

Is the Right to Exclude Fundamental to Property?

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Kaiser Aetna identifies the right to exclude as a core element of property, without distinguishing improved from unimproved land. This Article argues that the Constitution does not mandate landowner's right to exclude from unimproved land. Most scholarship assume a right to exclude and ignores the role that race played in the development of the doctrine. Kaiser Aetna and its progeny inappropriately federalize property law, a matter best left to the states. When policing conflict, this Article proposes that competing uses should guide the inquiry.

Introduction.....	2
I. The Jurisprudence of Exclusion.....	3
A. Kaiser Aetna.....	3
B. The Right to Exclude after Kaiser Aetna	4
C. Has Lochner Returned?.....	6
D. What Do Scholars Think?.....	8
II. Thinking About the Right to Exclude	9
A. The Right to Exclude Today	9
B. Either Rights Evolve or Not	11
1. Originalism	11
2. An Evolving Understanding.....	12
C. A Framework for Setting Boundaries: Competing Uses.....	13
III. The Right to Exclude in the United States	14
A. The Right to Exclude Before 1860.....	15
B. The Enclosure of America.....	21
C. Closing Public Accommodations	28
IV. The Right to Exclude Elsewhere	29
A. The British Isles	30
B. Scandinavia and the Continent	33
C. The European Consensus	35
V. Reviving the Right to Roam.....	35
A. The Economics of Exclusion	35
B. Other Rationales	37
C. Philosophical Considerations	40
D. Benefits	41
C. Looking Ahead.....	42
Conclusion	43

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Introduction

The right to exclude others is generally identified as a core property right. In *Kaiser Aetna v. United States*, the Supreme Court characterized the right to exclude as “one of the most essential” and “universally held to be a fundamental element of the property right.”¹ In addition, legal scholarship generally assumes a right to exclude, without supplying any historical or comparative evidence for the assumption of its centrality. The paucity of debate indicates that this is an examined assumption. This Article argues that the right to exclude from unimproved land is not a core element of property.² As such, the states should be free to alter the terms of exclusion, as with other aspects of property.

No right is absolute; landowners are not the only party to hold rights over a given parcel. Neighbors, the public, and the state may have rights over that parcel, including rights of access.

In many parts of Europe, the public’s right to roam is considered vital to a system of private property rights. In the early United States, similarly, the right to roam was considered important; it was no mere license to roam lands unworthy of policing. An Illinois court wrote that “[n]o man has questioned this right [to roam].”³

Part I addresses the *Kaiser Aetna* and subsequent cases that discuss the landowner’s right to exclude. Part II describes the contours of public access today and provides some guidance on how to think about these rights. Part III shows that the right to exclude is not a long-standing element of American law. Additionally, this Part links historical and legal research showing the race was a key motivator for enclosure. Part IV provides some comparative perspective, showing the right to exclude is hardly universal. Section V provides arguments for expanding the public’s right to roam and speculates on the effect of overturning *Kaiser Aetna*.

Legal scholarship is full of academic questions, but why does this one matter? Firstly, “[n]o other [property] right has been singled out for such extravagant endorsement by the Court.”⁴ Secondly, the Supreme Court has treated the right to exclude as a core element of property, beyond any state’s power to regulate. Federalization restricts state autonomy in an area generally considered to be core to sovereignty. Lastly, defining real property is not among the enumerated powers of the federal government, so *Kaiser Aetna* raises the prospect that *Lochner* has returned.

¹ 444 U.S. 164, 176, 179–80 (1979).

² Unimproved land is land without buildings or standing crops, even if fencing or clearing has changed it from its natural state. A building’s curtilage is considered improved, even if a landscape architect could improve upon it.

³ *Seeley v. Peters*, 10 Ill. 130, 141–2 (1848).

⁴ Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 735 (1998). Thompson calls “the right to exclude others from one’s property” the “Court’s current fixation.” Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1527 (1990). The current jurisprudence privileges land over other forms of property. Fred P. Bosselman, *Land As a Privileged Form of Property*, in TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* (David L. Callies ed., 1996).

I. The Jurisprudence of Exclusion

The *Kaiser Aetna* opinion devotes considerably more attention to navigation than to the right to exclude.⁵ *Kaiser Aetna* could find little precedent for its sweeping conclusion, but subsequent decisions have relied upon it. Also, the factual background in *Kaiser Aetna* is rather unique, yet courts have cited it in dissimilar situations. This Part discusses *Kaiser Aetna* and some of the cases that have applied its incautious language.

A. *Kaiser Aetna*

In *Kaiser Aetna*, marina developers dredged a passage between Kuapa Pond, a privately-owned tidal lagoon, and the ocean. The Army Corps of Engineers sought a navigational servitude over the now navigable-in-fact lagoon.

Although the majority held that “the right to exclude, so universally held to be a fundamental element of the property right, falls within th[e] category of interests that the Government cannot take without compensation,”⁶ it found slim precedent for this extreme position. None of the three cases cited has much precedential value for delimiting the landowner’s right to exclude.

The first case comes from the U.S. Court of Claims and discusses exclusion in the context of Indian title.⁷ Exclusive possession is a necessary element for establishing Indian title; no title exists where two or more tribes shared land. Exclusion is the means of showing one tribe’s connection to a particular piece of land. Indian title has little relevance since tribes are sovereigns, not private individuals.

The second is dicta in a U.S. Court of Appeals for the Fifth Circuit case arising when a warehouse of Army tomatoes was lost to fire; the passage discusses the risk of loss.⁸ The right to exclude is included in a long list of rights possessed by the owners of chattel.

The third citation is a dissent in an intellectual property dispute between the International News Service and the Associated Press. Unlike land,

⁵ *Kaiser Aetna* read *The Genesee Chief v. Fitzhugh*, 53 U.S. 443 (1852) to mean that navigable-in-fact had replaced the earlier English rule of tidal ebb and flow. Less than a decade later, the Court abandoned *Kaiser Aetna*’s reading and found that *Genesee Chief* had supplemented, but not supplanted, the earlier rule. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988).

⁶ *Id.* at 179. Elsewhere in the opinion, the language is slightly different. *Id.* at 176 (“one of the most essential sticks in the bundle of rights that are commonly characterized as property – the right to exclude others.”) *Id.* at 179 (“number of expectancies embodied in the concept of “property”–expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner’s property.”)

⁷ “True ownership of land by a tribe is called in question where the historical record of the region indicates that it was inhabited, controlled or wandered over by many tribes or groups. Ordinarily, where two or more tribes inhabit an area no tribe will satisfy the requirement of showing such ‘exclusive’ use and occupancy as is necessary to establish ownership by Indian title.” *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1394 (Ct. Cl. 1975).

⁸ *United States v. Lutz*, 295 F.2d 736, 740 (5th Cir. 1961).

intellectual property's only value *as property* is exclusion.⁹ The majority in *Kaiser Aetna* quotes Brandeis for “[a]n essential element of individual property is the legal right to exclude others from enjoying it,” but does not quote the following sentence, which reads “if the property is affected with a public interest, the right of exclusion is qualified.”¹⁰

The opinion does not explain how Indian title relates to fee simple, how rights over chattel extend to land, or why navigable water is not affected with a public interest. The *Kaiser Aetna* Court could find only three cases to cite because, as Part III describes, the right to exclude is a recent development in American law. If the right to exclude is a “fundamental element” of property, why did it take hundreds of years to appear. Also, it would be odd if a “fundamental element” of property were lacking from the private tenure in many European countries.¹¹

Even though *Kaiser Aetna* addresses a rather specific set of circumstances, it has been taken to stand for a much broader proposition: the U.S. Constitution defines property to include a right to exclude, a right beyond a state's power to regulate.¹² Given the facts, it is clear from *Kaiser Aetna* that the government cannot take a particular individual landowner's right to exclude.

Although the Court took pains to emphasize the developer's investment, the opinion is entirely silent on how much a navigation servitude would diminish the value of the pond. The *Kaiser Aetna* opinion does not answer why the Court chose to abandon the whole parcel approach that it developed the year before in *Penn Central Transp. Co. v. New York City*.¹³ In contrast, the Court adopted a functional segmentation, finding a taking when a single right was lost.¹⁴

B. The Right to Exclude after Kaiser Aetna

The cases since *Kaiser Aetna* present something of a quandary. When the government has exacted increased public access in exchange for building permits, the Court has found a taking. Yet, when the government restricted a landowner's right to exclude to promote constitutional values, no taking was found. The opinions include unqualified language as dicta, so it is difficult to determine whether the state can regulate the right to exclude.

In *Nollan v. California Coastal Commission*, a state agency exacted a public access easement across the dry sand in exchange for a building

⁹ Of course, intellectual property may be valuable instrumentally, e.g., as technology used in the production of goods or services.

¹⁰ *International News Service v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

¹¹ See *infra* Part IV.

¹² The Court disregarded the government's argument that Hawaiian law would permit public access. Brief for the United States at 27-30, *Kaiser Aetna* (No. 78-738).

¹³ 438 U.S. 104 (1978).

¹⁴ Daniel R. Mandelker, *New Property Rights under the Takings Clause*, 81 MARQ. L. REV. 9, 12-14 (1997).

permit.¹⁵ The easement demanded only affected sand beyond the Nollan's fence, protecting their privacy. The opinion, which cited *Kaiser Aetna* for the proposition that "the right to exclude is one of the most important sticks in the bundle of rights that are commonly characterized as property,"¹⁶ is especially hostile to public access when compared with other burdens. *Nollan* would permit the coastal commission to impose "a height limitation, a width restriction, or a ban on fences" or even a complete prohibition on new construction.¹⁷ *Nollan* introduced the requirement of an "essential nexus" between exactions and the justifications for the prohibition.¹⁸

Nollan's twin case is *Dolan v. City of Tigard*.¹⁹ In *Dolan*, the city conditioned a commercial building permit on the dedication of an easement across a floodplain. The proposed expansion of the Dolan hardware store was expected to increase run-off and traffic, both municipal concerns. The public greenway did fulfill the "essential nexus" test, since bike and foot traffic would replace some auto traffic. To forestall public access, the Supreme Court introduced a second requirement: "rough proportionately," which the Court did not find.²⁰

To distinguish lawful zoning in *Euclid* from *Nollan* and *Dolan*, the Court noted that the latter cases address an "adjudicative decision to condition petitioner's application for a building permit" on "unconstitutional conditions."²¹ But, the Court does not specify which is dispositive: municipal extortion or the individual burden of expanded public access.

The property rights jurisprudence since *Kaiser Aetna* is not uniformly hostile to state regulation. At first blush, *Pruneyard Shopping Ctr. v. Robinson* has little application since leafleting a mall is a far cry from a day spent afield.²² In *Pruneyard*, secondary school students were ejected from a 21-acre mall for distributing anti-Zionist literature. The California Supreme Court found that the state constitution protects "speech and petitioning, reasonably exercised"; thus, the landowner could not exclude the students.²³ The U.S. Supreme Court found that the federal constitution did not grant landowners a right to exclude that the state could not regulate or alter. The opinion found that "appellants have failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'"²⁴

¹⁵ 483 U.S. 825 (1987).

¹⁶ *Id.* at 831. It is unclear whether California law gave the Nollans the right to exclude the public. See *Id.* at 832-33; *id.* at 847-48, 855, 857-58 (Brennan, J., dissenting); *id.* at 865 (Blackmun, J., dissenting). The majority notes the California Court of Appeals did not find the Nollans were unable to exclude. *Id.* at 832-33. But, that question was not before the California court.

¹⁷ *Id.* at 836. Oddly, the coastal commission can deny the Nollan's almost any use of their property, but cannot require them to share the dry sand beyond their fence.

¹⁸ *Id.* at 837.

¹⁹ 512 U.S. 374 (1994).

²⁰ *Id.* at 391.

²¹ *Id.* at 385.

²² 447 U.S. 74 (1980).

²³ *Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899, 910 (1979).

²⁴ 447 U.S. at 84.

In a case that predates *Kaiser Aetna* and *Pruneyard*, the Court found no taking in *Heart of Atlanta v. United States* when federal statute limited the right to exclude.²⁵ Title II of the 1964 Civil Rights Act banned racial discrimination in public accommodations. A racist innkeeper asserted a taking of his property right to exclude, but the Court held that “the cases are to the contrary.”²⁶

These four cases show the quandary: does *Kaiser Aetna* prevent the state from expanding public access to private land? *Nollan* and *Dolan* suggest hostility to any expansion of public access. But, the Court validated new limits on the landowner’s right to exclude in *Pruneyard* and *Heart of Atlanta*. None of the opinions give much indication how to distinguish these cases. One reading is that constitutional concerns trump property rights. Another reading is that the burdens of public access should be broadly dispersed.

When discussing *Kaiser Aetna*, the *Pruneyard* opinion cites *Armstrong v. United States*.²⁷ That principle would “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.”²⁸ This Article argues that this is a fair reading of precedent and a better way to determine how the government can regulate the right to exclude.²⁹ *Kaiser Aetna* itself is entirely silent on whether the government can take every landowner’s right to exclude.

C. Has *Lochner* Returned?

With apologies to Tip O’Neill, all property is local. Defining and regulating property is a core state power. The *Kaiser Aetna* jurisprudence defines property to include a landowner’s right to exclude, limiting state autonomy. Federalizing property law stands at odds with the jurisprudence since *Lochner*. Contracts is not grounded in place like property, but the Court has beaten a repeat from the *Lochner* era’s federalization of contract. *Kaiser Aetna* and its progeny suggest that the Court is developing a federal common law of property. No provision of the Constitution identifies the right to exclude as a required element of property. The only limits to *Lochner* jurisprudence are “the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint.”³⁰

In the cases that most closely resemble public access to unimproved land, the Court has not stopped the states from expanding public access. Arguably, courts in Hawaii, Oregon, and New Jersey have resolved issues of beach access in a way that expands public access at the expense of the

²⁵ 379 U.S. 241 (1964).

²⁶ The claim is rather extraordinary since no cases are cited. *Id.* at 261.

²⁷ 346 U.S. 40 (1960).

²⁸ *Id.* at 49.

²⁹ Even if the burden is widely shared, it will be uneven and probably hard to predict *ex ante*. It is clear, however, that landowners (as members of the public) would gain something of value from a right to roam, even at the same time that they lose (as landowners) the right to exclude. Landowners could expect an “average reciprocity of advantage,” thus not taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

³⁰ *City of East Cleveland*, 431 U.S. 494, 502 (1977).

landowners' right to exclude.³¹ The U.S. Supreme Court has declined to hear these cases.³² But, the denial of certiorari by itself does not imply validation of the result. Additionally, the broad and unqualified language suggest federalization of property law, the actual outcomes in the individuals cases does not.

At least one current (and one former) Justice has revealed a willingness to dictate the contents of property law to the states. In *State ex rel. Thornton v. Hay*, the Oregon Supreme Court found that custom gave the public access to dry sand along the shore.³³ In a subsequent case, the Oregon Supreme Court found no taking since public access was a "background principle" of state law.³⁴ Justice Scalia (with O'Connor joining) penned a five-page dissent from the denial of certiorari for this case.³⁵ Scalia's dissent makes it abundantly clear how he would decide the case.³⁶ Since the Court has not established the doctrine of judicial takings,³⁷ Scalia cites precedent that is, at best, suggestive.³⁸ Scholars who accept the notion of judicial takings would also cite a 1905 case and a concurring opinion from 1967.³⁹ Neither Scalia nor the scholars adequately answer how judicial takings might exist as a federal matter if the Constitution does not create property, but instead adopts state law.⁴⁰

³¹ In neither case did the court claim to be expanding public rights. Instead, the court was merely formalizing earlier law. In *re Ashford*, 50 Haw. 314 (1968); *State ex rel. Thornton v. Hay*, 254 Or. 584 (1969). In contrast, the New Jersey court was more explicit that this decision worked a change in state law. *Matthews v. Bay Head Assoc.*, 471 A.2d 355 (N.J. 1984).

³² *County of Hawaii v. Sotomura*, 419 U.S. 872 (1974), *cert denied*; *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994), *cert. denied*.

³³ 254 Or. 584 (1969). In 1899, the Oregon legislature had declared the foreshore a public highway. Act of Jan. 25, 1899, 1899 Or. Laws (codified as amended at Or. Rev. Stat. § 390.615 (1995)); *see also* Steve A. McKeon, *Public Access to Beaches*, 22 STAN. L. REV. 564, 581 & n.96 (1970) (describing 1913 legislation preventing further alienation of state owned tideland of beach). In 1967, Oregon legislature vested easements created adjacent to public highways in the state. Act of July 6, 1967, ch. 601, §§ 2-3, 1967 Or. Laws 1448 (codified as amended at Or. Rev. Stat. §§ 390.610(2)-.610(3) (1995)).

³⁴ 317 Or. 131, 143 (1993).

³⁵ *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994), *cert. denied* (Scalia, J. dissenting from denial of petition for certiorari). In addition, Justice Scalia presumes to correct the Oregon Supreme Court on its misreading of its own precedent. *Id.* at 1207 & n.3.

³⁶ Scalia implies that Oregon is "invoking nonexistent rules of state substantive law." *Id.* at 1207.

³⁷ *See* Thompson, *supra* note 4, at 1469-70 (noting that this issue was briefed and argued in *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980)).

³⁸ *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

³⁹ *Muhlker v. New York & Harlem Railroad*, 197 U.S. 544 (1905)(no majority opinion); 389 U.S. 290, 296-97 (1967)(Stewart, J., concurring)(federal question whether decision worked a "sudden change in state law").

⁴⁰ *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980); *Demorest v. City Bank Farmers Trust*, 321 U.S. 36, 42 (1944).

D. What Do Scholars Think?

There is no shortage of scholarship on *Kaiser Aetna* and its progeny, but very little addressing the focus of this Article. Most of the literature is hobbled with mistakes, both historical and conceptual. Some of the scholarship suggests a willful blindness to the historical record, even when the information is available.⁴¹

Even though cases well into the 20th century distinguish between improved and unimproved land, very little scholarship on the landowner's right to exclude makes the same distinction. This omission is surprising because the current law of trespass differentiates between improved and unimproved land. Thirty states immunize trespassers without notice by requiring landowners to post their land to prevent public access.⁴² Posting statutes do more than protect the lost hiker; these laws reverse the presumption that visitors need permission and impose non-trivial costs on landowners. For example, New Mexico requires signs posted in Spanish and English and advertisements run in a local newspaper.⁴³

Advocates of broad property rights avoid detailed discussions of legal history, which is unsurprising since the historical record does not support broad claims of exclusion. For example, Callies and Breemer cite only four 19th century cases in their paean to exclusion. Of the four cases, two concern road building within cities and the other two address flooding.⁴⁴ None of the cases discussed in Part III are acknowledged. Merrill's historical evidence is twofold: an account of land tenure among the Algonquin and some speculation on property's role in the Neolithic revolution.⁴⁵

The historical record is somewhat complicated and more than a few scholars opt instead for a simple frame. Writing before enclosure was complete, Cohen asserts that "the essence of private property is always the right to exclude others"⁴⁶ and Holmes writes that the owner is "allowed to exclude all."⁴⁷ Reminiscent of an intellectual parlor game, Merrill writes that the right to exclude has logical primacy.⁴⁸ Merrill and Smith frame their

⁴¹ For example, Goble and Freyfogle write that "Americans understood private property in land [to] include the right to exclude others . . . Landowners possessed the inherent power to close their lands to hunting" only a few pages after detailing two cases that show the landowner had no right to exclude hunters. DALE D. GOBLE & ERIC T. FREYFOGLE, *WILDLIFE LAW* 133–39 (2002).

⁴² No posting law extends to improved land since improvement provides constructive notice to trespassers. See Section II.A and V.A.

⁴³ N.M. STAT. ANN. § 17-4-6.

⁴⁴ David L. Callies & J. David Breemer, *The Right to Exclude Others From Private Property: A Fundamental Constitutional Right*, 3 WASH. U. J.L. & POL'Y 39 (2000).

⁴⁵ Merrill, *supra* note 4, at 746. Since any discussion of property relations 10,000 years ago is entirely speculative, Merrill cites the Algonquin as supporting evidence. But, Algonquin society is not static. Although this view was popular during the 19th century, Indians are not Europeans frozen in the primitive past.

⁴⁶ Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 12 (1927).

⁴⁷ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 246 (1881).

⁴⁸ Merrill, *supra* note 4, at 740.

textbook around the right to exclude, which presents a host of case selection challenges because of that right's recent vintage.⁴⁹

Kaiser Aetna describes the right to exclude as “so universally held” and “commonly characterized,”⁵⁰ yet scholars have shown little interest in interrogating those claims. This lapse is surprising since the Hawaii Supreme Court has found that the “western concept of exclusivity is not universally applicable in Hawai’i.”⁵¹ While the Hawaii Supreme Court may be correct that exclusivity is not applicable in Hawaii, the court is wrong that exclusivity is a “western concept.” Exclusivity was not the law in most states in the 1791 or 1868. In Western Europe, many countries recognize broad public rights of access on private land.

Although *Kaiser Aetna* has attracted no small amount of scholarly attention, the scholarship has not challenged the Court on its reading of American history or universality. In contrast, the vague and historical unclear public trust doctrine has produced more scholarship on public rights of access.⁵²

II. Thinking About the Right to Exclude

Before discussing the right to exclude, it is worthwhile to describe its contours today. This Part explains the two ways to thinking about rights: either static or fluid. If rights are fluid, this Part proposes a novel way to balance the landowner's rights against public rights.

A. *The Right to Exclude Today*

Today, the right to exclude in the United States is not absolute. Every state recognizes a doctrine of necessity, where trespass is authorized to preserve life or property.⁵³ Additionally, law enforcement has privileged access to private property in case of emergency.⁵⁴ Landowners have only limited rights to exclude wandering animals because of state game laws, and no right whatsoever to exclude endangered species. In fact, endangered species have the right to exclude the proprietor since an endangered species may not be “disturbed.”⁵⁵

⁴⁹ THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* (2007).

⁵⁰ 444 U.S. at 176, 179.

⁵¹ *Public Access Shoreline Hawaii v. Hawai’i County Planning Commission*, 79 Hawai’i 425, 447 (1995). Bederman accepts Hawaiian custom, but rejects Oregon’s “bare instrumentalism” in recognizing customary beach access. David Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUMB. L. REV. 1375, 1434 (1996). Would it be unfair to say that he believes the natives have custom, but whites have law?

⁵² See Catherine Robinson Hall, *Dockominiums: In Conflict with the Public Trust Doctrine*, 24 SUFFOLK U. L. REV. 331 (1990); Timothy M. Mulvaney & Brian Weeks, “Waterlocked”: *Public Access to New Jersey’s Shoreline*, 34 ECOLOGY L. Q. 579 (2007).

⁵³ Although common sense is the ultimate progenitor, this doctrine is traced to Bracton’s maxim “that which is otherwise not lawful is made lawful by necessity.” Henry of Bracton (ca.1210–68)

⁵⁴ *People v. Ray*, 21 Cal. 4th 464, 981 P.2d 928 (1999).

⁵⁵ 16 U.S.C. 668(c).

Some states provide protection to the wanderer even if the states do not grant a right to roam. In total, thirty states limit trespass to land posted or fenced.⁵⁶ Unposted land is presumptively open to the public, absent personal notice. Fencing is often insufficient to enclose the land, signs meeting specific requirements are necessary.⁵⁷ Successful prosecutions for trespass are rare since it is difficult to prove *ex post* that legally sufficient signs were present when the intrusion occurred. With time, signs falls and blocking vegetation grows.

In addition, many states recognize a public right to access the shoreline. At common law, the king owned the foreshore, or intertidal zone.⁵⁸ Upon independence, the states assumed ownership of the foreshore as public trust.⁵⁹ Most states authorize broad public access to the foreshore. Maine and Massachusetts, however, limit public access to the foreshore to archaic uses: navigation, fishing, and fowling.⁶⁰ Other states have allowed public rights to evolve. In *Neptune City v. Avon-by-the-Sea*, the New Jersey Supreme Court held that public rights were not “limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities.”⁶¹

Hawaii and Oregon recognize the broadest rights of public access to the shore, in both cases relying on custom.⁶² Landowners cannot exclude the public from dry sand, even up to the vegetation’s edge. Additionally, landowners in Hawaii cannot exclude native Hawaiians from customary use of unimproved land.⁶³ Custom has provided the basis for legislation recognizing public access in Texas⁶⁴ and the Virgin Islands.⁶⁵

⁵⁶ Mark R. Sigmon, Note, *Hunting and Posting on Private Land in America*, 54 DUKE L.J. 549 (2004). In South Dakota, hunting is permitted along section lines, even if the land is posted. *Benson v. State*, 710 N.W.2d 131 (S.D. 2006).

⁵⁷ *E.g.*, Ariz. Rev. Stat. § 17-304

⁵⁸ In England, navigable waters are defined as those subject to the tides, whereas Americans understand navigability to extend to inland waters that are navigable in fact.

⁵⁹ *E.g.*, *Bacon v. Mulford*, 41 N.J.L. 59 (1879).

⁶⁰ The Massachusetts Attorney General has taken the position that fowling includes bird watching, but this has not been tested in court.

⁶¹ 61 N.J. 296, 309 (1972). *See also* *Weden v. San Juan County*, 958 P.2d 273, 283-84 (Wash. 1998)(“fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters”); *Hixon v. Public Service Comm.*, 146 N.W.2d 577 (Wis. 1966) (public trust authorizes “all public uses of water including pleasure boating, sailing, fishing, swimming, hunting, skating and enjoyment of scenic beauty”).

⁶² *In re Ashford*, 50 Haw. 314 (1968); *State ex rel. Thornton v. Hay*, 254 Or. 584 (1969).

⁶³ *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1 (1982)(customary rights limited to inhabitants of the *ahupua'a* [district]); *Public Access Shoreline Hawaii v. County of Hawaii Planning Comm’n*, 79 Haw. 425 (1995), *cert. denied*, 517 U.S. 1163 (1996). Native Hawaiians are defined as anyone with at least one ancestor who predates Cook’s arrival in 1778. Haw. Const., art XII, § 7.

⁶⁴ Tex. Nat. Res. Code Ann. §§ 61.011-026.

⁶⁵ Although the legislation made no mention of custom, the decision upholding it relied on custom. 1971 V.I. Sess. Laws 224 (codified at V.I. Code Ann. tit. 12, §§ 401-403 (1982); *United States v. St. Thomas Beach Resorts, Inc.*, 386 F. Supp. 769, 772 (D.V.I. 1974), *affirmed* 529 F.2d 513 (1975).

In recent decades, several states have expanded the public right of access. In Arkansas, the state definition of navigability was expanded, enlarging the scope of public access.⁶⁶ In South Carolina, the navigable channel includes improvements and artificial expansions.⁶⁷ In Illinois, the public can boat on lakes too small for navigation.⁶⁸ In Wyoming, the river channel is open to the public, regardless of navigability.⁶⁹ In drier states, the public can use seasonal or fluctuating water bodies.⁷⁰ In Montana, North and South Dakota, all water is public property and open to the public.⁷¹ Montana has codified its stream access law.⁷² In South Dakota, public retains the right to hunt along section lines, even where there is no recognizable road.⁷³

Yet, the sum total of rights to access would appear unrecognizably limited to the Founding Fathers. At the Framing, the public had broad rights to use unimproved land, including the right to graze, fish, hunt, and forage.⁷⁴ Since then, private landowners have acquired broader rights at the expense of the public.

B. Either Rights Evolve or Not

At the broadest level of generality, our rights either evolve or not. More than a little ink has been spilt on this question. This Article, however, will take no opinion on whether rights can change over time. Whether rights are static or fluid, this Part shows that the states have the power the right to expand public access to unimproved land.

1. Originalism

If the Constitution is understood to freeze our rights as those rights were understood at the Framing (or subsequent amendment), then no right to exclude is beyond state power to define or regulate. Before the 14th Amendment, the Takings Clause did not bind the states. Thus, the states are bound to protect property rights as those rights were understood in 1868. The historical evidence is clear that the right to exclude was not a fundamental to property. By then, several northern and midwestern states had bestowed on landowners a right to exclude. But, no southern or western state recognized a right to exclude from unimproved land. As late as 1892,

⁶⁶ State v. McIlroy, 268 Ark. 227 (1980).

⁶⁷ State v. Head, 498 S.E.2d 389 (S.C. App. 1997); *cf* Kaiser Aetna v. United States, 444 U.S. 164 (1979)(improvements do not expand access).

⁶⁸ Beacham v. Lake Zurich Property Owners Assn., 526 N.E.2d 154 (Ill. 1988).

⁶⁹ Day v. Armstrong, 362 P.2d 137 (Wyo. 1961).

⁷⁰ Parks v. Cooper, 676 N.W.2d 823 (S.D. 2004)

⁷¹ Montana Stream Access Coalition, Inc. v. Curran, 210 Mont. 38, 682 P.2d 163 (1984); Roberts v. Taylor, 47 N.D. 146 (1921); Flisrand v. Madson, 35 S.D. 457 (1915).

⁷² Montana Stat. § 23-2-302 (2009).

⁷³ Hunters could cross barbed, but not woven, wire fences. Tom Simmons, *Highways, Hunters and Section Lines: Tensions Between Public Access and Private Rights*, 2 GREAT PLAINS NAT. RES. J. 240, 252 (1997).

⁷⁴ See *infra* Part III.A.

Thornton's treatise counted 20 states embracing a right to roam, representing both a majority of the states and the national population.⁷⁵ Part III will discuss this history in more detail.

Since some states recognized a landowner's right to exclude in 1868, no state is precluded from recognizing that right. Symmetrically, no state is required to recognize a landowner's right to exclude. Under *Lucas v. South Carolina Coastal Commission*, no taking exists when the state's regulatory action conforms to the "background principles of nuisance and property law."⁷⁶ If originalism dictates the content of property law, then states retain the authority to limit the landowner's right to exclude as a background principle of property law.

2. *An Evolving Understanding*

Alternatively, our rights are not frozen in the manner they were understood at the Framing (or subsequent amendment). Instead, law depends on an evolving understanding: "creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object."⁷⁷

Most of the Drafters believed that property was not a natural right, instead it was an adventitious right, arising by convention and social compact. In this view, property rights were utilitarian, useful not for their own sake, but "instrumental in developing the nation's economy."⁷⁸ Jefferson was quite explicit in recognizing that property in land flowed from government. He wrote that the "right of property in moveable things is admitted before the establishment of government. A separate property in lands, not till after that establishment. . . . Government must be established and laws provided, before lands can be separately appropriated."⁷⁹

As Part III will show, property rights developed through the 19th and 20th centuries. Property rights developed in response to technology, settlement, and economic development.⁸⁰ Legal change may not be innocuous: the increasing concentration of economic power allowed elites to change property law in ways to favor the haves over the have-nots. In particular, enclosure helped white landowners weaken the autonomy of freedman after the Civil War.

⁷⁵ WILLIAM WHEELER THORNTON, *THE LAW OF RAILROAD FENCES AND PRIVATE CROSSINGS* § 9–10 (1892).

⁷⁶ 505 U.S. 1003, 1031 (1992).

⁷⁷ *Silver v. Silver*, 280 U.S. 117, 122 (1929).

⁷⁸ BARLOW BURKE, *THE LAW OF ZONING AND LAND USE CONTROLS* 12 (2009).

⁷⁹ Thomas Jefferson: *Batture at New Orleans*, 1812. ME 18:45. Hart argues that our predecessors had the advantage of clearer thinking since "[t]he actual founding of the colonies and their settlements, the beginnings of land title in the colonies, were too recent for anyone to pretend that land rights in America had existed prior to government." John F. Hart, *Colonial Land Use Law and Its Significance For Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1286 (1996).

⁸⁰ See also Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

C. A Framework for Setting Boundaries: Competing Uses

The evolving rights view provides little guidance to lawmakers on which rights should be protected and which should be subject to popular control. (In contrast, originalism provides perhaps too specific instructions.) This Article proposes that conflict between users should guide this jurisprudence.⁸¹ Some uses of property conflict, whereas others do not. Where uses conflict, primacy should be given to the landowner.

Conflicts are both spatial and temporal. The backyard is an example of spatial conflict: public access and quiet enjoyment are inconsistent. Therefore, the landowner should be able to exclude the public from her home and garden at all times. A football pitch presents a temporal conflict since a match conflicts with any other use. Therefore, the players should be able to exclude walkers during play. At other times, there is no conflict and therefore footballers should have no right to exclude. In the relatively rare situations that public use could destroy the grass and affect play, reasonable limitations are appropriate.

Unimproved lands present few spatial or temporal conflicts. These lands are little used by their owners (hence unimproved) and public use will usually be light.⁸² Most unimproved land is far from where people live and access is difficult since roads are few.

Consider the conflicts likely in a pasture. Where stocking densities are low, other users are not likely to interfere with animals grazing. Even where stocking densities are high, stock rotation is common, so most of the pasture is empty at any given time, limiting conflict. In the forest, the potential for conflict is even more limited. Standing timber is only logged at very long intervals. Between planting and harvest, the forester does return to manage the forest. Again, conflicts will be rare since trimming, controlled burns, etc. are infrequent events. On the mountain, there is even less opportunity for conflict. Too high for grazing and timber, the owner's use is limited because the mountains are "unsafe during winter storms, and for the most part unfit for the construction of permanent structures."⁸³

One of the underlying concerns in *Kaiser Aetna* was the effect of access on the marina owner's investment. Both the majority opinion and dissent note the substantial investment.⁸⁴ It is certainly the case that socially-useful investment will be deterred if owners are unable to exclude at all.⁸⁵ But, the

⁸¹ This model is compatible with, but distinct from, the owner's agenda-setting prerogative. Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L. J. 275 (2008).

⁸² In contrast, off-road motoring does significant damage to the land and other's enjoyment, so landowners should be able to exclude. See Byron Kahr, *The Right to Exclude Meets the Right to Ride: Private Property, Public Recreation, and the Rise of Off-Road Vehicles*, 28 STAN. ENVTL. L. J. 51 (2009).

⁸³ Although the opinion was describing the Oregon beach, the description and logic apply equally to the mountains. *State ex rel. Thornton v. Hay*, 254 Or. 584, 589 (1969).

⁸⁴ 444 U.S. 167, 169, 180, 192

⁸⁵ Countries that recognize a right to roam protect the owner's right to profit from investment. The Scottish Outdoor Access Code is the most detailed scheme and it specifies that no right to roam extends to "visitor attractions or other places which charge for entry." Scottish Outdoor Access Code at 6.

navigational servitude at issue in *Kaiser Aetna* would not extend to the marina or other improvements. The developers could still profit from their investment, including sales to occasional visitors. See Part V.A. for a more detailed discussion of the economics.

III. The Right to Exclude in the United States

Until the late 19th century, open access was the norm in the United States. Public rights varied, largely as a function of the landscape and local conditions. Enclosure was “suitable to an old and highly cultivated country . . . [but] it has no suitable and proper application in Ohio.”⁸⁶ Referring to enclosure, an Illinois court opined that “no principle of the Common Law [was] so inapplicable.”⁸⁷ “Uninclosed land, for many purposes such as hunting and pasture, is regarded as a common.”⁸⁸ A Georgia court wrote that “[a] man could not walk across his neighbor’s unenclosed land . . . without subjecting himself to damages for trespass. Our whole people, with their present habits, would be converted into a set of trespassers. We do not think that such is the law.”⁸⁹

While there is evidence of a right to roam, the historical record of livestock roaming is much richer. To supplement the more limited evidence of human roaming, livestock cases can complete the picture. Legal history is a record of disputes rather than a record of laws. The structure of the common law emphasizes cases over other sources of law, including legislation.⁹⁰ Additionally, legal research uncovers cases more easily than a long-forgotten statute.⁹¹

As a matter of pure theory, it is possible to imagine a law that permits animals to roam, but not people. As a historical matter, the open range has never meant livestock could roam where people could not.⁹² There are two reasons why an open range includes a right to roam. Wandering people impose a much smaller burden on landowners than foraging livestock, so closing the range was the first step in enclosure. Additionally, owners will eventually need to find their wandering stock, so an open range implies public access.

The reasoning of the stock cases often meant that persons must have at least as great rights as animals. For example, horse hit by a railroad in Illinois was called a “free commoner and at large.”⁹³ This language would

⁸⁶ *Kerwhacker v. The Cleveland, Columbus & Cincinnati R.R.Co.*, 3 Ohio 172, 179–80 (1854).

⁸⁷ *Seeley v. Peters*, 10 Ill. 130, 141–2 (1848).

⁸⁸ *Law v. Nettles*, 2 Bailey 447 (S. Car. 1831). Note that inclose was the preferred spelling through most of the 19th century.

⁸⁹ *Macon & Western R.R.Co. v. Lester* 30 Ga. 911, 913–14 (1860).

⁹⁰ “Scholars have largely ignored colonial statutes as part of our legal heritage, because the statutes preceded the era of judicial review.” Hart, *supra* note, at 1294.

⁹¹ A careful reading of this Article’s footnotes will show that statutes are often referenced in cases.

⁹² Cats, however, are a special case. Several jurisdictions allows cats, but not other animals to freely roam while people, dogs, and other animals are not, *e.g.*, Maine Stat. § 4104-6.

⁹³ *Aurora Branch R.R.Co. v. Grimes*, 13 Ill. 585 (1858).

make little sense if people did not have a right to roam also. Even where livestock were fenced in, the public retained rights of access.⁹⁴ In Massachusetts, livestock could not roam, but hunters could cross unimproved land to reach public waters.⁹⁵ So, fencing in livestock does not translate into a landowner's right to exclude, but fencing livestock out invariably means the public had a right to roam.

A variety of factors, including economics, motivated enclosure. The role of race in enclosure, however, is rarely discussed and entirely neglected by contemporary discussions of the right to exclude. Courts and legislatures modified property law to prevent blacks from enjoying a right to roam or a right to public accommodation. Whatever the merits of a right to exclude, it is important to understand its origin in racism and its role in Jim Crow.

A. *The Right to Exclude Before 1860*

The common law of England gave the landowner an unqualified right to exclude people and required fencing livestock in. By statute, the colonials reversed the English rule, invariably within a few years of first settlement.⁹⁶ Virginia required farmers to fence out livestock in 1632. Maryland, North and South Carolina, and Georgia had similar legislation.⁹⁷ The pattern continued as settlement moved westward, as each territory adopted an open range.⁹⁸ The common view is that the southern colonies had dispersed settlement and an open range, while the northern colonies had compact settlements and a closed range.⁹⁹ This is partially correct, but incomplete. Villages were more common, particularly in Massachusetts. But, both the Plymouth and Massachusetts Bay colonies required farmers to fence livestock out.¹⁰⁰ Free-roaming livestock were common in many northern colonies, though enclosure began spreading from New England in the 18th century.

The open range was more than a negative rule that stopped landowners from excluding. To ensure that the right to roam would not be limited, fencing was severely restricted in several colonies. Landowners were permitted to fence only those areas under cultivation; pastures and fallow fields could not be enclosed.¹⁰¹ In South Carolina, landowners who erected

⁹⁴ This is the law in Europe. See *infra* Part IV.

⁹⁵ THE COLONIAL LAWS OF MASSACHUSETTS 119 (W. Whitmore ed., 1889).

⁹⁶ In 1632, for example, Virginia required farmers to fence livestock out of their fields "crops" or else to plant, upon their own peril." THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA at I, 199 (William W. Hening ed., 1819).

⁹⁷ Georgia was established in 1733 and legislated an open range in 1755. Session Laws; King, Jr., *supra* note , at 53; Jones v. Witherspoon, 7 Jones' L. Rev. 555 (N.C.). British colonies in the Caribbean, including Jamaica, had an open range. Stewart, *supra* note , at 22 n.36.

⁹⁸ *Id.*

⁹⁹ JOHN R. STILGOE, COMMON LANDSCAPE OF AMERICA: 1580–1845 (1982). Spanish settlements followed a third pattern; Chimayo, N.M. is discussed in some depth. *Id.* at 34–42.

¹⁰⁰ WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND 134–35 (1983).

¹⁰¹ McDonald & McWhiney, *Herdsmen*, *supra* note , at 157.

cane fences that injured stock were fined 40 shillings per injury.¹⁰² In Alabama, the penalty was fifty dollars.¹⁰³ Georgia landowners were subject to treble damages for any injuries to livestock from non-complying fences.¹⁰⁴ Fence construction was specified in great detail: height, rail spacing, and strength standards.¹⁰⁵

To understand the right to roam, it is essential to imagine a country in 1850 very different from our own today. Only a portion of the land area was under cultivation; planted fields and towns were few and far between. Fences and roads were rare. People were accustomed to crossing unenclosed land, while unfenced land was open to roaming livestock.

Since historians of the South have researched the open range in detail, the best information comes from that region.¹⁰⁶ But, sufficient evidence is available about the rest of the country to provide a convincing argument that most states recognized a right to roam until the late 19th century.

Only ten percent of the South's acreage was improved in 1850, though the figure varied considerably from state to state. As much as twenty percent of Maryland, Delaware, Virginia, and Kentucky were improved. In contrast, less than one percent of Texas and Florida was cultivated.¹⁰⁷ While fencing may be the norm today (particularly in the East), America was largely open before 1870 and fenced land was "exceptional."¹⁰⁸

Until the 1960s, food production depended on pasturing livestock. In the 18th and early 19th century, pork was America's meat.¹⁰⁹ Free-roaming hogs were an important source of meat and income for farmers, particularly smaller farmers. Released in the spring, hogs were free to roam for the summer and fall. Hogs were slaughtered in November and December after fattening on the autumn's nuts.

Historians have estimated that eighty percent of hogs were slaughtered in any given year, of which a quarter was slaughtered for market sale.¹¹⁰ In

¹⁰² RANSOM HEBBARD TYLER, *A TREATISE ON THE LAW OF BOUNDARIES AND FENCES* 490 (1876).

¹⁰³ *Id.* at 493.

¹⁰⁴ Kantor & Kousser, *supra* note 126, at 207.

¹⁰⁵ TYLER, *supra* note 102, at 490–93.

¹⁰⁶ This region included Texas, Missouri, Kentucky, Maryland, and Delaware. Between 1790 and 1830, the population was equally divided between north and south. Between 1840 and 1860, the northern population (including the Midwest) grew to almost twice the southern population. Note that many parts of the north were still unenclosed in 1860. BUREAU OF THE CENSUS, *HISTORICAL STATISTICS OF THE UNITED STATES, 1789–1940*, at 27 & Series B 48-71.

¹⁰⁷ Forrest McDonald & Grady McWhiney, *The South from Self-Sufficiency to Peonage: An Interpretation*, 85 AM. HIST. REV. 1095, 1099 (1980). Other historians favor slightly higher estimates. Hilliard argues that 87 percent of the South was either unfarmed or unimproved in 1850, falling to 82 percent in 1860. SAM BOWERS HILLIARD, *HOG MEAT AND HOECAKE: FOOD SUPPLY IN THE OLD SOUTH, 1840-1860*, 74 (1972).

¹⁰⁸ STEPHANIE MCMURRY, *MASTERS OF SMALL WORLDS: YEOMAN HOUSEHOLDS, GENDER RELATIONS & THE POLITICAL CULTURE OF THE ANTEBELLUM SOUTH CAROLINA LOW COUNTRY* 10 (1995).

¹⁰⁹ Beef would not become popular (or economical) until the opening of the prairies in the 1870s.

¹¹⁰ ROGER L. RANSOM & RICHARD SUTCH, *ONE KIND OF FREEDOM: THE ECONOMIC CONSEQUENCES OF EMANCIPATION* 151, 346–47 (1977). See also McDonald & McWhiney, *Peonage*, *supra* note 107, at n 28.

addition, livestock provided a cushion of economic security. Many small farmers raised a few head of livestock to supplement their main crop, generally corn. Since cattle and hogs were free-roaming, the return on effort was large. Profit margins on crops were “slender and uncertain,” while the gross sale price of livestock was nearly all net profit.¹¹¹

Large-scale livestock drives were a common feature of the landscape. Drives are incompatible with the right to exclude since the livestock need a wide swath of pasture, and any orchards or crops would be destroyed by the passage of so many animals.¹¹² Cattle drives in Texas after the Civil War averaged 280,000 head per year, but 4.5 million hogs were driven to market every year before the Civil War. Figures for cattle are lacking, but anecdotal figures suggest significant numbers of cattle. For example, 200 square miles of piney woods where Mississippi, Louisiana, and Alabama meet raised one million head of cattle annually.¹¹³

Not surprisingly, the law supported and encouraged one of the most important industries. Recognizing the importance of stock raising, Florida’s legislature abrogated the common law rule of trespass so that “cattle and other domestic animals [could] range and graze on all unenclosed lands, even upon the lands of another, without liability for damage.”¹¹⁴ In 1818, the South Carolina Supreme Court found that landowners did not own the grass on unenclosed land; it was “common property.”¹¹⁵ In Alabama, unfenced land was the “common pasture for the cattle and stock of every citizen.”¹¹⁶ In Mississippi, the range “by common consent, [has] been understood, from the early settlement of the State, to be a common of pasture.”¹¹⁷ Writing on the eve of the Civil War, a North Carolina court noted that “flocks and herds were, therefore, allowed to go at large, and, as early as the year 1777.”¹¹⁸ In North Carolina, it was a crime to interfere with grazing livestock on unfenced land, regardless of the underlying ownership.¹¹⁹

While the open range has received the most scholarly scrutiny in the South, the practice was common in other parts of the country. Before 1850, only a few states in the Northeast had closed the range. Illinois was fairly typical, with free-roaming cattle and hogs in the early 19th century. A horrified English commentator reported that livestock suffered “great disfigurement” since the ears were notched. Without fences to keep animals

¹¹¹ McDonald & McWhiney, *Peonage*, *supra* note 107, at 1106–07.

¹¹² Spanish property law similarly facilitated sheep drives since wool was a major export. [citation needed]

¹¹³ McDonald & McWhiney, *Peonage*, *supra* note 107, at 1107. Perhaps the cattle drives are better known because the cowboy cuts a more romantic image than the swineherd.

¹¹⁴ *Harris v. Baden*, 154 Fla. 373, 382 (1944).

¹¹⁵ *M’Conico v. Singleton*, 9 S.C.L. (2 Mill.) 244, 246 (S.C. 1818).

¹¹⁶ *Nashville & Chattanooga R.R. Co. v. Peacock*, 25 Ala. 229 (1854).

¹¹⁷ *Vickburg & Jackson R.R. Co. v. Patton*, 31 Miss. 156 (Miss.Err. & App., 1856).

¹¹⁸ *Laws v. The North Carolina R.R.Co.*, 52 N.C. 468, 469 (1860). See also *Garris v. The Portsmouth & Roanoke R.R.Co.*, 24 N.C. 324 (1842); *Aycock v. Wilmington & Weldon R.R.Co.*, 51 N.C. 231 (1858).

¹¹⁹ Forrest McDonald & Grady McWhiney, *The Antebellum Southern Herdsman: A Reinterpretation*, 41 J. SO. HIST. 147, 158 (1975)(hereinafter McDonald & McWhiney, *Herdsman*).

apart, owners had to mark their animals so ownership could be determined before slaughter.¹²⁰

In the West, an open range persisted the longest. Even where settlement was relatively thick and agriculture was viable, the open range was the norm. For example, California had an open range. The California Supreme Court noted the state was home to “vast herds of cattle, which were pastured exclusively on unenclosed land.”¹²¹

Even in the thickly-settled East, the public could use some private land. Through the early 19th century, farmers in Delaware had exclusive rights only to their own cultivated lands. In contrast, uncultivated land (mostly forest) had well-established and extensive public use rights.¹²²

The open range persisted where conditions warranted an open range. The town of Gates in upstate New York adopted the open range by statute in 1838, requiring landowners to fence and permitting livestock to “run at large.”¹²³ Even though enclosure had been the law since 1750, the New York legislature had authorized the town to institute an open range.¹²⁴

As the most valuable use of land, livestock production received the most contemporaneous comment and current scholarly attention. It would be mistaken, however, to view the right to roam as exclusively an issue of animal husbandry.¹²⁵ The economics literature, in particular, focuses on the fencing issue, while ignoring other aspects of the right to roam.¹²⁶ While it is true that the open range was an economic response to labor scarcity and land abundance, the right to roam was broader.

The right to roam developed a cultural resonance and often took on natural rights rhetoric. Courts recognized a right to roam even in cases where the public use was inefficient. Since mules were extremely valuable (and poor eating), a prudent owner would keep them fenced.¹²⁷ But, the open range even protected the foolish owner. A Georgia court refused to

¹²⁰ JOHN WOODS, TWO YEARS’ RESIDENCE ON THE ENGLISH PRAIRIE OF ILLINOIS 132-134 (1968 ed.; originally published 1822), cited in Eric T. Freyfogle, *The Enclosure of America* 15 (Illinois Public Law and Legal Theory Research Papers, No. 07-10, 2007) In England, livestock were fenced and supervised, so there was no need to mark the animals.

¹²¹ *Waters v. Moss*, 12 Cal. 535 (1859).

¹²² BERNARD L. HERMAN, *THE STOLEN HOUSE* (1992).

¹²³ *Tonawanda R.R.Co. v. Munger*, 5 N.Y. 255, 261 (1848).

¹²⁴ HOWARD SCHWEBER, *THE CREATION OF THE COMMON LAW, 1850-1880: TECHNOLOGY, POLITICS, AND THE CONSTRUCTION OF CITIZENSHIP* 137 (2004).

¹²⁵ Even where prudent husbandry would have meant fencing in livestock, courts refused to immunize railroads.

¹²⁶ In addition, the literature often mischaracterizes fencing as an issue of torts rather than property. Shawn Everett Kantor & J. Morgan Kousser, *Common Sense or Commonwealth? The Fence Law and Institutional Change in the Postbellum South*, 59 J. SO. HIST. 201, 201 (1993) (“Rarely have southern historians devoted as much attention to a simple question of torts as they have in the instance of fencing laws”). During most of this period, torts did not exist and most cases were analyzed in property terms.

¹²⁷ A good mule was even more valuable than a slave, making mules one of the most expensive investments for the farmer.

allow jury instructions requested by a defendant railroad that “mules, being of a peculiar nature, should be kept up by the owner.”¹²⁸

As a source of food and fur, hunting was an important part of the right to roam. In 1777, Vermont’s new state constitution recognized the “liberty, in seasonable times, to hunt and fowl on the land they hold, and on other lands not inclosed.”¹²⁹ Pennsylvania’s 1683 constitution authorized colonists to hunt, fish and fowl on “all other lands therein not enclosed.”¹³⁰ Pennsylvania’s delegation to the Constitution Convention proposed a parallel federal provision.¹³¹ Even where the practice was not protected by state constitution, unrestricted hunting on unenclosed land was common practice. In Kentucky, public hunting in rural areas was common in the late 18th and early 19th century.¹³² In Illinois, an English traveler was told by locals that a system that limited hunting to landowners would not be tolerated.¹³³ American courts and legislatures had repudiated English law, opening “unenclosed, undeveloped, unposted” unlike English law which “drew an invisible fence around all private property, no matter the description.”¹³⁴

Writing in 1846, William Elliot called the right to hunt on unenclosed land, a “franchise” held by the “great body of people, whether landholders or otherwise” in a popular book detailing his sporting adventures.¹³⁵ Elliot reports that the hunting tradition was so engrained that many people wanted to extend the same rights to enclosed land, at least when the pursuit of game continued onto enclosed land. Elliot despised market hunters, but the right to roam extended to commercial hunting also. Through the early 20th century, hunting guides took paying customers onto private land in Maine without permission.¹³⁶ As late as 1973, South Dakota allowed hunters to enter private land, unless it was woven fenced or had standing crops, livestock, or buildings.

¹²⁸ *The Central R.R. & Banking Co. v. Davis*, 19 Ga. 437, 438–39 (1856) (“But then, on the other hand, the company had no right to kill the mules merely for being there.”).

¹²⁹ This provision was interpreted in *Payne v. Gould*, 52 A. 421 (Vt. 1902). In addition, citizens could fish on all “boatable” waters.

¹³⁰ *Frame of Government of Pennsylvania §XXII* (1683), reprinted in WILLIAM F. SWINDLER, ED., 8 *SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS* 263, 266 (1979).

¹³¹ THOMAS A. LUND, *AMERICAN WILDLIFE LAW* 25 (1980).

¹³² Stephen Aron, *Pigs and Hunters: “Rights in the Woods” on the Trans-Appalachian Frontier*, in Andrew R.L. Clayton & Fredrika J. Teute, eds., *CONTACT POINTS: AMERICAN FRONTIERS FROM THE MOHAWK VALLEY TO THE MISSISSIPPI, 1750-1830* (1998). After then, most of the game had been hunted out.

¹³³ JOHN WOODS, *supra* note 120, at 204. Historians of early Illinois report the same. JAMES MACK FARAGHER, *SUGAR CREEK: LIFE ON THE ILLINOIS PRAIRIE* 132 (1986).

¹³⁴ Thomas Lund, *Nineteenth Century Wildlife Law: A Case Study of Elite Influence*, 33 *ARIZ. ST. L. J.* 935, 942 (2001).

¹³⁵ WILLIAM ELLIOTT, *CAROLINA SPORTS BY LAND & WATER, INCLUDING THE INCIDENTS OF DEVIL-FISHING* 166-72 (facsimile ed. 1967), cited in Freyfogle, *supra* note 120, at 20.

¹³⁶ RICHARD W. JUDD, *COMMON LANDS, COMMON PEOPLE: THE ORIGINS OF CONSERVATION IN NORTHERN NEW ENGLAND* 58-120 (1997). As late as 1882, Maine found no trespass for crossing private unimproved land and only \$1 in damages for crossing a cultivated field. *Barrows v. McDermott*, 73 Me. 441 (1882). Although the holding only addressed the ownership of a pond, the court denied an injunction excluding hunters from unimproved land. *Conant v. Jordan*, 107 Me. 227 (1910).

Although increasingly scarce game likely produced grumbling, the disputes that reached 19th century courts generally involved hunters' horses and dogs. In 1818, the South Carolina Supreme Court recognized a hunter's right to enter "unenclosed and unimproved land" even though the landowner was present and refused the hunter permission. In South Carolina, the hunter's right to enter "ha[d] never been disputed" and had been "universally exercised."¹³⁷

Fishing appears to have been a significant contributor to the food supply. Inland, trout and catfish were often caught.¹³⁸ One fishing dispute was litigated to the Michigan Supreme Court, which found that "[i]t has always been customary, however, to permit the public to take fish in all the small lakes and ponds of the State."¹³⁹ Like grazing and hunting, fishing was a significant public use of unimproved land and an important source of food for many people.

Many households relied on unenclosed land for gathering, which was more than mere hobby in the 19th century.¹⁴⁰ More than few people supplemented their diet with foraging.¹⁴¹ Pecan, hickory, chestnut, blackberry, persimmon, and several varieties of grape were widely consumed. In addition to eating fruits and berries raw, preserves were made, important variety to the winter diet. Ginseng, yellowroot, sassafras, and other herbs were gathered for their healing properties. Also, pokeweed was "avidly sought" during the spring when the greens were still tender enough to eat.¹⁴²

Whether the public had a right to log trees on unenclosed land is less clear. Unenclosed land could be used for a public mustering ground, even when that meant the cutting of over one hundred trees.¹⁴³ In South Carolina, only cultivated or ornamental trees were protected from public road commissioners.¹⁴⁴ In 1808, a Georgia court identified logging and hunting as "natural rights" in a "country which was but one extended forest."¹⁴⁵

In early America, no landowner could exclude the public. By 1868, landowners in a few states could, but all can today.

¹³⁷ "A civil war would have been the consequence of an attempt, even by the legislature, to enforce a restraint on this privilege." *M'Conico v. Singleton*, 9 S.C.L. (2 Mill.) 244 (S.C. 1818). While the right to roam was certainly treasured, this statement may reflect South Carolina's propensity for insurrection.

¹³⁸ HILLIARD, *supra* note 107, at 85–88.

¹³⁹ *Marsh v. Colby*, 39 Mich. 626 (1878).

¹⁴⁰ STEVEN HAHN, *THE ROOTS OF SOUTHERN POPULISM: YEOMAN FARMERS AND THE TRANSFORMATION OF THE GEORGIA UP-COUNTRY, 1850-1890* 58-63 (1983)(hereinafter *POPULISM*); Steven Hahn, *Hunting, Fishing, and Foraging: Common Rights and Class Relations in the Postbellum South*, 26 *RADICAL HIST. REV.* 37-64 (1982)(hereinafter *Common Rights*).

¹⁴¹ DANIEL R. HUNDLEY, *SOCIAL RELATIONS IN OUR SOUTHERN STATES* 261-73 (1860).

¹⁴² HILLIARD, *supra* note 107, at 89–90.

¹⁴³ *Law v. Nettles*, 18 S.C.L.(2 Bail.) 447 (S.C. App. 1831).

¹⁴⁴ Even trees behind a fence were subject to a "tacit reservation" for road building. *Eaves v. Terry*, 15 S.C.L. (4 McCord) 125 (S.C. App. 1827).

¹⁴⁵ *State v. Campbell*, 1 T.U.P. Charl. 167-68 (Ga. Super. Ct. 1808).

B. The Enclosure of America

The enclosure of America occurred in two stages. In the first (legal) stage, the right to roam was re-characterized as a mere license. As late as 1922, Justice Holmes maintained that a “common understanding” that the public had a license to “wander, shoot, and fish” until the owner affirmatively acted to limit access. Holmes maintained that “[a] license may be implied from the habits of the country.”¹⁴⁶ In the second stage, the implied license was replaced with the presumption that access must be authorized in advance. Note that this stage of enclosure is incomplete because many states immunize trespassers of unposted land.¹⁴⁷

Enclosure began first in New York and New England. Upon settlement, colonists rejected the English rule and restricted trespass to land under cultivation. Before the mid-eighteenth century, the public could log unfenced land in New York.¹⁴⁸ Each township could legislate for itself on fencing, but the general rule was that owners had to fence out livestock. Small farmers successfully resisted enclosure until the middle of the 18th century, when the colonial assembly began legislating enclosure.¹⁴⁹ Note that parts of upstate were not enclosed as late as 1838.¹⁵⁰ Even after enclosure, nominal damages were presumed for trespasses to unfenced land, weakening the landowner’s remedy.¹⁵¹

The development of the common law in the United States was disproportionately shaped by New York and New England, especially Massachusetts. New England had attracted settlers from England (especially East Anglia), where the everyday practices were closest to the common law. (In contrast, the South and Appalachia were peopled with Scots and Irish, in addition to English settlers.) Courts in New England were the first to publish their opinions and many treatise writers hailed from New York or New England.¹⁵² In addition, these legal elites were disproportionately urban, while the open range was rural, by definition.

Freyfogle argues that the common law relied upon by American courts was a gross simplification of the actual land tenure arrangements in Britain. Developed in royal courts, the common law did not reflect land tenure outside of southeast England. In fact, open range herding on the frontier reflected similar open range practices in Scotland and Ireland.¹⁵³ In Florida,

¹⁴⁶ *McKee v. Gratz*, 260 U.S. 127, 136 (1922).

¹⁴⁷ *E.g.*, Ariz. Rev. Stat. § 17-304.

¹⁴⁸ In addition, stone and lime could be removed. Elizabeth V. Mensch, *The Colonial Origins of Liberal Property Rights*, 31 BUFFALO L. REV. 635, 674, 725 (1982). In fact, fencing out received brief mention in the trial of John Peter Zenger. *A Brief Narrative of the Case and Trial of John Peter Zenger*, in L. RUTHERFORD, JOHN PETER ZENGER, HIS PRESS, HIS TRIAL 205 (1904).

¹⁴⁹ *Id.*

¹⁵⁰ See n. 123.

¹⁵¹ Mensch, *supra* note 148, at 725.

¹⁵² Freyfogle, *supra* note 120, at 43–44.

¹⁵³ For example, Scotland remained unfenced through the 18th century and County Donegal was unfenced until the 19th century. Grady McWhiney & Forrest McDonald, *Celtic Origins of Southern Herding Practices*, 51 J. SO. HIST. 165, 168 (1985).

California, Texas, and New Mexico, open range pastoralism reflected Spanish land tenure regimes.¹⁵⁴ For most of the people living in the United States, enclosure was foreign.

For only a minority of Americans in 1850 would enclosure have been part of their legal and cultural heritage. In 1848, an Illinois court described the open range as a custom that “the memory of man runneth not to the contrary” and “universal understanding of all classes of the community.”¹⁵⁵ A Georgia court held that enclosure “would require a revolution in our people’s thoughts and habits.”¹⁵⁶ While the open range adherents were a majority, it was the minority that determined the content of blackletter law.

Pressure for enclosure came from large landowners, but faced significant resistance from the remainder of the population. Enclosure might make land more valuable, but it would curtail the landowner’s ability to use nearby land. Most large landowners were indifferent since most could only use a small portion of their land at one time. (Labor scarcity was a defining characteristic of Colonial America and the early United States.) Even a wealthy planter like Edmund Ruffin waited twenty years before a special act of the Virginia legislature allowed enclosed plantations in Prince George County.¹⁵⁷

The process of enclosure was slow. Virginia passed its first laws allowing limited fencing in the mid-1830s with South Carolina following a decade later.¹⁵⁸ Tennessee did not permit the fencing of entire farms until the late 19th century.¹⁵⁹ Florida’s open range and forage rights survived until the 1950s.¹⁶⁰ Enclosure was not complete until 1969 in Missouri and 1978 in Mississippi.¹⁶¹ In many states, enclosure resulted from “local option” laws, which allowed a majority of voters in a county to close the range. When enclosure was defeated in the Georgia hill country, enclosure advocates resorted to misleading ballot language, gerrymandering, and fraud.¹⁶² The last of the “local option” laws were repealed in Texas, Louisiana, and Georgia after 1950, replaced finally with a closed range.¹⁶³ In many areas, the open range persisted as practice long after enclosure by law.¹⁶⁴ As late as 1986, Ellickson found that significant confusion among lawyers (including two who raised cattle also) in Shasta County over the boundaries of the closed range.¹⁶⁵

¹⁵⁴ Mart A. Stewart, *Whether Wast, Deodand, or Stray: Cattle, Culture, and the Environment in Early Georgia*, 65 AGRIC. HIST. 1, n.6 (1991).

¹⁵⁵ Seeley v. Peters, 10 Ill. 130, 141–2 (1848).

¹⁵⁶ Macon & Western Railroad Co. v. Lester, 30 Ga. 911, 914 (1860).

¹⁵⁷ McDonald & McWhiney, *Herdsmen*, *supra* note 119, at 157.

¹⁵⁸ *Id.* South Carolina was enclosed state-wide in 1881.

¹⁵⁹ *Id.* at 158.

¹⁶⁰ *Id.* at 158.

¹⁶¹ King, Jr., *supra* note, at 54.

¹⁶² Kantor & Kousser, *supra* note 126, at 229–32.

¹⁶³ McDonald & McWhiney, *Herdsmen*, *supra* note 119, at 158.

¹⁶⁴ See J. Crawford King, Jr., *The Closing of the Southern Range: An Exploratory Study*, 48 J. S. HIST. 53, 58 (1982).

¹⁶⁵ Robert C. Ellickson, *Of Coase & Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 671 (1986).

In the second half of the 19th century, classical legal reasoning came to dominate legal discourse. Legal reasoning became formal and abstract. Referring to “actual lands, to actual people, and to the customs and expectations of people who live in real places” lost in a struggle with “[a]bstract deductive reasoning.”¹⁶⁶ As an abstraction from reality, deduction leads to “simplistic ideas about ownership.”¹⁶⁷ Abstract reasoning held powerful attraction to lawmakers reaching for the prestige of science. In contrast, the proponents of the open range did not have an intellectual framework with the same appeal. The variety of open range practices had evolved from Spanish and Celtic practices, as well as frontier common sense. Without a common origin, no coherent theory of justification was forthcoming.

While the development of classical legal reasoning provided the milieu, the impetus for enclosure was often railroads. Railroads were a major driver of social change in the 19th century, in everything from corporate law to timekeeping.¹⁶⁸ Economically, railroads’ impact on shipping costs was more significant than its impact on the speed of travel. Before railroads, farmers could only ship crops to market by water, limiting the area where market agriculture was possible.¹⁶⁹

In the North, railroads also acquired a political significance beyond their economic impact. Not merely carriers of people and cargo, railroads were “carriers of republican virtue.”¹⁷⁰ In fact, railroad construction would spread American democracy abroad, for example extending “social freedom to benighted Russia.”¹⁷¹

Outside of New England, railroad construction did not begin in earnest until the 1850s. Between 1849 and 1855, 22,000 miles of track were laid and reached as far west as Iowa.¹⁷² In the 1850s, courts in the North revised the common law to accommodate and encourage railroads.¹⁷³ Railroads, however, do not require legal change or judicial subsidy. In England, railroads were taxed, rather than subsidized and judges fit railroads into the traditional common law system rather than fashioning new rules.¹⁷⁴ In fact, rules imposing liability on railroads for damage to neighbors can avoid a

¹⁶⁶ Freyfogle, *supra* note 120, at 36.

¹⁶⁷ *Id.* For the role that rights discourse played in debates over fence laws in Georgia, see Kantor & Kousser, *supra* note 126, at 215–18.

¹⁶⁸ Henry David Thoreau noted that punctuality improved and people spoke and thought quicker. WALDEN 171 (1971).

¹⁶⁹ Before railroads, livestock was driven to market, but this was expensive and time-consuming. In addition, some corn was distilled in whiskey because only whiskey was valuable enough to transport by land.

¹⁷⁰ Charles Caldwell, *Thoughts on the Moral and Other Indirect Influences of Rail-Roads*, 2 NEW ENGLAND MAGAZINE 288, 288 (Apr 1832) cited in SCHWEBER, *supra* note 124, at 27.

¹⁷¹ *American Genius and Enterprise*, 2 SCIENTIFIC AMERICAN (Sep 1847) cited in SCHWEBER, *supra* note 124, at 27.

¹⁷² ALFRED D. CHANDLER, *VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 83 (1977).

¹⁷³ SCHWEBER, *supra* note 124, at 29 et seq.

¹⁷⁴ RANDE W. KOSTAL, *THE LAW AND ENGLISH RAILWAY CAPITALISM, 1825–1875*, at 362–64 (1994).

“clamor against it, more detrimental to its interests than the value of all such damages.”¹⁷⁵

In contrast, Southern courts resisted railroad-friendly legal modernization until the 1870s, largely because railroads did not serve the interest of Southern elites, who were slave-owning planters. The South did not resist innovation because it was a backwater, unaware of legal trends elsewhere.¹⁷⁶ One of the ways in which railroads threatened slavery was the potential for escape.

Before railroads, most slaves escaped by sea; on foot, escaping slavery might take months, increasing the chance of re-capture. Once a ship set sail, it would be difficult to recapture an escaped slave.¹⁷⁷ Railroads provided another means of escape, which created resistance to their expansion. Instead of months on foot, a slave might escape to freedom in hours or days. Where railroads were built, the states quickly acted to update their laws. In states with more railroad miles (or the most railroad miles per slave), legislatures regulated railroads to prevent slaves from escaping.¹⁷⁸

Railroads did serve the interests of small-scale farmers, particularly those remote from water transport. The question of whether to encourage railroads produced significant conflict in Virginia where a majority of the white population lived in the Shenandoah Valley and Trans-Allegheny by 1860.¹⁷⁹ Since Tidewater and Piedmont planters retained all the political and legal power, few railroads were built. The issue of railroads contributed in no small way to the secession of West Virginia.¹⁸⁰

While the railroads prompted legal changes in many fields, the effect on property law and the open range was quite stark.¹⁸¹ Illinois is perhaps the clearest example of the legal transformation. As late as 1848, Illinois had an open range;¹⁸² three years later, a railroad could avoid liability for killing wandering stock.¹⁸³ But, legal innovation and enclosure progressed slowly through the 1850s. Through the decade, the common law developed gradually, showing a pattern of trial and error.¹⁸⁴

Before the Civil War, the South preserved the traditional rule that livestock must be fenced out.¹⁸⁵ That livestock was killed on a railroad track

¹⁷⁵ Clark v. Virginia & Tennessee Railroad Co., 4 QUARTERLY LAW JOURNAL 280, 298 (Circuit Court of Washington County, 1859).

¹⁷⁶ Schweber, *supra* note 124, at 187.

¹⁷⁷ By statute in 1855, Virginia required ships leaving port to be searched for escaped slaves because so many slaves were escaping by sea. SCHWEBER, *supra* note 124, at 187.

¹⁷⁸ JENNY BOURNE WAHL, THE BONDMAN'S BURDEN: AN ECONOMIC ANALYSIS OF THE COMMON LAW OF SOUTHERN SLAVERY 95, 97–99 (1998).

¹⁷⁹ SCHWEBER, *supra* note 124, at 150.

¹⁸⁰ *Id.* at 158.

¹⁸¹ For example, a digest of Illinois law in 1856 had no entry for negligence. Three decades later, hundreds of cases were listed. *Id.* at 37–38.

¹⁸² Seeley v. Peters, 10 Ill. 130 (1848).

¹⁸³ Alton & Sangamon R.R.Co. v. Baugh, 14 Ill. 211 (1852).

¹⁸⁴ SCHWEBER, *supra* note 124, at 197.

¹⁸⁵ Murray v. The South Carolina R.R.Co., 10 Rich. L. Rev. 227 (S.C. App. L. 1857).

was considered *prima facie* evidence of negligence.¹⁸⁶ When states in the South adopted these rules, the transition was abrupt. Lagging states adopted the law wholesale from national digests.¹⁸⁷ Kentucky was the first southern state to close the range in 1859, imposing an “obligation upon the owners of cattle to keep them off the tracks of railways.”¹⁸⁸ The reasoning is familiar: “[s]peed in transit, and exact punctuality . . . are lawful, and the vital interests of the public.”¹⁸⁹

Like all realignments of rights, the enclosure of America sparked conflict. Railroads produced many of the conflicts, since the rights of way disrupted prior land use arrangements.¹⁹⁰ In addition, trains moved at great speed and often killed livestock.¹⁹¹ In the South, there were railroad livestock cases from many states including Alabama, Georgia, and Mississippi.¹⁹² While ranchers in the South were successful in getting compensation, northern farmers were not. In response, Michigan ranchers took matters in their own hands and destroyed track and depots.¹⁹³ In South Carolina, “some classes” burnt and destroyed fences in response to a law barring free-roaming hogs in two counties.¹⁹⁴

Public access was the norm in the thinly-settled periphery of the northeast. When Orrando P. Dexter enclosed 7000 acres in the Adirondacks and prosecuted trespassers, he was shot and killed. “[E]ven the local school children knew the name of the murderer, but no charges were ever filed.”¹⁹⁵ His neighbors had been long accustomed to hunting, fishing, and gathering firewood on his private land, but courts would not recognize their custom.

Railroads may have been one impetus for enclosure, but other economic forces were at work also. Specialization, increasing incomes, and population growth contributed to the pressure for enclosure. Transportation improvements allowed more farmers to abandon subsistence agriculture and specialize.¹⁹⁶ With specialization, fewer farmers relied on free-roaming livestock to supplement a small plot of corn. In addition, increasing prosperity meant that foraging and hunting were less important. Rising incomes allowed farmers to substitute away from forage and home production to higher prestige, store-bought food. Increasing populations

¹⁸⁶ *Danner v. The South Carolina R.R.Co.*, 4 Rich L. Rev. 329 (S.C. App. L. 1851); *but see* *Wilson v. The Wilmington & Man R.R.Co.*, 10 Rich. L. Rev. (S.C. App. L. 1857)(no liability for killing a dog).

¹⁸⁷ Redfield’s *LAW OF RAILROADS* (1867) and *SHERMAN AND REDFIELD ON NEGLIGENCE* (1869) were particularly influential. *Id.* at 197–98.

¹⁸⁸ *Louisville & Frankfort R.R.Co. v. Ballard*, 59 Ky. 177, 181–83 (1859).

¹⁸⁹ *Id.*

¹⁹⁰ SCHWEBER, *supra* note 124, at 38–42.

¹⁹¹ The Alabama legislature outlawed “salting” railroad tracks since some livestock owners lured their charges to an untimely end. King, Jr., *supra* note 164, at 62.

¹⁹² *Vicksburg & Jackson R. Co. v. Patton*, 2 George 156, 31 Miss. 156 (Miss. Err. & App. 1856).

¹⁹³ Freyfogle, *supra* note 120, at 13. Detroit’s depot was burned to the ground. SCHWEBER, *supra* note 124, at 63.

¹⁹⁴ King, Jr., *supra* note 164, at 55.

¹⁹⁵ PHILLIP G. TERRIE, *CONTESTED TERRAIN: A NEW HISTORY OF NATURE AND PEOPLE IN THE ADIRONDACKS* 123 (1997).

¹⁹⁶ Kantor & Kousser, *supra* note 126, at 213–14.

played a role, by expanding the area under cultivation and hence the fencing required.¹⁹⁷

The changing economics of fencing plays a major role in the impetus for and the timing of enclosure. In the well-watered East, plentiful timber made fencing feasible.¹⁹⁸ On the prairie, there was no stone or timber for fencing, but low rainfall meant there were no crops to protect either. In both landscapes, an open range made sense. Deforestation, particularly in the East, changed the landscape, making fencing more expensive, at least until the 1870s.¹⁹⁹ In addition, the expansion of railroads – which need timber for ties, bridges, rolling stock, and stations – pushed up the price of timber and made fencing less economical, thereby increasing the pressure for enclosure.²⁰⁰

The increasing cost of fencing changed the balance of interests underlying the right to roam in the East. As fencing became more expensive, the burden on farmers of fencing livestock out increased. In addition, shrinking forests meant that hunting and forage were less important. When the range was thrown open in the early colonial period, that decision reflected a balance of interests that favored hunters and livestock. By the mid-19th century, the balance of interests was quickly shifting in favor of farmers.²⁰¹ Both factors contributed to enclosure in the East, which occurred before the enclosure of the West.

While expensive fencing contributed to enclosure in the East, it was cheap fencing that led to enclosure in the West. Pressure for enclosure in the West only appears after barbed wire.²⁰² Without trees or even many stones, there was no way to keep livestock from roaming before barbed wire. After the 1870s, economical fencing made it cheaper to fence livestock in than out.²⁰³ As the economics of fencing changed, the balance of interests underlying the open range changed.

Timber interests showed little interest in enclosure in the 19th century, but played a major role by the early 20th century. Deforestation in the previous century meant that in the 20th century lumber companies depended on reforestation, which rooting hogs disrupted.²⁰⁴

In the South, the end of slavery prompted enclosure. Freedman resisted returning to the same plantations where they had been slaves. How to re-impose plantation labor on blacks was called the “question of labor control.”²⁰⁵ If blacks could hunt, fish, forage, and let their hogs roam free,

¹⁹⁷ Kantor & Kousser, *supra* note 126, at 208–09, 236.

¹⁹⁸ In New England, stone fences were common. Stone fences require more effort, so the farmers would have used timber if the stones could have been left in the fields.

¹⁹⁹ BERNARD L. HERMAN, *THE STOLEN HOUSE* (1992).

²⁰⁰ Kantor & Kousser, *supra* note 126, at 215.

²⁰¹ In contrast, McDonald & McWhiney portray enclosure and the consequent replacement of pastoralism with cash crops impoverishing for the small farmer, while serving the interests of the large landowner and shopkeeper. McDonald & McWhiney, *Peonage*, *supra* note 107, at 1116–18.

²⁰² Joseph Glidden patented barbed wire in 1874.

²⁰³ Kantor & Kousser, *supra* note 126, at 242.

²⁰⁴ King, Jr., *supra* note 164, at 62–63.

²⁰⁵ Hahn, *Common Rights*, *supra* note 140, at 43.

there would be little need to return to plantation labor. Denying blacks the opportunity to forage, hunt and let their hogs roam would increase their dependence on white landowners.²⁰⁶ Planters reported the blacks withdrew from the labor force when fishing or foraging was good.²⁰⁷ One commentator wrote: “Game is getting scarce where it was once plenty, because every vagabond negro that can get a three-dollar gun . . . [is] killing everything that flies.”²⁰⁸ In 1866, Georgia and Louisiana enacted trespass laws that imposed large fine or imprisonment for anyone entering land without the landowner’s permission.²⁰⁹

A closed range limited the ability of sharecroppers to make the leap to landownership by increasing the minimum parcel size needed.²¹⁰ If the owners of small parcels could let their hogs roam and collect forage and firewood, then owners could survive on a smaller parcel. If, however, landowners had to rely entirely on their own land, the smallest viable farm would have to be larger, making the leap from sharecropping to owning even larger. The effect of enclosure was apparent at the time: “the stock law will divide the people of this county into classes similar to the patricians and plebeians of ancient Rome.”²¹¹ Put more briefly, enclosure “would keep the negroes more confined.”²¹² Economic self-sufficiency would provide blacks with alternatives that whites did not want them to have, so lawmakers obliged by enclosing the South.

Alabama and Mississippi provides a more or less typical example of postbellum enclosure by legislation and ballot. In 1866, Alabama created the Canebrake Agricultural District, where commissioners elected by landowners (hence no black voters) could close the range and fence the district. Later the same year, Mississippi created an adjacent agricultural district.²¹³ Also in 1866, Alabama (and Mississippi) each closed the range in one county by state legislation. County-specific legislation closing the range was repeated dozens of times.²¹⁴ More common was “local option” legislation, where the state legislature authorized a county decision, either by the county government or by public vote.²¹⁵ Eventually, enclosure was authorized more broadly; state-wide local option laws were adopted in 1872

²⁰⁶ HAHN, *POPULISM*, *supra* note 140.

²⁰⁷ Hahn, *Common Rights*, *supra* note 140, at 44.

²⁰⁸ Old Sport, *Muskets, Darkies, and Game*, 16 *FOREST AND STREAM*, at 208 (1881). *See also The Freedman and the Quail*, 20 *FOREST AND STREAM*, at 87 (1883).

²⁰⁹ Hahn, *Common Rights*, *supra* note 140, at 45.

²¹⁰ Although commonly associated with Jim Crow, sharecropping predated the Civil War and many whites were sharecroppers also. Before 1870, landowners experimented with wage labor, but freedmen preferred the autonomy of sharecropping. The arrangements negotiated between landowners and farmers were varied. In addition to sharecropping, share and cash tenancy was common. More successful sharecroppers could acquire a mule and negotiate for a better share of the harvest.

²¹¹ Kantor & Kousser, *supra* note 126, at 224. Open range laws were called fence laws, while enclosure was often called the stock law.

²¹² Hahn, *Common Rights*, *supra* note 140, at 46.

²¹³ King, Jr., *supra* note 164, at 58.

²¹⁴ *Id.* at 58–59.

²¹⁵ In Mississippi, voting was limited to landowners. *Id.* at 59.

in Georgia, Mississippi in 1892 and 1903 in Alabama.²¹⁶ In 1880, sixty percent of Alabamians lived in enclosed counties, but those counties had eighty-one percent of the black population.²¹⁷ Opponents of enclosure often were accused of being pro-black, the political trump card in the Jim Crow era.²¹⁸

Elsewhere, courts closed the range; Virginia is a fairly typical example. A Virginia court wrote in 1857 that “[t]here is nothing in the laws of Virginia compelling persons to keep their stock enclosed.”²¹⁹ After the Civil War, Virginia’s highest court adopted Northern rules immunizing railroads. In language that would have shocked antebellum jurists, free-roaming horses were found to be “vagrant, trespassing.”²²⁰

C. Closing Public Accommodations

The right to exclude from unimproved land, called enclosure, has a parallel, the right to exclude from private property town. Today, the common belief is that the common law granted owners the right to exclude without limitation. The nominally race-neutral right to exclude was used to exclude blacks from shops, restaurants, and other privately-owned public places. Where segregation was not the law, innkeepers and common carriers were obliged to serve blacks. The intuition is that travel is different, either because of local monopoly or the special vulnerability of travelers. Singer argues this intuition is wrong.²²¹

Blackstone applies the common law obligation to a broader category, including farriers, tailors, and “other workmen.”²²² The reasoning in early cases suggests In *Lane v. Cotton*, the innkeeper’s duty to serve the public arose not from a local monopoly or the special vulnerability of travelers, but instead because the innkeeper has “made a profession of a trade which is for the public good.”²²³ In *Markham v. Brown*, an innkeeper could not expel a stagecoach driver for soliciting business, only for being violent or

²¹⁶ In 1939, Alabama reversed the presumption: the range was closed state-wide, but counties could vote to open the range. *Id.* at 60.

²¹⁷ King, Jr., *supra* note 164, at 64–65.

²¹⁸ Kantor & Kousser, *supra* note 126, at 224.

²¹⁹ *Hunter v. Baltimore & Ohio R.R.Co.*, 2 *Quarterly Law Journal* 253 (Circuit Court of Marshall County, 1857).

²²⁰ *Trout v. Virginia & Tennessee Railroad Co.*, 24 *Vir.* 617, 635 (1873). Still, Trout prevailed.

²²¹ Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 *Nw. U. L. Rev.* 1283 (1995-1996).

²²² 3 WILLIAM BLACKSTONE, COMMENTARY ON THE LAWS OF ENGLAND 165–66 (Edward Christian ed., 15th ed. 1809). See also Matthew O. Tobriner & Joseph R. Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 *Calif. L. Rev.* 1247, 1249–50 (1967) (arguing that blacksmiths, food vendors, veterinarians, tailors also had a duty to serve the public).

²²³ 88 *Eng. Rep.* 1458, 1464–65 (K.B. 1701). Note that no one proposed to exempt innkeepers in cities from the common law obligations. Singer, *supra* note 221, at 1320.

disruptive.²²⁴ The general license extended even to those who were not guests.

The earliest case in which a public place can exclude without providing justification comes from Massachusetts. In *McCrea v. Marsh*, the Supreme Judicial Court sanctioned the Howard Athenæum's refusal to seat blacks at a public lecture.²²⁵ Singer notes that it is not a coincidence that the first limitation on the public's right to be served concerns a black man.²²⁶ Abolishing the right of access for everyone, black and white, has the benefit of appearing race neutral on the surface.²²⁷

Landowners received the right to exclude from public accommodations around the same time that they received the right to exclude from unimproved land. This is no mere coincidence.²²⁸ The rise of legal classicism may have provided the intellectual cover, but the impetus for both, at least in part, was racism. After 1868, blacks were citizens and therefore could not be refused entry to unimproved land or public accommodations. Jim Crow would take decades to implement, but courts could, and did, quickly grant landowners a right to exclude, which was used to bar blacks from businesses and unimproved land.

IV. The Right to Exclude Elsewhere

This Part will show that many of our peer countries do not recognize an absolute right to exclude. The countries chosen are similar to the United States in wealth, urbanization, and respect for rule of law.²²⁹ It is worth noting that the government in the United States plays a much larger role in managing land than in Europe.²³⁰ Particular attention will be paid to England and Scotland, the source of our legal system. But, property rights in Scandinavia and on the Continent will also be discussed since these countries are nice places to live. Each country's rights of public access reflect that

²²⁴ 8 N.H. 523, 525–6, 530–31 (1837). See also *Adams v. Freeman*, 12 Johns. 408 (N.Y. Sup. Ct. 1815) (“Any person professing to keep an inn, thereby gives general license to all persons to enter his house.”)

²²⁵ 78 Mass. (12 Gray) 211 (1858). See also *Burton v. Scherpf*, 83 Mass. (1 Allen) 133 (1861). Both cases relied on *Wood v. Leadbitter*, 153 Eng. Rep. 351 (Ex. 1845) (places of entertainment have no duty to serve the public).

²²⁶ Singer, *supra* note 221, at 1340.

²²⁷ *Id.* at 1350. Although developed to permit segregation, the right to exclude has developed an aura of sacredness to some commentators. Epstein calls the “the right to exclude others without the need for any justification . . . the essence of freedom.” RICHARD EPSTEIN, *TAKINGS* 65–66 (1985).

²²⁸ Incidentally, both Virginia and North Carolina adopted the rule of contributory negligence to bar the recovery by free blacks. *Richmond & Danville R.R.Co. v. Morris*, 31 Vir. 200 (1878); *Manly v. Wilmington & Weldon R.R.Co.*, 74 N.C. 655 (1876).

²²⁹ Legal scholarship often ignores the developing world and this Article is not an exception. With a majority of the world's population, the developing world is not unimportant. But, poor countries are not known for their property rights, so those legal regimes do not make for a good comparison.

²³⁰ For example, 95 percent of Denmark is privately owned. PETER SCOTT, *COUNTRYSIDE ACCESS IN EUROPE: A REVIEW OF ACCESS RIGHTS, LEGISLATION AND PROVISION IN SELECTED EUROPEAN COUNTRIES* 5 (1991). In contrast, one-third of the United States is public land.

nation's terrain, priorities, and character; Austrians, for example, love the mountains and Danes loves the seashore.

The use of foreign law as precedent has attracted considerable controversy in recent years. This Article does not rely on foreign law as evidence as a matter of *law*. Instead, this Part relies on foreign law as a *factual* matter. The European experience can tell us whether a right to roam destroys private property.²³¹

A. *The British Isles*

In Britain, the public has two types of access rights: footpaths and a statutory right to roam. Although England and Wales have 130,000 miles of footpaths,²³² most Britons would have access to open land without a right to roam. One percent of the population owns fifty-two percent of the land.²³³ Before enclosure, commoners had a variety of rights on common land, including the right to roam.²³⁴ Enclosure abolished most public rights of use, including the general right to roam.²³⁵ Footpaths, however, were generally protected, either by specific language in the enclosure order or by doctrines of dedication or prescription.²³⁶ The public has the right to travel by foot or horse along the footpath, regardless of the underlying landownership (which is overwhelmingly private). The landowner may not restrict or even discourage access.²³⁷ If a landowner wants to re-route a footpath, local government will not approve a “substantially less convenient” diversion.²³⁸

Enclosure allowed landowners to reorganize farming to increase profits, by shifting to wool production from crop cultivation or mixed farming. The

²³¹ Although one could plausibly argue that we should borrow from European law, particularly where it is clearly superior, this Article will not make that argument.

²³² Anderson, *Roam*, *supra* note 235, at 381.

²³³ RICHARD NORTON-TAYLOR, *WHOSE LAND IS IT ANYWAY? AGRICULTURE, PLANNING, AND LAND USE IN THE BRITISH COUNTRYSIDE* 23 (1982). See Part IV.A. for U.S. figures.

²³⁴ In addition, commoners had the right to graze a certain number of livestock on the village common, cut firewood, and take rock or gravel. G.M. TREVELYAN, *ENGLISH SOCIAL HISTORY*, 35-37 (2000). In addition, commoners could gather fruits, nuts, herbs, and roots. J.M. NEESON, *COMMONERS: COMMON RIGHT, ENCLOSURE AND SOCIAL CHANGE IN ENGLAND, 1700-1820*, at 169-70 (1993).

²³⁵ Parliament passed the first enclosure act in either 1564 or 1606, but the pace greatly accelerated between 1760 and 1840. Jerry L. Anderson, *Britain's Right to Roam: Redefining the Landowner's Bundle of Sticks*, 19 *GEO. INT'L ENVTL. L. REV.* 375, 384 (2007) [hereinafter Anderson, *Roam*]. Twenty percent of Britain were enclosed between 1750 and 1830. Today, the village of Laxton in Nottinghamshire is last common field system in Britain. John Cannon, *Enclosures*, *THE OXFORD COMPANION TO BRITISH HISTORY* (2002).

²³⁶ *Inter alia*, *Poole v. Huskinson*, 11 M. &W. 827, 828 (1843) (Exch. Div.) (Eng.) and *Eyre v. New Forest Highway Bd.*, 56 J.P. 517 (1892); see also SIR ROBERT HUNTER, *THE PRESERVATION OF OPEN SPACES AND OF FOOTPATHS AND OTHER RIGHTS OF WAY* 316 (2d ed. 1902), cited in Anderson, *Roam*, *supra* note 235, at n.48.

²³⁷ For example, a landowner is generally prohibited from keeping a bull in any field crossed by a footpath. See *Wildlife and Countryside Act, 1981*, ch. 69, pt. III, § 59., cited in Anderson, *Roam*, *supra* note 235, at n.39.

²³⁸ *Highways Act, 1980*, ch. 66, § 119(6) (Eng.), cited in Anderson, *Roam*, *supra* note 235, at n.40

loss of common rights generally made the poor worse off.²³⁹ Small holders and the landless poor were more likely to rely on gleaning, forage, and common use rights. By increasing the flow of people to cities, enclosure served the interests of urban elites also.

New pastimes among the elites also prompted enclosure. Pheasant, red grouse, and deer hunting increased in popularity in the 19th century and spurred enclosure in England and Scotland.²⁴⁰ The red grouse, in particular, requires very specific ecological conditions, strongly encouraging landowners to enclose. Additionally, Romanticism produced a fashion for “polite landscapes,” which had no rude peasants and busy agriculture. In order to create these pastoral idylls, footpaths were blocked, farmers expelled, and villages flooded. The picturesque ruin of chapel is often the only sign that a village was razed to create a playground for the gentile.²⁴¹

Enclosure was strongly opposed by most Britons, but commoners have left few records. The poet John Clare does provide a contemporaneous lament for enclosure: “Each tyrant fixt his sign . . . inclosure thourt a curse upon the land”²⁴² Perhaps the most common recorded protest to enclosure and emparkment was riot and poaching.²⁴³ In court, commoners had mixed luck in preserving historic uses.²⁴⁴ Courts did not recognize any rights held by the public; only locals or some other narrowly defined group could hold a right.²⁴⁵ Even where the court could identify a narrow group holding (e.g. villagers), a right to roam was not recognized, since it would seemingly defeat the purposes of enclosure.²⁴⁶ Where the evidence for public use was overwhelming, courts opted to treat the use as permissive, thereby defeating the public right to continuing use.²⁴⁷

²³⁹ WILLIAM HOLDSWORTH, *A HISTORY OF THE ENGLISH LAW* at IV: 391 (1924); W.R. CORNISH & G. DE N. CLARK, *LAW AND SOCIETY IN ENGLAND, 1750–1950* at 137 (1989). In contrast, enclosure in France in 1793 was progressive. Kathryn Norberg, *Dividing Up the Commons: Institutional Change in Rural France, 1789–1799*, 16 *POLITICS AND SOCIETY* 265 (1988).

²⁴⁰ SHOARD, *supra* note 268, at 121–27.

²⁴¹ SHOARD, *supra* note 268, at 110–14.

²⁴² John Clare, *EARLY POEMS II* quoted in J. Goodridge, *Pastoral and Popular Notes in Clare’s Enclosure Elegies* 141 in *THE INDEPENDENT SPIRIT: JOHN CLARE AND THE SELF-TAUGHT TRADITION* (J. Goodridge, ed., 1994)

²⁴³ Most riots were local and sporadic, the Midland Revolt of 1607 is a rare example of coordinated, widespread rioting. Several thousand people rioted for over a month. SHOARD, *supra* note 268, at 143, 148; HOLDSWORTH, *supra* note 239, at 367.

²⁴⁴ *Steel v. Houghton et Uxor*, (1788) 126 Eng. Rep. 32 (C.P.) (no right to glean); *Abbott v. Weekly*, 1 Lev. 176, 176-77 (1665) (permitting dancing on village green); *Mounsey v. Ismay*, 1 Huelst. & Coltm. 729 (1863) (authorizing horseracing); *Cox v. Glue*, 5 C.B. 533 (1848) (permitting grazing and horse racing between July 6 and February 14, but not disturbing the soil with tent stakes); *Fitch v. Rawling*, *Fitch & Chatheiss*, 126 Eng. Rep. 614, 614-15 (C.P. 1795) (allowing villagers, but not others, to play cricket).

²⁴⁵ “Customs must in their nature be confined to individuals of a particular description, and what is common to all mankind, can never be claimed as a custom.” *Fitch v. Rawling*, *Fitch & Chatheiss*, at 616–17. Cf. “But it does not follow that a custom, established in fact, cannot have regional application and be enjoyed by a larger public than the inhabitants of a single village.” *State ex rel. Thornton v. Hay*, 254 Or. 584, 598 & n.6 (1969) (citations omitted).

²⁴⁶ *Schwinge v. Dowell*, (1862) 175 Eng. Rep. 1314.

²⁴⁷ *Folkestone Corp. v. Brockman* [1914] A.C. 338.

In the great sweep of British history, the early 20th century was the nadir of the public right to roam and the zenith of the landowners right to exclude. Since then, Parliament has gradually expanded public rights to roam in Britain. After a celebrated confrontation between hikers and (this being England) the landowners' servants, Parliament passed the Access to Mountains Act in 1939. Ten years later, Parliament expanded public rights with the National Parks and Access to the Countryside Act, which mapped public rights of way.²⁴⁸

In 2000, Parliament responded with the Countryside and Rights of Way Act ("CRoW"). In England and Wales, the CRoW grants a right to roam over registered common land and "open country," defined as "mountain, moorland, heath and downland."²⁴⁹ Cultivated land, including a park or garden, is excluded.²⁵⁰ Landowners were protected from liability, but received no compensation.²⁵¹ In addition, the public cannot hunt, fish, camp, cycle, ride, swim, forage or disrupt lawful activities.²⁵²

Unlike rights to roam in other countries, the CRoW requires governmental action before public access is permitted. The CRoW directs the Countryside Agency to map all common land and open country, a process including drafts, comments and multiple appeals.²⁵³ The first provisional maps were issued in 2004.²⁵⁴ Since the process of identifying open country is still ongoing, no final figure for the total area affected by the CRoW is available. However, the figure of twelve percent of England and Wales is generally accepted.²⁵⁵ Since thirty percent of the coast remained off-limits, subsequent legislation has expanded public access to the shoreline following the CRoW model of time-consuming mapping.²⁵⁶

The CRoW did not apply to Scotland or Northern Ireland, which have devolved legislatures. In 2003, the Scottish Parliament formalized the tradition of unhindered access to unimproved land in the Land Reform (Scotland) Act. Article 1 of the Act created a statutory right of access to Scotland's outdoors, from "open spaces in towns to the remote and wild areas of land and water."²⁵⁷ To provide the public and landowners with

²⁴⁸ Anderson, *Roam*, *supra* note 235, at 402–03.

²⁴⁹ Countryside and Rights of Way Act [CRoW], 2000, c. 37, § 1, (Eng.).

²⁵⁰ Countryside and Rights of Way Act [CRoW], 2000, ch. 37, sched. 1 (Excepted Land) (Eng.).

²⁵¹ Anderson, *Roam*, *supra* note 235, at 408. Estimates of the cost imposed on landowners range from 6p to 51p per hectare, although a few estimates were as high as £8.70. Anderson, *Roam*, *supra* note 235, at 404–05. Needless to say, landowner estimates were much higher, ranging from £29 to £37 per hectare. Anderson, *Roam*, *supra* note 235, at 405.

²⁵² *Id.* sched. 2. Although the right to roam is always limited by the obligation to tread considerately, the last prohibition is likely meant to constrain Britain's animal rights activists.

²⁵³ In Wales, the Countryside Council for Wales would produce the map. Registered common land and land above 600m was declared open country without mapping. *Id.* § 1, 4–8.

²⁵⁴ Anderson, *Roam*, *supra* note 235, at 407.

²⁵⁵ Giles Wilson, THE WALK THAT CHANGED BRITAIN, BBC NEWS ONLINE, April 26, 2002, cited in Anderson, *Roam*, *supra* note 235, at 407. Unfortunately, comparative figures are lacking, so it is difficult to evaluate whether the CRoW grants significantly less access than other open access regimes.

²⁵⁶ Marine and Coastal Act 2009.

²⁵⁷ Scottish Outdoor Access Code 1.1

guidance and reduce conflict, the Scottish Parliament approved an Outdoor Access Code.²⁵⁸ In contrast to England and Wales, Scots can roam in farmland, grassland, and forest.²⁵⁹ In addition, the public can camp, swim, cycle, and ride, none of which is permitted farther south.²⁶⁰ Commercial access is permitted, e.g., a “mountain guide who is taking a customer out hill-walking.”²⁶¹ As in England, the right to hunt and fish continues to run with the land.²⁶² Rights of way and access to the foreshore are unaffected.²⁶³

B. Scandinavia and the Continent

In Sweden, the public right to roam is called the *allemansrätten*, or everyman’s right. In 1994, the customary right to roam was recognized explicitly in the Swedish constitution. The public can roam, picnic, camp, and gather berries and mushrooms. Although the public can swim and canoe, freshwater fishing is private, except for the five largest lakes.²⁶⁴

In Norway, the customary rights to roam were codified in 1957 as part of the Outdoor Recreation Act. Land is either *utmark* (open land) or *innmark*, where landowners can exclude. *Innmark* is very carefully defined and delineated, all other land is *utmark*. Cultivated fields may only be crossed when covered by snow. Landowners retain hunting and freshwater fishing rights.

In Finland, the *jokamiehenoikeus* gives the public the right to walk, ski, cycle, or ride, except near homes. During the (brief) growing season, the public cannot cross or disturb cultivated fields. In addition, the public can camp, but not for extended periods. The public can also gather berries, fruits, and flowers, unless the species is protected. Campfires are not permitted, but boating and fishing are.²⁶⁵

Denmark is the most crowded of the Scandinavian countries and also the one with the most influence from the Continent. Denmark had public access traditions similar to other Scandinavian countries, but landowners gained the right to exclude by statute in 1873.²⁶⁶ Denmark recognizes the most limited public access rights in Scandinavia: dry sand, sand dunes, heath, and forest.²⁶⁷ Danes have free access to all forest owned by the state or official

²⁵⁸ *Id.* at 1.4

²⁵⁹ The Code is quite specific. It notes that access rights do not apply to bird rearing pens, factories, warehouses, military bases, quarries, airports, chemical plants, sewage treatment plants, or football pitches while a match is in progress. *Id.* at 2.11 It notes that the right to roam allows the public to cross a golf course, but not play for free. *Id.* at 2.2.

²⁶⁰ *Id.* at 2.

²⁶¹ *Id.* at 2.9

²⁶² *Id.* at 2.

²⁶³ Like the United States, the public can fowl, fish, forage, and even light fires on the foreshore. *Id.* at 2.18.

²⁶⁴ NATURVARDsverket [Swedish Environmental Protection Agency], ALLEMANSRÄTTEN (2009).

²⁶⁵ For a very cheerful brochure, see FINNISH MINISTRY OF THE ENVIRONMENT, EVERYMAN’S RIGHT IN FINLAND (2007).

²⁶⁶ SCOTT, *supra* note 230, at 84.

²⁶⁷ The Nature Protection Act 1992. *Id.* at 86.

church.²⁶⁸ In privately owned woodland, all paths and roads are open to the public during the day. On all private land, dogs must be kept on a leash.²⁶⁹

In the Alps, there is a strong tradition of hiking. In Switzerland, the 1907 civil code incorporated the ancient custom of free access: “Everyone has free access to other people’s forests and grazing lands and may take berries, mushrooms, and other small fruits.”²⁷⁰ In addition, the public can use most paths and roads, even on private land. Shoreline access was lost to development (mostly enclosed lakeside gardens), so the federal government has restricted shoreline development to permit free passage. Several cantons have gone farther; Bern requires municipal governments to establish paths along lakes and rivers.²⁷¹

In Austria, the right to roam in forests, or *Wegefreiheit*, was codified in federal law in 1975. The public may travel on foot and rest, but may not ride, cycle, and camp. The right to roam varies from state to state. Carinthia, Styria, and Salzburg guarantee a right to roam above the tree line.²⁷² In Tyrol, Burgenland, and Lower Austria, landowners can exclude the public, although this is rare.

In Slovenia, the right to roam includes hunting, fishing, and foraging. Like elsewhere in the Alps, hiking is a national obsession and the countryside is honeycombed with trails. Fencing is severely restricted because it restricts access and detracts from the visual appeal. Where fencing is necessary, temporary electric fencing is strongly encouraged to minimize the visual disruption.

In Germany, hikers head for the forests, largely because most of the terrain is quite flat. Increasing leisure and prosperity in the post-war years brought city dwellers into the countryside. But, many forests were closed to the public because the land was leased for hunting. In 1969, North-Rhine Westphalia (which includes Bonn, Cologne, and Aachen) granted the public a right to outdoor recreation in all wooded areas. The Federal Forest Act extended forest access to the entire country in 1975. When fears of environmental damage proved unfounded, the federal government extended public access to rough grasslands, heath, marsh, unused meadows, fallow land, and all paths and roads (except where near a dwelling or through a farmyard).²⁷³

Elsewhere, the public has no general right to roam, but some access to the sea. In Portugal, public access extends 50m inland from the high water mark.²⁷⁴ In Spain, the strip of public access ranges is only 6m (in some

²⁶⁸ The state owns 31 percent of Denmark’s forests. MARION SHOARD, *A RIGHT TO ROAM* 271 (1999).

²⁶⁹ The Danish Parliament progressively decreased the size of the woodlot subject to public access in 1969, 1984, and again in 1992. *Id.* at 271–72.

²⁷⁰ *Id.* at 274.

²⁷¹ *Id.* at 274–75. Note that areas used by the Swiss military for practice are open to the public and often unmarked. Hikers are encouraged not to touch any plastic, metal, or disturbed ground in these areas, or allow their children to do so.

²⁷² See also *THE SOUND OF MUSIC* (20th Century Fox 1965).

²⁷³ SHOARD, *supra* note 268, at 269–70.

²⁷⁴ Law 54/2005 (Portugal).

places 20m), which must be unimpeded, public, and free.²⁷⁵ In France, the public can stroll beside canals and canalized rivers.²⁷⁶ In addition, the public can enjoy a 3m strip along the shore. In the Netherlands, the public has free access only to the seashore. In addition, public use of waterways and canals is tolerated.²⁷⁷

C. *The European Consensus*

Although the right to roam varies considerably across Europe, there are a few common features. The core characteristic is a balancing between the landowner's privacy and the public's interest in outdoor exercise. Although the balance varies from country to country, there are few elements recognized across Europe. No European country recognizes a right to roam near homes or buildings. No European country recognizes the right to damage the land or interfere with other uses. Motor sports and livestock are not permitted.

Where do the Europeans differ amongst each other? Some countries allow cycling and horseback riding, others allow foraging. A few countries recognize a right to camp for a short period, but most do not. Federal countries have either entirely devolved questions of access or permit substantial local autonomy. Austria has no national legislation, while Germany and Switzerland have a mix of national and local regulation.

V. Reviving the Right to Roam

What, then, does this Article propose? *Kaiser Aetna* appears to have inappropriately federalized property law; the solution is to return this matter to the states. Some states may increase public access, while others may choose to retain the status quo. The states are better positioned than federal courts to decide, say where gathering berries is appropriate. Our national landscape is varied and so should our property law be.

A. *The Economics of Exclusion*

Two largely specious arguments have been advanced for a broad right to exclude.²⁷⁸ The first argument is that an qualified right to exclude, often termed the boundary approach, is more efficient because it minimizes the cost of determining rights. Ellickson and Smith both argue a broad right to exclude is less costly since it is simpler.²⁷⁹ While intellectually less costly,

²⁷⁵ 1988 Coasts Act

²⁷⁶ SCOTT, *supra* note 230, at 22

²⁷⁷ *Id.* at 64.

²⁷⁸ Broader property rights are often mistakenly termed stronger rights. More accurately, strong rights should refer to those rights that receive robust protection from governmental or private intrusion.

²⁷⁹ Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1382 (1993); Henry E. Smith, *Self-Help and the Nature of Property*, J.L. ECON. & POL'Y 69, 78 (2005).

this view ignores that the most costly aspect of any dispute on unfenced, unimproved land is determining boundaries.²⁸⁰ There is little reason to believe that a right to exclude is any cheaper to enforce than a right to roam.²⁸¹

While intellectually less taxing,²⁸² an absolute right to exclude is more costly when applied to unimproved land. The most expensive part of any dispute away roads and buildings is determining location and boundaries. Anyone who has wandered off an established trail can testify to the difficulty of determining one's location. Property boundaries are invisible, so difficult to locate away from points of references like roads and buildings, even with plat in hand.²⁸³ Recognizing this, thirty states impose on landowners the obligation to post their land to give notice to the public.²⁸⁴ Landowners are much better positioned to know the boundaries of their property than the wandering hiker.

The second argument goes as follows: If members of the public value the right to roam more than landowners value the right to exclude, then the hiker will negotiate with the landowner and pay for the hike. But, what steps are necessary for this mutually-beneficial transaction? The hiker must scout charming spots, traveling by road. Then, the hiker must visit the local land registry, to find the names of landowners. The hiker then contacts the landowner and negotiates. After memorializing their agreement, the hiker takes a hike while the landowner monitors. Even on the single-parcel hike, non-trivial transaction costs restrict the number of transactions and thus the amount of hiking.²⁸⁵

But, what if the hiker wants to cross land owned by two or more landowners? As before, the hiker faces search costs, while the landowner and hiker face transaction costs. In addition, a mutually-beneficial transaction between a hiker and landowner faces the risk of opportunistic behavior. One of the landowners might hold out, hoping to capture the entire willingness-to-pay. Even where none of the landowners are acting opportunistically, the threat that one of them might will discourage hikers from search and negotiation. Since most hikes cover more than one parcel, hold-out problems doom a market solution.

Limiting or eliminating the right to exclude will benefit hikers at the expense of landowners whose interest in exclusion is greater than their interest in hiking on others' land. Shifting to a right to roam will not be Pareto-improving without compensation. There is evidence, however, that

²⁸⁰ Anyone who has spent a day afield can confirm that determining an exact location is extremely difficult. Global positioning system (GPS) does facilitate determining one's location, but does nothing to determine property boundaries.

²⁸¹ See *infra* Part V.A.

²⁸² Cognitive fluency is the term that psychologists use to describe the preference for thinking about easier concepts. See generally Drake Bennett, *Easy = True*, BOSTON GLOBE, Jan. 31, 2010.

²⁸³ See e.g. *Howard v. Kunto*, 477 P.2d 210 (Ct.App.Wash. 1970)(survey failed to discover that house was built on adjacent lot).

²⁸⁴ See *infra* n. 43.

²⁸⁵ Brokers could spread the costs of search and negotiation, increasing the volume of hiking. None exist, strongly suggesting the transaction cost barriers are too high.

suggests creating a right to roam would be Kaldor-Hicks efficient.²⁸⁶ In a report prepared about CRow Act, the losses to landowners were estimated to be no more than £8.70 per hectare, but the public benefits (measured by willingness to pay) could be as much as £87.50.²⁸⁷

Market failure is likely to produce inefficient outcomes. Additionally, there are fairness considerations when penalizing errant hikers. Without fencing or posting, it is very difficult to determine when someone is straying into private property. Disturbingly, twenty states do not immunize trespassers without notice.

The *Kaiser Aetna* court appears to have been motivated by a perceived linkage between the right to exclude and the ability to profit from investment. In fact, the sentence before the famous “most essential” language notes that the pond owner had “invested substantial amounts of money in making improvements.”²⁸⁸ Blackmun’s dissent argues that the Court has “distressingly” adopted “an implication that the *amount* of private investment somehow influences the legal result.”²⁸⁹

Although the potential for private gain is only one factor to consider, it is worth noting that there is no strong connection between the right to exclude and private investment. Consider a parcel of land in the mountains of Vermont. With no right to roam, the development potential is limited. If, however, the public can roam through the adjacent mountains, the landowner can develop the parcel into a restaurant or guesthouse. Visitors to the Alps are sometimes surprised by the number of restaurants perched high in the mountains, but private landownership combined with a right to roam encourage this sort of commerce. Also, a right to roam the mountains makes land in the valley more valuable since the number of hikers is higher. Thus, the greengrocer, pub, and gas station increase sales. Increased tourism might even justify a hiking outfitter. Similarly, Rhode Island tourism would likely benefit from increased public access to Narragansett Bay.

B. Other Rationales

While the historical and comparative evidence is clear, the right to roam is certainly an issue on which reasonable people can differ. Even if the right to exclude is not fundamental, it does not follow that the right to exclude is unimportant. Over time, the legal right to exclude has certainly developed cultural resonance. Landowners appear to tolerate intrusive zoning and historical preservation regulation, while evidencing hostility to any increased public access.

²⁸⁶ Kaldor-Hicks efficiency means that the gains to the winners are larger than the losses to the losers, meaning society overall is better-off.

²⁸⁷ DEPT. FOR ENV'T, FOOD AND RURAL AFFAIRS, *Appraisal of Options on Access to the Open Countryside of England and Wales* (Mar. 1999), tbl 7.2.

²⁸⁸ 444 U.S. at 176. *Pruneyard* distinguishes *Kaiser Aetna* by noting the substantial investment made in dredging the marina. 447 U.S. at 83.

²⁸⁹ Emphasis in original. 444 U.S. at n.2 (Blackmun, dissenting).

Since the right to exclude is now the norm, what are some reasons in favor of a right to roam? Private landownership is the norm where most Americans live, limiting opportunities for outdoor recreation. Even where the resource is publicly-owned, strategic private ownership may largely eliminate the public's access.²⁹⁰ For example, access to the ocean is severely limited by private ownership of the shoreline in the Northeast. Ninety percent of the shoreline of Narragansett Bay is privately-owned,²⁹¹ meaning the public can hardly enjoy Rhode Island's *raison d'être*.

Critics of the right to roam often seize upon the issue of privacy, but that is a red herring. The right to roam in early United States or Europe today does not include a right to roam into someone's yard. Protecting personal privacy guides and limits the right to roam in every country where the right exists. With a lower population density, privacy conflicts in the United States should be even more limited than in Europe.²⁹²

There is another red herring that should be addressed. Enclosure advocates may concede that a right to roam existed in 1850, but will argue that too much time has passed and therefore a return to open access will overturn stable expectations.²⁹³ But, the range was open more recently than most might realize. Enclosure was only completed in Tennessee in 1947, Alabama in 1951, Georgia in 1955, Missouri in 1969, South Dakota in 1973 and Mississippi in 1978.²⁹⁴ For perspective, note that adverse possession (in its modern form) dates to 1623.²⁹⁵ Executory interests date to 1536, the State

²⁹⁰ Jerry L. Anderson, *Comparative Perspectives on Property Rights: The Right to Exclude*, 56 J. LEGAL EDUCATION 1, 7 (2006) (referring to public land without public access as an "allegedly" public resource) (hereinafter Anderson, *Comparative*).

²⁹¹ Michelle A. Ruberto & Kathleen A. Ryan, *The Public Trust Doctrine and Legislative Regulation in Rhode Island: A Legal Framework Providing Greater Access to Coastal Resources in the Ocean State*, 24 SUFFOLK U. L. REV. 353, 354 (1990).

²⁹² The threat to wildlife is also illusory. Arguing that closing access on private land may be difficult, Anderson asserts that a right to roam may lead to environmental degradation without providing any evidence. Jerry Anderson, *Countryside Access and Environmental Protection: An American View of Britain's Right to Roam*, 9 ENVTL. L. REV. 241 (2009). In England, land managers report "quiet recreation offers no threat to wildlife." Hilary Allison, Corporate Affairs Manager for the Woodland Trust, quoted in SHOARD, *supra* note 268, at 359–60.

²⁹³ An opponent of enclosure made a parallel argument in 1881, "Our present system is an old one – so old that it would seem cruel to attempt an innovation upon it. From long usage our people have become accustomed to it, and any change in or abridgment of it will unquestionably work serious injury to a large number of our citizens." Kantor & Kousser, *supra* note 126, at 217.

²⁹⁴ King, Jr., *supra* note 164, at 54; Simmons, *supra* note 73. The *Kaiser Aetna* may have been technically correct that the right to exclude was "universally held" since it was decided the following year. 444 U.S. 164, 179–80 (1979). It is worth noting that the *memory of man runneth to the contrary*.

²⁹⁵ 21 Jac. 1, Ch. 16, §§1, 2. At common law, land must have been put into seisen before the reign of Henry I. Bevil's Case 10 Co. Rep. Subsequent kings were specified in the Statute of Merton, 20 H. 3, and Statute of Westminster I, 3 Edw. 1 c. 29. In 1540, the more modern practice of specifying a number of years was adopted. 32 H. 8 c.2 (Limitation of Prescription 1540).

of Frauds to 1677, and the Rule Against Perpetuities arises in the Duke of Norfolk's Case in 1681.²⁹⁶

If landowners must be compensated, it is unclear how to calculate the cost of public access. For obvious reasons, landowners are likely to overestimate wildly the diminution in value.²⁹⁷ Since comparable parcels without and without a right to exclude do not exist, most valuation models are useless. Britain provides a good model for landowner compensation. Under the 1949 Countryside Act, local governments could issue access orders if a voluntary agreement with the landowner is impossible. Five years after the effective date of the access order, the landowner is compensated for any diminution in value. No system is perfect, however, as determining the effect of public access on parcel value is complicated by exogenous market trends.

Counter-intuitively, expanding legal public access in areas where unauthorized access has created problems is likely to reduce those problems. There are two explanations, the first being that vandals prefer privacy. As the number of people using an area increases, the potential for discovery increases, discouraging mischief. This is the experience of Bramingham Wood in Luton, England: "The people who were causing damage don't want to be seen doing it, so the more people you get into a wood like this the less damage you get."²⁹⁸ Once someone has broken the law, the calculus changes, leading to more wrongdoing. There is a second effect, which operates subconsciously. The trespasser has already transgressed against a norm so will take less care to follow other norms. In contrast, a legal visitor will take more care to adhere to rules of good behavior.

Still, the potential for vandalism and misuse exists. If a state chooses to expand access, it is appropriate for the state to reconsider its laws on vandalism. Assuming that vandals can be deterred (which assumes some rationality on their part), the cost of vandalism should be increased. Either the penalties can be increased, enforcement expanded, or both. Enforcing game laws presents similar challenges, since poachers and vandals are rarely discovered. Since enforcement will always be imperfect, states have imposed draconian penalties: forfeiture of the poacher's vehicle and personal property, especially firearms.²⁹⁹ A similar scheme is appropriate for vandals. Vandals may think twice if discovery means the loss of a vehicle. Since motor sports cause so much damage to the land, the penalties should be similarly outsized.

²⁹⁶ 27 Hen.8 c.10 (1535); 29 Chas. 2 c. 3 (1677); 22 Eng. Rep. 931 (Ch. 1681). Interestingly, conveyance in writing is mandating in Rhode Island predates the Statute of Frauds by several decades. PAUL SAMUEL REINSCH, ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES 28 (1977).

²⁹⁷ In England and Wales, landowners estimated the annual cost of public access to range from £29 to £37 per hectare. In contrast, the government estimated the annual cost to be no more than £8.70, but likely less than 51 pence. Anderson, *Roam*, *supra* note 235, at 405–06.

²⁹⁸ Andrew Thompson, Woodland Trust (1987), quoted in SHOARD, *supra* note 268, at 360.

²⁹⁹ *E.g.*, Alaska Statutes § 16.05.195.

C. Philosophical Considerations

This Article proposes that the states be granted more deference in regulating property rights in land, but not in chattel. Why might private rights over land be different than private rights over shoes, for example? The first reason is practical: land is more easily shared than chattels.³⁰⁰ The European experience shows that public rights can coexist with private land ownership without undue burdens on landowners.

A more important reason for distinguishing ownership in things is that land is finite, while material goods are not strictly limited in number. Thus, J.S. Mill called “any exclusive right in land . . . a privilege.”³⁰¹ No number of material possessions limits others from acquiring goods themselves. The destitute are barefoot because of poverty, not because of Imelda Marcos. In contrast, any private ownership of land deprives everyone else of owning that particular parcel. This private monopoly is particularly apparent on the coasts: only so many houses can be built in Narragansett Bay.³⁰²

Private monopolies are tolerated, if those monopolies produce benefits to society. J.S. Mill called landownership “privilege, or monopoly . . . a necessary evil,” which could easily degenerate into an injustice if it did not produce compensating, social benefits.³⁰³ Other thinkers were not so sanguine that private landownership is a necessary evil. The leader of the Diggers called land a “common treasury.”³⁰⁴ Charles Stewart Parnell of the Irish Land League argued that since lands were “made by no man. They belong to the human race.”³⁰⁵ This sentiment is echoed by Thomas Jefferson, writing “[t]he earth is given as a common stock for man to labor and live on.”³⁰⁶ He acknowledged private ownership only so far as those rights did not deprive others of opportunity. Jefferson wrote that where there is “uncultivated lands and unemployed poor, it is clear that the laws of property . . . violate natural right.”³⁰⁷

In many European countries, the right to roam is considered a key component of citizenship. In Britain, the sacrifices made in two world wars motivated (at least partially) the struggle to recover a right to roam. In the words of one veteran of Italy and D-Day, “I didn’t serve my country for five years so as to be kept off four-fifths of it for the rest of my life.”³⁰⁸ Although no longer considered a right of Americans, there is resonance for the claim

³⁰⁰ Ask anyone who has shared a car with his or her siblings.

³⁰¹ MILL, *supra* note **Error! Bookmark not defined.**, at II.2.28.

³⁰² In other areas, the landowners’ monopoly is less apparent: on the High Plains or the Southwestern deserts, there’s plenty more nothingness left for others.

³⁰³ MILL, *supra* note **Error! Bookmark not defined.**, at II.2.28.

³⁰⁴ Gerrard Winstanley, quoted in SHOARD, *supra* note 268, at 258. During the English Civil War, the Diggers (also called True Levellers) were a Christian group that planted crops on common and grazing land.

³⁰⁵ *Id.* at 258.

³⁰⁶ Thomas Jefferson to James Madison, 1785. ME 19:18, Papers 8:682.

³⁰⁷ *Id.*

³⁰⁸ *Sorry State of Welsh Footpaths*, 13 RAMBLING TODAY 10 (1994) cited in SHOARD, *supra* note 268, at 265.

that citizenship is more than the sum of property lawfully acquired. Citizenship is more than shopping.

While a system of private tenure may serve social goals, the distribution of land ownership may not reflect those goals or any notion of justice. Although the United States has high rates of home ownership, the distribution of land is uneven. One percent of Americans own 46 percent of the land, but two-thirds of the privately-owned land.³⁰⁹ There is a racial imbalance in landownership: Anglos own 98 percent of all agricultural land. From a peak of 19 million acres in 1910, black farmers owned only 1.5 million acres in 1999.³¹⁰ Since landowners can exclude, the patterns of landownership limit who can spend a day afield.

D. Benefits

In any public discussion, widely-distributed benefits and concentrated costs translate to an excessive preoccupation with the costs. The benefits of increased public access will be large and well-distributed. One benefit from a right to roam would be increased spending on outdoor recreation.

In 2005, low-impact (non-motorized) outdoor recreation contributed \$730 billion to the U.S. economy, including \$88 billion in taxes. Over 6 million jobs and \$289 billion in sales depend on outdoor recreation.³¹¹ In 2009, 48 million Americans will go fishing, 42 million will camp, and 33 million will hike. In contrast, only 26 million Americans will play basketball, the most popular team sport.³¹² In total, 49 percent of Americans of Americans will enjoy the great outdoors.³¹³ But, 43 percent of them are unable to get outdoors more once a fortnight.³¹⁴ Twenty-eight percent of Latino youth report living in places without opportunities for outdoor recreation.³¹⁵

One benefit of expanding a public right to roam is less occasion for opportunistic behavior by private landowners. Uranium miners received a mining patent for land on the rim of the Grand Canyon across the most popular trail to the river, the Bright Angel Trail. Between 1891 and 1928, this landowner charged \$1 toll for every person passing down the trail. No one paid the toll to access any improvements made by the patentee. Nor did anyone pay the toll to enjoy the uranium mine. Instead, the public paid a toll to travel from one part of the public domain to another. In response, the

³⁰⁹ U.S. DEP'T OF AGRIC., AGRICULTURAL ECONOMICS AND LAND OWNERSHIP SURVEY, 1.2 (1988).

³¹⁰ Jess Gilbert, Spencer D. Wood, & Gwen Sharp, *Who Owns the Land? Agricultural Land Ownership by Race/Ethnicity*, 17 RURAL AMERICA 55, 56&Tbl. 1 (2002).

³¹¹ OUTDOOR INDUSTRY FOUNDATION, THE ACTIVE OUTDOOR RECREATING ECONOMY 3 (2006). The Outdoor Industry Foundation is a sporting equipment lobby group. While the Foundation certainly feels that every Americans should buy new skis, it does not lobby for a right to roam.

³¹² OUTDOOR INDUSTRY FOUNDATION, OUTDOOR RECREATION PARTICIPATION REPORT 16 (2009). The report identifies fishing, camping, and hiking as gateway activities since they frequently lead to escalating outdoor activity. *Id.* at 18.

³¹³ *Id.* at 7.

³¹⁴ *Id.* at 12.

³¹⁵ *Id.* at 37.

National Park Service built the South Kaibab Trail in 1924. The South Kaibab Trail is substantially less convenient since all of the park's hotels are located within a few steps of the Bright Angel trailhead.

Unfortunately, opportunism is not limited to the hard rock mining or the colorful Old West. Landowners have privatized large parts of the public domain through strategic private ownership. Access to national forests is particularly limited since private inholdings tend to cluster along roads. Also, private ownership has created "private beaches" in California. By law, the beach is public in California, yet many hotels and communities advertise private beaches because public access is so limited. These landowners appropriate a public resource for private benefit.

If these landowners' right to exclude is curtailed, would the parcel's value fall? Whatever the merits of a right to roam, a regulatory taking may give some discomfort. But, why is the parcel more valuable with a right to exclude? The parcel is more valuable because the landowner has exclusive access to a public resource. High prices reflect an uncompensated transfer from the public to an individual. If the land loses value after the right to exclude is limited, the landowner is merely disgorging misappropriated public resources.

C. Looking Ahead

If the Court were to limit *Kaiser Aetna* and no state were to change its laws, then it is not clear this Article was worth reading. "It's tough to make predictions, especially about the future."³¹⁶ But, several states are likely to expand the public's right to roam, responding to increased demand for outdoor recreation. States with dense populations and limited public land are most likely to expand access.

Coastal states are likely to expand shoreline access. Rhode Island, New Jersey, Texas, California and perhaps others are likely to expand public access to the shoreline. Several states could follow Oregon and Hawaii's example and grant the public access to all dry sand, up to the vegetation. The exact contours of this access are likely to vary considerably, but domestic privacy will almost certainly be protected.

In Vermont and New Hampshire, rights of way do not lapse from abandonment. In Vermont, the state of public records is so poor that many landowners have been surprised to find paper roads crossing their land, some that were never built and others that have not been maintained since the 1830s. In 2006, the Vermont legislature set a deadline for recording ancient roads.³¹⁷ In response, a small army of volunteers is pouring over public records, in order to record roads and trails town-by-town.³¹⁸ Since tourism is such a large contributor to the Vermont economy, the legislature might rationally choose to abandon a piecemeal effort to expand access. Outdoor

³¹⁶ Generally attributed to Yogi Berra.

³¹⁷ H.334, 2005–2006 Leg., Reg. Sess. § 1 (Vt. 2006).

³¹⁸ See Eric Goldwarg, *Known Unknowns: Ancient Roads in Northern New England*, 33 VT. L. REV. 35 (2008).

recreation contributes twelve percent of Vermont's gross state product and \$187 million in tax revenue.³¹⁹ Agriculture contributes just \$ 754 million, in contrast to \$2.64 billion from tourism. Most agriculture would suffer no disruption, while many farmers would see a new source of income.

In other states, traditional outdoor recreation will be the driver of legal change. Montana already provides the most access to streams of any state and it is likely to expand those rights of access. Fly fishing is part of Montana's heritage.³²⁰ In addition to a traditional pastime, fly fishing is a significant contributor to the state economy. South Dakota is apt to abandon its thirty-year experiment with restricting hunting access. Like Montana, South Dakota is a destination for sportsmen (and their dollars). South Dakota has already liberalized its stream access.³²¹

It is worth noting, however, that some states may not expand public access. In 1974, the General Court (legislature) of Massachusetts asked the Supreme Judicial Court to opine on a bill overturning the 1647 statute that transferred ownership of the foreshore to the littoral landowner and returning to the common law *status quo ante*. The S.J.C. rejected any return to greater public access, even though "strictly the ordinance was limited to the area of the Massachusetts Bay Colony."³²² Maine's legislature did pass the legislation that Massachusetts only contemplated. But, Maine's Public Trust in Intertidal Land Act was rejected by Maine courts, limiting the public easement over the foreshore to fishing, fowling, and navigation.³²³

Returning property law to the state would permit each state to decide for itself the boundaries of private and public rights in unimproved land. Some states value hiking, others fishing. And Massachusetts values keeping the hoi polloi off Cape Cod.

Conclusion

This Article argues that the right to exclude is not a fundamental element of property. A fundamental element should boast a long pedigree. In many parts of the United States, the right to exclude only developed in the second half of the 19th century. In fact, the right to roam persists in several places until the middle of the 20th century. In addition, a fundamental element should be broadly observed in civilized countries, but many of our peers do not grant landowners the right to exclude the public from unimproved land. While the right to exclude may not be fundamental, some landowners do feel

³¹⁹ OUTDOOR RECREATION FOUNDATION, *THE ACTIVE OUTDOOR RECREATION ECONOMY: VERMONT* (2006).

³²⁰ *A RIVER RUNS THROUGH IT* (Columbia Pictures 1992).

³²¹ *Parks v. Cooper, Parks v. Cooper*, 676 N.W.2d 823 (S.D. 2004).

³²² Thus, Nantucket, Martha's Vineyard, and the Plymouth Bay Colony were excluded. *Opinion of the Justices*, 365 Mass. 681, 685 (1974). The S.J.C. even quoted approvingly a case limiting the amount of mud that clam diggers could remove. 365 Mass. at 687, *Weston v. Sampson*, 8 Cush. 347 (1851).

³²³ *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989). New Hampshire's coast is nestled between Maine and Massachusetts, but the public enjoys access to the foreshore. *Opinion of the Justices*, 139 N.H. 82 (1994).

strongly about excluding the public. There are significant benefits from expanding public access, including increased spending on outdoor recreation. In this author's view, the issue is largely one of generosity. Will the (by definition) haves share with the have-nots?