Balancing Surveyor Access and Property Rights in the Age of *Cedar Point*: A Legal Analysis of Iowa's Evolving Pipeline Troubles

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ABSTRACT: This Note explores the law surrounding surveyor access to private land in Iowa, specifically in the context of carbon pipeline projects. The changing legal landscape influenced by the Cedar Point Nursery v. Hassid *decision has generated confusion regarding whether all government intrusions give rise to a Fifth Amendment taking. This Note delves into the historical background of Iowa property owners' right to exclude, current government entry on private property, the contemporary public outrage, and the legal actions that have arisen due to carbon pipeline surveyors. A new approach is needed—one that respects both property rights and infrastructure development.*

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INTRODUCTION

The Supreme Court's decision in *Cedar Point Nursery v. Hassid* introduced ambiguity into property law. By striking down a California law that allowed union organizers to access private property for unionization efforts, the Supreme Court changed the analysis of "taking" under the Fifth Amendment.[1] Following the *Cedar Point* decision, a wave of litigation focusing on governmental access to land has emerged.[2] In Iowa, these disputes have increasingly centered around pipeline construction, particularly carbon capture pipelines, which face growing opposition.[3]

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1. Cedar Point Nursery v. Hassid, 594 U.S. 139, 162 (2021); Kitt Tovar Jensen, *U.S. Supreme Court Says Regulation Granting Unions Access to Private Farms Led to Unconstitutional Taking*, IOWA ST. U. CTR. FOR AGRIC. L. & TAX'N (June 28, 2021), https://www.calt.iastate.edu/article/us-supreme-court-says-regulation-granting-unions-access-private-farms-led-unconstitutional [https://perma.cc/652U-EKZS]; Jennifer Harrington, *District Court Challenges to Carbon Pipeline Survey Access*, IOWA ST. U. CTR. FOR AGRIC. L. & TAX'N (June 30, 2023), https://www.calt.iastate.edu/article/district-court-challenges-carbon-pipeline-survey-access [https://perma.cc/7HCG-A9F6]. It should also be noted that this change may not be as significant as initially imagined. *See infra* Section I.B (discussing the impacts of the *Cedar Point* decision in federal courts and beyond). Still, this decision has led to ambiguity in Iowa nonetheless.

2. These challenges have been widespread, affecting everything from environmental litigation to New York housing law. *Cf.* Olivia Johnson, Note, *Let the Exceptions Do the Work: How Florida Should Approach Environmental Regulation After* Cedar Point Nursery v. Hassid, 77 U. MIA. L. REV. 258, 286–93 (2022) (discussing how Florida can enact potential environmental regulations in the wake of *Cedar Point*); Abigail K. Flanigan, Note, *Rent Regulations After* Cedar Point, 123 COLUM. L. REV. 475, 497–98 (2023) (discussing how a New York housing act could be affected under interpretations of *Cedar Point*).

3. Jenny Splitter, *The Bitter Fight to Stop a 2,000-Mile Carbon Pipeline*, GUARDIAN (July 7, 2022, 6:00 AM), https://www.theguardian.com/environment/2022/jul/07/iowa-pipelines-farmers-indigenous-people-fight [https://perma.cc/FQ5R-CHG2]; Todd Neeley, *Iowa Court: Pipeline Survey Law Unlawful*, PROGRESSIVE FARMER (May 4, 2023, 12:41 PM), https://www.dtnpf.com/agricultu

In Iowa, the effect of the *Cedar Point* decision centers on surveyors' ability to access private property. Under an Iowa statute enacted in 1995, pipeline companies have the authority to survey private land to determine the feasibility of pipeline construction, including potential condemnation actions.[4] This access often serves as a preliminary step for potential condemnation proceedings.[5] In most states, similar statutes exist that allow surveyor entry[6]—these states treat surveyor entry as an ordinary trespass under common law,[7] and thus, the states can exempt surveyors from civil and criminal liability.[8] However, Iowa landowners now argue that these surveyor entries constitute a taking under the Fifth Amendment, which prohibits the government from taking private property for public use (surveyor entry, in this case) without just compensation.[9] Essentially, these Iowans argue that such common law exemptions for surveyors violate the Constitution in light of the *Cedar Point* decision. Some Iowa courts have sided with landowners, finding these actions to be takings, while others have upheld the constitutionality of the 1995 statute.[10]

However, *Cedar Point* does not directly apply to pipeline surveying. The *Cedar Point* decision involved union access to property, a matter distinct from traditional common law principles governing land access for public purposes.[11] Surveyor access, by contrast, aligns with long-established legal doctrines and state statutory authority permitting entry for public infrastructure development,[12] a distinguishment that falls within an exception within *Cedar Point* itself.[13] This Note argues that pipeline surveyors should be allowed to enter private property

re/web/ag/news/business-inputs/article/2023/05/04/court-rules-iowa-law-governing-land [https://perma.cc/5GGY-ZWSG].

4. IOWA CODE §§ 479B.15–.16 (2024).

5. *See generally id.* (describing land surveys and eminent domain for pipeline permits).

6. Douglas Chapman, Note, *This Land Is Your Land? Survey Delegation Laws as a Compensable Taking*, 25 WASH. & LEE J.C.R. & SOC. JUST. 545, 562 n.88 (2019).

7. RESTATEMENT (SECOND) OF TORTS § 211 (AM. L. INST. 1965).

8. *Cf.* IOWA CODE § 354.4A(1)(a) ("A land surveyor may enter public or private land or water in the state only to occupy, locate, relocate, install, or replace survey monuments, to locate boundaries, rights-of-way, and easements, to determine geodetic positions, and to make surveys and maps and may carry with them their customary equipment and vehicles. A surveyor may not enter buildings or other structures located on the land. Entry under the right granted in this section shall not constitute trespass, and land surveyors shall not be liable to arrest or a civil action by reason of the entry.").

9. Harrington, *supra* note 1.

10. *Compare* Navigator Heartland Greenway, LLC v. Koenig, No. EQCV034863, 2023 WL 5333334, at *18 (Iowa Dist. Ct. May 3, 2023) (holding there had been a taking under the Fifth Amendment Takings Clause), *with* Navigator Heartland Greenway, LLC v. Hulse, No. EQCV204557, 2023 WL 5338305, at *25 (Iowa Dist. Ct. May 30, 2023) (holding that there had not been a taking under *Cedar Point*).

11. *Cedar Point* focused on the entry of union organizers onto California farms for a considerable period of time. *See* Cedar Point Nursery v. Hassid, 594 U.S. 139, 164 (2021) (Breyer, J., dissenting) ("[Representatives of labor organizations] may do so during four months of the year, one hour before the start of work, one hour during an employee lunch break, and one hour after work.").

12. *See infra* Section I.C.

13. *Cedar Point*, 594 U.S. at 159–60; *see infra* Section III.A.

without evoking the Fifth Amendment. However, recognizing the need for balance, this Note suggests that the Iowa Legislature should empower landowners and protect the state's interest in pipeline construction by more precisely defining a scope of surveyor access rights that can ensure a fairer balance between the rights of property owners and the need for pipeline surveyor access.[14]

I. BACKGROUND

Property rights and the public interest often clash, as seen in the Fifth Amendment's Takings Clause: "The Fifth Amendment's [Takings Clause] . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[15] Therefore, the government pays the private property owner "just compensation" for a taking of their property by the public.[16] This principle is echoed in many state constitutions, including Iowa's;[17] like the U.S. Constitution, Iowa recognizes the right to compensation when property is used for the public good.[18] However, property ownership rights are not absolute. For example, public interest may supersede unconditional ownership rights when a criminal seeks refuge on private property, allowing law enforcement to enter against the owner's wishes without violating the Constitution.[19] Doctrines prioritizing the public good over individual rights are common in the U.S. legal system, presenting the challenge of determining warranted compensation for government intrusion or justifiable access restrictions.[20]

In Iowa, the dispute over granting surveyors access to private land underscores a fundamental principle: Public interest can, in certain instances, supersede the landowner's right to exclude. The issue lies in discerning when access limitations infringe upon property rights or merely constitute trespass. Property matters are inherently local, but the Fifth Amendment introduces federal protections into what are essentially local interactions, such as those between surveyors and private property owners—interactions between neighbors. Therefore, when new Fifth Amendment case law is presented by the Supreme Court, it can further complicate these neighborly interactions.

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14. *See infra* Section III.B.

15. Armstrong v. United States, 364 U.S. 40, 49 (1960) (Harlan, J., dissenting).

16. U.S. CONST. amend. V.

17. IOWA CONST. art. I, § 18; *see also* Maureen E. Brady, *Property's Ceiling: State Courts and the Expansion of Takings Clause Property*, 102 VA. L. REV. 1167, 1168 n.1 (2016) (giving examples of federal and state statutes involving takings).

18. IOWA CONST. art. I, § 18 ("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.").

19. *See, e.g.*, Bachmann v. United States, 134 Fed. Cl. 694, 698 (2017) (holding that damage to property resulting from an arrest—where the occupants were not connected to the suspect—did not constitute a taking and, therefore, did not qualify for compensation).

20. *See* Georgette Chapman Phillips, *Boundaries of Exclusion*, 72 MO. L. REV. 1287, 1292 (2007).

A. CURRENT PIPELINE PLANS IN IOWA

Several companies have proposed building pipelines across Iowa to transport carbon dioxide.[21] Carbon pipelines transport carbon dioxide from emission sources and mitigate the release of CO_2 into the atmosphere.[22] The primary objective of the promotion of carbon pipelines is to reduce climate change,[23] and the growing prominence of carbon pipelines in the energy market can be attributed largely to substantial funding from grants, federal tax credits, and government financing.[24] In addition to playing a crucial role in mitigating CO_2 emissions and reducing climate change, the pipelines also benefit the economic landscape of Iowa. Notably, a significant portion of Iowa's corn production is directed toward ethanol manufacturing, a sector integral to the state's economy,[25] and carbon pipelines can reduce the emissions from that ethanol production.[26] The connection between carbon pipelines and ethanol production becomes increasingly significant because pipelines are expected to not only reduce emissions but also facilitate the entry of ethanol producers into the low-carbon fuel market[27]—a market poised for growth in the coming years. This synergy between carbon pipelines and ethanol manufacturing contributes to Iowa's economy in multiple ways: generating taxes through pipeline utilization, boosting Iowa corn prices by acquiring close to sixty percent of all Iowa corn, and elevating Iowa land prices.[28] Proponents of pipelines frequently contend that future ethanol production could face economic

21. Kristine Tidgren, *Carbon Capture Pipeline Considerations for Landowners*, IOWA ST. U. CTR. FOR AGRIC. L. & TAX'N (Nov. 15, 2022), https://www.calt.iastate.edu/article/carbon-capture-pipeline-considerations-landowners [https://perma.cc/GV9A-BKJG].

22. PAUL W. PARFOMAK, CONG. RSCH. SERV., IN12169, CARBON DIOXIDE (CO_2) PIPELINE DEVELOPMENT: FEDERAL INITIATIVES 1 (2023), https://crsreports.congress.gov/product/pdf/IN/IN12169 [https://perma.cc/TT4Y-92QL].

23. *Id.*

24. *Id.* at 2; Jacob Fischler, *Thanks to Federal Tax Credits, It's Boom Time in the Midwest for Carbon Dioxide Pipelines*, KAN. REFLECTOR (July 4, 2023, 11:11 AM), https://kansasreflector.com/2023/07/04/thanks-to-federal-tax-credits-its-boom-time-in-the-midwest-for-carbon-dioxide-pipelines [https://perma.cc/JYJ9-X5RC]; Kendall Crawford, *Carbon Capture Pipelines Will Benefit from Federal Climate Legislation*, IOWA PUB. RADIO (Aug. 18, 2022, 6:03 PM), https://www.iowapublicradio.org/environment/2022-08-18/carbon-capture-pipelines-will-benefit-from-federal-climate-legislation [https://perma.cc/LH4N-5RDD].

25. *Ethanol Industry in Iowa and the U.S.*, IOWA FARM BUREAU (Jan. 24, 2023), https://www.iowafarmbureau.com/Article/Ethanol-Industry-in-Iowa-and-the-US [https://perma.cc/H3HN-A7CA].

26. *See* PARFOMAK, *supra* note 22, at 1.

27. *See* Katie Peikes, *CO_2 Pipelines Would Be a Boon for Ethanol. But Some Question if They're Really a Climate Solution*, IOWA PUB. RADIO (Apr. 14, 2023, 3:14 PM), http://www.iowapublicradio.org/ipr-news/2023-04-14/co2-pipelines-would-be-a-boon-for-ethanol-but-some-question-if-theyre-really-a-climate-solution [https://perma.cc/F4DQ-E6E7].

28. Richie Schmidt, Opinion, *CO_2 Pipeline Technology Is Safe and Beneficial*, DES MOINES REG. (Sept. 25, 2022, 5:30 AM), https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2022/09/25/carbon-pipeline-technology-safe-useful/8073439001 [https://perma.cc/5LP4-RUPM].

challenges without pipeline infrastructure, largely due to the expected tax incentives associated with their implementation.[29]

Despite the potential benefits, including those for current land-utilizing farmers, there is a widespread concern among farmers regarding the adverse impacts of pipelines on the land. The first worry is environmental. The construction of pipelines is anticipated to have detrimental effects on Iowa's agricultural land.[30] These pipelines could harm the soil and reduce water absorption in fields,[31] which may injure Iowa farmers for years to come. The second major concern revolves around the familial connection to the land. Around Iowa, many farmers are proud to say they have a "Century Farm" that has been in their family's possession for generations.[32] For example, Cynthia Hansen, who owns a Century Farm in Shelby County, said her land was her legacy; "[t]his is not just a piece of dirt to be willy nilly dug up. . . . My family has shed blood, sweat[,] and tears on this land, seeing good harvests and bad . . . [but] always protecting the soil."[33] The pipeline further prompts anxiety among farmers who perceive their farmland not only as a source of livelihood but also as an inheritance to be passed down to their children.

The third worry is broader: There is growing concern among Iowa residents regarding the potential safety hazards of carbon pipelines. These apprehensions can be traced to a widely circulated video demonstrating a carbon pipeline explosion.[34] This video is often accompanied by a more alarming clip depicting an actual explosion of a carbon pipeline in Satartia, Mississippi.[35] The explosion forced over two hundred to evacuate and hospitalized at least forty-five.[36]

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29. Peikes, *supra* note 27.

30. *Pipeline Study Shows Soil Compaction and Crop Yield Impacts in Construction Right-of-Way*, IOWA ST. U. COLL. AGRIC. & LIFE SCIS. (Nov. 11, 2021), https://www.cals.iastate.edu/news/2021/pipeline-study-shows-soil-compaction-and-crop-yield-impacts-construction-right-way [https://perma.cc/459R-897W].

31. *Id.*

32. *See Century Farm Program*, IOWA DEP'T AGRIC. & LAND STEWARDSHIP, https://iowaagriculture.gov/century-and-heritage-farm-program [https://perma.cc/3QQ7-SL2D]; *see also* Kendall Crawford, *Iowa Landowners Push Lawmakers to Stop the Use of Eminent Domain for Carbon Pipelines*, IOWA PUB. RADIO (Mar. 30, 2022, 3:49 PM), https://www.iowapublicradio.org/ipr-news/2022-03-30/iowa-landowners-push-lawmakers-to-stop-the-use-of-eminent-domain-for-carbon-pipelines [https://perma.cc/PXC3-UGCA] ("Cynthia Hansen, who owns a century farm in Shelby [C]ounty, said her land was her legacy.").

33. Crawford, *supra* note 32.

34. *See* Climate Investigations Center, *The Reality of Carbon Capture: Mississippi CO_2 Pipeline Explosion. Victims and Rescuers Tell Story*, YOUTUBE, at 1:15 (Nov. 7, 2022), https://www.youtube.com/watch?v=yGIXeWktiWU [https://perma.cc/QU8H-CXQN]. The video shows an underground carbon pipeline explosion test, and the video is watermarked with directions to *Major Hazard Research, Testing and Training*, DNV, https://www.dnv.com/oilgas/laboratories-test-sites/large-scale-fire-explosion-and-blast-research-testing-dnv-spadeadam.html [https://perma.cc/S89Y-Z36E], which is a risk management firm.

35. Julia Simon, *The U.S. Is Expanding CO_2 Pipelines. One Poisoned Town Wants You to Know Its Story*, NPR (Sept. 25, 2023, 9:05 AM), https://www.npr.org/2023/05/21/1172679786/carbon-capture-carbon-dioxide-pipeline [https://perma.cc/GCJ3-TPF4].

36. *Id.*

Witnesses recounted individuals convulsing on the ground and young men unconscious in their vehicles.[37] Even among those that see the economic benefits as dispositive to Iowa question the safety of carbon pipelines.[38] Carbon dioxide is both invisible and heavier than air, raising concerns about the possibility of gas pockets persisting in homes after an explosion. Residents fear the potential for an explosion, and the difficulty of self-protection intensifies this concern. Moreover, there is a lingering sense that safety may never be fully restored, extending well beyond the immediate aftermath of the explosion. This emotional impact is substantial and challenging to quantify. While the occurrence of such an event is unlikely, the explosion in Mississippi serves as a stark example. The lingering aftermath posed challenges and hindered the effectiveness of emergency response efforts,[39] and this incident emphasizes the genuine worries surrounding the safety of carbon pipelines, irrespective of the precautions taken.

B. Pipelines in Other Locations and the Supreme Court Cedar Point *Decision*

Issues with pipelines extend beyond Iowa and the Midwest.[40] Historically, surveyor access and pipeline eminent domain have been well-established areas of law, with most courts finding surveyor entry exempt from the Fifth Amendment.[41] For example, in Virginia, there has been a longstanding legal battle over pipeline surveyor entry.[42] In *Klemic v. Dominion Transmission, Inc.*, a Virginia court ruled that pipeline survey access does not require the state to provide just compensation under the Fifth Amendment.[43] The Virginia court reasoned that courts have long-recognized exceptions to the right to exclude, including surveys for eminent domain purposes.[44] These privileges have been upheld in various other cases, and every state has codified such exceptions.[45] The court further concluded that even if a right to exclude existed, the statute

37. *Id.*

38. Loren G. Flaugh, *Some Pros and Cons of CO_2 Pipelines*, Cherokee Chron. Times, May 27, 2022, at 3 (on file with the *Iowa Law Review*).

39. Simon, *supra* note 35.

40. *See* Coral Davenport, *Mountain Valley Pipeline Halted as Legal Wrangling Heats Up*, N.Y. Times (July 12, 2023), https://www.nytimes.com/2023/07/12/climate/mountain-valley-pipeline-courts.html (on file with the *Iowa Law Review*).

41. These examples existed prior to the *Cedar Point* decision. *See generally* Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021) (relying on a new "per se" standard). *E.g.*, Klemic v. Dominion Transmission, Inc., 138 F. Supp. 3d 673, 691 (W.D. Va. 2015) (discussing how surveyor right of access is not a Fifth Amendment taking). This is discussed more thoroughly in Chapman, *supra* note 6, at 546.

42. Davenport, *supra* note 40; The Associated Press, *Virginia Supreme Court Sides with Pipeline in Survey Lawsuit*, ABC 13 News (July 13, 2017, 7:15 PM), https://wset.com/news/local/virginia-supreme-court-sides-with-pipeline-in-survey-lawsuit [https://perma.cc/DU3E-YT8F].

43. *Klemic*, 138 F. Supp. 3d at 691–93.

44. *Id.* at 688–91.

45. *Id.* at 690.

did not constitute a compensable taking because it was temporary and minimally intrusive, serving a public purpose by facilitating the transportation and sale of natural gas.[46] However, the *Cedar Point* decision has introduced uncertainty, causing some courts to question whether surveyor access should be considered a taking.

Traditionally, the Supreme Court deploys appropriation or regulation analysis when evaluating whether a taking has occurred.[47] In an appropriation scenario, the government directly seizes or takes ownership of someone's property—this is a per se taking, essentially a classic example of a taking that requires no further explanation.[48] Conversely, regulations that impede a property owner's use are evaluated under a regulatory balancing test, which weighs the public benefit of the regulation against the private burden on the property owner.[49] The Court's balancing test in these cases typically focuses on three key elements: the economic impact of the regulation, the property owner's investment-backed expectations, and the character of the government's action.[50] Generally, if a regulation imposes such a substantial burden that it deprives the owner of the economic use or value of the property, then it is treated as a taking, even though the property has not been physically appropriated.[51] In *Pennsylvania Coal Co. v. Mahon*, the Court referred to this analysis as determining whether the government has gone "too far."[52] Although regulatory analysis requires a more nuanced evaluation of the impact on property rights, the outcome is clear: If a regulation operates as a taking (has gone "too far"), then the property owner must be compensated.[53]

The U.S. Supreme Court's 2021 decision in *Cedar Point* upset this doctrinal clarity. In *Cedar Point*, a California regulation permitted union organizers to access agricultural workers on company property.[54] Specifically, "[a]gricultural employers [had to] allow union organizers onto their property for up to three

46. *Id.* at 690–93.

47. Aziz Z. Huq, *Property Against Legality: Takings After* Cedar Point, 109 VA. L. REV. 233, 238–39 (2023).

48. *Id.* at 238.

49. Many articles have been written on this point, but for the most part, it is clear when there has been an "appropriation" or a "regulation." *See id.* at 242–51. *But see* Lynda L. Butler, Murr v. Wisconsin *and the Inherent Limits of Regulatory Takings*, 47 FLA. ST. U. L. REV. 99, 140 (2019) ("Courts applying the regulatory takings doctrine thus need to recognize the doctrine's inherent limits. Ignoring those limits has led to much confusion and inconsistency in takings jurisprudence."). While there is major contention in some fringe cases to determine which analysis is more appropriate, generally, many cases are clear. Huq, *supra* note 47, at 242.

50. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415–16 (1922); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 840–41 (1987); Huq, *supra* note 47, at 246–51.

51. Huq, *supra* note 47, at 251–53.

52. *Mahon*, 260 U.S. at 415–16.

53. Huq, *supra* note 47, at 242 ("While there are specific pockets of doctrinal ambiguity, most controversies are in practice relatively straightforward to predict. From prospective litigants' perspective, the Takings Clause historically has provided clear answers.").

54. Cedar Point Nursery v. Hassid, 594 U.S. 139, 143 (2021).

hours per day, 120 days per year."[55] The Ninth Circuit had previously determined that the regulation was not an "appropriation," as it did not grant random public access to the property at all times.[56] Rather, the regulation should be given regulatory taking analysis.[57] The Ninth Circuit, in turn, concluded that the regulation did not amount to a taking under regulatory analysis.[58]

In a 6–3 decision, the Supreme Court overturned the Ninth Circuit's ruling, classifying the law permitting union organizers to enter as a per se taking.[59] The Court dismissed regulatory analysis and stated a per se taking could occur "regardless whether the government action takes the form of a regulation, statute, ordinance, or decree."[60] *Cedar Point* did not address the regulation analysis further.[61] The Court explained that "[w]henever a regulation results in a physical appropriation of property, a per se taking has occurred."[62]

While the Supreme Court deviated to per se analysis, the *Cedar Point* majority also provided a list of exceptions that should be considered when assessing infringement on the right to exclude. The first exception is "isolated physical invasions" that are not carried out in accordance with a granted right of access—in other words, trespasses.[63] The second exception permits "government-authorized physical invasions" in alignment with traditional (or historical) common law privileges for accessing private property.[64] The third exception allows the government to require a right of access as a condition for receiving specific benefits.[65] Thus, even if a court engages in a per se analysis of the *Cedar Point* decision for a Fifth Amendment takings claim, there are several exceptions within that analysis.

Fundamentally, the analysis in *Cedar Point* significantly departs from past takings analysis. By adopting this per se takings analysis, the Supreme Court opened the door to challenges against many regulations that previously required a balancing test. However, many lower courts continued to apply the traditional Fifth Amendment analysis, disregarding *Cedar Point*.[66] Aziz Huq discussed the implications of the *Cedar Point* case on Fifth Amendment takings: "At least in the short run, the impact of *Cedar Point* beyond the specific context of California's agricultural sector has not been substantial. No lower court decision in 2021 applied that ruling to classify a government action as a per

55. *Id.*
56. *Id.* at 146.
57. *See* Cedar Point Nursery v. Shiroma, 923 F.3d 524, 533 (9th Cir. 2019), *rev'd and remanded sub nom.* Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021).
58. *Id.* at 530–34.
59. *See generally Cedar Point*, 594 U.S. 139 (using a "per se" requirement throughout).
60. *See id.* at 140.
61. *See* Huq, *supra* note 47, at 259–60.
62. *Cedar Point*, 594 U.S. at 149.
63. *Id.* at 159.
64. *Id.* at 160.
65. *Id.* at 161.
66. Huq, *supra* note 47, at 261–64.

se taking."[67] This alone does not mean that *Cedar Point* analysis should be disregarded; however, it is unclear how the takings doctrine might be shifted in the future.

C. Historical Background: Iowa's Right to Exclude and Government Entry

Historically, in Iowa, private individuals could access private land without compensation for the purpose of surveying. On July 3, 1838, the United States established the Territory of Iowa after splitting from the Territory of Wisconsin.[68] The new territory was governed by "The Statute Laws of the Territory of Iowa."[69] Similar to many other territories and states, the Iowa Territory allowed private citizens and government officials to access private land for the purpose of constructing mills.[70] In essence, if an individual desired to build a mill and needed to construct a dam for this purpose, they were required to provide notice to neighboring landowners whom they believed would be adversely affected.[71] Following a four-week notice period, the prospective mill builder and members of the local community would enter properties to evaluate the potential damage to private property.[72] Subsequent paragraphs detailed how the mill was to be operated and maintained. These sections specified that the mill must be accessible to the public, its equipment properly maintained, and a standardized "toll" collected for usage.[73] The mill functioned much like a public utility, and these surveyor-like entries were precursors to private individuals gaining statutory grants to enter land through state authority without violating the Fifth Amendment.

In 1846, Iowa achieved statehood, and by 1851, the legislature enacted a statute to permit surveying without fear of penalties or trespassing repercussions.[74] This statute specified that "[a] company or person" had the right to conduct surveys, and the statute imposed liability solely for any actual damage caused.[75] Surveying access remained a constant in Iowa, with future legislative actions providing more specific instructions on how surveyors should operate.[76] In 1995, the Iowa Legislature further enacted another

67. *Id.* at 261.

68. Act of May 31, 1838, ch. 96, 5 Stat. 235. Congress later created the State of Iowa in 1846. Act of Mar. 3, 1845, ch. 48, 5 Stat. 742.

69. *See generally* THE STATUTE LAWS OF THE TERRITORY OF IOWA: ENACTED AT THE FIRST SESSION OF THE LEGISLATIVE ASSEMBLY OF SAID TERRITORY, HELD AT BURLINGTON, A. D. 1838–'39 (Hist. Dep't Iowa 1900) (1839).

70. Mills and Millers, 1839 Iowa Acts, *reprinted in id.* at 366–70.

71. *Id.*

72. *Id.* at 366–68.

73. *Id.* at 369–70.

74. IOWA CODE § 778 (1851).

75. *Id.*

76. Surveyors are now required to give notice along with a number of details about conducting the survey and the purpose of the survey before entry. *See* IOWA CODE § 354.4A(4) (2024).

statute to allow carbon pipeline companies to access land for surveying with ten days' notice.[77]

D. Contemporary Public Outrage and Legal Actions in Iowa

Opposition to Iowa pipelines stems from deep citizen concerns: fears of economic harm to agricultural land, attachment to "Century Farm" legacies, and safety matters.[78] Iowans have begun protesting pipeline construction and started mounting litigation;[79] visible signs suggesting "No Carbon Pipeline" are common throughout the state.[80] According to polls published by the Des Moines Register and USA Today, the majority of Iowans oppose eminent domain for carbon construction, effectively making a pipeline across Iowa impossible.[81]

Eminent domain has long stirred debate regarding the balance between public interest and private property rights. Eminent domain protests increased in the wake of the Supreme Court's 2005 decision *Kelo v. City of New London*; there, the plaintiff argued that eminent domain should not solely serve economic interests but rather benefit the "public."[82] The *Kelo* decision centered around the City of New London, Connecticut, and its plan to redevelop an economically struggling area,[83] yet Susette Kelo and several other property owners challenged this action.[84] The residents argued the taking violated the Fifth Amendment's Takings Clause, which limits the government to take private property for public use.[85] In a narrow 5–4 decision, the Supreme Court affirmed the city's authority to employ eminent domain for economic development, extending governmental power beyond the interpretation many private property advocates initially held were within the Fifth Amendment's constraints.[86] This decision expanded the understanding of eminent domain beyond public benefit to include broader economic purposes.[87]

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77. 1995 Iowa Acts 476.

78. *See supra* Section I.A.

79. Anelia K. Dimitrova, *Bremer Co. Supervisors Vote to File an Objection to Carbon Pipeline Ahead of Aug. 23 Informational Meeting in Waverly*, WAVERLY NEWSPAPERS (Aug. 1, 2022), https://www.communitynewspapergroup.com/waverly_newspapers/bremer-co-supervisors-vote-to-file-an-objection-to-carbon-pipeline-ahead-of-aug-23/article_4d380080-164c-5032-9956-f70316coe6f7.html (on file with the *Iowa Law Review*).

80. Splitter, *supra* note 3.

81. *See* Donnelle Eller, *Iowa Poll: Strong Majority Opposes Using Eminent Domain for Carbon-Capture Pipelines*, DES MOINES REG. (Mar. 14, 2023, 8:21 AM), https://www.desmoinesregister.com/story/news/politics/iowa-poll/2023/03/14/iowa-carbon-capture-pipeline-use-eminent-domain-opposed-majority-iowa-poll/69982590007 [https://perma.cc/PAF6-5N6J].

82. Dimitrova, *supra* note 79 (discussing a recent challenge to an eminent domain claim to build a pipeline in Iowa after *Kelo*); Kelo v. City of New London, 545 U.S. 469, 475–76 (2005).

83. *Kelo*, 545 U.S. at 473–75.

84. *Id.* at 475–76.

85. *Id.*

86. *Id.* at 488–90.

87. Ashley J. Fuhrmeister, Note, *In the Name of Economic Development: Reviving "Public Use" as a Limitation on the Eminent Domain Power in the Wake of* Kelo v. City of New London, 54 DRAKE L. REV. 171, 199–200, 212–13 (2005).

The *Kelo* decision ignited widespread public outrage and prompted numerous states to limit the use of eminent domain for economic development purposes. In Iowa, the impact of *Kelo* remains a complex issue, with many in the Midwestern anti-carbon pipeline movement vehemently opposing the ruling.[88] In July 2006, Iowa convened a special session to introduce several new restrictions on eminent domain actions aimed at economic development—an attempt to diminish *Kelo*'s impact in Iowa.[89] Even as recently as 2023, many Iowans have continued to protest *Kelo* and its implications for pipelines within the state.[90] During these protests, members engaged in discussions about electing county supervisors and county attorneys as a strategy to hinder the pipeline process, aiming to circumvent the influence of *Kelo*.[91]

Although protests in the state have generally targeted carbon pipelines, most legal actions have been directed toward surveyors. The majority of these legal actions have taken place in western Iowa, one even resulting in criminal trespass charges in Dickinson County.[92] There, a South Dakota resident named Stephen Larsen faced a criminal trespass charge while conducting surveys for Summit, a pipeline company.[93] The Jones family, who own and farm the property, had previously made it clear surveyors from Summit were not welcome on their land.[94] When Larsen was discovered on their property, the Jones family called the police, resulting in Larsen being charged with trespassing.[95] During the legal proceedings, the prosecutor argued that because the residents opposed having surveyors on the land, the surveyors should have obtained a court injunction.[96] However, the court ultimately ruled that Larsen had not trespassed

88. There is some confusion as to where *Kelo* came from and how it has affected Iowa legislation; for example, the *Kelo* decision was described as an Iowa Supreme Court ruling in Aaron Viner, *Iowa Plays Role in Eminent Domain Precedents*, IOWA FARMER TODAY (June 8, 2023), https://agupdate.com/iowafarmertoday/news/state-and-regional/iowa-plays-role-in-eminent-domain-precedents/article_84e7e02e-04a4-11ee-97c5-3fee86f59472.html [https://perma.cc/D639-3GVJ]. Generally, it is understood as loosening the Fifth Amendment Takings Clause. *See* Fuhrmeister, *supra* note 87, at 203 ("*Kelo* was the Court's opportunity to add some bite to the Public Use Clause. Instead, the five-justice *Kelo* majority gutted its constitutional significance.").

89. 2006 Iowa Acts 1031.

90. *Cf.* The New American, *Rally to Defend Private Property Rights Against Biden-Backed Carbon Capture*, RUMBLE, at 18:40 (July 8, 2023, 10:57 AM), https://rumble.com/v2yopno-rally-to-defend-private-property-rights-against-biden-backed-carbon-capture.html (on file with the *Iowa Law Review*) (describing a rally named "Rally to Defend Private Property Rights Against Biden-Backed Carbon Capture" held in Fort Dodge, Iowa, where former western-Iowa Congressman Steve King argued against the changes brought about by *Kelo* in the domain of private property rights).

91. *Id.* at 5:04:33.

92. *See generally* State v. Larsen, No. STA0053087 (Iowa Dist. Ct. June 30, 2023) (holding that there had not been a trespass).

93. *Id.* at 2; Jared Strong, *Judge Acquits Pipeline Surveyor of Trespassing Charge*, IOWA CAP. DISPATCH (July 6, 2023, 4:54 PM), https://iowacapitaldispatch.com/briefs/judge-acquits-pipeline-surveyor-of-trespassing-charge [https://perma.cc/BT2U-QHVM].

94. *Larsen*, No. STA0053087, at 1–2. The Joneses had found other Summit surveyors on their land and requested they leave. *Id.* at 2.

95. *Id.* It was clear that Larsen was working for Summit at the time. *See id.*

96. Strong, *supra* note 93.

in the course of his survey work because there was an exemption under Iowa Code section 479B.15, allowing pipeline surveyors to enter land with notice.[97]

Most other cases have been civil actions invoking the Fifth Amendment and citing *Cedar Point* to enjoin surveyors. For example, in *Navigator Heartland Greenway, LLC v. Koenig*, an Iowa district court in Clay County held that the right of surveyor access violated the Takings Clause.[98] The *Koenig* court found that surveyors were on the property four separate times for different surveys, and Navigator's witness testified that it was her understanding that Iowa Code section 479B.15 did not limit the number of times a surveyor could access property nor the duration of the surveys.[99] The *Koenig* court held that Iowa Code section 479B.15 constituted a clear per se taking of the right to exclude individuals from private property.[100] After identifying the Code as a per se taking, the court considered whether any of the three exceptions in *Cedar Point* applied.[101] The court found that the historical exception was the most likely to allow for surveying activities, but the court determined an exception for surveying was "more dissimilar to the examples provided by *Cedar Point* than similar."[102] The court held that Iowa Code section 479B.15 was a taking under the *Cedar Point* standard.[103]

However, in *Navigator Heartland Greenway, LLC v. Hulse*, the Woodbury County Court came to the opposite conclusion. There, the Hulse family filed a claim asserting that Navigator Pipeline had used Iowa law to commence a Fifth Amendment taking when Navigator's surveyors accessed their property for surveying for a new pipeline.[104] The *Hulse* court used the *Cedar Point* decision to analyze whether an exception under the *Cedar Point* rule would allow for surveyors to enter property without constituting a taking under the Fifth Amendment.[105] The court determined that an exception for "longstanding background restriction" applied.[106] The court cited the U.S. Supreme Court and the Virginia district court in *Klemic v. Dominion Transmission*, ruling that

97. *Larsen*, No. STA0053087, at 5.

98. *See generally* Navigator Heartland Greenway, LLC v. Koenig, No. EQCV034863, 2023 WL 5333334 (Iowa Dist. Ct. May 3, 2023) (holding there had been a taking under *Cedar Point*).

99. *Id.* at *11–12.

100. *Id.* at *12.

101. *Id.* at *7–12.

102. *Id.* at *6. The court discussed *Klemic* in detail. *Id.* at *6 n.5. It determined that the *Klemic* decision was overruled because "it predates *Cedar Point*." *Id.* The court also stated that it was "not convinced that there exists a traditional background principle of property law requiring private landowners to allow private hazardous liquid pipeline companies (and their hired third-party surveyors) to enter onto private lands for survey purposes that align with the type of 'background restriction' exceptions contemplated by Cedar Point." *Id.*

103. *Id.* at *9.

104. *See* Navigator Heartland Greenway, LLC v. Hulse, EQCV204557, 2023 WL 5338305, at *1–3 (Iowa Dist. Ct. May 30, 2023).

105. *Id.* at *5.

106. *Id.* at *9–11.

surveying activities did not constitute a taking and were covered by the exceptions established in *Cedar Point*.[107]

In light of the surveying issue, the Iowa Legislature introduced new legislation that would either limit or completely eliminate carbon pipeline surveyor access to private property in Iowa.[108] This legislation has been coupled with other legislation limiting surveyor access.[109] However, it is unclear whether similar legislation will be passed or signed; especially given that Iowa's Governor and legislature have been, allegedly, in favor of the pipeline.[110] Citing unpredictable regulatory challenges, particularly in South Dakota and Iowa, Navigator has cancelled or pulled their carbon pipeline projects.[111] Other companies like Summit Carbon Solutions and Wolf Carbon Solutions are still pursuing similar projects.[112]

II. THE CURRENT ISSUES IN IOWA AND *CEDAR POINT*

The *Cedar Point* decision triggers an examination of property rights, government access, and exceptions within takings law. At its core is the standard of inquiry: Every governmental action on private property is considered a taking unless one of three exceptions is found upon further examination by the court: (1) an Isolated Physical Invasion (trespass within the state's power); (2) a Longstanding Background Restriction; or (3) Conditional Access. In this context,

107. *Id.* at *10 (drawing on precedent from State *ex rel.* Rhodes v. Crouch, 621 S.W.2d 47, 48 (Mo. 1981) (en banc); State *ex rel.* Waste Mgmt. Bd. v. Bruesehoff, 343 N.W.2d 292, 296 (Minn. Ct. App. 1984); and Klemic v. Dominion Transmission, Inc., 138 F. Supp. 3d 673, 690–91 (W.D. Va. 2015)).

108. *See* H. File 307, 90th Gen. Assemb., Reg. Sess. (Iowa 2023).

109. *See* H. File 299, 90th Gen. Assemb., Reg. Sess. (Iowa 2023) (renumbered as H. File 643).

110. Katarina Sostaric, Michael Leland & Madeleine Charis King, *Legislators Address Carbon Concerns*, IOWA PUB. RADIO (Feb. 20, 2023, 8:15 AM), https://www.iowapublicradio.org/ipr-news/2023-02-20/statehouse-carbon-capture-pipelines [https://perma.cc/MRY4-LSPG] ("Gov. Kim Reynolds has historically been a supporter of the carbon capture pipelines because Iowa's biofuels industry says they're needed to keep Iowa's ethanol plants going."); John Aspray & Jennifer Winn, *Why Iowa Lawmakers Chose Pipelines Over People — Again*, FOOD & WATER WATCH (May 24, 2023), https://www.foodandwaterwatch.org/2023/05/24/iowa-legislative-session-2023 [https://perma.cc/M5WE-NJQH] (discussing how and why Iowa "lawmakers have failed to take action" regarding pipelines); Leah Douglas, *U.S. Midwest Carbon Pipeline's Backers Have Close Ties to Iowa Government*, REUTERS (Apr. 26, 2022, 4:00 PM), https://www.reuters.com/world/us/us-midwest-carbon-pipelines-backers-have-close-ties-iowa-government-2022-04-25 (on file with the *Iowa Law Review*) ("The Reuters review found that Bruce Rastetter, the head of Summit's parent company Summit Agricultural Group, is the top individual donor to Reynolds, Iowa's Republican governor. Rastetter gave nearly $150,000 to Reynolds between 2018 and 2022, according to records maintained by the National Institute on Money in Politics."). This Author reached out to the Governor's Office in the summer of 2023 and fall of 2024. Understandably, Governor Kim Reynolds's staff kindly stated that they were unable to comment. The Author does not offer any statements regarding any politician's interest or position on pipelines.

111. Donnelle Eller, *Navigator Kills Its $3.5B Carbon Capture Pipeline Across Iowa, South Dakota, Other States*, DES MOINES REG. (Oct. 20, 2023, 4:27 PM), https://www.desmoinesregister.com/story/money/business/2023/10/20/navigator-kills-its-carbon-capture-pipeline-in-iowa-other-states-ethanol-poet/71253882007 [https://perma.cc/5Y98-3TCB].

112. *Id.*

the question arises: Does surveying constitute a physical intrusion that would constitute a taking, or does it fall within one of the exceptions?

The responses from the Iowa district courts highlight the uncertainties stemming from the rule's ambiguous exceptions—reflecting the challenge inherent in applying *Cedar Point*. These complexities are evident in *Koenig* and *Hulse*, where the courts grapple with vague exceptions, questioning whether surveying is sufficiently isolated or if there is a historical basis to consider pipeline surveying within the state's power.

A. Ambiguities of the Exceptions Applied to Surveying

When applying the *Cedar Point* exceptions to pipeline surveying, two exceptions are particularly relevant: the Isolated Physical Invasion exception and the Longstanding Background Restriction. While there might be situations where pipeline surveying warrants discussion of Conditional Access, the focus should be more on the specifics of surveying rather than broad concepts. This issue was evident in both the *Koenig* court and the *Hulse* court cases.[113] Moreover, historically, surveying has been regarded within the framework of trespass common law, as evidenced by carveouts in state statutory law that exempt surveyors from trespassing.[114] Given this traditional perspective, it follows that surveying should be analyzed within the contexts of the Isolated Physical Invasion and Longstanding Background Restriction exceptions.

Pipeline surveying activities appear to align with both listed exceptions, yet they do not fall under either of them simultaneously. First, is surveying an isolated physical invasion? How frequently are surveyors allowed to access land for pipeline purposes? Traditionally, surveyor access would not fall under the federal view of a "taking," but after *Cedar Point*, many courts may find that "[a]n in-depth pipeline class location survey [that] can take anywhere from a few weeks to a few months to complete" may be beyond what the Supreme Court intended in their creation of the Isolated Physical Invasion exception.[115] This issue is exemplified in Justice Breyer's dissenting opinion in *Cedar Point*:

> How is an "isolated physical invasion" different from a "temporary" invasion . . . ? And where should one draw the line between trespass and takings? Imagine a school bus that stops to allow public school children to picnic on private land. Do three stops a year place the stops outside the exception? One stop every week? Buses from one school? From every school? Under current law a court would know what question to ask. The stops are temporary; no one assumes a permanent

113. Both courts dismissed the Conditional Access exception without much discussion. *See* Navigator Heartland Greenway, LLC v. Koenig, No. EQCV034863, 2023 WL 5333334, at *10–11 (Iowa Dist. Ct. May 3, 2023); Navigator Heartland Greenway, LLC v. Hulse, No. EQCV204557, 2023 WL 5338305, at *7–8 (Iowa Dist. Ct. May 30, 2023).

114. Chapman, *supra* note 6, at 562 n.88.

115. *Pipeline Class Location Surveys: What Are They and What Do They Do?*, FENSTERMAKER (June 29, 2023), https://blog.fenstermaker.com/pipeline-class-location-surveys [https://perma.cc/83Y2-WHPD]; Cedar Point Nursery v. Hassid, 594 U.S. 139, 149 (2021).

> right to stop; thus the court will ask whether the school district has gone "too far." Under the majority's approach, the court must answer a new question (apparently about what counts as "isolated").[116]

The "isolated physical invasion" exception may not be a true exception. One could argue that the Court, in creating this "exception," was actually signaling the elimination of the "too far" rationale. If that interpretation is incorrect, it leaves an analysis that lacks clear guidance on the exception's scope and implications. Given how new and difficult this standard is to apply, courts either avoid *Cedar Point* altogether or focus on the longstanding traditional common law Background Restriction exception.[117] Still, the Longstanding Background Restriction may be just as difficult to analyze.

Second, could surveying fit under the Background Restriction? In creating the new Background Restriction exception, the Supreme Court attempts to draw a circle around government-authorized physical invasions that will not amount to takings; within the circle, the Court states, traditional common law *and* historical entries by the government are exempted.[118] The only examples that the Supreme Court provides in *Cedar Point* focus solely on nuisances, necessity, and other criminal law doctrines;[119] however, because the Supreme Court states these traditional common law examples are only "encompass[ed]" in the Longstanding Background Restriction, it leaves the lower courts to determine which non-common law historical exceptions are also within the circle.[120] Unfortunately, the Court does not give non-common law examples, leaving lower courts without a standard to be used for these exceptions.[121]

B. IOWA DISTRICT COURT APPLICATION OF CEDAR POINT *AND THE UNCLEAR RESULTS*

Cedar Point presents a challenge in its application, particularly in the realm of surveying, as it demands a court to comprehensively understand constitutional and property law alongside historical research not typically required by courts.[122] The struggle of applying this historical research to pipelines becomes evident in the rulings of both *Koenig* and *Hulse*.

To begin, both the *Koenig* and *Hulse* courts' analyses chose not to apply the Isolated Physical Invasion exception to pipelines. The *Koenig* court asserted, "[A]s *Cedar Point* makes clear, the frequency and duration of the invasion is

116. *Cedar Point*, 594 U.S. at 177 (Breyer, J., dissenting).

117. The *Koenig* court all but dismisses the exception out of hand. *Koenig*, 2023 WL 5333334, at *11. While the *Hulse* court dismisses the exception as not "applicable." *Hulse*, 2023 WL 5338305, at *8. Some federal district courts refuse to even use the *Cedar Point* analysis. *See, e.g.*, Huq, *supra* note 47, 263–64 (detailing examples of district courts refusing to use the *Cedar Point* analysis).

118. *Cedar Point*, 594 U.S. at 160–61.

119. *Id.*

120. *See id.*

121. *See id.* at 161–62.

122. *See, e.g.*, Huq, *supra* note 47, at 263–64; *Cedar Point*, 594 U.S. at 160–61 (noting a list of historical background limitations to property rights).

no longer relevant."[123] In *Hulse*, the parties agreed that the Isolated Physical Invasion Analysis would not apply.[124] Additionally, both courts disregarded the Conditional Access exception in the context of pipeline surveyor access, opting instead to apply the Longstanding Background Restriction exception, which involves researching the historical background of such access.[125]

The *Koenig* court ruled that allowing pipeline surveyors access constituted a taking, even when the Background Restriction exception was applied. The *Koenig* court referenced the Supreme Court's decision in *Cedar Point*, which found that union organizer access to farmland in California did not qualify as a traditional privilege despite historical precedents allowing access.[126] Consequently, the *Koenig* court argued that granting access to pipeline surveyors would not be covered since there is not a comparable historical precedent for such actions.[127] The *Koenig* court pointed out the absence of provisions for "survey access, utility and or railroad easements, etc." in the Supreme Court's analysis,[128] and, therefore, the *Koenig* court reasoned, "[t]he lack of inclusion leads to conclusion."[129]

The *Hulse* court took the opposite view. The *Hulse* court noted that "the authority is overwhelming that survey access is precisely the kind of 'longstanding background restriction' that *Cedar Point* excepts from its newly created *per se* rule."[130] The court further described how statutes have authorized surveyors for many years.[131] The *Hulse* court highlighted how statutes, such as Iowa Code section 354.4A governing nonprivate surveying, have long authorized surveyors' access.[132] Because the Iowa Legislature has allowed both private and nonprivate surveyor access for an extended period of time, the *Hulse* court found that pipeline surveys fit into the Background Restriction.[133]

123. Navigator Heartland Greenway, LLC v. Koenig, No. EQCV034863, 2023 WL 5333334, at *10 (Iowa Dist. Ct. May 3, 2023).

124. Navigator Heartland Greenway, LLC v. Hulse, No. EQCV204557, 2023 WL 5338305, at *7–8 (Iowa Dist. Ct. May 30, 2023).

125. *Koenig*, 2023 WL 5333334, at *9 n.4; *Hulse*, 2023 WL 5338305, at *8.

126. *Koenig*, 2023 WL 5333334, at *8–9; *see* NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956) ("It is our judgment, however, that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution."). This decision implies that providing access to employees when no alternative exists would be permissible. However, the Author does not completely agree with the Iowa District Court's contention.

127. *Koenig*, 2023 WL 533334, at *10–11.

128. *Id.* at *11.

129. *Id.*

130. *Hulse*, 2023 WL 5338305, at *9.

131. *Id.*

132. *See id.* at *9–10.

133. *Id.*

C. Iowa Legislative Action Against Pipeline Surveyors

The Iowa Legislature introduced bills to limit surveyor access with the aim of completely removing pipeline surveying.[134] However, some of the legislation has expanded to include limitations on surveying altogether.[135] It remains unclear whether the current controlling party in the state, originally responsible for much of the carbon pipeline promotion,[136] can successfully pass such legislation. The recent unpopularity of pipelines has increased the likelihood of new legislation being passed.[137] Iowa appears to prioritize eliminating surveying activity instead of making these activities fairer to property owners. While other states have adopted measures to reduce the impact on property owners, Iowa has not introduced any similar legislation.[138] Consequently, Iowa's approach seems to be all or nothing: either eliminating all pipeline surveying or maintaining the status quo.

III. Solutions to Carbon Pipeline Surveyor Analysis and Public Policy

Currently, there is no clear exception permitting surveyor access under the new, post-*Cedar Point*, Takings Clause. Additionally, due to the ambiguity surrounding the Isolated Physical Invasion analysis, it is unlikely that a definitive answer exists in Iowa without further guidance from either the Iowa or U.S. Supreme Court.[139] Nevertheless, the Background Restriction provides a basis for determining whether pipeline surveyor access aligns with longstanding background restrictions allowing government entry. First, this Part argues that the historical record supports private surveyor access as an unequivocal

134. Iowa House File 307 would have completely repealed Iowa Code section 479B.15 which allows surveyor access for pipeline. H. File 307, 90th Gen. Assemb., Reg. Sess. (Iowa 2023). Iowa House File 299 was introduced as an act to modify Iowa Code section 354.4A, which is Iowa's general survey law that allows for public surveyors. H. File 299, 90th Gen. Assemb., Reg. Sess. (Iowa 2023). This law would have completely banned surveyor entry without the property owner's permission and imposes trespass liability on surveyors. *Id.*

135. *See* sources cited *supra* note 134.

136. *See* Jeffrey Tomich, *Republicans Dodge Iowa's Hot-Button Energy Issue: CO_2 Pipelines*, E&E News by Politico (Jan. 16, 2024, 6:16 AM), https://www.eenews.net/articles/republicans-dodge-iowas-hot-button-energy-issue-co2-pipelines [https://perma.cc/T68X-3NRZ].

137. *See* Donnelle Eller, *Iowa Law Allowing Surveyors on Property for Carbon Capture Pipeline Ruled Unconstitutional*, Des Moines Reg. (May 3, 2023, 7:59 PM), https://www.desmoinesregister.com/story/money/agriculture/2023/05/03/iowa-law-allowing-surveyors-for-carbon-capture-pipelines-ruled-unconstitutional/70180245007 [https://perma.cc/E9TG-L7UM].

138. *See infra* notes 186–88 and accompanying text.

139. The Iowa Supreme Court has recently held that the Background Restriction articulated in *Cedar Point* applies to pipeline surveyors operating within the state, aligning with the arguments laid out in this Note. *See* Summit Carbon Sols., LLC v. Kasischke, No. 23-1186, 2024 WL 4861721, at *21–23 (Iowa Nov. 22, 2024). While this decision addresses the immediate issue of access, the *legislative* landscape remains unsettled. *See infra* Section III.B. As discussed herein, legislative action could provide greater clarity and establish a more comprehensive framework governing the interaction between property rights and pipeline development, particularly concerning procedural safeguards and compensation mechanisms.

exception to the per se rule. Next, it explores potential legislative measures that can balance surveyor entry and the right of property owners to exclude. Given the importance of pipelines to agricultural states like Iowa, failure to work toward this balance jeopardizes Iowa's economy.

A. THE LONGSTANDING BACKGROUND RESTRICTION AND PIPELINE SURVEYING

The Background Restriction establishes there are government-authorized intrusions that do not qualify as takings based on historical rights.[140] The examples provided by the U.S. Supreme Court are solely based on common law, but the Court indicated there may be exempt intrusions beyond these few common law examples.[141] Hence, the initial question in determining whether a surveyor's entry constitutes a taking should be whether such entry falls under a common law exception or is supported by a longstanding background principle that serves as a basis for the Background Restriction. Subsequently, courts should evaluate whether the historical precedent for access aligns with the type of entry that occurred in the contemporary case; this would determine if the entry is similar to traditional common law or longstanding practices. In other words, is contemporary surveying somehow different from historical surveying?

1. Traditional Common Law and Longstanding Practices Analysis

Surveying is a statutory grant of access on land[142] and is not traditionally a common law exempt activity.[143] However, many government-authorized physical invasions, including surveying, will not amount to takings because they represent statutory grants of access that extend beyond the traditional common law exceptions.[144] In *Cedar Point*, the U.S. Supreme Court cites a number of authorities when discussing longstanding exceptions to takings,[145] one of the first being Philip Nichols's *The Law of Eminent Domain*.[146] Within the text, Nichols states, "A momentary entry for the purpose of a survey is not however a taking, and may be authorized without compensation whether the survey is preliminary to some public work or is for any other public purpose. . . ."[147] Nichols continues on to cite *Winslow v. Gifford*, an 1850s

140. Cedar Point Nursery v. Hassid, 594 U.S. 139, 160–61 (2021).

141. *Id.*

142. Chapman, *supra* note 6, at 562 n.88.

143. CURTIS M. BROWN & FRED H. LANDGRAF, BOUNDARY CONTROL AND LEGAL PRINCIPLES 235 (1957) ("Foundation for this right is lacking in common law.").

144. *Cedar Point*, 594 U.S. at 160–61.

145. Navigator Heartland Greenway, LLC v. Hulse, No. EQCV204557, 2023 WL 5338305, at *9–10 (Iowa Dist. Ct. May 30, 2023); *Cedar Point*, 594 U.S. at 159–62.

146. *Cedar Point*, 594 U.S. at 159.

147. PHILIP NICHOLS, THE LAW OF EMINENT DOMAIN: A TREATISE ON THE PRINCIPLES WHICH AFFECT THE TAKING OF PROPERTY FOR THE PUBLIC USE § 112, at 310 (1917) (citations omitted).

Massachusetts case where a statute[148] authorized surveyors to enter private property for the purpose of surveying "to determine the extent and boundaries of [land] . . . not inconsistent with the interests of the public."[149] The court found this entry was similar to the doctrine of necessity in torts—making analogies to sheriffs entering land for the purpose of catching a criminal.[150] The court stated that surveyors were similar to sheriffs in this context:

> [T]he right to enter upon the lands of individuals, without making compensation therefor, has always been exercised, . . . in the discharge of public duties, thus to pass over the lands of individuals, so far as may be necessary to discharge properly such duty as is required in the cases supposed.[151]

Nichols drew connections to new rail construction where a plaintiff's land was used for a railroad without compensation.[152] Surveys were conducted, but no compensation was paid.[153] The court held that temporary occupation through surveys, as an initial step to acquiring property rights for public use, is allowed without compensation.[154] The court stated, "It is generally admitted . . . that examinations and surveys may be authorized by legislative enactments without a violation of the constitutional provision."[155] In other words, private surveys, due to their resemblance to public utilities, are constitutional without compensation.[156] Thus, using guidance cited directly by the Supreme Court, surveying is within the Background Restriction.

Furthermore, in *Cedar Point*, the U.S. Supreme Court also cites the Restatement (Second) of Torts;[157] the section the Court cites in the Restatement does not give more clarity as to whether compensation would be required for

148. The Town of Westport, Massachusetts have saved these provisions in the Costal Agricultural Resource Community of New England. *Historical Landing Documents*, TOWN WESTPORT MASS., https://www.westport-ma.com/historical-documents/pages/historical-landing-documents [https://perma.cc/MVL6-7QFG]; WESTPORT, MASS., ORDINANCES ch. 171, § 3 (1848).

149. WESTPORT, MASS., ORDINANCES ch. 171 § 3 (1848); Winslow v. Gifford, 60 Mass. (6 Cush.) 327, 329 (1850).

150. *Winslow*, 60 Mass. (6 Cush.) at 330.

151. *Id.*

152. Cushman v. Smith, 34 Me. 247, 252 (1852).

153. *Id.*

154. *Id.* at 260.

155. *Id.*

156. *Cf.* NICHOLS, *supra* note 147, § 112, at 310–11 (pointing to a variety of accesses that would not constitute a taking under traditional common law). Admittedly, many of Nichols's citations supporting the view that pipelines fall under the traditional common law exception in *Cedar Point* are state law cases; however, this is hardly a counterargument, as federal courts have not yet been tasked with applying the Supreme Court's new per se analysis in this historical context. *See id.* § 112, at 310 nn.31–33.

157. Cedar Point Nursery v. Hassid, 594 U.S. 139, 161 (2021).

surveyor access.[158] However, the Restatement does indicate under section 211, comment c, that surveyor entries would not violate the Fifth Amendment, stating, "[A]n employee of a public utility is in terms authorized to enter upon privately owned land for the purpose of making surveys preliminary to instituting a proceeding for taking by eminent domain."[159] Because the Supreme Court did not directly cite to section 211 or the surveying exception discussed in Philip Nichols's *The Law of Eminent Domain*, one could take the similar approach to the *Koenig* court that "[t]he lack of inclusion leads to conclusion,"[160] but the examples given by the Supreme Court were not a strict limitation upon the Background Restriction where no other exceptions could be applied. Rather, these examples are only "encompass[ed]" in the Background Restriction.[161] The Restatement and other passages cited are to be used as guidance. In that context, it is clear that private surveying fits.

In conclusion, while surveying is not a common law-exempt activity, the access granted to pipeline surveyors falls within the purview of the Background Restriction exception outlined by the *Cedar Point* Court. Surveying is statutorily permitted and historically rooted in the public interest, and it aligns with longstanding exceptions within takings jurisprudence. The allowance for surveyors to enter private property for the purpose of surveys, akin to public utilities, does not inherently trigger compensation obligations under the Takings Clause.

2. Pipeline Surveying Juxtaposed to Traditional Surveying

Given that private surveying fits within the Background Restriction, the next issue is whether pipeline surveying in Iowa is similar to traditional surveying of the past. The *Koenig* court identified four distinct types of pipeline surveys, each serving a specific purpose in pipeline project planning: civil, environmental and biological, cultural, and geotechnical.[162] The civil survey, similar to traditional surveys, involves two surveyors walking the property to determine its boundaries.[163] In the environmental/biological survey, the survey team inspects water crossings and habitats and identifies any endangered species.[164] For this type of survey, surveyors use methods such as shovel testing or soil probing, along with visual inspections.[165] The cultural survey involves digging a two-

158. The *Cedar Point* Court only cites sections 196–197 and sections 204–205 when discussing the Restatement. *Id.* Such provisions only discuss the public necessity of averting serious harm or imminent disaster or provisions discussing arrests and eliminating a crime. *See* RESTATEMENT (SECOND) OF TORTS §§ 196–197, 204–205 (AM. L. INST. 1965).

159. RESTATEMENT (SECOND) OF TORTS § 211 cmt. c (AM. L. INST. 1965).

160. Navigator Heartland Greenway, LLC v. Koenig, No. EQCV034863, 2023 WL 5333334, at *11 (Iowa Dist. Ct. May 3, 3023).

161. *Cedar Point*, 594 U.S. at 160–61.

162. *See Koenig*, 2023 WL 5333334, at *2.

163. *Id.* at *3.

164. *Id.*

165. *Id.*

foot hole to search for historical or prehistoric artifacts.[166] Discovering an artifact triggers more extensive surveys.[167] Finally, the geotechnical survey, taking about eight hours, involves drilling probe holes between two to four inches wide and twenty to two hundred feet deep, and the drilled holes are later refilled with soil.[168]

Extensive digging is integral to modern surveys, but extensive digging traces back to the early days of Iowa's formation and the implementation of the Rectangular Survey System prevalent throughout the Midwest.[169] This systematic approach aimed to organize the region into easily identifiable large squares.[170] Surveyors, as part of their work, excavated plots of Iowa land and marked them with substantial stones and significant portions of soil.[171] During these surveys, the depth of the excavation was not the primary focus; instead, the emphasis was ensuring the markers' height was sufficient to withstand potential displacement by cattle—requiring fairly large deposits of soil (or other material) to be added upon the land.[172] A level of soil displacement was expected at the time.[173]

Unlike the European counterparts of the United States, surveying has been integral to American tradition and culture since before the colonial period.[174] While surveying often carries a negative connotation abroad, viewed as a tool of powerful elites to seize land or levy heavier taxes, in the Americas, it was a means for property owners to establish the boundaries of their property, ensuring clear and undisputed ownership.[175] The assurance "of clear and outright ownership of land was what attracted many settlers away from Europe[]."[176] Not only was there an acceptance of surveying at the time, but also the technological advances of surveys were welcomed.[177]

Advancements in surveying technologies have not only made surveys less invasive but also less burdensome on landowners, benefiting both the environment and property owners. As surveyors now contend with factors that were not relevant two hundred years ago, the overall impact of modern surveys tends to be more favorable for both the climate and landowners. Consequently,

166. *Id.*

167. *Id.*

168. *Id.*

169. *See* C. ALBERT WHITE, U.S. DEP'T OF THE INTERIOR, A HISTORY OF THE RECTANGULAR SURVEY SYSTEM 153 (1983).

170. *See id.*

171. *Id.* at 162; *see also* Andy Gott, *What Are These Strange Stones Doing in Iowa Fields?*, KXRB (Aug. 20, 2022), https://kxrb.com/what-are-these-strange-stones-doing-in-iowa-fields [https://perma.cc/T8VC-6TMW].

172. WHITE, *supra* note 169, at 269.

173. *Id.*

174. Kerry Goettlich, *The Colonial Origins of Modern Territoriality: Property Surveying in the Thirteen Colonies*, 116 AM. POL. SCI. REV. 911, 915 (2022).

175. *Id.*

176. *Id.*

177. *Id.*

it is evident that pipeline surveying under Iowa Code section 479B.15 adheres to the "longstanding background restrictions" on property because it falls within the Longstanding Background Restriction exception, and modern surveying closely resembles traditional surveying practices.

B. PUBLIC POLICY CONSIDERATIONS AND LEGISLATION

The pipeline projects in Iowa face widespread unpopularity, yet it is essential to weigh the policy implications of increasing the difficulty of pipeline surveyor access. Upholding laws becomes a public interest once approved by the state legislature. Granting homeowners the authority to hinder the pipeline surveyor process through self-help measures and restrictions rather than engaging in a more effective and corrective approach, such as mobilizing public opinion and voting on various legislation, does not align with public interests.[178] Additionally, the absence of pipelines could potentially lead to a reduction in overall corn production on the land.[179] If the government aims to enforce pipeline mandates without conducting surveys, it might need to explore alternative and potentially more invasive procedures.

Pipeline survey access is constitutional, yet there are ways to balance surveyor access and the right of exclusion. One of the best answers to this balancing comes from Douglas Chapman's note, *This Land Is Your Land? Survey Delegation Laws as a Compensable Taking*.[180] Chapman suggests awarding a nominal fee for each survey, considering it a symbolic acknowledgment of an invasion of a landowner's right to exclude.[181] This fee, set by state legislatures, would pay for the loss of control by property owners without substantially impacting surveying delegation laws.[182] Still, this would allow the state to continue to allow for access to pipeline surveyors while expanding property owner rights under the Takings Clause.

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178. *See* Carrie Stadheim, *Landowners Say No to Summit Carbon Solutions Easements; Eminent Domain May Be Enforced*, FENCE POST (July 7, 2023), https://www.thefencepost.com/news/landowners-say-no-to-summit-carbon-solutions-easements-eminent-domain-may-be-enforced [https://perma.cc/EQM9-UNUX]. Jared Bossly is an example of someone who has promoted self-help against surveyors; he participated in the "Rally to Defend Private Property Rights Against Biden-backed Carbon Capture." *See supra* note 90 and accompanying text. His story discusses an alleged altercation with a pipeline surveyor, resulting in a restraining order. *See* Stadheim, *supra*; *see also* State v. Larsen, No. STA0053087, at 1–2 (Iowa Dist. Ct. June 30, 2023) (discussing Iowa trespass action against pipeline surveyor).

179. *See supra* Section I.A.

180. *See generally* Chapman, *supra* note 6. This Author disagrees with many of the conclusions made by Douglas Chapman in his note, but fundamentally agrees with the solution offered by Chapman. In fact, the South Dakota Legislature has recently adopted a similar fee to that discussed by Chapman. *See* John Hult, *Pipeline Survey Law, Carbon as a Public Commodity Argued at South Dakota Supreme Court*, IOWA CAP. DISPATCH (Mar. 20, 2024, 11:00 AM), https://iowacapitaldispatch.com/2024/03/20/pipeline-survey-law-carbon-as-a-public-commodity-argued-at-state-supreme-court [https://perma.cc/S7RT-SSHC] ("[The new law] requires $500 and advance notice to landowners before a pipeline company is allowed to survey property . . . ."). This new law offers more value to landowners, but the fee, though commendable by the legislature, is not constitutionally required.

181. Chapman, *supra* note 6, at 571–75.

182. *Id.*; *see* discussion *supra* note 180.

Rather than completely eliminate pipeline surveyor entry, the Iowa Legislature should create new laws that limit surveyor entry. Current Iowa law requires pipeline surveyors to give ten days' notice before entry,[183] give an informational meeting to affected property owners,[184] and, if necessary, obtain survey permission through injunction—although it is not obligatory.[185] Some states offer a longer period of notice before entry,[186] limit when entry can occur based upon the time of day,[187] and give the owner a description of where and what type of survey is being completed (along with a myriad of other information).[188] The Iowa Legislature might explore enhancing safeguards for property owners. Legislative measures could rectify the ambiguity regarding surveyor access following *Cedar Point*. This clarity does not require outright banning of pipeline surveyor access. Rather, Iowa can give more control to landowners and protect the State's interest in pipeline construction by further defining the scope of surveyor access rights.

CONCLUSION

Surveyor access to private land presents a complex and evolving challenge at the intersection of property rights, state authority, and public policy. The legal landscape varies from state to state, with statutes often granting surveyors access for essential purposes like energy infrastructure development. The recent *Cedar Point* decision has added a layer of complexity by emphasizing the need to consider potential takings in cases where property owners experience a reduction in their right to exclude others. While *Cedar Point* has provided a potential avenue for private property owners seeking compensation and injunctive relief, it is essential that states recognize the nuanced nature of this ruling. It does not automatically classify every instance of reduced property rights as a taking—it acknowledges exceptions for state historical actions, including surveying. This nuance indicates that surveying, traditionally a state prerogative,[189] should not automatically be considered taking, even when conducted for pipeline companies.

Considering these points, legislators should focus on facilitating surveyor access to private land when it benefits crucial public interests like energy

183. IOWA CODE § 479.30 (2024).

184. *Id.* § 479B.4.

185. *Id.* § 479.30.

186. *See, e.g.*, IND. CODE ANN. § 32-24-1-3(g)(1) (LexisNexis 2016) ("The Public utility or the pipeline company . . . . [shall give notice] fourteen (14) days before the date of the public utility's or the pipeline company's proposed examination or survey.").

187. *See, e.g.*, ALA. CODE § 18-1A-50(a) (LexisNexis 2015) ("[I]t is suitable and within the power of the condemnor to take for public use, if the entry is . . . [u]ndertaken during reasonable daylight hours and for reasonable times . . . .").

188. *See, e.g.*, COLO. REV. STAT. ANN. § 18-4-515(2) (West 2023) ("The notice of the pending survey shall contain . . . the purpose[,] . . . the identity of the surveyor, the dates the land will be entered, the time, location . . . [and] the estimated completion date . . . . At least fourteen days before the desired date of entry, the professional land surveyor shall [give] such notice . . . .").

189. *See supra* Section II.C; IOWA CODE § 479B.15.

infrastructure. At the same time, they must ensure that landowners' property rights are respected and safeguarded. The Iowa Legislature should develop legislation that precisely defines the scope and objectives of surveyor access, balancing the public good with the protection of individual property rights and avoiding any undue infringement. Ultimately, as energy infrastructure needs continue to evolve, the need for a thoughtful and equitable approach to surveyor access becomes increasingly vital for both the energy industry and private landowners.