Many states' statutes are ambiguous about the type of companies that have eminent domain authority and were written in a way that does not align with current technology and energy industry norms.¹⁴² Even when the eminent domain power is being used for renewable energy transportation, "states, counties, and landowners often continue to oppose such lines because of their impact on local land values and aesthetics."¹⁴³

In contrast, advocates of this new technology boast of intended public benefits. For example, expanded infrastructure may reduce electricity costs and increase the diversity of power sources.¹⁴⁴ Other benefits include "improve[d] grid reliability, resilience, and cyber-security on a region-wide basis," but these are only possible through the control or easement of large areas of land.¹⁴⁵ Unfortunately, each state has differing views on whether to justify the use of condemnation by constituting these benefits as "public use" or to find in favor of opponents' concerns of immediate harm. The lack of will to change the current eminent domain situation is increasingly problematic as modern U.S. utility grids expand across state lines and no longer match with the "physical contours" to which the state-based approach originally catered.¹⁴⁶

B. BENEFITS OF COHESIVE EMINENT DOMAIN LAW

When the United States ratified the Constitution, relationships between states hinged on slow, limited, and difficult communication and transportation.¹⁴⁷ Differences in state laws were of lesser consequence for

139. *Id.* at 698–99.

140. *Id.* "A growing number of large, investor-owned electric utilities in such states have announced plans for billions of dollars of investment in new, utility-scale renewable energy," and "large corporate and municipal customers . . . are demanding more and more renewable energy in order to meet self-imposed sustainability and decarbonization goals." *Id.* at 711.

141. *Id.* at 723–24.

142. *Id.* at 701.

143. *Id.* at 703 (footnote omitted).

144. *Id.* at 710.

145. *See id.* (noting the argument that lowering greenhouse gas emissions alone is a justified public use).

146. *Id.* at 723.

147. George B. Young, *Uniform State Laws*, 8 AM. BAR ASS'N J. 181, 181 (1922) ("Voluntary state action will prevent undue centralization in federal government, remove uncertainties in law and

infrastructure projects.¹⁴⁸ But as the nation grew and continues to grow by means of communication, trade, and travel, as well as the normalization and ease of interaction between citizens of different states, the disadvantages of inconsistent laws are made more apparent.¹⁴⁹ These issues tend to arise around subjects that are not within the traditional scope of the federal government but affect interstate relations and commerce.¹⁵⁰ Further, “[t]he perplexity, uncertainty, confusion, and waste resulting from variant laws . . . hinder[s] freedom of trade and constitute a serious burden on business between the states.”¹⁵¹ The push for uniformity does not assume federal authority will be the driving force, but if states do not resolve defects due to variance, the door remains open for federal intervention.¹⁵² Eliminating the patchwork of conflicting state laws may mitigate current disincentives for beneficial public projects such as technological improvements and renewable energy sources.¹⁵³

Rather than inciting federal intervention, neighboring and regionally connected states should prioritize the adoption of consistent eminent domain laws.¹⁵⁴ Uniformity can create efficiencies, which is especially important for “[m]assive infrastructure projects” that “are almost always more expensive, complicated, and time-consuming than they seem at the outset.”¹⁵⁵ The most publicized of these projects in recent years are oil pipeline construction projects.¹⁵⁶ Currently, the federal government does not regulate oil pipeline siting unless the site is on “land under federal jurisdiction.”¹⁵⁷ State law typically governs this process, which leads to dramatically different situations in some cases because “state laws conflict in their treatment of oil pipelines.”¹⁵⁸

delays in administration, and bring legal situation in harmony with results of national social and economic development[.]”).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 183 (emphasis omitted).

152. *Id.*

153. *See* Jensen, *supra* note 120, at 340–41.

154. *See id.*; Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 138 (1996) (“Uniform laws not only clarify what statute applies but also facilitate the development of a repository of judicial decisions that aid interpretation of statutory terms.”).

155. Natasha Frost, *A Decade Ago, the US Was Promised High-Speed Rail—so Where Is It?*, QUARTZ (Jan. 6, 2020), <https://qz.com/1761495/this-is-why-the-us-still-doesnt-have-high-speed-trains> [<https://perma.cc/8EPB-VD6L>]; *see also* Ribstein & Kobayashi, *supra* note 154, at 132.

156. Jensen, *supra* note 120, at 342 (“There is a push from scholars to transition to a more regional approach for the United States energy grid . . . [which] would be more efficient and would also help facilitate a transition to renewable energy.”); Listgarten, *supra* note 130 (explaining that “many of the concerns about reliability and cost can be addressed with a robust grid”).

157. Jensen, *supra* note 120, at 321; *see Oil: Overview*, FED. ENERGY REGUL. COMM’N, <https://www.ferc.gov/oil> [<https://perma.cc/RJ3D-LZLK>].

158. Jensen, *supra* note 120, at 321; McKenna, *supra* note 130 (noting that oil pipelines “are regulated by state rather than federal agencies”).

This can be inefficient as it slows down projects and increases administrative costs.¹⁵⁹ Further, many states approach energy infrastructure projects on a case-by-case basis, which leads to even more variability between eminent domain decisions.¹⁶⁰ Thus, states should be proactive and unify their eminent domain law rather than wait until large-scale, multi-state projects require federal intervention or rulings on conflicting laws that lead to substantially different outcomes.¹⁶¹

Several legal scholars have suggested a “cooperative federalism” model that would essentially create an additional federal agency that would retain all regulatory authority of oil pipelines.¹⁶² Although this solution would help streamline and stabilize oil pipeline cases, it is unhelpful for future large-scale infrastructure projects that are currently unforeseen but will nonetheless require similar analyses in future years.¹⁶³

The Uniform Law Commissioners’ Model Eminent Domain Code of 1974 is the closest the United States has come to adopting uniform eminent domain law.¹⁶⁴ The intent of the Act was “to remedy a perceived potential for injustice

159. Jensen, *supra* note 120, at 340; William Murray, *Eminent Domain Is Hurting Clean Energy*, GREENTECH MEDIA (Oct. 22, 2018), <https://www.greentechmedia.com/articles/read/eminent-domain-is-killing-clean-energy> [<https://perma.cc/YJ5E-CKPN>] (discussing how eminent domain lawsuits negatively affect interests on both sides of the issue: it “strangle[s] a growing market for renewable energy” and tends to stop infrastructure projects all together).

160. Coleman & Klass, *supra* note 6, at 728 (suggesting that groups of states could find a consensus on how to approach certain categories of projects instead of each state acting on its own through individual permitting processes that govern every project).

161. Zack Hale, *Electric Grid Expansion May Require Congressional Action, Energy Experts Say*, S&P GLOBAL (Oct. 13, 2020), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/electric-grid-expansion-may-require-congressional-action-energy-experts-say-60716767> [<https://perma.cc/325H-E5R6>] (“While U.S. electric grid operators, states and utilities will need to achieve a high degree of cooperation in the coming years to accommodate a surge in renewable generation, federal lawmakers may also need to get involved in promoting system planning . . .”).

162. Jensen, *supra* note 120, at 345 (arguing the federal agency would cure current issues of inconsistency and lack of reliability). See generally Colin P. O’Rourke, *Oil Pipeline Regulation: The Current Patchwork Model and an Improved National Solution*, LSU J. ENERGY L. & RES. (Feb. 2, 2016), <https://jclr.law.lsu.edu/2016/02/02/oil-pipeline-regulation-the-current-patchwork-model-and-an-improved-national-solution> [<https://perma.cc/A3P2-ZFDD>] (arguing for “[a] unified, national regulatory scheme administered by FERC” to solve the patchwork of oil pipeline laws).

163. Jensen, *supra* note 120, at 348 (“As technology changes the perception of energy, the legal framework surrounding energy development will also change. One day, pipelines may be obsolete and replaced with new alternative fuels and transportation methods . . .”).

164. MODEL EMINENT DOMAIN CODE (UNIF. L. COMM’N 1974); *Eminent Domain Code*, UNIF. L. COMM’N (Feb. 2, 2022), <https://www.uniformlaws.org/committees/community-home?CommunityKey=47ca00b2-8003-4116-9608-41434foa5658> [<https://perma.cc/C58S-8UJ8>]; Comm. on Condemnation L., *Uniform Eminent Domain Code—A Review*, 10 REAL PROP., PROB. & TR. J. 614, 614 (1975). The Institute for Justice also proposed “model eminent domain legislation” on January 18, 2020, which focuses on “requir[ing] actual ‘public use’—rather than a broader ‘public purpose’—for any exercise of eminent domain.” *Eminent Domain Act: Protecting Property Owners from Takings for Economic Development*, INST. FOR JUST. (Jan. 1, 2021), <https://ij.org/activism/legislation/model-legislation/model-eminent-domain-law> [<https://perma.cc/S3CH-Q5Q3>].

due to the diversities in eminent domain procedures among the several states.”¹⁶⁵ It was to give a clear set of procedures that would produce greater equality of treatment between landowners and the party condemning the property.¹⁶⁶ After the National Conference of Commissioners approved the code in 1975, it received minimal support.¹⁶⁷ The American Bar Association recommended a thorough study committee to promote the adoption of these new laws and adequately assess their effectiveness.¹⁶⁸ There was no major acceptance of the Uniform Code, but the bits and pieces states did adopt have led to modern state eminent domain laws. Currently, no uniform or model eminent domain law exists.

Although states are taking various regulatory approaches to emerging technologies and resources, long-established means of travel and communication have successfully moved towards uniform systems.¹⁶⁹ Newer technologies, like oil pipelines and fiber optics, could learn from the regulation systems of traditional mediums of transportation, such as train tracks and bridges.¹⁷⁰ For example, railroad systems are highly regulated at the national level. The Surface Transportation Board is a federal agency created by Congress that controls “[r]ail restructuring transactions such as mergers, rail line sales, new line construction, and rail abandonment.”¹⁷¹ State departments of transportation have minimal regulatory jurisdiction over railroad operations, and the main authority lies with the Surface Transportation Board or the Federal Railroad Administration.¹⁷² This is slightly different than bridges, for example, which cross state lines less frequently.¹⁷³

165. Comm. on Condemnation L., *supra* note 164, at 614.

166. *Id.* at 615.

167. Unif. Eminent Domain Subcomm. of the Condemnation Comm., *The Uniform Eminent Domain Code—Its Status and Its Future*, 12 REAL PROP., PROB. & TR. J. 281, 281 (1977).

168. *Id.* at 284.

169. Heather Morton, *Broadband 2020 Legislation*, NAT. CONF. STATE LEGISLATURES (Jan. 11, 2021), <https://www.ncsl.org/research/telecommunications-and-information-technology/broadband-2020-legislation.aspx> [<https://perma.cc/W8QD-TQW3>] (“In the 2020 legislative session, 43 states and Guam addressed broadband in issue areas . . .”).

170. See Tyler Cooper, *Fiber-Optic Internet in the USA*, BROADBAND NOW (Mar. 23, 2021), <https://broadbandnow.com/Fiber> [<https://perma.cc/3U2U-66J3>] (explaining how some of the biggest limitations of fiber optic internet usage in the U.S. are the costly infrastructure requirements, “large capital expenditure[s] for service providers,” and “complex state laws”).

171. *Rail Transportation: Regulatory Jurisdiction Over Railroads*, IOWA DEP’T TRANSP., <https://iowadot.gov/iowarail/iowa-freight-rail/who-regulates> [<https://perma.cc/S9LK-HL24>] (noting the independent agency was created by the Interstate Commerce Commission Termination Act of 1995); *About STB*, SURFACE TRANSP. BD., <https://prod.stb.gov/about-stb> [<https://perma.cc/X83Z-3ZSD>].

172. *About STB*, *supra* note 171 (stating the agency’s additional “jurisdiction over certain passenger rail matters, the intercity bus industry, non-energy pipelines, household goods carriers’ tariffs, and rate regulation of non-contiguous domestic water transportation”).

173. *Bridges*, LAW JRANK (2022), <https://law.jrank.org/pages/4868/Bridges.html> [<https://perma.cc/FQ5N-D6AF>] (“The construction of public bridges is a function of the state government . . . but if the bridge connects two states, both states share involvement in the venture but must

Railroad industry advocates have vocalized the need for less government intrusion while also recognizing the important role that industry regulators hold in developing public trust and project completion.¹⁷⁴ Rather than proposing less restrictive regulations, industry members instead suggest improvement through aligning industry and regulatory objectives across the board.¹⁷⁵ In order to encourage technological progress, regulatory agencies must allow breathing room to develop and implement new practices, but that does not mean they must forgo legitimate safeguards.¹⁷⁶ When states recognize their need to create robust, yet flexible eminent domain law that works well with government interests and neighboring states, they should look to these more established industries for guidance.

C. *THE PROBLEM WITH FOLLOWING KELO'S OVERLY BROAD APPROACH*

Although recognizing the benefits of consistent eminent domain laws between states, state legislatures should also be aware of potential harms in crafting overly deferential statutes in this area, as showcased in *Kelo*. Criticized as one of the most unpopular U.S. Supreme Court decisions of all time, there are flaws in *Kelo* that justify such harsh scrutiny.¹⁷⁷ Government overstep and insufficient justification are two main critiques of the opinion.¹⁷⁸ By allowing the government to take private property and then give it to another private party in the name of “economic development,” the Court opened the floodgates to condemnations. In the year after the *Kelo* decision, local governments threatened or condemned almost 6,000 homes, businesses, churches, and

yield to the power of the federal government to supervise matters that have an effect on interstate commerce.”); see Bridge Masters, *The State of Bridges Across the U.S.: The Bad*, BRIDGE MASTERS RENTALS (Aug. 16, 2019), <https://bridgemastersinc.com/the-state-of-bridges-across-the-u-s-the-bad> [<https://perma.cc/KT8R-KYLD>] (showing how states' current treatment of bridges can greatly vary, and the remedies for each state may require different solutions).

174. Edward R. Hamberger, *Constructively Improving Railroad Regulations*, THE REGUL. REV. (July 10, 2017), <https://www.theregreview.org/2017/07/10/hamberger-constructively-improving-railroad-regulations> [<https://perma.cc/CUS5-WAMR>]; see Hale, *supra* note 161 (quoting Beth Emery, the senior vice president and general counsel at Gridliance, saying “It’s hard to get big interregional projects built without federal siting and eminent domain authority, and I think the record shows that even when FERC has that authority, it’s hard sometimes to get gas pipelines built . . .”).

175. See Hale, *supra* note 161 (discussing how ineffective regulation creates costs that slow or stop productivity-enhancing technology).

176. *Id.*

177. Mellor, *supra* note 38 (explaining that decisions on deeply held beliefs like religion or politics commonly provoke division, but the American response to *Kelo* was a rare, uniform, and extensive showing of outrage over a non-mainstream issue).

178. John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783, 784 (2006) (discussing “that many who criticize the Supreme Court’s ruling in *Kelo*, and who now wish to reform eminent domain legislatively, have rallied around the theme of protecting the private home” (citation omitted)).

other properties to be transferred to other private parties.¹⁷⁹ These types of private takings ignite fears unlike those that accompany public takings because of their breadth, seemingly limitless justifications, and potential for personal and emotional harm.¹⁸⁰

An important defect in this decision is that over-broad judicial deference to the government's definition of economic development may harm citizens disproportionately. The majority opinion allows the government to "provid[e] some citizens with benefits at the expense of other citizens" and "take rights from some to benefit others."¹⁸¹ Unfortunately, this has a disparate impact on poor and minority communities, just as the dissenting justices predicted.¹⁸² This phenomena is nothing new, but *Kelo* certainly fast-tracked the rate at which poor and minority neighborhoods were displaced in hopes of more economically beneficial alternatives.¹⁸³ Indeed, there have been countless articles, studies, and notes about *Kelo's* effect on lower-income communities.¹⁸⁴ One such study found that these eminent domain project areas include a significantly greater percentage of minority residents and lower incomes when compared to their surrounding communities.¹⁸⁵ Although not the focus

179. DANA BERLINER, INST. FOR JUST., OPENING THE FLOODGATES: EMINENT DOMAIN ABUSE IN THE POST-KELO WORLD 1 (2006), <http://castlecoalition.org/pdf/publications/floodgates-report.pdf> [<https://perma.cc/Q9AP-ZUD6>]; Mellor, *supra* note 38.

180. Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 144 (2006) (listing examples of takings that the *Kelo* majority could allow, such as substituting "any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory").

181. CATO INST., *supra* note 3, at 353.

182. Jason Pye, *Kelo v. New London: How the Supreme Court Guttled Constitutional Protections for Private Property*, FREEDOMWORKS (June 23, 2015), <https://www.freedomworks.org/content/kelo-v-new-london-how-supreme-court-guttled-constitutional-protections-private-property> [<https://perma.cc/PT5A-XPZP>]. See generally DICK M. CARPENTER II & JOHN K. ROSS, INST. FOR JUST., VICTIMIZING THE VULNERABLE: THE DEMOGRAPHICS OF EMINENT DOMAIN ABUSE (2007), http://www.ij.org/images/pdf_folder/other_pubs/Victimizing_the_Vulnerable.pdf [<https://perma.cc/EBM5-2NBB>] (discussing the statistical impact of eminent domain abuse on various demographic and socioeconomic classes in the immediate years following *Kelo*).

183. CARPENTER II & ROSS, *supra* note 182, at 5.

184. Sharon A. Rose, Note, *Kelo v. City of New London: A Perspective on Economic Freedoms*, 40 U.C. DAVIS L. REV. 1997, 2035 (2007) ("[P]oor and middle-income property owners cannot afford the monetary costs involved with disputing a city's compensation calculation, and they are even less able to afford the costs associated with defending themselves against improper takings."); see Emma Westbrook Perry, *No Room for the Poor—The Blight of Eminent Domain on America's Lowest Economic Classes*, 94 TEX. L. REV. 155, 162 (2016) (discussing how blight removal may "exploit[] low-income communities and communities that have been historically discriminated against, such as racial minorities"). See generally Somin, *supra* note 123 (explaining how aggressive use of eminent domain damages the economic and social fabric of poor communities due to significant displacements of residents and businesses).

185. CARPENTER II & ROSS, *supra* note 182, at 6–7. The statistics show that eminent domain target areas consist of 58 percent minority residents in comparison to the surrounding community of 45 percent. *Id.* The median income is also significantly lower, showing it at about \$19,000 in the target area and \$23,000 in the community, which amounts to 25 percent of residents in the target area living at or below poverty levels and 16 percent of residents in the surrounding areas. *Id.*

of this Note, this potentially disproportionate effect should be considered as states reflect and revisit their own eminent domain laws.¹⁸⁶

Further, lack of political power is a substantial factor leading to the loss of private property, and the Supreme Court in *Kelo* failed their task of ensuring justice for all by allowing the government to prey upon the weak.¹⁸⁷ In her dissent, Justice O'Connor discusses the importance of protecting the rights of those with little political power. She explains how it is necessary to “ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government’s eminent domain power—particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority’s will.”¹⁸⁸ Again, this is to be contrasted with taking land for honest and justifiable purposes that benefit the community at large.

Another issue stemming from the *Kelo* majority is its inappropriate invasion into the private market. As Garrett and Rothstein put it, “[t]hose who approve of eminent domain as it was used in *Kelo* fail to recognize the difference between what economists call ‘private goods’ and ‘public goods,’” and “[t]hey also fail to see the inefficiencies often generated from government intervention in private markets.”¹⁸⁹ Although “government intervention in the market is justified for providing public goods and regulating externalities,” efficiency is only achieved if those goods are truly public.¹⁹⁰ Of course, that is the rub—critics of *Kelo* do not believe the “economic benefits” used to justify the taking were actually “public goods” and thus, the decision was inefficient.¹⁹¹ These are some of the main issues presented by *Kelo* that states should seek to avoid when crafting their own eminent domain laws.

D. THE PROBLEM WITH OVERLY STRICT EMINENT DOMAIN LAW

In the years after *Kelo*, there was widespread support at the state level for substantive restrictions on eminent domain powers to counter fears of government overreach following the deferential Supreme Court ruling.¹⁹² The typical solution that eminent domain reformers propose is a stricter

186. Typically, the way in which a state defines “blight” greatly affects the extent of these takings—a discussion beyond the scope of this Note. Asha Alavi, *Kelo Six Years Later: State Responses, Ramifications, and Solutions for the Future*, 31 B.C. THIRD WORLD L.J. 311, 321–22 n.79 (2011) (describing that “[a] sensible solution to [a blighted area] type of scenario is to adopt a provision similar to Iowa’s,” which strikes a good balance by “giv[ing] planners flexibility in pursuing beneficial revitalization projects while protecting against corrupt or abusive takings” (citations omitted)).

187. CARPENTER II & ROSS, *supra* note 182, at 5.

188. *Kelo v. City of New London*, 545 U.S. 469, 496 (2005) (O’Connor, J., dissenting).

189. Garrett & Rothstein, *supra* note 12, at 8.

190. THOMAS J. MICELI & KATHLEEN SEGERSON, *THE ECONOMICS OF EMINENT DOMAIN: PRIVATE PROPERTY, PUBLIC USE, AND JUST COMPENSATION* 1 (2007).

191. *See id.* at 7.

192. Garnett, *supra* note 180, at 149.

public use doctrine with fewer options for condemnation to qualify as “public use,” but this can lead to additional problems that do not adequately address the original purpose of the stricter rule.¹⁹³ While policy goals involve protecting state citizens’ rights, overly strict and narrow laws cause negative effects on constituents and the public at-large.¹⁹⁴ For example, many states interpret “public use” very narrowly, which obstructs energy and utility projects.¹⁹⁵ Similarly, transmission lines designed to transport renewable energy across several states may be prohibited because such a narrow interpretation of public use will only allow states where the lines are sending or receiving the low carbon electricity to take land, but will not allow the taking of land for the in-between states where the electricity is passing through.¹⁹⁶ Thus, large-scale projects are substantially hindered, if not totally prohibited, and lose “the ability to integrate large amounts of renewable energy into” multi-state grids.¹⁹⁷

Not only is this harmful to technological and energy source advancements, but it also constrains beneficial market behavior. Eminent domain law must not strangle the free market in a way that strips it of its natural profit-driven tendencies. Allowing competitive supply and demand to work unrestrained incentivizes investments.¹⁹⁸ But when eminent domain barriers become so large as to overshadow any benefit the project may produce, fewer projects will come to fruition. Too strict eminent domain laws may ignore benefits that come with the economic assumption that “[p]rivate companies presumably will only build projects when they will create economic surplus;”¹⁹⁹ limiting infrastructure too narrowly will lead to the scrapping of beneficial projects. States should be aware of these opportunity costs when choosing how to construct their eminent domain laws.

IV. IOWA’S APPROACH TO EMINENT DOMAIN LAW SHOULD BE THE NATIONAL STANDARD

In response to advances in technology and energy infrastructure, states should revisit their eminent domain laws and look to Iowa’s approach as a model framework. Iowa’s Constitution, Code, and jurisprudence set boundaries

193. Fee, *supra* note 178, at 785 (explaining states that imposed stricter public use doctrines prohibit eminent domain for redevelopment projects but usually do not require more than a rational basis to strip a person of their home for any traditional public use).

194. *Id.* at 817 (finding that narrowing the public use doctrine is not the only solution to protecting homes from condemnation but is also not the most accurate solution).

195. Coleman & Klass, *supra* note 6, at 702. Iowa’s recent jurisprudence allows “pass through” resources to serve a public use, but that is not the norm.

196. *Id.*

197. *Id.*

198. See generally JOSEPH WHELAN & KAMIL MSEFER, ECONOMIC SUPPLY & DEMAND 6–8 (1996), <https://ocw.mit.edu/courses/sloan-school-of-management/15-988-system-dynamics-self-study-fall-1998-spring-1999/readings/economics.pdf> [<https://perma.cc/Q4ZF-C96A>] (explaining the basic elements of supply and demand and subsequent market behavior).

199. Coleman & Klass, *supra* note 6, at 718.

to protect private property owners, yet Iowa does not strip the government of all eminent domain power. Instead, the framework allows an appropriate amount of flexibility for the government to engage in and encourage beneficial projects. Iowa's approach to eminent domain law adopts Justice O'Connor's dissenting *Kelo* opinion through Iowa Code chapter 6A and was solidified in *Puntenney v. Iowa Utilities Board*.²⁰⁰ This legal framework sufficiently balances government and private interests through a workable "public use" definition and a supportive statutory scheme in the Iowa Code. This Note argues that other states should revise their eminent domain laws to do the same.

The culture, constituents, and needs of each state vary, which makes it difficult to pinpoint what should constitute "public use" for eminent domain purposes. This is especially unclear in relation to energy and utility projects because states have differing postures towards them. For example, there is little consensus about the amount of public use derived from an energy grid's reliability or an electricity service's expansion.²⁰¹ There is more consensus for oil pipelines, but there are still vast differences.²⁰² Although some jurisdictions disapprove of justifying "public use" for projects that do not distribute any tangible resource within the state, the Iowa Supreme Court in *Puntenney* categorized the pipeline as a common carrier, placing it alongside traditionally valid public uses like a public utility or railroad.²⁰³ Thus, it deemed the benefits sufficiently distinct from pure "economic development."²⁰⁴ This is significant because pass-through states, like Iowa in the Dakota Access pipeline project, are just as necessary to the completion of multi-state projects as the beginning and ending points. Other state courts should similarly find "that public use, under current constitutional and statutory law, includes private fossil fuel projects designed to lower the costs of oil and gas resources."²⁰⁵

Another important aspect of *Puntenney* was the Court's respect for the separation of powers. Not only did the Iowa Supreme Court clarify the statute's application, but it did so while properly deferring to the state legislature.²⁰⁶ The Iowa legislature made intentional policy decisions in the way it crafted Iowa Code sections 6A and 6B, seeking a beneficial balance

200. *Puntenney v. Iowa Utils. Bd.*, 928 N.W.2d 829, 848 (2019) (explaining that Iowa is joining Illinois, Michigan, Ohio, and Oklahoma in following Justice O'Connor's dissent in *Kelo*); Murray, *supra* note 159 (Texas and Iowa were leaders post-*Kelo* in "strengthen[ing] . . . protection[s] [for] private landowners against government takings . . .").

201. Coleman & Klass, *supra* note 6, at 715.

202. Alexandra B. Klass, *Eminent Domain Law as Climate Policy*, 2020 WIS. L. REV. 49, 68 (explaining that "virtually all states define these pipelines as a 'public use' by statute, making it difficult for landowners to challenge eminent domain for oil or NGL pipelines in the absence of state legislative reform").

203. *Puntenney*, 928 N.W.2d at 848.

204. *Id.*; see Coleman & Klass, *supra* note 6, at 722.

205. See Klass, *supra* note 202, at 72.

206. See Tidgren, *supra* note 25.

between government powers and private rights. The Court cannot disturb those policy decisions unless certain, limited circumstances arise; the Court should apply the law to the facts of the case before it and, thus, over time clarify the scope of the statute. Because the legislature “vested the [Iowa Utilities] Board with the authority to interpret the statutory meaning of ‘public convenience and necessity,’” the *Punttenney* court was only to review the decision “to ensure that it was not ‘irrational, illogical, or wholly unjustifiable.’”²⁰⁷ The Court restrained itself from overreach by allowing the executive agency space—given to it by the legislature—to balance factors specific to Iowa communities.²⁰⁸ The Court also acknowledged the alternative ways that landowners could challenge the exercise of eminent domain outside of the courtroom: through their elected representatives in the legislature.²⁰⁹

The Iowa Code supports the Court’s determination while also protecting an important state-specific interest—agricultural land. Iowa Code section 6A.21(1)(d) gives special treatment to agricultural land, requiring owner consent to the condemnation when the taking is for private development purposes, even if the taking would normally constitute a public use.²¹⁰ This specification and additional protection recognizes the value and importance that agricultural land has in a state like Iowa. But in alignment with the *Punttenney* Court’s conclusion that utilities and resources akin to utilities constitute public use and are unique as common carriers, Iowa Code section 6A.21(2) states that this limitation of “public use” for agricultural land does not apply to entities under the jurisdiction of the IUB.²¹¹ Thus, the legislature still allowed space for IUB-governed utility and energy development projects that are likely to benefit the public.²¹² By giving utility overseers, like the IUB, more leeway in conducting eminent domain analyses, the Iowa legislature gave special recognition to the importance and necessity of those goods. Additionally, the next section in the Iowa Code, section 6A.22, explicitly defines the avenues the government can use to justify a proper taking of

207. *Id.*

208. *Id.* (discussing the Court’s deference to Iowa’s history of common carrier land transfers and the legislature in regard to policymaking).

209. Coleman & Klass, *supra* note 6, at 690. The Court suggested a “broad-based carbon tax” as a possible solution to the opposition’s fears, which would spread the cost of the carbon emissions throughout the market. *Id.*

210. IOWA CODE § 6A.21(1)(d) (2022).

211. *Id.* § 6A.21(2) (explaining that “[t]he limitation on the definition of public use, public purpose, or public improvement does not apply to . . . utilities, persons, companies, or corporations under the jurisdiction of the Iowa utilities board”).

212. See Coleman & Klass, *supra* note 6, at 722–23 (discussing that special treatment for utilities also aligns with Congress’s intent dating back to the Natural Gas Act of 1938, which articulated a national interest in the interstate flow of natural gas justifying nationwide eminent domain for those pipelines).

private property, which more closely aligns with Justice O'Connor's dissenting *Kelo* opinion.²¹³

Although the Iowa legislature intended to reign in *Kelo* through its statutory response, it still left room for interpretation via the Iowa courts. *Puntenney* sparked complex policy discussions, and hopefully the case will urge further conversations between energy companies, lawmakers, regulators, and landowners to reduce conflict before it arises.²¹⁴ By classifying the oil pipeline as a justifiable public use—a common carrier—under Iowa's eminent domain statute, the Court gave proper deference to the framework laid out by the legislature and provided clarity to the public about the statute's scope.

That same determination for interstate oil pipelines and electric transmission lines has yet to be made in all states, and thus, there are varied "public use" determinations for these energy projects throughout the country.²¹⁵ This inconsistency can be solved by state legislatures revisiting their eminent domain statutes and revising them to recognize oil pipelines as common carriers akin to utilities. Not only would this create a consistent interpretation of public use between states, but it would also minimize regulatory costs for companies to pursue these large-scale projects.²¹⁶

V. CONCLUSION

The U.S. Supreme Court swung in one direction through its *Kelo* decision, and many states over-corrected by swinging in the opposite direction. Iowa has found a workable middle-ground that protects private property yet does not curtail critical infrastructure. By interpreting the Iowa Constitution's public use clause to require more than mere "trickle-down" economic development benefits,²¹⁷ the Court defended private property rights from invasive takings. But by upholding the IUB's properly delegated eminent domain power and classifying an oil pipeline as a common carrier, the Court also made room for, and encouraged, increasingly important energy projects. Through its post-*Kelo* statutory changes and the Iowa Supreme Court's *Puntenney* decision, Iowa's eminent domain law properly balances the interests of its constituents, and other states should adopt a similar framework.

213. IOWA CODE § 6A.22. This also includes limits on acquisitions for redevelopment purposes, which are commonly referred to as "blight" takings and beyond the scope of this Note. *Id.*

214. Coleman & Klass, *supra* note 6, at 738.

215. *Id.* at 722–23.

216. *Id.* at 724 ("The variety of potential approaches reflects the different theories of when eminent domain can and should be used and also whether policymakers wish to make the use of eminent domain easier or more difficult for certain types of projects.")

217. *Puntenney v. Iowa Utils. Bd.*, 928 N.W.2d 829, 849 (Iowa 2019).