
THE RIGHT TO EXCLUDE FROM UNIMPROVED LAND

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The U.S. Supreme Court has held that property must include a landowner's right to exclude. The Court, however, has not addressed whether this right must extend to unimproved land. In many states, the law presumes that unimproved land is open to the public until affirmatively closed by landowners. Before the twentieth century, the public had the right to roam on unfenced land, even if landowners objected. In many European countries, the public has a right to roam on unimproved land. This Article argues that states should be free to revive the right to roam across unimproved land on foot, regardless of ownership.

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I. INTRODUCTION

In *Kaiser Aetna v. United States*,¹ the Supreme Court characterized the right to exclude as “one of the most essential” and as “universally held to be a fundamental element of the property right.”² The *Kaiser Aetna* opinion has spawned a whole jurisprudence of exclusion. Scholars have accepted the notion that exclusion is inherent in a regime of private property; the only remaining question appears to be whether the right to exclude is *the* seminal property right.³ This Article argues that the current debate is incomplete because no distinction is made between the city and the countryside.

While state law distinguishes between improved and unimproved land,⁴ scholarly comment does not. 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.) Constitutional jurisprudence and scholarship should distinguish between the home and the field.

This Article argues that the states are free to expand or contract the scope of public access to unimproved land. In support, this Article makes three related claims: first, that a careful reading of precedent does not prevent the states from expanding public access to unimproved land; second, that public access is consistent with American history; and, third, that public access is consistent with private property in the modern world.

In many parts of Europe, the public’s right to roam is considered vital to a system of private property rights. Similarly, in the early United States, the right to roam was considered important; it was no mere license to roam lands unworthy of policing.

Part II of this Article addresses *Kaiser Aetna* and subsequent cases that discuss the landowner’s right to exclude. Part III shows that the right to exclude is a relatively recent development in American law. Part IV provides some comparative perspective, showing that a modern right to roam is consistent with private property. Part V argues why states should expand public access to unimproved land.

Legal scholarship is full of academic questions, but why does this one matter? Firstly, “no other [property] right has been singled out for such extravagant endorsement by the Court.”⁵ Secondly, the U.S. Supreme Court has treated the right to

1. 444 U.S. 164 (1979).

2. *Kaiser Aetna*, 444 U.S. at 176, 179–80.

3. For a nice summary of the debate, see John Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act of 2003*, 89 NEB. L. REV. 739 (2011).

4. See, e.g., CAL. FISH & GAME CODE § 2016 (West 2010).

5. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 735 (1998). Another commentator has called “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). 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* 29, 29 (David L. Callies ed., 1996).

exclude as a core element of property, beyond any state's power to regulate. States are deterred, therefore, from expanding public access out of fear that *Kaiser Aetna* and its progeny prevent them from doing so.

II. THE JURISPRUDENCE OF EXCLUSION

The *Kaiser Aetna* opinion devotes considerably more attention to navigation than to the right to exclude.⁶ *Kaiser Aetna* could find little precedent for its sweeping conclusion that property must include a right to exclude, but subsequent decisions have relied upon it. Also, while the factual background in *Kaiser Aetna* is rather unique, courts have cited it in dissimilar situations, including where government has tried to expand public access to private land. This Part discusses *Kaiser Aetna* and some of the cases that have applied its incautious language.

A. *Kaiser Aetna v. United States*

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.⁷

Although the majority held that “the ‘right to exclude,’ so universally held to be a fundamental element of the property right, falls within [the] category of interests that the Government cannot take without compensation,”⁸ 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 cited, *United States v. Pueblo of San Ildefonso*,⁹ comes from the U.S. Court of Claims and discusses exclusion in the context of Indian title. Exclusive possession is a necessary element for establishing Indian title; no title exists where two or more tribes shared land.¹⁰ But, Indian tribes are sovereigns, not proprietors, so exclusive possession establishes political boundaries, not private rights.

The second citation is mere dicta from *United States v. Lutz*,¹¹ a decision of the U.S. Court of Appeals for the Fifth Circuit. The passage cited discusses the risk of loss after a warehouse of Army tomatoes was lost to fire, and includes the right to exclude

6. *Kaiser Aetna* read *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1852), to mean that navigable-in-fact had replaced the earlier English rule of tidal ebb and flow. 444 U.S. 164, 172 n.7 (1979); *id.* at 182 (Blackmun, J., dissenting). 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, 481 (1988).

7. *Kaiser Aetna*, 444 U.S. at 169.

8. *Id.* at 179–80 (footnote omitted). Elsewhere in the opinion, the language is slightly different. *Id.* at 176 (“[O]ne of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others.”).

9. 513 F.2d 1383 (Ct. Cl. 1975).

10. *Pueblo of San Ildefonso*, 513 F.2d at 1394 (“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.”).

11. 295 F.2d 736 (5th Cir. 1961).

among a long list of rights possessed by the owners of chattel.¹² The opinion does not address property in land.

The third and final citation provided by the Court is Justice Brandeis's dissent in *International News Service v. Associated Press*,¹³ a dispute over intellectual property. Unlike land, intellectual property's only value *as property* is exclusion.¹⁴ The majority in *Kaiser Aetna* quotes Brandeis for the proposition that "[a]n essential element of individual property is the legal right to exclude others from enjoying it,"¹⁵ but does not quote the following sentence, which reads "if the property is affected with a public interest, the right of exclusion is qualified."¹⁶ The fact that water, particularly navigable water, is affected with a public interest, suggests that *Kaiser Aetna* should not have relied upon Brandeis here.

In short, *Kaiser Aetna* does not explain how Indian title relates to fee simple, how rights over chattel extend to land, or why rules for intellectual property should determine the limits of the public interest in navigable water. 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. Moreover, the Court ignored the government's argument that Hawaiian law would permit public access.¹⁷

Even though *Kaiser Aetna* addresses a rather specific set of circumstances, it has been taken to stand for a much broader proposition: that the U.S. Constitution defines property to include a right to exclude, a right beyond a state's power to regulate. Given its facts, it is clear from *Kaiser Aetna* that the government cannot take a particular individual landowner's right to exclude. *Kaiser Aetna* is silent, however, on whether the government can take or adjust every (similarly situated) landowner's right to exclude.

Since the opinion devotes so little discussion to the right to exclude, it is unclear why the right is so important. Although the Court took pains to emphasize the developer's investment,¹⁸ the opinion is entirely silent on how much a navigation servitude would diminish the value of this investment. Moreover, 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 Transportation Co. v. New York City*.¹⁹ Rather than consider what effect a navigation servitude might have on the value of the whole parcel, *Kaiser Aetna* found a taking when only one element of the property right was impinged.²⁰ The navigation servitude over the lagoon would not

12. *Id.* at 740.

13. 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

14. Of course, intellectual property may be valuable instrumentally (e.g., to aid in the production of goods or services).

15. *Kaiser Aetna v. United States*, 444 U.S. 164, 180 n.11 (1979) (alteration in original) (quoting *Int'l News Serv.*, 248 U.S. at 250 (Brandeis, J., dissenting)).

16. *Int'l News Serv.*, 248 U.S. at 250 (Brandeis, J., dissenting).

17. Brief for the United States at 27-30, *Kaiser Aetna*, 444 U.S. 164 (No. 78-738), 1979 WL 199965 at *27-30 (advancing argument not addressed by Court).

18. *Kaiser Aetna*, 444 U.S. at 167, 169.

19. 438 U.S. 104, 130-131 (1978).

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

have impinged on the landowner's power to exclude from dry land, the marina, or docks; yet the court found a taking nonetheless.

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 has been found.

In *Nollan v. California Coastal Commission*,²¹ a state agency conditioned a building permit upon dedication of a public access easement. The easement sought lay beyond the Nollans' fence, on the dry sand along the shoreline. So long as an "essential nexus" existed between the restriction and the state interest, the state could impose "a height limitation, a width restriction, or a ban on fences."²² The state could even ban all construction, but it could not require the landowner to share the dry sand beyond their fence.

Nollan's twin case is *Dolan v. City of Tigard*.²³ In *Dolan*, the city conditioned a commercial building permit on the dedication of an easement across a floodplain. The proposed expansion of the Dolan's hardware store was expected to increase run-off and traffic, both of which were municipal concerns. The public greenway did fulfill the "essential nexus" test, since bike and foot traffic would replace some auto traffic.²⁴ To forestall public access, the Supreme Court introduced a second requirement: "rough proportionately," which the Court did not find.²⁵

To distinguish lawful zoning in *Euclid v. Amber Realty Co.*²⁶ 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. But, the *Dolan* Court did not specify which is dispositive: municipal extortion or the individual burden ("rough proportionality") of expanded public access.

The property-rights jurisprudence since *Kaiser Aetna* is not uniformly hostile to state regulation. In *Pruneyard Shopping Center v. Robins*,²⁷ secondary school students were ejected from a twenty-one 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.²⁸ The U.S. Supreme Court held that the federal constitution did not grant landowners a right to exclude that the state could not regulate or alter. The Court found that the shopping center's owners "failed to demonstrate that the 'right to exclude

21. 483 U.S. 825 (1987).

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

23. 512 U.S. 374 (1994).

24. *Dolan*, 512 U.S. at 379–80, 381–82, 387–88.

25. *Id.* at 391.

26. 272 U.S. 365 (1926).

27. *Pruneyard Shopping Ctr.*, 447 U.S. at 77.

28. *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979).

others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'"²⁹

In a case that predates *Kaiser Aetna* and *Pruneyard*, the Court found no taking in *Heart of Atlanta Motel, Inc. v. United States*,³⁰ even though the landowner lost his right to exclude. Title II of the 1964 Civil Rights Act banned racial discrimination in public accommodations.³¹ A racist innkeeper asserted a taking of his property right (to exclude), but the Court held that "[t]he cases are to the contrary."³²

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. In contrast, the Court validated new limits on the right to exclude in both *Pruneyard* and *Heart of Atlanta*. When discussing *Kaiser Aetna*, the *Pruneyard* opinion cites *Armstrong v. United States*.³³ Under *Armstrong*, government cannot force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."³⁴ For, 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 no taking.³⁵ 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.

C. The Court's Inaction on Public Access

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 landowners' right to exclude.³⁶ The U.S. Supreme Court has so far declined to intervene.³⁷

29. *Pruneyard Shopping Ctr.*, 447 U.S. at 84. The argument that the California Supreme Court had taken the landowner's property was briefed and argued, but found no support in the opinion. Thompson, *supra* note 5, at 1469–70.

30. 379 U.S. 241 (1964).

31. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 201–02, 78 Stat. 241, 243–44 (current version at 42 U.S.C. §§ 2000a–2000a-1 (2006)).

32. *Heart of Atlanta Motel*, 379 U.S. at 261. The claim is rather extraordinary since no cases are cited. *Id.*

33. *Pruneyard Shopping Ctr.*, 447 U.S. at 82 (citing *Armstrong v. United States*, 364 U.S. 40 (1960)).

34. *Armstrong*, 364 U.S. at 49.

35. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

36. Neither the Oregon nor Hawaii courts claimed to be expanding public rights. Instead, the courts reasoned that they were merely formalizing earlier law. See *In re Ashford*, 440 P.2d 76, 78 (Haw. 1968) (delimiting private from public according to native Hawaiian custom); *State ex rel. Thornton v. Hay*, 462 P.2d 671, 673 (Or. 1969) (noting that public had enjoyed use of dry sand "since the beginning of the state's political history"). In contrast, the New Jersey court was more explicit that its decision worked a change in state law. See *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984) (holding that the public trust doctrine is not "fixed or static").

37. *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994); *Sotomura v. Cnty. of Hawaii*, 419 U.S. 872 (1974).

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*,³⁸ the Oregon Supreme Court found that custom gave the public access to dry sand along the shore.³⁹ In a subsequent case, the Oregon Supreme Court found no taking since public access was a “background principle” of state law.⁴⁰ Justice Scalia (with Justice O’Connor joining) penned a five-page dissent from the denial of certiorari for this case.⁴¹ Scalia’s dissent makes it abundantly clear how he would decide the case (i.e., against public access). Additionally, he would have found that the Oregon Supreme Court had effected a judicial taking.⁴²

Although the U.S. Supreme Court has not acted to bar states from expanding public access to the shore, some state courts have interpreted the Takings Clause to do so. 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. If the 1647 statute were repealed, and thus the common law revived, ownership of the foreshore would vest in Massachusetts, in trust for its citizens. Like every other state (but Maine), the public would have the right to use the wet sand. The Massachusetts court, however, rejected any return to greater public access, even though the 1647 ordinance “was limited to the area of the Massachusetts Bay Colony.”⁴³ 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 the traditional trinity of fishing, fowling, and navigation, but nothing more: no swimming, sunbathing, or walking.⁴⁴

D. *The Right to Exclude from Unimproved Land 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

38. 462 P.2d 671 (Or. 1969).

39. *Thornton*, 462 P.2d at 673–74.

40. *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1004 (1992)).

41. *Stevens*, 510 U.S. at 1207 (Scalia, J., dissenting from denial of certiorari). In addition, Justice Scalia presumed to correct the Oregon Supreme Court on what he deemed a misreading of its own precedent. *Id.* at 1210–11 & n.3. Further, he accused Oregon of “invoking nonexistent rules of state substantive law.” *Id.* at 1211.

42. *Id.* at 1211–12. Although judicial takings is a novel doctrine with no precedent, four sitting Justices would recognize it. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2597 (2010) (plurality opinion). Parts II and III of Justice Scalia’s opinion were joined by Roberts, Thomas, and Alito. There, Scalia argued that “the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking.” *Id.* at 2602. Scalia’s opinion cites his dissent from the denial of certiorari in *Stevens v. Cannon Beach*. *Id.* at 2601.

43. *In re Opinion of the Justices*, 313 N.E.2d 561, 566 (Mass. 1974). Nantucket, Martha’s Vineyard, and the Plymouth Bay Colony (southeastern Massachusetts and Cape Cod) were not part of the Massachusetts Bay Colony.

44. *See Bell v. Town of Wells*, 557 A.2d 168, 169 (Me. 1989) (holding that Public Trust in Intertidal Land Act was unconstitutional). In contrast to Maine and Massachusetts, the public enjoys access to the foreshore in New Hampshire. *Opinion of the Justices*, 649 A.2d 604, 608 (N.H. 1994).

property. Additionally, law enforcement has privileged access to private property in emergencies.⁴⁵ Landowners also have limited rights to exclude wandering animals. In fact, bald eagles have the right to exclude a property owner since no one may “disturb” a bald eagle.⁴⁶

Thirteen states have open range districts, designated by state statute.⁴⁷ A majority of states reject the English common law and presume land is open to the public until the landowner acts to close access. In total, twenty-nine states limit trespass to land posted or fenced.⁴⁸ In these states, unposted land is presumptively open to the public, absent personal notice. In removing the presumption that visitors need permission to enter land, the laws impose non-trivial costs on landowners. For example, New Mexico requires landowners to post signs in Spanish and English and run advertisements in a local newspaper before they can exclude the public from unimproved land.⁴⁹ Fencing is often insufficient notice that the land is closed to the public; signs meeting specific requirements are necessary.⁵⁰ In contrast, improvement is sufficient to provide constructive notice to the public.⁵¹ 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 fall 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.⁵² Upon independence, the states assumed ownership of the foreshore in trust for the public.⁵³ 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.⁵⁴ Other states have allowed public rights to evolve. In *Neptune City v. Avon-by-the-Sea*,⁵⁵ 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.”⁵⁶

45. *E.g.*, *People v. Ray*, 981 P.2d 928, 933 (Cal. 1999).

46. Bald and Golden Eagle Protection Act, 16 U.S.C. § 668c (2006). Moreover, under the Endangered Species Act, landowners are prohibited from taking any endangered species found anywhere “within the United States,” including on their own property. 16 U.S.C. § 1538(a)(1)(B) (2006). State game laws also limit a landowner’s rights with respect to wild animals on their property. *See, e.g.*, CAL. FISH & GAME CODE § 3007 (West 2010) (making it unlawful to take any wild animal without a license).

47. Ray Ring, *The New West Collides with Open Range Laws*, HIGH COUNTRY NEWS, March 1, 2004.

48. Mark R. Sigmon, Note, *Hunting and Posting on Private Land in America*, 54 DUKE L.J. 549, 558–60 (2004) (noting that three states require posting in all cases, twenty-four states have hunting-specific statutes, and two states have no statute but “nevertheless presume that unposted land is open to hunters”).

49. N.M. STAT. ANN. § 17-4-6 (2010).

50. *E.g.*, ARIZ. REV. STAT. ANN. § 17-304 (2011).

51. *E.g.*, CAL. FISH & GAME CODE § 2016 (West 2010).

52. Opinion of the Justices, 649 A.2d 604, 607 (N.H. 1994); *Bacon v. Mulford*, 41 N.J.L. 59, 63–64 (N.J. 1879).

53. *E.g.*, *Bacon*, 41 N.J.L. at 63–64.

54. See *supra* notes 43–44 and accompanying text for a discussion of the case law from Maine and Massachusetts.

55. 294 A.2d 47 (N.J. 1972).

56. *Neptune City*, 294 A.2d at 54.

Hawaii and Oregon recognize the broadest rights of public access to the shore, with the high courts in both states relying on custom.⁵⁷ Landowners cannot exclude the public from dry sand, even up to the vegetation's edge.⁵⁸ Additionally, landowners in Hawaii cannot exclude native Hawaiians from customary use of unimproved land.⁵⁹ Custom has provided the basis for legislation recognizing public access in Texas⁶⁰ and the Virgin Islands.⁶¹

In recent decades, several states have expanded the public right of access. In Arkansas, for example, the state definition of navigability was expanded, enlarging the scope of public access to streams and rivers.⁶² In South Carolina, the navigable channel includes improvements and artificial expansions (e.g., "artificial lakes along navigable streams").⁶³ In Illinois, the public can boat on lakes too small for navigation.⁶⁴ In Wyoming, the river channel is open to the public, regardless of navigability.⁶⁵ In drier states, the public can use seasonal or fluctuating water bodies.⁶⁶ In Montana and the Dakotas, all water is public property and open to the public.⁶⁷ Montana has codified its stream access law; the public has access to streams much too small for navigation.⁶⁸ In South Dakota, the public retains the right to hunt along section lines, even where there is no recognizable road.⁶⁹

Nevertheless, the sum total of these public rights would appear unrecognizably limited to the Founding Fathers. At independence, the public had broad rights to use unimproved land, including the right to graze, fish, hunt, and forage. Since then, private

57. *In re Ashford*, 440 P.2d 76, 77 (Haw. 1968) ("Hawaii's land laws are unique in that they are based on ancient tradition, custom, practice and usage."); *State ex rel. Thornton v. Hay*, 462 P.2d 671, 676 (Or. 1969) ("The most cogent basis for the decision in this case is the English doctrine of custom.").

58. *Ashford*, 440 P.2d at 77; *Thornton*, 462 P.2d at 678.

59. *Kalipi v. Hawaiian Trust Co.*, 656 P.2d 745, 748–49, 752 (Haw. 1982) (limiting customary rights to residents of *ahupua'a*); *Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n*, 903 P.2d 1246, 1259–61, 1267–68 (Haw. 1995) (extending customary rights to those who reside outside *ahupua'a*). Native Hawaiians are defined as anyone with at least one ancestor who predates Cook's arrival in 1778. HAW. CONST. art. XII, § 7.

60. Tex. Nat. Res. Code Ann. §§ 61.011–026 (2009).

61. Although the enabling legislation makes no mention of custom, the court decision upholding the right to public access relied on custom. 1971 V.I. Sess. Laws 224 (codified at V.I. Code Ann. tit. 12, §§ 401–403 (2008)); *United States v. St. Thomas Beach Resorts, Inc.*, 386 F. Supp. 769, 772 (D.V.I. 1974), *aff'd*, 529 F.2d 513 (3d Cir. 1975) (unpublished table decision).

62. *See State v. McIlroy*, 595 S.W.2d 659, 664–65 (Ark. 1980) (noting that navigability includes both recreation and commerce).

63. *State v. Head*, 498 S.E.2d 389, 394–95 (S.C. Ct. App. 1997). *Contra Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979) (stating that improvements do not expand access).

64. *Beacham v. Lake Zurich Prop. Owners Ass'n*, 526 N.E.2d 154, 157 (Ill. 1988).

65. *Day v. Armstrong*, 362 P.2d 137, 143 (Wyo. 1961).

66. *E.g., Parks v. Cooper*, 676 N.W.2d 823, 838–39 (S.D. 2004).

67. *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 171 (Mont. 1984); *Roberts v. Taylor*, 181 N.W. 622, 625–26 (N.D. 1921); *Flisrand v. Madson*, 152 N.W. 796, 800–01 (S.D. 1915).

68. *See MONT. CODE ANN. § 23-2-302* (2009) (granting right of access to streams so long as they are "capable of recreational use").

69. Tom Simmons, Comment, *Highways, Hunters and Section Lines: Tensions Between Public Access and Private Rights*, 2 GREAT PLAINS NAT. RESOURCES J. 240, 241 (1997).

landowners have acquired broader rights at the expense of the public. The following Part describes how the range was thrown open at settlement and then gradually closed.

III. THE RIGHT TO EXCLUDE IN THE UNITED STATES

Until the late nineteenth century, open access was the norm in the United States. Enclosure was “suitable to an old and highly cultivated country [i.e., England] . . . but it has no suitable and proper application in Ohio.”⁷⁰ Referring to enclosure, an Illinois court opined that “no principle of the common law [was] so inapplicable.”⁷¹ A South Carolina court noted: “Uninclosed land, for many purposes such as hunting and pasture, is regarded as common”⁷² A Georgia court wrote that if the English rule were the law, “[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.”⁷³

Even where states granted landowners the power to exclude, that power was not framed as a right to exclude. The right to exclude was largely a creation of the Legal Realists.⁷⁴ Before then, property was the right of “free use, enjoyment, and disposal.”⁷⁵ Any right to exclude was derivative, intended to protect the original interest of use, enjoyment, and disposal.⁷⁶ The Legal Realists turned the formula on its head, arguing the right to exclude was primary.⁷⁷ From their point of view, the right to exclude was superior because it facilitated regulation.⁷⁸ So long as the landowner could keep others out, then the government could tell the landowner how to use the property without effecting a taking.

While there is evidence of a person’s right to roam, the historical record of livestock roaming is even richer. To supplement the more limited evidence of human roaming, livestock cases help complete the picture. 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, however, the open range has never meant livestock could roam where people could not.⁷⁹ There are two reasons why an open range includes a right to roam. First,

70. *Kerwaker v. Cleveland, Columbus & Cincinnati R.R. Co.*, 3 Ohio St. 172, 182 (1854).

71. *Seeley v. Peters*, 10 Ill. (5 Gilm.) 130, 142 (1848).

72. *Law v. Nettles*, 18 S.C.L. (2 Bail.) 447, 447 (S.C. Ct. App. 1831). Note that “inclose” was the preferred spelling through most of the nineteenth century.

73. *Macon & Western R.R. Co. v. Lester*, 30 Ga. 911, 914 (1860).

74. Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 372 (2003).

75. 1 WILLIAM BLACKSTONE, COMMENTARIES *138 (1807). Other nineteenth century sources use slightly different wording. *See, e.g., Wynehamer v. People*, 12 N.Y. 378, 433 (1856) (defining property as right to “possess, use, enjoy and dispose of a thing”).

76. *Eaton v. Boston, Concord, & Montreal R.R.*, 51 N.H. 504, 511 (1872) (citing 2 AUSTIN ON JURISPRUDENCE 836 (3d ed. 1869)).

77. *See, e.g., Morris R. Cohen, Property and Sovereignty*, 13 CORNELL L. Q. 8, 12 (1927) (“[T]he essence of private property is always the right to exclude others”).

78. Mossoff, *supra* note 74, at 381–82.

79. Cats, however, are a special case. Several jurisdictions allow cats, but not people, dogs, or other animals, to freely roam. *E.g., ME. REV. STAT. tit. 7, § 4041* (2010).

wandering people impose a much smaller burden on landowners than foraging livestock, so closing the range to livestock was the first step in enclosure. When lawmakers expand landowner rights, the most intrusive use is the first to be limited. Often, the range was closed to more destructive or dangerous animals first, like bulls.⁸⁰ Second, owners will eventually need to find their wandering stock, so an open range implies public access.

In addition to the internal logic of the open range, there is further evidence of a broader right to roam for people than livestock. Even where livestock were fenced in, the public retained rights of access. In Massachusetts, livestock could not roam after 1800, but hunters could cross unimproved land to reach public waters.⁸¹ So, while fencing in livestock did not translate into a landowner's right to exclude, fencing livestock out invariably meant that 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 current discussions of the right to exclude.⁸²

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 settlement. Virginia required farmers to fence out livestock in 1632.⁸³ Responding to the same scarcity of labor, but abundance of land, northern colonies adopted the same open range laws.⁸⁴ As the last colony settled, Georgia was established in 1733 and legislated an open range in 1755.⁸⁵ The pattern continued as settlement moved westward, with each territory adopting an open range soon after territorial organization.⁸⁶

The open range was more than a negative rule that stopped landowners from excluding. One planter wrote in 1834 that "the right of common created by the General Assembly, and so long enjoyed by the good people of this state, puts it out of the power

80. See, e.g., KAN. GEN. STAT. ch. 105, § 38, 1868 Kansas Acts 386 (repealed 1986) (stating that owner who lets a bull run at large is guilty of misdemeanor).

81. CITY COUNCIL OF BOSTON, THE COLONIAL LAWS OF MASSACHUSETTS 18–19 (William H. Whitmore ed., 1887).

82. The only apparent exception is a brief mention in ERIC T. FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND 45 (2007). See *infra* notes 165–74 and accompanying text for a discussion of the role that race relations played in enclosure.

83. 1 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 199 (William W. Hening ed., 1969).

84. Both the Plymouth and Massachusetts Bay Colonies required farmers to fence livestock out. WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND 134–35 (1983).

85. J. Crawford King, Jr., *The Closing of the Southern Range: An Exploratory Study*, 48 J. S. HIST. 53, 53 (1982). British colonies in the Caribbean, including Jamaica, had an open range. Mart A. Stewart, "Whether Wast, Deodand, or Stray": Cattle, Culture, and the Environment in Early Georgia, 65 AGRIC. HIST. 1, 22 n.36 (1991).

86. E.g., A Law Regulating Enclosures, June 25, 1795, ch. 56, § 1, *reprinted in* 1 THE STATUTES OF OHIO AND THE NORTHWEST TERRITORY 183–84 (Salmon P. Chase ed., 1833).

of any farmer in this county to enclose a standing pasture.”⁸⁷ If a landowner harmed livestock grazing on unfenced land (or where the fence was insufficient), he was liable for damages.⁸⁸ Fence construction was specified in great detail: height, rail spacing, and strength standards.⁸⁹

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.

Most land was not improved in the nineteenth century. While as much as twenty percent of Maryland, Delaware, Virginia, and Kentucky was improved in 1850, less than one percent of Texas or Florida was.⁹⁰ Although fencing may be the norm today (particularly in the East), America was largely open before 1870 and fenced land was “exceptional.”⁹¹

1. Free-Range Livestock

Free-roaming hogs and cattle were an important source of meat and income for farmers, particularly smaller farmers.⁹² Released in the spring, hogs were free to roam for the summer and fall.⁹³ Farmers relied on an “occasional feeding of corn to keep them tame.”⁹⁴ Hogs were slaughtered after fattening on the autumn’s nut crop.⁹⁵ Without fences to keep animals apart, owners had to mark their animals so ownership could be determined before slaughter. A horrified English visitor to Illinois reported that livestock suffered “great disfigurement” since the ears were notched.⁹⁶

Courts recognized the popular support that the open range held. In Alabama, unfenced land was the “common pasture for the cattle and stock of every citizen.”⁹⁷ In Mississippi, the range “by common consent, [has] been understood, from the early settlement of the State, to be a common of pasture.”⁹⁸ Wisconsin’s highest court held

87. 2 LEWIS CECIL GRAY, *HISTORY OF AGRICULTURE IN THE SOUTHERN UNITED STATES TO 1860*, at 843 (1941) (internal quotation marks omitted).

88. *E.g.*, Amendment to 1777 Fence Law, ch. 2, sec. 3, 1831 N.C. Sess. Laws 5, 6 (providing that landowner may not “chase, worry, maim or kill” livestock); GA. CODE ANN. § 1458 (1867) (providing triple damages for harming livestock).

89. RANSOM HEBBARD TYLER, *A TREATISE ON THE LAW OF BOUNDARIES AND FENCES* 490–93 (1874).

90. Forrest McDonald & Grady McWhiney, *The South from Self-Sufficiency to Peonage: An Interpretation*, 85 AM. HIST. REV. 1095, 1099 (1980).

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

92. GRAY, *supra* note 87, at 840.

93. *Id.*

94. *Id.* at 845.

95. *Id.*

96. JOHN WOODS, *TWO YEARS’ RESIDENCE ON THE ENGLISH PRAIRIE OF ILLINOIS* 134 (Paul M. Angle ed., 1968).

97. *Nashville & Chattanooga R.R. Co. v. Peacock*, 25 Ala. 229, 232 (1854).

98. *Vicksburg & Jackson R.R. Co. v. Patton*, 31 Miss. 156, 185 (Miss. 1856).

that “common consent” had overturned the common law and its earlier decisions.⁹⁹ Implicit in open range laws, statutory preambles also occasionally recognized unfenced land to be a “common pasture.”¹⁰⁰

In the West, an open range persisted the longest. Even in states like California, where settlement was relatively thick and agriculture was viable, the open range was the norm. The California Supreme Court noted that the state was home to “vast herds of cattle, which were pastured exclusively upon uninclosed land.”¹⁰¹

Even when state legislatures closed the range, several states allowed individual towns or counties to keep it open. For example, when Ohio closed the range in 1865, the state legislature allowed counties to keep the range open.¹⁰²

As a more valuable use of land, livestock production received the most contemporaneous comment and continues to receive more scholarly attention.¹⁰³ It would be mistaken, however, to view the right to roam as exclusively an issue of animal husbandry. The economics literature, in particular, focuses on the fencing issue, while ignoring other aspects of the right to roam.¹⁰⁴ While it is true that the open range was an economic response to labor scarcity and land abundance, the right to roam was broader.

2. Hunting, Fishing, and Forage

As a source of food and fur, hunting was an important part of the right to roam.¹⁰⁵ English law restricted hunting by landownership and class; both limitations were rejected in the colonies.¹⁰⁶ In Illinois, an English traveler was told by locals that a system that limited hunting to landowners would not be tolerated.¹⁰⁷ The right to hunt, without property qualifications or other restrictions, was protected by state constitution, statute, and case law.

99. *McCall v. Chamberlain*, 13 Wis. 637, 640 (1861) (finding common law was “disregarded by common consent”); *Pitzner v. Shinnick*, 39 Wis. 129, 131 (1875) (holding that *McCall* rejected the common law rule).

100. *E.g.*, An act for the disposition of strays, Aug. 1, 1792, ch. 30, § 1, reprinted in 1 THE STATUTES OF OHIO AND THE NORTHWEST TERRITORY 125 (Salmon P. Chase ed., 1833).

101. *Waters v. Moss*, 12 Cal. 535, 538 (1859) (“[C]ommon law which required owners of cattle to keep them confined . . . has never prevailed in California.”).

102. Act of Apr. 13, 1865, §2, 1865 Ohio Laws 185, 185 (allowing counties to re-open the range), discussed in *Marietta & Cincinnati R.R. Co. v. Stephenson*, 24 Ohio St. 48, 56–58 (1873).

103. Livestock also produced more disputes since cattle were struck by trains and rooting hogs could destroy a garden or orchard.

104. *See, e.g.*, Shawn Everett Kantor & J. Morgan Kousser, *Common Sense or Commonwealth? The Fence Law and Institutional Change in the Postbellum South*, 59 J. S. HIST. 201 (1993).

105. *See* D. R. HUNDLEY, SOCIAL RELATIONS IN OUR SOUTHERN STATES 261–62 (1860) (describing how the rural poor depended on hunting).

106. THOMAS A. LUND, AMERICAN WILDLIFE LAW 26 (1980).

107. WOODS, *supra* note 96, at 204. Historians of early Illinois report the same. *See* JAMES MACK FARAGHER, SUGAR CREEK: LIFE ON THE ILLINOIS PRAIRIE 132 (1986) (“Customs allowed farmers, for example, to hunt game for their own use though they might be in woodlands owned by someone else.”). The same is true for Kentucky. Stephen Aron, *Pigs and Hunters: “Rights in the Woods” on the Trans-Appalachian Frontier*, in CONTACT POINTS: AMERICAN FRONTIERS FROM THE MOHAWK VALLEY TO THE MISSISSIPPI, 1750–1830, at 175 (Andrew R.L. Clayton & Fredrika J. Teute, eds., 1998).

In 1777, Vermont's new state constitution recognized the "liberty to hunt and fowl, in seasonable times, on the lands they hold, and on other lands (not enclosed)."¹⁰⁸ Pennsylvania's 1683 constitution authorized colonists to hunt, fish, and fowl on "all other lands therein not inclosed."¹⁰⁹ Members of Pennsylvania's delegation to the Constitutional Convention proposed a parallel federal provision.¹¹⁰ Even where the practice was not protected by state constitution, unrestricted hunting on unenclosed land was common practice. American courts and legislatures had repudiated English law, opening "unenclosed, undeveloped, unposted" land, unlike English law which "drew an invisible fence around all private property, no matter the description."¹¹¹

Writing in 1846, William Elliot called the right to hunt on unenclosed land a "franchise[]" held "by the great body of the people, whether landholders or otherwise" in a popular book detailing his sporting adventures.¹¹² Elliot reported 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.¹¹³ Elliot despised market hunters, but the right to roam extended to commercial hunting also. Through the early twentieth century, hunting guides took paying customers onto private land in Maine without permission.¹¹⁴ Although some landowners certainly preferred to monopolize hunting on their land, the handful of disputes that reached nineteenth century courts generally involved hunters' horses and dogs. In 1818, the South Carolina Supreme Court recognized a hunter's right to enter "unenclosed and uncultivated land[]" even though the landowner was present and refused the hunter permission.¹¹⁵ In South Carolina, the hunter's right to enter "ha[d] never been disputed" and had been "universally exercised."¹¹⁶ As the high court noted, "a civil war would have been the consequence of an attempt, even by the legislature, to enforce a restraint on this privilege."¹¹⁷

Like grazing and hunting, fishing was a significant public use of unimproved land and an important source of food for many people. A wide variety of salt-water fish were caught; inland trout and catfish dominated the catch.¹¹⁸ One fishing dispute

108. VT. CONST. OF 1777, ch. 2, § 39. This provision, which was interpreted in *Payne v. Gould*, 52 A. 421, 421 (Vt. 1902), also provided that citizens could fish on all "boatable" waters. *Id.*

109. FRAME OF GOVERNMENT OF PENNSYLVANIA § XXII (1683), reprinted in 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 263, 266 (William F. Swindler, ed., 1979).

110. Thomas Lund, *Early American Wildlife Law*, 51 N.Y.U. L. Rev. 703, 712 n.76 (1976).

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

112. WILLIAM ELLIOTT, CAROLINA SPORTS BY LAND AND WATER 285 (1867).

113. *Id.* at 288.

114. See generally RICHARD W. JUDD, COMMON LANDS, COMMON PEOPLE: THE ORIGINS OF CONSERVATION IN NORTHERN NEW ENGLAND 58–120 (1997). As late as 1910, hunters could cross unimproved land to reach a great pond to fish or fowl. *Conant v. Jordan*, 77 A. 938 (Me. 1910). Even crossing cultivated land yielded only \$1 in damages. *Barrows v. McDermott*, 73 Me. 441, 451–52 (1882).

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

116. *Id.*

117. *Id.* While the right to roam was certainly treasured, this statement may reflect South Carolina's propensity for insurrection.

118. SAM BOWERS HILLIARD, HOG MEAT AND HOECAKE: FOOD SUPPLY IN THE OLD SOUTH, 1840-1860, at 85–88 (1972).

reached the Michigan Supreme Court, which found that “[i]t has always been customary . . . to permit the public to take fish in all the small lakes and ponds of the State.”¹¹⁹ In the South, whites grumbled that blacks “monopolized all the good fishing holes,” enjoying “indiscriminate permission to fish at large.”¹²⁰

Many households also relied on unenclosed land for gathering, which was more than mere hobby in the nineteenth century.¹²¹ Nuts, fruits, and berries were eaten in season and preserves were made, providing important variety to the winter diet. Ginseng, yellowroot, sassafras, and other herbs were gathered for their healing properties.¹²²

Whether the public had a right to log trees on unenclosed land is less clear. In New York, the public could log unfenced land through the mid-eighteenth century.¹²³ In 1808, a Georgia court identified logging and hunting as “natural rights” in a “country which was but one extended forest.”¹²⁴

B. Closing the Range

As a creation of statute, the open range was also dismantled by statute. Many colonies and states were constantly tinkering with their fence law and the boundaries of the open range.¹²⁵ Although some states closed the range statewide, more common was the local option.¹²⁶ Over time, more and more counties voted to close the range. In mid-century, the closed range was spreading quickly. For example, while only one county was closed in Kansas in 1868, roughly half the counties in Kansas voted to close the range by 1875.¹²⁷ Landowners’ right to exclude people expanded in a similarly piecemeal fashion. When Virginia banned hunting without landowner permission, each county had to vote to make the new law applicable there.¹²⁸

Although most courts deferred to the legislature,¹²⁹ some courts closed the range by fiat. Michigan’s highest court adopted the English rule, despite a state statute adopting the open range.¹³⁰ In contrast, Wisconsin’s highest court acknowledged that

119. *Marsh v. Colby*, 39 Mich. 626, 627 (1878).

120. Steven Hahn, *Hunting, Fishing, and Foraging: Common Rights and Class Relations in the Postbellum South*, 26 RADICAL HIST. REV. 37, 48 (1982) (internal quotation marks omitted).

121. STEVEN HAHN, *THE ROOTS OF SOUTHERN POPULISM: YEOMAN FARMERS AND THE TRANSFORMATION OF THE GEORGIA UPCOUNTRY, 1850–1890*, at 58–63 (1983); Hahn, *supra* note 120, at 37–64.

122. HILLIARD, *supra* note 118, at 89–91.

123. In addition, the public could remove stone and lime. *Elizabeth V. Mensch, The Colonial Origins of Liberal Property Rights*, 31 BUFF. L. REV. 635, 674 (1982).

124. *State v. Campbell*, 1 T.U.P. Charlt. 166, 167 (Ga. Super. Ct. 1808).

125. Connecticut adopted the open range in 1643, but amended its fence laws in 1650, 1666, 1702, 1732, 1821, and 1866. *Hine v. Wooding*, 37 Conn. 123, 127–29 (1870).

126. See, e.g., *Bulpit v. Matthews*, 34 N.E. 525, 527 (Ill. 1893) (discussing Ill. Rev. Stat. ch. 8 (1874)).

127. Nicolas Sanchez & Jeffrey B. Nugent, *Fence Laws vs. Herd Laws: A Nineteenth-Century Kansas Paradox*, 76 LAND ECON. 518, 520 (2000).

128. Act of Feb. 20, 1866, § 3, 1866 Va. Acts 202, 202.

129. See, e.g., *Gregg v. Gregg*, 55 Pa. (Walk.) 227, 230 (1868) (upholding open range state statute).

130. *Wood v. LaRue*, 9 Mich. 158, 160–61 (1861).

its adoption of the English rule had been “generally disregarded by common consent” and repealed by the legislature.¹³¹

New York was the first state to permit towns to close the range in 1788.¹³² Even after enclosure, however, nominal damages were presumed for trespasses to unfenced land, weakening the landowner’s remedy.¹³³ In 1830, the statute was amended: the new wording suggested that New York was closed by default but towns could still vote to reopen.¹³⁴ In the first half of the nineteenth century, other states joined New York, but the pace was slow. In 1848, an Illinois court described the open range as a custom that “the memory of man runneth not to the contrary,” and as a “universal understanding of all classes of the community.”¹³⁵ A Georgia court held that enclosure “would require a revolution in our people’s habits of thought and action.”¹³⁶

Pressure for enclosure came from large landowners, but faced significant resistance from the remainder of the population.¹³⁷ While enclosure might make land more valuable, it would curtail the landowner’s ability to use nearby land. Landowner indifference was, therefore, rational 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.¹³⁸

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.¹³⁹ Tennessee did not permit the fencing of entire farms until the late nineteenth century.¹⁴⁰ Florida’s open range and forage rights survived until the 1950s.¹⁴¹ Enclosure was not complete until 1969 in Missouri and 1978 in Mississippi.¹⁴² When enclosure was defeated in the Georgia hill country, enclosure advocates resorted to misleading ballot language, gerrymandering, and fraud.¹⁴³ The last of the “local option” laws were repealed in Texas, Louisiana, and Georgia after 1950, replaced finally with a closed range.¹⁴⁴ In many areas, the open range persisted in practice long after enclosure laws were

131. *McCall v. Chamberlain*, 13 Wis. 637, 640 (1861).

132. Act of Mar. 7, 1788, 1788 N.Y. Laws 748, 766 (establishing right of each town to determine whether range should be closed).

133. See *Mensch*, *supra* note 123, at 725 (noting that defendant could mitigate damages by showing land was unfenced for long period before suit, or that land could have been fenced at little cost).

134. See N.Y. 1 R. S. 341, ch. XI, § 5, sub. 11. (1830) (allowing electors of each town to make “rules and regulations for ascertaining the sufficiency of all fences in such town” and to determine “times and manner in which cattle, horses, or sheep, shall be permitted to go at large on highways”).

135. *Seeley v. Peters*, 10 Ill. (5 Gilm.) 130, 142 (1848).

136. *Macon & W. R.R. Co. v. Lester*, 30 Ga. 911, 914 (1860).

137. *Hahn*, *supra* note 120, at 48, 54–56.

138. *McDonald & McWhiney*, *supra* note 90, at 157.

139. *Id.*

140. *Id.* at 158.

141. *Id.*

142. *King, Jr.*, *supra* note 85, at 54.

143. *Kantor & Kousser*, *supra* note 104, at 229–32, 239–40.

144. *McDonald & McWhiney*, *supra* note 90, at 158.

enacted.¹⁴⁵ As late as 1986, significant confusion existed among lawyers (including two who raised cattle) in Shasta County, California, over the boundaries of the closed range.¹⁴⁶

Pressure for closing the range came from three sources: farmers who resented the expense of fencing, railroads who wanted to avoid liability for killing livestock, and planters who wanted a docile workforce after emancipation.

1. Farmers

Before the mid-nineteenth century, many farmers relied on both crops and open range livestock. After 1850, transportation improvements allowed more farmers to abandon subsistence agriculture and specialize.¹⁴⁷ 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 forage and home production with higher prestige, store-bought food. Increasing populations also played a role by expanding the area under cultivation and hence the fencing required.¹⁴⁸

The changing economics of fencing played a major role in the impetus for and the timing of enclosure. In the well-watered East, plentiful timber made fencing feasible. Even so, fencing was extremely expensive, eating up a third or even half of the income from land.¹⁴⁹ Where local law permitted enclosing pastures, the cost was prohibitive. On the prairie, there was no stone or timber for fencing; low rainfall meant there were no crops to protect either. In both well-timbered land and prairies, therefore, an open range made sense. Pressure for a closed range developed after deforestation in the East made fencing more expensive. Also, the expansion of railroads—which needed 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.¹⁵⁰

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 from fencing livestock out increased. In addition, shrinking forests meant that hunting and forage were less important. 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 the advent of barbed wire. Without trees or even many stones, there was no way to keep livestock from roaming

145. See, e.g., King, Jr., *supra* note 85, at 58 (“Until just recently, despite the [stock] law, the common practice in the woody sections of Greene County was to let stock run at large.”).

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

147. Kantor & Kousser, *supra* note 104, at 208 (railroads facilitated marketing crops in national and international markets).

148. *Id.* at 208 (describing need for more efficient use of land as population grew).

149. GRAY, *supra* note 87, at 843.

150. Kantor & Kousser, *supra* note 104, at 215.

before barbed wire.¹⁵¹ After the 1870s, economical fencing made it cheaper to fence livestock in than out.¹⁵² As the economics of fencing changed, the balance of interests underlying the open range changed.

Timber interests showed little interest in enclosure in the nineteenth century, but played a major role by the early twentieth century. Deforestation in the previous century meant that in the twentieth century lumber companies depended on reforestation, which roaming animals—such as rooting hogs—disrupted.¹⁵³

2. Railroads

Railroads were a disruptive technology, “roar[ing] through the countryside, killing livestock, setting fire to houses and crops, smashing wagons at grade crossings, mangling passengers and freight.”¹⁵⁴ Killing livestock on the track was prima facie evidence of the railroad's negligence in open range states.¹⁵⁵ Railroads wanted to avoid liability, particularly since the owners of livestock made little effort to reduce losses.¹⁵⁶ Before 1850, railroads were largely confined to New England; between 1849 and 1855, more than 21,000 miles of track were laid and reached as far west as Iowa.¹⁵⁷ In response, courts in the North revised the common law to accommodate and encourage railroads. Illinois is the best example of both the role of railroads in legal change,¹⁵⁸ and how limits to the open range were often confined to railroad law. As late as 1848, Illinois courts understood the open range to mean that railroads were liable for all stock losses unless the track was fenced:¹⁵⁹ three years later, railroads could escape liability even without fencing their track.¹⁶⁰ Illinois did not close the range until 1872, but individual counties could reopen the range by local vote.¹⁶¹

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

151. Some ranchers had experimented with natural fences. Jeffrey L. Smith & Janice V. Perino, *Osange Orange (Maclura Pomifera): History and Economic Uses*, 35 *ECON. BOTANY* 24, 29 (1981). Joseph Glidden patented barbed wire in 1874. U.S. Patent No. 157, 124 (issued Nov. 24, 1874).

152. See Kantor & Kousser, *supra* note 104, at 213 (discussing benefits of fencing in livestock).

153. King, Jr., *supra* note 85, at 62–63.

154. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 468 (1985).

155. *Danner v. S.C. R.R. Co.*, 38 S.C.L. (4 Rich.) 329, 334–35 (S.C. Ct. App. 1851). *But see* *Wilson v. Wilmington & Manchester R.R. Co.*, 44 S.C.L. (10 Rich.) 52, 54 (S.C. Ct. App. 1857) (refusing to extend *Danner* rule to killing of dogs).

156. Alabama outlawed “salting” railroad tracks, since stockowners were deliberately attracting livestock to the tracks to receive compensation. Act of Feb. 13, 1879, §2, 1879 Ala. Acts 175, 175.

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

158. See HOWARD SCHWEBER, *THE CREATION OF AMERICAN COMMON LAW, 1850–1880: TECHNOLOGY, POLITICS, AND THE CONSTRUCTION OF CITIZENSHIP* 33–35 (2004) (discussing role of railroad cases in development of tort law). 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.

159. *Seeley v. Peters*, 10 Ill. (5 Gilm.) 130, 148–49 (1848). Later, in 1866, the Illinois Supreme Court held that the range remained open. *Headen v. Rust*, 39 Ill. 186, 191–92 (1866).

160. *See Alton & Sangamon R.R. Co. v. Baugh*, 14 Ill. 211, 212 (1852) (holding railroads were not required to construct fences to protect wandering cattle).

161. Act of Jan. 13, 1872, § 3, 1872 Ill. Laws 116, 117 (allowing counties to re-open the range by ballot)

slave-owning planters. Railroads provided another means of escape for slaves, which made the slave owners that dominated state legislatures resistant to railroad expansion. Instead of months on foot, a slave might escape to freedom in hours or days.¹⁶² After emancipation, southern states adopted railroad-friendly law “wholesale from national digests.”¹⁶³

Although farmers and ranchers benefited from railroads, new rules that immunized railroads were not always popular. In Michigan, ranchers destroyed tracks and depots after railroads refused to pay compensation for livestock killed by passing trains.¹⁶⁴

3. Planters

Emancipation presented Southern planters with the “question of labor control”¹⁶⁵: how to keep blacks working in the fields. Planters reported that blacks refused plantation labor when any alternative existed.¹⁶⁶ If blacks could hunt, fish, forage, and let their hogs roam free, there would be little need to return to plantation labor. Denying freed slaves other opportunities would force them to negotiate with white landowners from a weakened position.¹⁶⁷

A closed range limited the ability of sharecroppers to make the leap to landownership by increasing the minimum parcel size needed. 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. One planter wrote that closing the range “would keep the negroes more confined.”¹⁶⁸ In short, economic self-sufficiency would provide blacks with alternatives that whites did not want them to have, so lawmakers obliged by enclosing the South.

To keep black people off white land, states enacted trespass laws with harsh penalties. Louisiana criminalized trespass in 1865.¹⁶⁹ The following year, Georgia made it a crime to take anything of value.¹⁷⁰ Also, the states closed the range to

162. 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. JENNY BOURNE WAHL, *THE BONDMAN’S BURDEN: AN ECONOMIC ANALYSIS OF THE COMMON LAW OF SOUTHERN SLAVERY* 95, 99–100 (1998).

163. SCHWEBER, *supra* note 158, at 198. Redfield’s *LAW OF RAILROADS* (1867) and SHERMAN AND REDFIELD ON NEGLIGENCE (1869) were particularly influential. *Id.* at 197–98.

164. Detroit’s depot was burned to the ground. *Id.* at 63.

165. Hahn, *supra* note 120, at 43 (internal quotation marks omitted).

166. *See id.* at 44 (noting that freedmen “seemed ready to spurn wage and sharecropping incentives in favor of a rude subsistence on game and raised foodstuffs rather than cotton when able to farm on their own account”).

167. HAHN, *supra* note 121, at 241–44.

168. Hahn, *supra* note 120, at 46 (quoting South Carolina plantation owner).

169. Act of Dec. 20, 1865, 1865 La. Acts 16.

170. Act of Feb. 23, 1866, §1, 1866 Ga. Laws 237.

livestock owned by blacks. The states closed the range in some counties by fiat.¹⁷¹ Elsewhere, the legislature allowed local ballots, but limited voting to white landowners.¹⁷² In 1880, sixty percent of Alabamians lived in closed range counties, but those counties had eighty-one percent of the black population.¹⁷³ White opponents of enclosure often were accused of being pro-black, the political trump card in the era.¹⁷⁴

IV. THE RIGHT TO EXCLUDE ELSEWHERE

Many states have closed the range and the remaining pockets of open range are just that. While most states presume that wanderers are welcome until the landowner posts her land, a minority require visitors to seek permission in advance. While open access is an American tradition, it is a tradition on the wane. It is not, however, a tradition inconsistent with modernity. This Part will show that robust private property rights can coexist with a public right to roam.

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 can co-exist with private property in a modern market economy.

A. *The British Isles*

Although every colony rejected the English law of trespass initially, English property law came to be dominant in the United States. 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,¹⁷⁵ most Britons would have little access to open land without a statutory right to roam. One percent of the population owns fifty-two percent of the land.¹⁷⁶ Before enclosure, commoners had a variety of rights on common land, including rights of access for recreation and forage.¹⁷⁷ Enclosure abolished most public rights of use, including access to enclosed land.¹⁷⁸ Footpaths,

171. *E.g.*, Act of Dec. 3, 1866, 1866 Ala. Acts 46 (closing a portion of Dallas county); Act of Jan. 31, 1867, 1867 Miss. Laws 259 (closing Warren county).

172. *E.g.*, Act of Feb. 20, 1866, § 4, 1866 Ala. Acts 334, 334–35 (limiting voting to white male landowners), *amended by* Act of Jan. 2, 1872, §4, 1872 Ala. Acts 335, 337 (allowing all resident landowners to vote). Since blacks did not own land, restricting voting to landowners had the effect of disenfranchising blacks.

173. King, Jr., *supra* note 85, at 64.

174. Kantor & Kousser, *supra* note 104, at 224.

175. Jerry L. Anderson, *Britain's Right to Roam: Redefining the Landowner's Bundle of Sticks*, 19 GEO. INT'L ENVTL. L. REV. 375, 381 (2007).

176. RICHARD NORTON-TAYLOR, *WHOSE LAND IS IT ANYWAY? AGRICULTURE, PLANNING, AND LAND USE IN THE BRITISH COUNTRYSIDE* 23 (1982). See *infra* notes 260–61 and accompanying text for data on concentration of land ownership in the United States.

177. G.M. TREVELYAN, *ENGLISH SOCIAL HISTORY*, 20–23 (2000). In addition, commoners had the right to graze a certain number of livestock on the village common, cut firewood, and take rock or gravel. *Id.* Commoners could also gather fruits, nuts, herbs, and roots. J.M. NEESON, *COMMONERS: COMMON RIGHT, ENCLOSURE AND SOCIAL CHANGE IN ENGLAND, 1700-1820*, at 169–70 (1993).

178. Parliament passed the first enclosure act in either 1545 or 1606, but the pace greatly accelerated between 1760 and 1840. Anderson, *supra* note 175, at 383–84. Twenty percent of Britain was enclosed

however, were generally protected, either by specific language in the enclosure order or by doctrines of dedication or prescription.¹⁷⁹ The public has the right to travel by foot or horse along the footpath, regardless of the underlying landownership (which is overwhelmingly private).¹⁸⁰ The landowner may not restrict or even discourage access.¹⁸¹ If a landowner wants to re-route a footpath, local government will not approve a “substantially less convenient” diversion.¹⁸²

In the great sweep of British history, the early twentieth century was the nadir of the public right to roam and the zenith of 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 1939.¹⁸³ Ten years later, Parliament expanded public rights with the National Parks and Access to the Countryside Act, which mapped public rights of way.¹⁸⁴

In 2000, Parliament expanded public access with the Countryside and Rights of Way Act (“CRoW Act”).¹⁸⁵ In England and Wales, the CRoW Act grants a right to roam over registered common land and “open country,” defined as “mountain, moor, heath or down.”¹⁸⁶ Cultivated land, including a park or garden, is excluded.¹⁸⁷ Landowners enjoy limited liability, but receive no compensation.¹⁸⁸ In addition, the public cannot hunt, fish, camp, cycle, ride, swim, and forage.¹⁸⁹

Unlike rights to roam in other countries, the CRoW Act requires governmental action before public access is permitted.¹⁹⁰ The CRoW Act directs the Countryside Agency to map all common land and open country, a process including drafts, comments, and multiple appeals.¹⁹¹ The first provisional maps were issued in 2004.¹⁹²

between 1750 and 1830. John Cannon, *Enclosures*, in THE OXFORD COMPANION TO BRITISH HISTORY (2002). Today, the village of Laxton in Nottinghamshire is the last common field system in Britain. *Id.*

179. *See, e.g.*, *Poole v. Huskinson*, (1843) 152 Eng. Rep. 1039 (Exch. Div.) 1040; 11 M. & W. 827, 828; Anderson, *supra* note 233, at 383 (citing SIR ROBERT HUNTER, THE PRESERVATION OF OPEN SPACES AND OF FOOTPATHS AND OTHER RIGHTS OF WAY 316 (2d ed. 1902)).

180. Anderson, *supra* note 175, at 382.

181. *Id.* at 382. For example, a landowner is generally prohibited from keeping a bull in any field crossed by a footpath. *Id.* at 382 n.39 (citing Wildlife and Countryside Act, 1981, c. 69, pt. III, § 59 (Eng.)).

182. *Id.* at 382 & n.40 (internal quotation marks omitted) (citing Highways Act, 1980, c. 66, § 119(6) (Eng.)).

183. *Id.* at 402–03.

184. *Id.* at 402.

185. Countryside and Rights of Way Act, 2000, c. 37 (Eng.).

186. *Id.* c. 37, § 1.

187. *Id.* c. 37, sch. 1.

188. Anderson, *supra* note 175, at 408–09. Estimates of the cost imposed on landowners ranged from £0.06 to £0.51 per hectare, although a few estimates were as high as £8.70. *Id.* at 405–06. Needless to say, landowner estimates were much higher, ranging from £29 to £37 per hectare. *Id.* at 405.

189. Countryside and Rights of Way Act, c. 37, sch. 2.

190. *See id.* § 1 (defining “access land” as that which has been marked on the map by appropriate countryside body).

191. 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.

192. Anderson, *supra* note 175, at 407.

Since the process of identifying open country is still ongoing, no final figure for the total area affected by the CRoW Act is available. However, the figure of twelve percent of England and Wales is generally accepted.¹⁹³ Since thirty percent of the coast remained off-limits, subsequent legislation has expanded public access to the shoreline following the CRoW Act model of time-consuming mapping.¹⁹⁴

The CRoW Act did not apply to Scotland or Northern Ireland, which have devolved legislatures. Although Scotland has a tradition of open access, many areas had been closed to private access. In 2003, the Scottish Parliament created a statutory right of access in the Land Reform (Scotland) Act. Article 1 of the Act opened access to “open spaces in our towns to the remote and wild areas of land and water.”¹⁹⁵ To provide the public and landowners with guidance and reduce conflict, the Scottish Parliament approved an Outdoor Access Code.¹⁹⁶ In contrast to England and Wales, Scots can roam in farmland, grassland, and forest and while there, can camp, swim, cycle, and ride.¹⁹⁷ Commercial access is permitted, e.g., a “mountain guide who is taking a customer out hill-walking.”¹⁹⁸ As in England, however, the right to hunt and fish continues to run with the land.¹⁹⁹ Rights of way and access to the foreshore, which preexisted the Act, were unaffected.²⁰⁰ Perhaps the greatest advantage of Scotland's right of access is that costly and time-consuming mapping is not required, like in England and Wales.

B. *Scandinavia and the Continent*

In England, Wales, and Scotland, the right to roam is a recent statutory innovation. In Scandinavia, there is a long tradition of public access to unimproved land. On the Continent, several countries have expanded public access over the twentieth century.

In Sweden, the public right to roam, called the *allemansrätten*, or everyman's right, has been explicitly recognized in the Swedish constitution.²⁰¹ The public can roam, picnic, camp, and gather berries and mushrooms. Although the public can swim

193. *Id.* at 407. Unfortunately, comparative figures are lacking, so it is difficult to evaluate whether the CRoW Act grants significantly less access than other open access regimes.

194. Marine and Coastal Access Act, c. 23, § 296 (2009) (Eng.).

195. SCOTTISH NATIONAL HERITAGE, SCOTTISH OUTDOOR ACCESS CODE § 1.1 (2009). For a detailed discussion, see Lovett, *supra* note 3.

196. SCOTTISH NATIONAL HERITAGE, *supra* note 195, § 1.4.

197. *Id.* §§ 2.2, 2.7. The Code is quite specific. It notes that access rights do not apply to bird-rearing pens, military bases, quarries, airports, or football pitches while a match is in progress. *Id.* § 2.11. It notes that the right to roam allows the public to cross a golf course, but not play for free. *Id.* § 2.2.

198. *Id.* § 2.9.

199. *Id.* § 2.14.

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

201. Heidi Gorovitz Robertson, *Public Access to Private Land for Walking: Environmental and Individual Responsibility as Rationale for Limiting Right to Exclude*, 23 GEO. INT'L ENVTL. L. REV. 211, 215 (2011).

and canoe, freshwater fishing is private, except for the five largest lakes.²⁰² The public cannot invade the privacy of landowners, a zone around dwellings called the “*tomt*.”²⁰³

In Norway, the customary rights to roam were codified in 1957 as part of the Outdoor Recreation Act.²⁰⁴ Landowners can exclude the public from cultivated land (*innmark*), except when covered by snow.²⁰⁵ All other land is *utmark* and thus open to the public.²⁰⁶ Landowners retain the hunting and freshwater fishing rights.²⁰⁷

In Finland, the *jokamiehenoikeus* gives the public the right to walk, ski, cycle, or ride horses, except near homes.²⁰⁸ During the (brief) growing season, the public cannot cross or disturb cultivated fields.²⁰⁹ 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.²¹⁰

Denmark had public access traditions similar to other Scandinavian countries, but landowners gained the right to exclude by statute in 1873.²¹¹ Since 1969, Danes have regained some of their traditional right to roam.²¹² Denmark recognizes the most limited public access rights in Scandinavia: dry sand, sand dunes, heath, and forest.²¹³ Danes have free access to all forests owned either by the state or official church. 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.²¹⁴

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. . . .”²¹⁵ 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.²¹⁶ Several cantons have gone farther; Bern requires municipal governments to establish paths along lakes and rivers.²¹⁷

202. *Id.* at 225.

203. *Id.* at 217.

204. *Id.* at 232.

205. PETER SCOTT PLANNING SERVICES, COUNTRYSIDE ACCESS IN EUROPE: A REVIEW OF ACCESS RIGHTS, LEGISLATION AND PROVISION IN SELECTED EUROPEAN COUNTRIES 96 (1991) (defining *innmark* as “all kinds of agricultural land, forest plantations, gardens, farmyards, house plots, etc”).

206. *Id.*

207. *Id.* at 93.

208. Robertson, *supra* note 201, at 235.

209. *Id.* at 236.

210. *Id.* at 237.

211. PETER SCOTT PLANNING SERVICES, *supra* note 205, at 7.

212. *Id.* at 84.

213. PETER SCOTT PLANNING SERVICES, ACCESS TO THE COUNTRYSIDE OF SELECTED EUROPEAN COUNTRIES: A REVIEW OF ACCESS RIGHTS, LEGISLATION AND ASSOCIATED ARRANGEMENTS IN DENMARK, GERMANY, NORWAY AND SWEDEN 33–45 (1998) (discussing Nature Protection Act of 1992).

214. *Id.* at 34. The state owns thirty-one percent of Denmark’s forests. MARION SHOARD, A RIGHT TO ROAM 271 (1999). The Danish Parliament increased access in 1969, 1984, and again in 1992. *Id.* at 272.

215. SHOARD, *supra* note 214, at 274 (internal quotation marks omitted).

216. *Id.* at 274–275.

217. *Id.*

In Austria, the right to roam in forests, or *Wegefreiheit*, was codified in federal law in 1975.²¹⁸ The public may travel on foot and rest, but may not ride, cycle, or camp. Elsewhere, the right to roam varies from state to state.²¹⁹

In Germany, hikers head for the forests, largely because most of the terrain is quite flat. In 1969, North-Rhine Westphalia (which includes Bonn, Cologne, and Aachen) granted the public a right to outdoor recreation in all wooded areas.²²⁰ The Federal Forest Act extended forest access to the entire country in 1975.²²¹ When fears of environmental damage proved unfounded, the federal government extended public access to include rough grasslands, heath, marsh, unused meadows, fallow land, and all paths and roads (except those near dwellings or through farmyards).²²²

C. *The European Consensus*

Although the right to roam varies considerably across Europe, there are a few common features. Landowner's interests, including privacy, are balanced against the public's interest in outdoor exercise. The right to roam never extends to home and garden, nor to anything that would damage the land, including grazing or motorsports.

Where do the Europeans differ amongst each other? Some countries allow cycling and horseback riding, while others allow foraging. A few countries recognize a right to camp for a short period, but most do not. In some states, the right to roam is established at the national level, while in other states there is a substantial degree of local autonomy.

V. REVIVING THE RIGHT TO ROAM

What, then, does this Article propose? *Kaiser Aetna* has inappropriately federalized property law; the solution is to return this matter to the states. The states are better positioned than federal courts to decide, say, where gathering berries is appropriate. Our national landscape is varied and our property law should be as well. Although legislatures are better placed to weigh the interests of landowners and the public, there is no legal impediment to a state court interpreting its common law to permit public access to unimproved land.

Originalism is often seen as a bar to tinkering with rights. Subpart A shows that the original understanding of property does not require property in land to include a right to exclude. The subsequent subparts advance economic and other arguments in favor of a right to roam. In the final subpart, this Article proposes guidelines for expanding public access to private land.

218. PETER SCOTT PLANNING SERVICES, *supra* note 205, at 47.

219. Robertson, *supra* note 201, at 257.

220. SHOARD, *supra* note 214, at 269.

221. *Id.*

222. *Id.* at 269–70.

A. *No Constitutional Right to Exclude*

There are two ways to think about rights, including the right to exclude: either rights evolve or not. If rights evolve, then the federal courts should not prevent state property law from evolving. If, however, rights do not evolve, then proposals to expand public access to private land must show that landowners do not have a constitutional right to exclude.

When the Takings Clause was drafted, only New York allowed counties or towns to close the range (i.e., grant landowners a right to exclude).²²³ Everywhere else, landowners had no right to exclude except where land was fenced.²²⁴ Before the Fourteenth 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 overwhelming that property in land did not include a right to exclude from unimproved land.²²⁵ A small minority of states bestowed on landowners a right to exclude, but the majority had no statewide right. In many states, each county could decide for itself whether landowners in that county could exclude wandering livestock. Only five states allowed landowners to exclude hunters.²²⁶

Since some states recognized a landowner's right to exclude in 1868, no state is precluded from recognizing that right. Most states, however, did not recognize that right; accordingly, states are under no obligation to do so today. Under *Lucas v. South Carolina Coastal Council*,²²⁷ no taking exists when the state's regulatory action conforms to the "background principles of nuisance and property law."²²⁸ 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.

If property law in 1868 determines what landowner rights must be recognized and preserved, those rights over unimproved land are few and limited. The states could open the range to livestock and penalize any interference with grazing. Since rooting hogs are no more destructive than off-road vehicles, states could permit motorists to drive on any open land. Note, however, that this Article does not suggest anything more than public access on foot.

A literal reading of property law in 1868 would suggest that landowners could prevent access by fencing. But, fencing was very expensive and quite limited in 1868, so a better reading—since historical materials often treat the words "fenced" and "improved" as synonyms—would require landowners to improve their land before they could exclude.

223. Act of Mar. 7, 1788, 1788 N.Y. Laws 748, 766 (allowing towns to close the range).

224. Brian Sawers, *The Original Understanding of Property: The Right to Exclude from Unimproved Land* (unpublished manuscript) (on file with author). See *supra* notes 83–86 and accompanying text for a discussion of open range laws in the eighteenth century.

225. See *supra* Part III for a discussion of the widespread right to access unimproved land in the United States throughout the nineteenth century.

226. JAMES A. TOBER, WHO OWNS THE WILDLIFE? THE POLITICAL ECONOMY OF CONSERVATION IN THE NINETEENTH CENTURY 122 (1981).

227. 505 U.S. 1003 (1992).

228. *Lucas*, 505 U.S. at 1031.

B. *The Economics of Exclusion*

Two largely specious arguments have been advanced for a broad right to exclude.²²⁹ The first argument is that an unqualified right to exclude, often termed the boundary approach, is more efficient because it minimizes the cost of determining rights. Ellickson and Smith both argue that a broad right to exclude is less costly since it is simpler than a more limited right to exclude.²³⁰ While intellectually less taxing,²³¹ an absolute right to exclude is costly when applied to unimproved land. The most expensive part of any dispute away from 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, thus difficult to locate away from points of references like roads and buildings, even with plat in hand.²³² Recognizing this, twenty-nine states impose on landowners the obligation to post their land to give notice to the public.²³³ 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, 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 must then contact the landowner and negotiate. After memorializing their agreement, the hiker takes a hike while the landowner monitors. Even on a single-parcel hike, non-trivial transaction costs restrict the number of transactions and thus the amount of hiking.²³⁴

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, transactions between a hiker and two or more landowners presents 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 act opportunistically, the threat that one of them might will discourage hikers from search and negotiation. Since most hikes cross 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 gain from exclusion is greater than their interest in hiking on others'

229. 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.

230. Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1382 (1993); Henry E. Smith, *Self-Help and the Nature of Property*, 1 J.L. ECON. & POL'Y 69, 78 (2005).

231. Cognitive fluency is the term that psychologists use to describe the preference for thinking about easier concepts. See generally Drake Bennett, *Easy = True: How 'Cognitive Fluency' Shapes What We Believe, How We Invest, and Who Will Become a Supermodel*, BOSTON GLOBE, Jan. 31, 2010.

232. See, e.g., *Howard v. Kunto*, 477 P.2d 210, 211–12 (Wash. Ct. App. 1970) (discussing a surveyor's mistake that resulted in house being built on wrong lot).

233. See *supra* notes 48–51 and accompanying text for a discussion of state posting requirements.

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

land. Shifting to a right to roam will not be Pareto-improving without compensation. There is evidence, however, that suggests creating a right to roam would be Kaldor-Hicks efficient.²³⁵ In a report prepared about CRow Act (England and Wales), 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 £87.50.²³⁶

If landowners must be compensated, it is unclear how to calculate the cost of public access. For obvious reasons, landowners are likely to wildly overestimate the diminution in value.²³⁷ Since comparable parcels with and without a right to exclude do not exist, most valuation models have no predictive value. Britain provides a good model for landowner compensation. Under the 1949 National Parks and Access to the Countryside Act, local governments could issue access orders if a voluntary agreement with the landowner is impossible.²³⁸ Five years after the effective date of the access order, the landowner is compensated for any diminution in value.²³⁹

Since 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,²⁴⁰ it is worth noting that there is little 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 ownership combined with a right to roam create this market. Also, a right to roam the mountains makes land in the valley more valuable since more people come to hike, spending their money at local businesses.

Although economic development and increased privatization has been the trend, progress does not require a right to exclude. In fact, many countries (including England, Scotland, Denmark, and Germany) have expanded public access in recent years. Demsetz argues that privatization (including enclosure) was motivated by exogenous market conditions.²⁴¹ When agriculture and timber plantations replaced ranching, economic conditions clearly favored fencing livestock in. While the economic rationale for fencing livestock remains, a new rationale for allowing people

235. A Pareto-improving action provides a gain to at least one person without harming anyone else. Kaldor-Hicks efficiency means that the gains to the winners are larger than the losses to the losers, meaning society overall is better off.

236. Anderson, *supra* note 175, at 406.

237. 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 per hectare for sites infrequently visited and not used for hunting. *Id.* at 405–06.

238. National Parks and Access to the Countryside Act, 1949, 12, 13, & 14 Geo. 6 c. 97 (Gr. Brit.).

239. *Id.* § 71. Although separating whatever loss in value occurs from exogenous market trends is difficult, *ex ante* speculation is even less reliable.

240. The sentence before the famous “most essential” language notes that the landowner had “invested substantial amounts of money in making improvements.” *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). In his dissent, Blackmun argued that the Court had “distressingly” adopted “an implication that the amount of the private investment somehow influences the legal result.” *Kaiser Aetna*, 444 U.S. at 183 n.2 (Blackmun, J., dissenting). *Pruneyard Shopping Center v. Robins* distinguished *Kaiser Aetna* by noting the substantial investment made by the landowner in dredging the marina. 447 U.S. 74, 84 (1980).

241. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 354–539 (1967).

to roam has arisen. Outdoor recreation, which hardly existed before the twentieth century and continues to grow, justifies a revived right to roam. The law should encourage public access to unimproved land since the transaction costs will prevent outdoor recreation on most private land. A revived right to roam is the next step in the Demsetzian evolution of property rights.

C. *Landowner Opportunism*

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. Although landowners appear to tolerate intrusive zoning and historical preservation regulation, they appear to express hostility to any increased public access.

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.²⁴² 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,²⁴³ meaning the public can hardly enjoy Rhode Island's *raison d'être*.

Expanding a public right to roam will reduce opportunistic behavior by private landowners. Under the right-to-exclude regime, landowners have essentially 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. In states where the foreshore is public, but the law does not provide for access across private land, waterfront landowners enjoy an effectively private shoreline. Thus, whether forest or shore, private landowners are able to enjoy nearly private access to a scarce resource, a resource they do not own. These landowners thereby appropriate a public resource for private benefit. To cite one example among many, a trail to Matilija Falls in Los Padres National Forest crosses private property. While the previous owner tolerated hikers, the new owner will not permit access or negotiate with the Forest Service.²⁴⁴ Worse, adjacent landowners often try to close roads on public land, either with gates or a sign that implies the government had closed access.²⁴⁵

In a more famous example, a mining patent issued before the Grand Canyon was designated a national park allowed the owner to impose a toll for using the popular

242. See 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).

243. 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).

244. Zeke Barlow, *Hikers to Matilija Falls Seek Access on Private Land, but Landowner Fights It*, VENTURA COUNTY STAR, June 18, 2010.

245. Dennis Wagner, *Suddenly, Access Is Barred to Tonto Swimming Holes*, THE ARIZONA REPUBLIC, Oct 23, 2010, at A1.

Bright Angel Trail.²⁴⁶ This “rank opportunist” and future U.S. Senator bought the mining patent and filed thirty-nine other mining claims nearby.²⁴⁷ There was no mine, the landowner was “mining only gold from tourists’ pockets.”²⁴⁸ No one paid the toll to access any improvements made by the patentee. Nor did anyone pay the toll to enjoy a uranium mine. Instead, the public paid a toll to travel from one part of the public domain to another. The National Park Service challenged his mining patent, eventually reaching the U.S. Supreme Court.²⁴⁹ In the end, the “miner” lost, but not before the National Park Service cut another trail to the Colorado River.²⁵⁰ 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.²⁵¹

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.”²⁵² 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.²⁵³ 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.

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

246. Blaine P. Lamb, “A Many Checkered Toga”: *Arizona Senator Ralph H. Cameron 1921–1927*, 19 *ARIZ. & THE W.* 47, 56–59 (1977).

247. *Id.* at 48, 59; NAT’L PARK SERVICE, U.S. DEP’T OF THE INTERIOR, *SOUTH KAIBAB TRAIL* (2008) (on file with author).

248. JOHN D. LESHY, *THE MINING LAW: A STUDY IN PERPETUAL MOTION* 58 (1987).

249. *Cameron v. United States*, 252 U.S. 450 (1920).

250. NAT’L PARK SERVICE, U.S. DEP’T OF THE INTERIOR, *SOUTH KAIBAB TRAIL* (2008) (on file with author).

251. *See generally* NAT’L PARK SERVICE, U.S. DEP’T OF THE INTERIOR, *BRIGHT ANGEL TRAIL* (2008) (on file with author).

252. SHOARD, *supra* note 214, at 360 (quoting ANDREW THOMPSON, *WOODLAND TRUST* (1987) (internal quotation marks omitted)).

253. *E.g.*, ALASKA STAT. § 16.05.195 (2010).

right to roam into someone's yard. With a lower population density, privacy conflicts in the United States should be even more limited than in Western Europe.²⁵⁴

There is another red herring that should be addressed. Even if exclusion advocates concede that a right to roam existed in cowboy days, they could argue that too much time has passed and, therefore, a return to open access will overturn stable expectations.²⁵⁵ But, the range was open more recently than most might realize. Tennessee closed the range in 1947, Alabama in 1951, Georgia in 1955, Missouri in 1969, and Mississippi in 1978.²⁵⁶ Also, thirteen western states have open range areas today.²⁵⁷ For perspective, note that adverse possession (in its modern form) dates to 1540²⁵⁸ and the statute of frauds to 1677.²⁵⁹

D. Other 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. 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 of chattels from landownership is that land is finite, while material goods are not strictly limited in number. No number of material possessions limits others from acquiring goods themselves. The destitute are barefoot because of poverty, not because the rich have calfskin slippers. 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.

While private ownership may be efficient and desirable, 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 two-thirds of privately-owned land, totaling forty-six percent of the entire country.²⁶⁰ The racial imbalance is even more stark: whites own

254. The threat to wildlife is also illusory. In England, land managers report "quiet recreation offer[s] no threat to wildlife." SHOARD, *supra* note 214, at 359–60 (quoting Hilary Allison, Corporate Affairs Manager for the Woodland Trust).

255. 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 104, at 217 (quoting a letter to the editor in a Jackson County newspaper from an author named "Fair Play") (internal quotation marks omitted).

256. King, Jr., *supra* note 85, at 54.

257. Ray Ring, *The New West Collides with Open Range Laws*, HIGH COUNTRY NEWS, March 1, 2004.

258. Limitation of Prescription, 32 Hen. 8, c.2 (1540) (Eng.).

259. Statute of Frauds, 29 Chas. 2, c. 3 (1677) (Eng.).

260. ECONOMIC RESEARCH SERVICE, U.S. DEP'T OF AGRIC., AGRICULTURAL HANDBOOK NO. 705, AGRICULTURAL RESOURCES AND ENVIRONMENTAL INDICATORS 17 (1988).

ninety-eight percent of all farmland.²⁶¹ By giving landowners the right to exclude, a tiny minority of whites are given the power to decide who can hike, fish, and hunt in many parts of the country.

E. Competing Uses

This Article proposes that conflict between users should guide this jurisprudence.²⁶² Some uses of property conflict, whereas others do not. Specifically, where uses of property conflict, primacy should be given to the landowner. There is a deep logic to a rule of landowner primacy. In early American law, the landowner could improve the land without restriction, thereby closing access. In Europe today, the right to roam allows the public to enjoy whatever land the owner is not using.

Conflicts are both spatial and temporal. The backyard is an example of a 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 golf course presents a temporal conflict between playing golf and picnicking. Therefore, the club should be able to exclude picnickers during playing times. When the course is covered in snow, however, there is no conflict and the club should not be able to exclude cross-country skiers. In the relatively rare situations where skiing could destroy the grass and affect play, reasonable limitations are appropriate (e.g., no walking on the greens).

Unimproved lands present few spatial or temporal conflicts. These lands are rarely used by their owners (hence, unimproved) and public use will usually be light.²⁶³ 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 occasionally. 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."²⁶⁴

261. Jess Gilbert et al., *Who Owns the Land? Agricultural Land Ownership by Race/Ethnicity*, RURAL AM., Winter 2002, at 55, 55.

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

263. Off-road motoring is an exception to this general rule as it can do significant damage to the land and other's enjoyment. Accordingly, landowners should be able to exclude. 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, 52–53 (2009).

264. *State ex rel. Thornton v. Hay*, 462 P.2d 671, 674 (Or. 1969). Although the opinion was describing the Oregon beach, the description and logic apply equally to the mountains.

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 noted the substantial investment.²⁶⁵ It is certainly the case that socially-useful investment will be deterred if owners are unable to exclude at all. But, not all types of use diminish investment values. Moreover, a right to roam does not mean a right to use improvements without paying (e.g., golfing for free). Countries that recognize a right to roam protect the owner's right to profit from investment.²⁶⁶

Scotland provides a good model for a statutory right to roam. Like the United States, Scotland had a long tradition of public access to open space. By the twentieth century, public access was limited, but public interest in the outdoors was growing. Unlike England and Wales, Scotland did two things quite well. No expensive and time-consuming attempt to map the entire country was required. Also, Scotland's legislation mandated a detailed outdoor access guide, providing landowners and the public with guidance.²⁶⁷

VI. CONCLUSION

A careful reading of precedent shows that the states remain free to expand public access to unimproved land, despite overbroad rhetoric in *Kaiser Aetna* and its progeny. Public access to unimproved land was the norm in the United States until the twentieth century. In Europe, many countries permit the public to walk on private land, either by tradition or, more recently, by statute. This Article argues that states should consider expanding public access to private, unimproved land. There are significant benefits from expanding public access, including increased spending on outdoor recreation. These public benefits far outweigh whatever costs fall on landowners. As members of the public, landowners will also benefit from the right to roam, enjoying access to the private land of others. In this author's view, however, the issue is largely one of generosity. Will the states ask the haves to share their least-used land with the have-nots?

265. *Kaiser Aetna v. United States*, 444 U.S. 164, 167, 169, 180 (1979); *id.* at 192 (Blackmun, J., dissenting).

266. 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 NAT'L HERITAGE, *supra* note 195, at 4.

267. *Id.*