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THE SUPREME COURT OF IOWA REJECTS *KELO* AND PREVIEWS THE FUTURE OF THE BATTLE OVER EMINENT DOMAIN—*PUNTENNEY V. IOWA UTILITIES BOARD*, 928 N.W.2D 829 (IOWA 2019)

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I. INTRODUCTION

In *Puntenney v. Iowa Utilities Board*, the Supreme Court of Iowa affirmed the decision of the Iowa District Court for Polk County to deny a petition for judicial review of a decision by the Iowa Utilities Board ("IUB") authorizing an oil company to use eminent domain to build a

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crude oil pipeline.[1] The Supreme Court of Iowa held that even though the pipeline would pass through the state without taking on or letting off oil, the use of eminent domain to build the pipeline did not violate the Iowa Constitution[2] or the United States Constitution.[3] This Comment argues first that the Supreme Court of Iowa was right to reject the precedent established by the U.S. Supreme Court in *Kelo v. City of New London*,[4] but missed an opportunity to thoroughly explore the history and original public meaning of Iowa's takings clause which may yield an even more rights-protective framework for the people of Iowa than the dissenting opinion in *Kelo*. Second, this Comment argues that the court's focus on the aggregate economic benefit of the Dakota Access Pipeline ultimately leaves Iowans vulnerable against future energy-related takings.

II. STATEMENT OF THE CASE

Beginning around 2007, the United States entered the "fracking revolution" as technological advancements in directional drilling and hydraulic fracturing dramatically increased the domestic development of shale oil and gas in states such as Texas, North Dakota, and Pennsylvania.[5] At the same time, technological advances, tax incentives, and state renewable energy policies catalyzed a major growth in the production of utility-scale onshore wind energy.[6] This explosion "of fossil fuels and renewable electricity required new oil pipelines, gas pipelines, and electric transmission lines" in order to transport these energy sources to market.[7] These new energy transportation projects required the use of eminent domain[8] in order to avoid landowner holdout that would render the projects impossible to complete.[9] One such energy

1. 928 N.W.2d 829 (Iowa 2019).

2. IOWA CONST. art. 1, § 18 provides in pertinent part:

> Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken.

3. U.S. CONST. amend. V provides: "[N]or shall private property be taken for public use, without just compensation."

4. 545 U.S. 469 (2005).

5. James W. Coleman & Alexandra B. Klass, *Energy and Eminent Domain*, 104 MINN. L. REV. 659, 662 (2019).

6. *Id.*

7. *Id.*

8. *See, e.g.*, William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1745 (2013) ("Eminent domain is the sovereign's power to take property—paradigmatically land—without its owner's consent.").

9. Coleman & Klass, *supra* note 5, at 662 (explaining that without utilizing the power of eminent domain to acquire land to construct the pipeline, a single landowner could refuse

transportation project is the Dakota Access Pipeline, which seeks to construct an underground pipeline to transport crude oil from the Bakken Oil Fields in North Dakota to southern Illinois.[10] Dakota Access, LLC ("Dakota Access") proposed that the pipeline run from western North Dakota across South Dakota and Iowa to the delivery point in southern Illinois.[11]

Since the nation's founding, the federal government and the states have exercised the power of eminent domain to build roads, bridges, schools, and other projects for "public use."[12] These "sovereigns" have also delegated their eminent domain authority to local governments and private parties to build projects that have been defined by statute as a "public use."[13] Furthermore, many states "grant eminent domain powers in their state constitutions or in state statutes to private parties to promote mining, milling, and agricultural development," and nearly every state grants oil and gas companies statutory authority to use eminent domain in order to build oil and gas pipelines and related infrastructure.[14] The State of Iowa is no different in this regard, as it authorizes the IUB, a state administrative agency, to grant pipelines a permit to exercise eminent domain authority, so long as the board determines that the construction of the pipeline will meet the statutory definition of a "public convenience and necessity."[15]

Dakota Access filed documents with the IUB disclosing its intent to construct the underground crude oil pipeline in October 2014.[16] The proposed pipeline would traverse Iowa from the northwest corner to the southeast corner of the state and span a distance of approximately 343 miles across eighteen counties.[17] In December 2014, Dakota Access held informational meetings, as required by law, in each of the eighteen affected counties, and each meeting was attended by IUB representatives.[18] In January 2015, Dakota Access filed a petition with the IUB for authority to construct the pipeline and "sought 'the use of the right of eminent domain for securing right of way for the proposed

to sell his or her property unless he or she received a price that was so exorbitant that it would consume all of the economic surplus of the project).

10. Puntenney v. Iowa Utils. Bd., 928 N.W.2d 829, 832–33 (Iowa 2019).
11. *Id.*
12. Coleman & Klass, *supra* note 5, at 666.
13. *Id.*
14. *Id.* at 671.
15. IOWA CODE § 479B.9 (1995); IOWA CODE § 6A.21(1)(d) (2017) (defining public use as related to agricultural land); IOWA CODE § 6A.22(1) (2018) (limiting and defining what counts as a "public use" for eminent domain).
16. *Puntenney*, 928 N.W.2d at 833.
17. *Id.*
18. *Id.*

pipeline project.'"[19] Various parties—including landowners, trade unions, business associations, and environmental groups—requested, and were granted, permission to intervene.[20]

On June 8, 2015, the IUB filed a procedural schedule for the case identifying "three issues for consideration: (a) whether the proposed pipeline will promote the public convenience and necessity, (b) whether the location and route of the proposed pipeline should be approved, and (c) whether and to what extent the power of eminent domain should be granted."[21] The hearing on Dakota Access's application took place over the course of November and December 2015 and included the submission of over 200 comments for and against the pipeline, an eleven-day evidentiary hearing, and the testimony of sixty-nine witnesses.[22] At the conclusion of the hearing the IUB also received post-hearing briefs.[23] On March 10, 2016, the IUB issued a 159-page final decision and order in favor of Dakota Access.[24]

First, the IUB concluded that the pipeline did satisfy the public convenience and necessity. It noted that the public convenience and necessity could be construed as a balancing test that weighs the public benefits of the proposed project against the public and private costs established by evidence in the record.[25] The IUB also concluded that it could consider "public benefits outside of Iowa" for an interstate oil pipeline.[26] It further noted that the public necessity and convenience would be served based on the economic benefits bestowed on Iowa and that, statistically speaking, transporting crude oil via pipeline is safer than transporting it by alternative means.[27]

The IUB next considered the questions surrounding the use of eminent domain. The IUB concluded that Iowa Code sections 6A.21 and 6A.22 gave authority to a pipeline company under the IUB's jurisdiction to condemn an easement for "public use."[28] It further concluded that the public use statutory requirement had been met, and by extension, the constitutional objections to the exercise of eminent domain had also been resolved by the statutory public use determination.[29] The IUB also

19. *Id.* (first citing IOWA CODE § 479B.4–.5 (1995), and then quoting IOWA CODE § 479B.16 (1995)).
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 833–34.
25. *Id.* at 833.
26. *Id.* at 833–34.
27. *Id.* at 834.
28. *Id.*
29. *Id.* at 834–35.

considered the objections of several landowners to the exercise of eminent domain over their particular properties and sustained many of the objections in whole or in part.[30]

The IUB was not persuaded, however, by the arguments put forward by two particular landowners, Keith Puntenney and LaVerne Johnson. Puntenney requested that the pipeline's path be diverted because he wanted to install three wind turbines on his property in the proposed path of the pipeline and Johnson objected to the pipeline crossing his tiling system on his farm.[31] The IUB denied Puntenney's request, finding that there was no "firm plan" to install wind turbines and that it had not been shown that the pipeline would necessarily interfere with the future installation of wind turbines.[32] The IUB also rejected Johnson's request, concluding that the pipeline could cross his tiling system, but it did require that the pipeline be bored under his tiling system, including the main concrete drainage line.[33]

Following the IUB's final decision and order, the landowners filed several motions for clarification and rehearing which were subsequently denied.[34] On May 26 and May 27, Puntenney, Johnson, the Sierra Club, and a group of landowners known as the "Lamb petitioners" filed several petitions for judicial review in the Polk County District Court.[35] The petitions were later consolidated for hearing.[36] In June 2016, Dakota Access began construction of the pipeline in Iowa.[37] On August 9, the Lamb petitioners asked the district court to stay any construction activity on their property, but the request for a stay was denied as was a renewed request eight days later.[38]

Finally, on February 15, 2017, following briefing and argument, the district court denied the petitions for judicial review.[39] The court determined that the IUB had correctly balanced the benefits and costs in its test to determine whether the pipeline satisfied the public convenience and necessity and entered a reasonable decision based on

30. *Id.* at 835.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* The Lamb petitioners sought to limit the construction on the fifteen parcels of land they owned, and the stay would not have extended state-wide. *Id.* They argued that until the trench for the pipeline had begun, their claims were not moot, but once the trench had been dug, no remedy would have been adequate. *Id.*
39. *Id.*

substantial evidence.[40] Because the substantial evidence standard was satisfied, the decision of the IUB was not subject to judicial review.[41] With respect to the question of eminent domain, the court concluded that sections 6A.21 and 6A.22 of the Iowa Code conferred condemnation authority on common-carrier pipelines under the jurisdiction of the IUB and that the condemnations were for a public use, thereby satisfying the requirements of the Fifth and Fourteenth Amendments as well as article I, section 18 of the Iowa Constitution.[42] The court also rejected the specific claims advanced by Puntenney and Johnson.[43] The land owners appealed to the Supreme Court of Iowa.[44]

III. HISTORICAL BACKGROUND OF EMINENT DOMAIN AND PUBLIC USE

A. Eminent Domain and Public Use at the Federal Level

The power of eminent domain—the sovereign's ability to take property without the landowner's consent—is a power of government that predates the American Founding.[45] Despite the strong emphasis placed on protecting property rights by the founding generation, there was relatively little discussion about the Public Use Clause in particular—or the Takings Clause more broadly—in the lead-up to ratification of the Constitution and in the years that followed.[46] During the Founding era, and for several decades afterward, the federal government lacked the power to condemn property within the states.[47] It was not until 1875 that the United States Supreme Court ruled that Congress had the power to authorize such takings.[48] The federal government could still take property in the District of Columbia and federally owned territories, but this relatively limited area did not yield many cases arising under the Fifth Amendment's Takings Clause.[49]

40. *Id.*
41. *See id.* at 833, 835.
42. *Id.* at 835.
43. *Id.* at 835–36.
44. *Id.* at 836.
45. Baude, *supra* note 8, at 1745–46 & nn.18–20 (noting that the term eminent domain can be traced back to Hugo Grotius and was also discussed by other legal theorists such as Samuel Pufendorf, Emer de Vattel, and Cornelius Van Bynkershoek and that the term also appeared in Blackstone's Commentaries around the time of the Founding).
46. ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* & THE LIMITS OF EMINENT DOMAIN 36–37 (2015). For an overview of the history and development of public use jurisprudence in the United States, see *id.* at 35–61.
47. *Id.* at 37.
48. Kohl v. United States, 91 U.S. 367, 371–72 (1875); SOMIN, *supra* note 46, at 37; Baude, *supra* note 8, at 1747.
49. SOMIN, *supra* note 46, at 37.

Instead, virtually all of the public use cases arose under the public use provisions of state constitutions.[50] The weight of the available evidence, from both the state and federal level from the Founding through Reconstruction, indicates that "public use" was generally given a narrow definition: in order for a taking to be for public use, the public had to have a legal right of access to and use of the property as opposed to some generalized economic benefit.[51]

The Progressive Era ushered in a movement away from the narrow definition of public use to a much broader conception of public use or "public purpose" that enabled the government to condemn property for almost any conceivable benefit.[52] The Supreme Court cemented this shift to the broad conception of public use with its decision in *Berman v. Parker*.[53] *Berman* upheld a Washington, D.C., condemnation that transferred property to private developers in the name of alleviating urban "blight."[54] In its *Berman* opinion, the Court emphasized an extreme deference to all legislative determinations of public use.[55] The Court continued along the deferential course charted in *Berman* with its 1984 decision in *Hawaii Housing Authority v. Midkiff*.[56] In *Midkiff*, the Supreme Court upheld large condemnations in Hawaii that were pursued by the State because approximately "47 percent of the land in Hawaii was owned by 'only 72 private landowners,' while another 49 percent was held by the federal or state governments."[57] The State of Hawaii claimed that these 72 private landowners were operating an oligopoly and established a program to condemn the property.[58] The Supreme Court accepted Hawaii's argument at face value and unanimously upheld the takings under an extremely broad conception of public use consistent with its decision in *Berman*.[59]

50. *Id.*

51. *Id.* at 35–55.

52. *Id.* at 55–61.

53. 348 U.S. 26 (1954).

54. SOMIN, *supra* note 46, at 58.

55. *Id.* (quoting Justice Douglas's opinion for the Court stating that "'[t]he role of the judiciary in determining whether [eminent domain] is being exercised for a public purpose is an extremely narrow one.' If the 'legislature has spoken, the public interest has been declared in terms well-neigh conclusive.'") (alterations in original) (quoting *Berman*, 348 U.S. at 32–33).

56. 467 U.S. 229, 240–44 (1984).

57. SOMIN, *supra* note 46, at 59 (quoting *Midkiff*, 467 U.S. at 232).

58. *Id.* (noting that there is significant dispute as to whether or not such an oligopoly actually existed).

59. *Id.* at 59–60 ("In a unanimous opinion written by Justice Sandra Day O'Connor, the Court held that the scope of public use is 'coterminous with the scope of a sovereign's police powers' and that takings must be upheld under the Public Use Clause so long as 'the

B. Eminent Domain and Public Use in Iowa

Prior to statehood, the Iowa territory held its first constitutional convention in 1844.[60] The draft constitution that emerged from the 1844 convention was rejected and another convention was held two years later, in 1846, from which came Iowa's first constitution.[61] The 1846 constitution would not remain in force long due to pressures that its anti-banking provisions placed on the State as well as the shifting political environment in the wake of the Kansas-Nebraska Act that saw the governorship and legislature shift from Democrat to Whig—later Republican—control.[62] On January 24, 1855, the Governor signed legislation calling for a vote to decide whether or not to hold a constitutional convention.[63] The people of Iowa overwhelmingly voted for a new convention which ran from January 19, 1857, to March 5, 1857, and produced the constitution that Iowa uses, as amended, to this day.[64]

Article I of the Iowa Constitution contains the state's bill of rights and opens by declaring that "[a]ll men and women are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness."[65] Iowa's takings and public use provision is found in article I, section 18.[66] Like the Federal Takings Clause, "[s]ection 18 requires the government to pay for any property that it takes from private owners for the larger community's use, and it also lays out several provisions aimed at facilitating the construction and maintenance of drains, ditches, and levees."[67] The takings and public use provision of the draft constitution of 1844 and the first constitution of 1846 both contained language that very closely tracked the Fifth Amendment of the U.S. Constitution and stated only that "[p]rivate property shall not be taken for public use without just compensation."[68] The constitution of 1857 introduced the takings and public use language as it appears today, and the second

exercise of eminent domain power is rationally related to a conceivable public purpose.'") (quoting *Midkiff*, 467 U.S. at 241).

60. TODD E. PETTYS, THE IOWA STATE CONSTITUTION 9 (G. Alan Tarr ed., 2d ed. 2018). For a historical overview of the drafting and ratification of the Iowa Constitution, see for example *id.* at 5–52.

61. *Id.* at 17–21.

62. *Id.* at 21–24.

63. *Id.* at 24.

64. *Id.* at 24–25.

65. *Id.* at 65 (quoting IOWA CONST. art. I, § 1).

66. IOWA CONST. art. I, § 18.

67. PETTYS, *supra* note 60, at 111.

68. *Id.* (quoting IOWA CONST. of 1846, art. I, § 18).

paragraph containing the provisions for construction of drains, ditches, and levees was added in 1908.[69]

The Supreme Court of Iowa has noted the textual similarities between the Federal Takings Clause and section 18's takings provision, and as a result, the court has said that it will generally follow Fifth Amendment precedent unless a party or the court can identify a good reason to depart from that path.[70] With respect to section 18's "public use" requirement, the Iowa Supreme Court has adopted an approach that prioritizes deference to the Legislature, noting that "[c]ourts should not substitute their judgement for the legislature's judgement as to what constitutes a public use unless the use is palpably without reasonable foundation."[71]

C. Kelo v. City of New London and Its Aftermath

In 2005, the U.S. Supreme Court handed down its highly controversial decision in *Kelo v. City of New London*,[72] which triggered an unprecedented backlash known as the "*Kelo* Revolution."[73] In *Kelo*, the Supreme Court ruled five to four that the City of New London, Connecticut could use eminent domain to acquire Suzette Kelo's little pink house as part of a larger public-private redevelopment project that included, among other things, a new research facility for Pfizer Corporation.[74] The Court held that the use of eminent domain for the redevelopment project satisfied the Takings Clause because the project's goal of job creation and increasing the city's tax base was itself a "public purpose" which satisfied the Constitution's "public use" requirement.[75] The wide latitude that New London was afforded to determine what constitutes a "[p]ublic [u]se" and the perceived insecurity in one's property rights, provoked a public outcry that spurred forty-three states and the federal government into action to curb economic development takings.[76] This legislative backlash was likely the broadest legislative

69. *Id.* at 110–11.

70. *Id.* at 112.

71. *Id.* at 115 (quoting CMC Real Estate Corp. v. Iowa Dep't of Transp., 475 N.W.2d 166, 169 (Iowa 1991)).

72. 545 U.S. 469 (2005).

73. Coleman & Klass, *supra* note 5, at 660. For a detailed analysis of the political reaction to *Kelo*, see generally Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100 (2009) [hereinafter *Political Response*]; for a detailed analysis of the judicial reaction to *Kelo*, see generally Ilya Somin, *The Judicial Reaction to* Kelo, 4 ALB. GOV'T L. REV. 1 (2011) [hereinafter *Judicial Response*].

74. Coleman & Klass, *supra* note 5, at 660, 719.

75. *Id.* at 660; *Kelo*, 545 U.S. at 483, 489–90.

76. *See Political Response*, *supra* note 73, at 2101–02 & n.2.

reaction ever generated by any Supreme Court case.[77] The Iowa General Assembly participated in the backlash and passed laws designed to give landowners greater protection.[78]

The political backlash was accompanied by extensive additional property rights litigation in both federal and state courts.[79] This wave of litigation gave state supreme courts the opportunity to weigh in on whether the deferential approach to economic development takings adopted by the U.S. Supreme Court also applied under the public use clauses of their state constitutions.[80] Several state supreme courts ruled on *Kelo*-related matters and strengthened property rights under their respective state constitutions. Notably, the Ohio, Oklahoma, and South Dakota Supreme Courts ruled that "public use" was more narrowly construed under their state constitutions than under the standard articulated in *Kelo*.[81] These states joined Illinois, Montana, South Carolina, and Michigan, which had construed their public use provisions in a narrower and more rights-protective manner prior to the decision in *Kelo*.[82]

In *Norwood v. Horney*,[83] the Ohio Supreme Court invalidated a taking that greatly resembled the taking in *Kelo* just one year after *Kelo* was decided. The City of Norwood had condemned an individual's property in order to transfer the property to a private entity for redevelopment.[84] After conducting a thorough analysis of the fundamental status of property rights in Ohio, the court rejected the broad reading of public use articulated in *Midkiff* and held that the views of "the dissenting justices of the United States Supreme Court in *Kelo* are better models for interpreting Section 19, Article I of Ohio's Constitution."[85] Similarly, the Oklahoma Supreme Court also rejected the *Kelo* majority's rationale in its decision in *Board of County Commissioners v. Lowery*.[86] The court explained that "our state constitutional eminent domain provisions place more stringent

77. *Id.* at 1202.

78. PETTYS, *supra* note 60, at 115 & n.118 (citing IOWA CODE §§ 6A.21–.22 (2017), .24 (2006)).

79. *Judicial Response*, *supra* note 73, at 2.

80. *Id.*

81. *Id.* at 7–9.

82. *Id.* at 21.

83. 853 N.E.2d 1115 (Ohio 2006).

84. *Id.* at 1123–24.

85. *Id.* at 1136, 1141; *see also* Marshall T. Kizner, Comment, *State Constitutional Law—Economic Benefit Alone Does Not Constitute a Public Use for Eminent Domain Takings.* City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006)*, 38 Rutgers L.J. 1379, 1382–88 (2007).

86. 136 P.3d 639, 651 (Okla. 2006).

limitation on governmental eminent domain power than the limitations imposed by the Fifth Amendment of the U.S. Constitution."[87] Finally, the Supreme Court of South Dakota ruled that economic development takings are essentially forbidden by the South Dakota State Constitution in *Benson v. State*.[88] The Supreme Court of South Dakota explained:

> The reasons which incline us to this view are, first, that it accords with the primary and more commonly understood meaning of the words; second, it accords with the general practice in regard to taking private property for public use in vogue when the phrase was first brought into use in the earlier Constitutions; third, it is the only view which gives the words any force as a limitation or renders them capable of any definite and practical application.[89]

All three of these decisions appear to reject *Kelo* on general, rather than narrower, state-specific, principles.[90]

Prior to *Kelo*, the Supreme Courts of Illinois and Michigan both determined that their state constitutions more significantly constrained "public use" than did the Federal Constitution and both opinions were influential in subsequent post-*Kelo* state supreme court decisions. In *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, the Illinois Supreme Court held that property that belonged to a recycling facility could not be condemned and conveyed to a private racetrack for use as a parking lot.[91] The court reasoned that "revenue expansion alone does not justify an improper and unacceptable expansion of the eminent domain power of the government."[92] In *County of Wayne v. Hathcock*, the Michigan Supreme Court overruled its infamous precedent in *Poletown Neighborhood Council v. City of Detroit*[93] which had adopted an exceptionally broad view of public use.[94] The Michigan Supreme Court relied extensively on the intent of those who ratified the Michigan Constitution and its own historical precedent to determine the proper scope of its public use provision.[95] The *Hathcock*

87. *Id.*
88. 710 N.W.2d 131, 146 (S.D. 2006).
89. *Id.*
90. *Judicial Response*, *supra* note 73, at 9.
91. 768 N.E.2d 1, 4, 11 (Ill. 2002).
92. *Id.* at 10–11.
93. 304 N.W.2d 455 (Mich. 1981).
94. County of Wayne v. Hathcock, 684 N.W.2d 765, 787 (Mich. 2004).
95. *Id.*

opinion appears to have been influential in Justice O'Connor's reasoning in her *Kelo* dissent.[96]

Despite the significant political and judicial backlash to the *Kelo*-style economic development takings, the post-*Kelo* reforms did not affect eminent domain actions brought by pipeline companies which entail an equally "private" type of taking.[97]

IV. THE COURT'S REASONING

In upholding the denial of judicial review of the Dakota Access Pipeline takings, the Supreme Court of Iowa was principally divided over what constitutes a "public use" under article I, section 18 of the Iowa Constitution.[98] Justice McDonald was the lone complete dissenter because he believed the case was moot.[99] Justices Wiggins and Appel concurred in part and dissented in part.[100]

A. The Majority Opinion

The majority opened its analysis of the constitutionality of the Dakota Access Pipeline takings by noting that the Supreme Court of Iowa considers cases interpreting the Federal Takings Clause to be persuasive in its consideration of article I, section 18, but not binding.[101] The majority then considered the very broad "public use" standard established in *Kelo* that permitted economic development takings and contrasted it with the state supreme court decisions in Illinois, Michigan,

96. *Compare id.* at 783 ("[T]he transfer of condemned property to a private entity, seen through the eyes of an individual sophisticated in the law at the time of ratification of our 1963 Constitution, would be appropriate in one of three contexts: (1) where the 'public necessity of the extreme sort' requires collective action; (2) where the property remains subject to public oversight after transfer to a private entity; and (3) where the property is selected because of 'facts of independent public significance,' rather than the interests of the private entity to which the property is eventually transferred"), *with Kelo v. City of New London*, 545 U.S. 469, 497–98 (2005) (O'Connor, J., dissenting) (identifying three categories of takings that prior cases held satisfied the public use requirement and, therefore, deserve judicial deference: (1) the transfer of private property to public ownership for public uses such as a road, hospital, or military base; (2) the transfer of private property to other private parties, often common carriers, that will be open to the public, such as a railroad, stadium, or public utility project; and (3) the transfer of private property to serve a broader "public purpose," even if the property will ultimately be placed in private hands, although such takings must be justified by an extraordinary need).

97. Coleman & Klass, *supra* note 5, at 661.

98. *See* Puntenney v. Iowa Utils. Bd., 928 N.W.2d 829, 844–49 (Iowa 2019).

99. *Id.* at 855–56 (McDonald, J., dissenting).

100. *Id.* at 853–55 (Wiggins, J., concurring and dissenting).

101. *Id.* at 844 (majority opinion) (quoting Kingsway Cathedral v. Iowa Dep't of Transp., 711 N.W.2d 6, 9 (Iowa 2006)).

Ohio, and Oklahoma that adopted a narrower definition of "public use" that prevented such takings.[102] The court further noted that *Kelo* itself recognizes that states may impose further restrictions on the takings power and that many states interpret the scope of the takings power under their respective constitutions more narrowly as a matter of state constitutional law.[103] Next, the court noted two instances in which it had previously invoked Justice O'Connor's *Kelo* dissent before concluding that it would now reject the *Kelo* holding and adopt the dissent as its interpretation of the Iowa Constitution's public use requirement.[104]

After adopting the framework of Justice O'Connor's dissent, the majority concluded that the Dakota Access takings at issue fit within "the second category of traditionally valid public uses cited by Justice O'Connor: a common carrier akin to a railroad or a public utility."[105] The court traced the recognition of common carrier takings as a valid use of the eminent domain power to 1870 when the Supreme Court of Iowa determined that the taking of a private road to build a railroad was a taking for public use within the meaning of article, I section 18.[106] In the same case, the court recognized that the object of the exercise of eminent domain is "the public benefit derived from the contemplated improvement, whether such improvement is to be effected directly by the agents of the government, or through the medium of corporate bodies, or of individual enterprise."[107]

The majority next cited more recent precedent which held that "cost savings alone" satisfied the statutory criteria for "public use" to justify the construction of a new electrical transmission line because the public is served when it can obtain services at a lower cost.[108] The majority explained that because it had just adopted the dissenting opinion in *Kelo*, the economic "trickle-down" benefits derived from the construction and operation of the pipeline alone would not be enough to constitute a public use.[109] However, the majority explained that although the pipeline was

102. *Id.* at 844–48.

103. *Id.* at 847.

104. *Id.* at 847–48 ("Like our colleagues in Illinois, Michigan, Ohio, and Oklahoma, we find that Justice O'Connor's dissent provides a more sound interpretation of the public use requirement.").

105. *Id.* at 848.

106. *Id.* (citing Stewart v. Bd. of Supervisors, 30 Iowa 9, 19–21 (1870)).

107. *Id.* at 848–49 (emphasis omitted) (quoting *Stewart*, 30 Iowa at 21 (quoting Beekman v. Saratoga & Schenectady R.R., 3 Paige Ch. 45, 73 (N.Y. Ch. 1831))).

108. *Id.* at 849 (citing S.E. Iowa Coop. Elec. Ass'n v. Iowa Utils. Bd., 633 N.W.2d 814, 820 (Iowa 2001)).

109. *Id.* ("To the extent that Dakota Access is relying on the alleged economic development benefits of building and operating the pipeline, we are unmoved. But here there is more. While the pipeline is undeniably intended to return profits to its owners, the

intended to deliver profits to its owner, a larger public benefit was to be produced in the form of cheaper and safer transportation of oil, which results in cheaper petroleum products which are used by three million Iowans.[110] As a result, Justice O'Connor's test for identifying a traditionally valid taking was satisfied.

The Court next considered an objection raised by the Lamb petitioners who contended that the benefits delivered by the pipeline were not sufficient because no Iowa business owner or consumer will ever use the pipeline to deliver or receive oil.[111] The majority dismissed the contention as "too formalistic" and adopted the rationale of the Illinois Court of Appeals in *Enbridge Energy (Illinois), L.L.C. v. Kuerth*.[112] The Illinois Court of Appeals rejected the challenge brought by landowners who objected to the use of eminent domain for a pipeline project, stating that the challengers focused too much on who would use a pipeline as opposed to who would benefit from it.[113] The Illinois Court of Appeals further stated that once the legislature determined that pipelines are in the public benefit it would fall to the challengers to prove that the public would not benefit from the pipeline.[114] The majority also invoked a decision of the Ohio Court of Appeals which held that even though a pipeline does not let off any of its contents within the state, the gas-carrying pipeline is a common carrier that carries materials that Ohioans need in addition to the economic benefit it provides.[115]

The court then distinguished two cases that reached the opposite conclusion regarding the common carrier status of pipelines. The first case, *Mountain Valley Pipeline, L.L.C. v. McCurdy*, involved a company that sought to construct a natural gas pipeline that traveled from West Virginia into Virginia and carried the gas to one of its affiliates.[116] The second case, *Bluegrass Pipeline Co. v. Kentuckians United to Restrain Eminent Domain, Inc.*, involved a pipeline that carried natural gas

record indicates that it also provides public benefits in the form of cheaper and safer transportation of oil, which in a competitive marketplace results in lower prices for petroleum products. As already discussed, the pipeline is a common carrier with the potential to benefit all consumers of petroleum products, including three million Iowans.").

110. *Id.*

111. *Id.*

112. *Id.* (citing Enbridge Energy (Ill.), L.L.C. v. Kuerth, 99 N.E.3d 210, 218 (Ill. App. Ct. 2018)).

113. *Id.* at 850.

114. *Id.* (quoting *Enbridge Energy*, 99 N.E.3d at 220–21).

115. *Id.* (citing Sunoco Pipeline L.P. v. Teter, 63 N.E.3d 160, 171–72 (Ohio Ct. App. 2016)).

116. *Id.* at 851 (citing Mountain Valley Pipeline, L.L.C. v. McCurdy, 793 S.E.2d 850 (W.Va. 2016)).

liquids through Kentucky on its way to the Gulf of Mexico.[117] The majority distinguished *Mountain Valley Pipeline* by noting that the pipeline in question was not a common carrier and was instead a private pipeline that would not provide a benefit to others unassociated with the company.[118] The majority distinguished *Bluegrass Pipeline* by noting that the Kentucky court's decision turned, in part, on the fact that "the legislature only intended to delegate the state's power of eminent domain to companies that are, or will be, regulated by the [Kentucky Public Service Commission]," and since the pipeline through Iowa would not have any off ramps within the state, it would not be subject to such regulation.[119] The majority concluded by noting, "we have a different view of 'public use' under the Iowa Constitution. We do not believe a common carrier of a raw material that is essential to Iowa's economy but isn't produced or processed in Iowa is prohibited from exercising eminent domain when so authorized by the general assembly."[120] The majority found no violation of article I, section 18 of the Iowa Constitution.[121]

B. The Dissent

Justice Wiggins, joined by Justice Appel, concurred with the majority's rejection of *Kelo*, but dissented from its determination that the Dakota Access Pipeline qualified as a common carrier.[122] Justice Wiggins noted that under Justice O'Connor's dissent in *Kelo*, a taking complies with the public use requirement when "the sovereign … transfer[s] private property to private parties, often common carriers, who make the property available for the public's use."[123] He added that "[i]nherent in this 'use-by-the-public' method of compliance is that the condemning sovereign's public be able to use the taken property."[124] Justice Wiggins further emphasized the requirement for actual use by the public by citing the West Virginia Supreme Court's recognition in *Mountain Valley Pipeline* that a sovereign's delegation of eminent domain to another party

117. *Id.* (citing Bluegrass Pipeline Co. v. Kentuckians United to Restrain Eminent Domain, Inc., 478 S.W.3d 386 (Ky. Ct. App. 2015)).

118. *Id.*

119. *Id.* at 850–51 (citing *Bluegrass Pipeline*, 478 S.W.3d at 392).

120. *Id.* at 851.

121. *Id.*

122. *Id.* at 853 (Wiggins, J., concurring and dissenting) ("I agree with the majority that incidental economic benefits alone are not enough for a taking to qualify as 'for public use' under article I, section 18. However, I disagree that the Dakota Access pipeline fits within the 'common carrier exception' for purposes of the Iowa Constitution.").

123. *Id.* (alteration in original) (quoting Kelo v. City of New London, 545 U.S. 469, 497–98 (2005) (O'Connor, J., dissenting)).

124. *Id.*

is limited in its scope and must be for the use and benefit of the people within the state.[125] Unlike the majority, Justice Wiggins focused on the broader distinguishing feature of the Kentucky and West Virginia cases which, he asserted, was the fact that the residents of the particular states did not use or directly benefit from the pipelines.[126]

V. ANALYSIS

With its decision in *Puntenney*, the Iowa Supreme Court took another step toward winding down one significant controversy over eminent domain while simultaneously adding to the emerging controversy over energy-related takings. Ultimately, the decision in *Puntenney* fits within Iowa's constitutional takings jurisprudence, but not without some tension.

A. Judicial Federalism and Kelo

Beginning in the 1970s the American legal system experienced a revolution known as the "New Judicial Federalism," in which judicial interpretation of the rights and guarantees in state constitutions became much more prevalent in American constitutional law.[127] Justice William Brennan noted in 1977 that U.S. Supreme Court cases rejecting rights "under the federal Constitution 'are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. Accordingly, such decisions are not mechanically applicable to state law issues.'"[128] Despite the emergence, or re-emergence, of judicial interpretation of individual rights in state constitutions, some state supreme courts nevertheless "lockstep" their interpretations of state constitutional provisions with the interpretations and determinations of the United States Supreme Court.[129] The Supreme Court of Iowa has not been hesitant to rely upon its state constitution to decide important cases. For example, the Supreme Court of Iowa has relied on its analogue

125. *Id.* ("[T]he sovereign's power of eminent domain, whether exercised by it or delegated to another, is limited to the sphere of its control and within the jurisdiction of the sovereign. A state's power exists only within its territorial limits for the use and benefit of the people within the state. Thus, property in one state cannot be condemned for the sole purpose of serving a public use in another state." (quoting Mountain Valley Pipeline, L.L.C. v. McCurdy, 793 S.E.2d 850, 862 (W.Va. 2016))).

126. *Id.* at 854.

127. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 5–6 (2009).

128. *Id.* at 135 (quoting William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977)).

129. See *id.* at 193–231 for a detailed analysis of "lock-stepping" in state constitutional analysis.

to the Fourth Amendment, found in article I, section 8, to provide heighted search and seizure protections beyond those provided by the Federal Constitution.[130] Additionally, the court has also interpreted its version of the Fourteenth Amendment's Equal Protection Clause, which is contained in article I, section 6 and pre-dates its federal counterpart, to require a more aggressive application of rational basis review and to impose heightened scrutiny where the Federal Constitution does not require such scrutiny.[131] With its decision in *Puntenney*, the court further demonstrated its commitment to independently interpreting its state constitution.

The Supreme Court of Iowa noted in *Harms v. City of Sibley* that it considers the Federal Takings Clause cases persuasive in its interpretation of article I, section 18, but not binding.[132] The court reinforced this stance in 2006 with its decision in *Kingsway Cathedral v. Iowa Department of Transportation*.[133] Since that time, the court appears to have progressively distanced itself from the U.S. Supreme Court's decision in *Kelo* before rejecting *Kelo* outright in *Puntenney*.

The court first cited Justice O'Connor's *Kelo* dissent in 2014 when it decided *Star Equipment, Ltd. v. State*.[134] In *Star Equipment*, the court expressed weariness of broadly construed public purpose tests when it explained that a valid public purpose was not a reason to make an exception to an Iowa constitutional prohibition on giving, loaning, or aiding "any individual, association, or corporation" with the credit of the

130. PETTYS, *supra* note 60, at 83–86 (identifying several cases interpreting article I, section 8 of the Iowa Constitution to provide greater search and seizure protections. These decisions include: State v. Cline, 617 N.W.2d 277, 293 (Iowa 2000)—rejecting the good faith exception to the exclusionary rule; State v. Ochoa, 792 N.W.2d 260, 291 (Iowa 2010)—declaring that article I, section 8 of the Iowa Constitution is interpreted independently of Fourth Amendment precedent and that "a parolee may not be subjected to broad, warrantless searches by a general law enforcement officer without any particularized suspicion or limitations to the scope of the search"; and State v. Baldon, 829 N.W.2d 785, 303 (Iowa 2013) (Appel, J., concurring)—evaluating whether a parolee voluntarily waives his section 8 rights upon signing the state's parole agreement and noting that "we jealously reserve our right to construe our state constitution independently of decisions of the United States Supreme Court interpreting parallel provisions of the Federal Constitution").

131. *Id.* at 75–78 (including notable examples: Racing Association of Central Iowa v. Fitzgerald, 675 N.W.2d 1, 16 (Iowa 2004)—invalidating an act of the legislature which taxed gambling receipts at racetracks at nearly twice the rate it taxed gambling receipts on riverboats because the means and conceivable ends were "far too loose to be rational"; and Varnum v. Brien, 763 N.W.2d 862, 904 (Iowa 2009)—determining that legislative classifications based upon sexual orientation warrant at least intermediate scrutiny and that the state's ban on same-sex marriage could not survive that rigorous analysis).

132. 702 N.W.2d 91, 97 (Iowa 2005).

133. 711 N.W.2d 6, 9 (Iowa 2006).

134. *See* 843 N.W.2d 446, 459 n.11 (Iowa 2014).

state.[135] In support of its rationale, the court quoted Justice O'Connor in a footnote stating that, "[w]e give considerable deference to legislatures' determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff."[136] The Supreme Court of Iowa cited Justice O'Connor again in 2015 when it decided *Clarke County Reservoir Commission v. Robbins* and held that a joint public-private commission organized under Iowa Code 28E could not exercise the power of eminent domain or serve as an acquiring agency.[137] In rejecting *Kelo*, the court has given its public use provision a narrower, and thus more rights-protective, interpretation—the state government can no longer condemn private property for the purposes of economic development alone. This narrower interpretation of the clause also likely moves the court's takings jurisprudence closer to the original public meaning of article I, section 18 that it would have had in 1857.

The Supreme Court of Iowa should be commended for its decision to reject *Kelo*, but it missed the opportunity to conduct a thorough originalist analysis comparable to that conducted by its judicial colleagues in Michigan and Ohio that may ultimately provide a stronger foundation for its opinion and provide Iowans greater protection for their property rights. The Michigan Supreme Court's decision in *County of Wayne v. Hathcock* was cited favorably in the *Puntenney* opinion, yet the court does not offer a similarly thorough analysis of Iowa's public use provision.[138] In *Hathcock*, the Michigan Supreme Court explained that "[t]he primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification."[139] The court further explained, invoking former Michigan Supreme Court Justice Thomas Cooley, that if the constitution employs legal terms of art, that it construes those terms according to

135. *Id.* at 458–59 (quoting IOWA CONST. art. VII, § 1).

136. *Id.* at 459 n.11 (quoting Kelo v. City of New London, 545 U.S. 469, 497 (2005) (O'Connor, J., dissenting)).

137. 862 N.W.2d 166, 171–72 (Iowa 2015) ("These two limitations serve to protect the security of Property, which Alexander Hamilton described to the Philadelphia Convention as one of the great obj[ects] of Gov[ernment]. Together they 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.") (alterations in original).

138. Puntenney v. Iowa Utils. Bd., 928 N.W.2d 829, 846–47 (Iowa 2019).

139. County of Wayne v. Hathcock, 684 N.W.2d 765, 779 (Mich. 2004).

their legal, technical meaning.[140] The *Hathcock* court then surveyed takings precedent in the lead-up to the ratification of the 1963 Michigan Constitution and concluded that the ratifying public would not have understood the public use requirement to encompass the type of taking that had occurred in *Poletown*.[141] By contrast, the *Puntenney* court surveyed several of the pre and post-*Kelo* state supreme court decisions that adopted a narrow view of public use before simply concluding that "Justice O'Connor's dissent provides a more sound interpretation of the public-use requirement."[142]

There is at least some historical evidence to suggest that this type of originalist inquiry would have been a prudent decision by the court. The first paragraph of article I, section 18 was ratified in its current form during the constitutional convention of 1857.[143] The second paragraph of article I, section 18, which permits the use of eminent domain for the construction of drains, ditches, and levees for agricultural, sanitary, and mining purposes, was added to the constitution by Iowa voters in 1908.[144] The fact that the Iowa Constitution needed to be amended to explicitly permit these takings suggests that the original public meaning of article I, section 18 may have been quite narrow with regard to what constitutes public use. At a minimum, a deeper dive into how the Iowa public understood the scope of the state government's eminent domain power was warranted in this case in order to ensure the accuracy of the legal reasoning and for the benefit of all Iowans seeking to protect their property rights, especially in situations which the U.S. Constitution provides no refuge.

One additional benefit of a more thorough originalist analysis of the Iowa Constitution's eminent domain clause is the conceivable benefit it could have on federal takings jurisprudence. Traditionally, a strong point of emphasis in the study of state constitutional law is the ability of state supreme courts to interpret their own constitutions to provide constitutional safeguards of individual liberty above the "floor" that is

140. *Id.* ("[I]t must not be forgotten, in construing our constitutions, that in many particulars they are but the legitimate successors of the great charters of English liberty, whose provisions declaratory of the rights of the subject have acquired a well-understood meaning, which the people must be supposed to have had in view in adopting them. We cannot understand these provisions unless we understand their history, and when we find them expressed in technical words, and words of art, we must suppose these words to be employed in their technical sense.") (alteration in original) (quoting 1 THOMAS MCINTYRE COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATE OF THE AMERICAN UNION (8th ed. 1927)).

141. *Id.* at 781–87.

142. *Puntenney*, 928 N.W.2d at 844–48.

143. PETTYS, *supra* note 60, at 111.

144. *Id.* at 110–11.

established by the Federal Constitution.[145] However, the prohibition against taking private property for a public use without just compensation is a constitutional guarantee that is shared by the federal government and the states, originating from the same classical liberal philosophical foundation.[146] Consequently, more originalist analysis at the state level about the scope of takings for the public use may, in the long run, cudgel the United States Supreme Court into recalibrating its own takings jurisprudence to be consonant with original public meaning and thus read "public use" to actually mean "for use by the public" as opposed to "a conceivable public benefit." The influence of the Michigan Supreme Court's decision in *Hathcock* was evident in Justice O'Connor's *Kelo* dissent, and the recent changes in the composition of the U.S. Supreme Court and the lower federal courts to include more judges and Justices who are inclined to decide cases on originalist grounds may make the originalist analysis conducted by state courts all the more valuable.[147]

B. The Common Carrier Difficulty

The Supreme Court of Iowa determined that, even after adopting Justice O'Connor's dissent in *Kelo*, the Dakota Access Pipeline takings satisfied the constitutional public use requirement because the pipeline is "a common carrier with the potential to benefit all consumers of petroleum products, including three million Iowans."[148] In its framing of what constitutes a public use, the court appears to indicate that any energy-related taking with the potential to provide an aggregate economic benefit for the State of Iowa would satisfy the public use requirement under article I, section 18. This raises concerns about how easily private property can be taken and, with regard to private party energy companies exercising eminent domain, landowners seem to be no better off than they would be under a regime that embraces *Kelo*.

It is true that many states grant eminent domain power to private parties such as gas companies to build oil and gas pipelines associated with infrastructure,[149] but that does not mean that the power should be unlimited. The *Puntenney* majority likened the takings for the Dakota Access Pipeline to that for a railroad and cited to a case upholding a

145. WILLIAMS, *supra* note 127, at 138.

146. *See* SOMIN, *supra* note 46, at 36–39.

147. *See Revitalizing the Federal Courts*, WALL ST. J.: OP. (Dec. 27, 2019, 5:37 PM), https://www.wsj.com/articles/revitalizing-the-federal-courts-11577486276?mod=searchresults&page=1&pos=2.

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

149. Coleman & Klass, *supra* note 5, at 671.

taking for a railroad because of its status as a common carrier that dated back to 1870.[150] The majority situated this analogy within Justice O'Connor's second traditionally valid public use category, but as Justice Wiggins pointed out in dissent, inherent in Justice O'Connor's view of public use is the fact that the public actually be able to use the condemned property.[151] Unlike a railroad, which any member of the public can physically use once it is completed, members of the public cannot physically use, or directly benefit from, an oil pipeline that merely carries crude oil through their state.[152] Additionally, the Supreme Court of Iowa has placed the burden on landowners to prove that the public would not experience some type of aggregate benefit as a result of a taking.[153] This will likely prove to be a nearly impossible standard to satisfy because the definition of what qualifies as an aggregate public benefit is not clear. The construction of an oil pipeline that would save Iowans ten dollars per year on their energy bills on average would seem to qualify as an aggregate public benefit, but it is not clear that this benefit is sufficiently great to justify taking someone's home or property. Further, it is unlikely that a landowner will be able to effectively rebut every conceivable benefit that the public will derive from a pipeline in the aggregate and, as a result, landowners in Iowa now appear to face a nearly irrebuttable presumption in favor of public use and necessity when it comes to energy-related takings.

A more rigorous insistence on the public's ability to benefit directly from a pipeline as demonstrated in the decisions of the West Virginia Supreme Court[154] and the Kentucky Court of Appeals[155] would be preferable to that adopted by the *Puntenney* majority because it would lessen the opportunity for takings that only confer some economic benefit in the aggregate. By requiring that the pipeline deliver oil to a location within the state, or by requiring proof that the oil delivered to an out-of-state refinery is eventually shipped directly back into the state, the scope of permissible takings would be narrowed and, therefore, better protect property rights. Without these physical use limitations, *Kelo*-style takings will have just migrated to a new setting in which a private party

150. *Puntenney*, 928 N.W.2d at 848–49 (quoting Stewart v. Bd. of Supervisors, 30 Iowa 9, 19–21 (1870)).

151. *Id.* at 848; *id.* at 853 (Wiggins, J., concurring and dissenting).

152. *Id.* at 854 (citing Mountain Valley Pipeline, L.L.C. v. McCurdy, 793 S.E.2d 850, 860–62 (W. Va. 2016)).

153. *Id.* at 850 (majority opinion) (quoting Enbridge Energy (Ill.), L.L.C. v. Kuerth, 99 N.E.3d 210, 220–21 (Ill. App. Ct. 2018)).

154. *Mountain Valley Pipeline*, 793 S.E.2d at 862–63.

155. Bluegrass Pipeline Co. v. Kentuckians United to Restrain Eminent Domain, Inc., 478 S.W.3d 386, 392 (Ky. Ct. App. 2015).

can exercise broad discretion to take private property based upon a conceivable economic benefit. With its decision in *Puntenney*, the Supreme Court of Iowa has likely left its citizens vulnerable to continued deprivations of private property by private entities as the American energy revolution continues apace.

VI. CONCLUSION

In *Puntenney v. Iowa Utilities Board*, the Iowa Supreme Court carried on the project of the New Judicial Federalism by rejecting the U.S. Supreme Court's decision in *Kelo v. City of New London* and determining that the Iowa Constitution provides a greater degree of protection for private property against eminent domain than the Federal Constitution. Despite its rejection of *Kelo*, the Court nevertheless appears to have determined that aggregate economic benefit constitutes a valid "public use" under the Iowa Constitution with regard to energy-related takings conducted by private entities. Ultimately, the "*Kelo* Revolution" appears to have only brought a partial revolution to the State of Iowa.