

Of Constitutions and Cultures: The British Right to Roam and American Property Law

by Jess Kyle

Jess Kyle is a J.D. Candidate, University of Maryland Francis King Carey School of Law, 2015. This Article won Honorable Mention in the 2013-2014 Beveridge & Diamond Constitutional Environmental Law Writing Competition.

Summary

In 2000, England enacted the Countryside and Rights of Way Act, which provides the public the right to roam on certain private lands without compensation to the landowners. There are many constitutional and cultural-historical issues pertinent to importing this right to roam into the United States, in particular the current constitutional barrier of the physical invasion rule in Fifth Amendment Takings Clause. However, significant doctrinal weaknesses persist regarding the “fundamental” right to exclude underpinning this rule. A right to roam agenda might be successfully interwoven into the American environmental justice movement to apply some pressure for change.

I. The Right to Roam: An Overview of Issues Raised From an American Perspective

In the United States, the desire to preserve natural landscapes often culminates in the creation of public spaces on government land.¹ Yet, at least one reason why environmental preservation is important to Americans is the aesthetic enjoyment it brings,² and our norms of public access to land generally preclude public access to private unimproved land without landowner consent, whatever its aesthetic value. This seems “rather like hiding a Monet in the attic.”³ Since 2000, Britons have enjoyed an expansive statutory “right to roam”⁴ on certain private land areas through enactment of the Countryside and Rights of Way Act (CRoW).⁵ This Article considers whether such a right to roam—which does not provide landowner compensation for public access—could have any place within American property law.

Two key issues relevant to prospects for an American right to roam are the protections afforded property interests in the U.S. Constitution,⁶ and Americans’ cultural and historical compatibility with a right to roam. Legal scholars have reached different conclusions as to the implications of Fifth Amendment jurisprudence and our cultural background for proposals of a right to roam in America.⁷

Author’s Note: The author would like to thank Prof. Robert Percival for engaging in very helpful discussions of this Article and for initiating the author’s interest in the right to roam. Any errors are solely the author’s.

1. See Jerry L. Anderson, *Britain’s Right to Roam: Redefining the Landowner’s Bundle of Sticks*, 19 GEO. INT’L ENVTL. L. REV. 375, 395 (2007) [hereinafter *Redefining*] (discussing how Americans create public spaces like national parks on government property to maintain wilderness, while countries like Britain address the goal of environmental protection through different—nearly opposite—regulatory means).
2. See National Park Service (NPS), *Explore Nature*, <http://www.nature.nps.gov/> (last visited Apr. 1, 2014) (celebrating the natural beauty of American wilderness).
3. See Anderson, *Redefining*, *supra* note 1, at 394.
4. Other countries, particularly in Scandinavia and on the European continent, and also Scotland, have even more expansive right-to-roam statutes or customs. See John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 NEB. L. REV. 739 (2011) (discussing the right to roam in Scotland); Heidi Gorovitz Robertson, *Public Access to Private Land for Walking: Environmental and Individual Responsibility as Rationale for Limiting the Right to Exclude*, 23 GEO. INT’L ENVTL. L. REV. 211 (2011) (discussing the right to roam in Scandinavia and the European continent). This Article narrows its scope to the more limited right-to-roam legislation of CRoW, which raises sufficiently knotty issues when considered within the context of the American system of law.
5. Countryside and Rights of Way Act, 2000, c. 37 (Eng.).
6. Particularly the Fifth Amendment, which states “nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.
7. See Anderson, *Redefining*, *supra* note 1, at 426, 431 (claiming that CRoW would be struck down as an unconstitutional taking in America, and that even if this were not so, the legislation would be “extremely unlikely” in America); Brian Sawers, *The Right to Exclude From Unimproved Land*, 83 TEMP. L. REV. 665, 674, 689 (arguing that there is no constitutional right

The Article analyzes constitutional and cultural-historical issues most pertinent to the right to roam, and acknowledges the current constitutional barrier of the physical invasion rule in Fifth Amendment Takings Clause jurisprudence. However, it also asserts that significant doctrinal weaknesses persist regarding the “fundamental” right to exclude underpinning this rule, and that a right to roam agenda might be successfully interwoven into the American environmental justice movement to apply some pressure for change.

The Article begins with a description of CRoW and comparison of this mechanism for recreational land access to more modest regulatory tools in the United States. After a preliminary overview of the main points of contention surrounding an American right to roam, the Article addresses how legislation like CRoW would fare under the Takings Clause. It also highlights several criticisms of today’s takings doctrine. The next part addresses whether the right to roam is so alien to American culture as it first appears, and concludes that it could well be at home here. Finally, some reflections on an American right to roam are offered, including responses to common objections.

II. Contrasting the British and American Experiences

A. Britain’s Right-to-Roam Law and the Current Status of Public Access to Private Land in the United States

Britain’s 2000 enactment of CRoW opened large swaths of private land to public access. This policy differs dramatically from American measures for obtaining public access, including posting rules, common-law doctrines, and national parks. Constitutional and cultural-historical differences between Britain and the United States cast some doubt on the idea of an American right to roam, although there is scholarly disagreement as to the impact of both the constitutional and cultural differences.

I. The Right to Roam and Britain’s CRoW Act of 2000

Although, as mentioned above, the right to roam appears in a variety of cultural iterations, at its core, it is the freedom to walk off the beaten path.⁸ In Britain, the codi-

to exclude and that America has more experience with the commons than commonly thought).

8. The Ramblers (an advocacy group in Britain) define the right to roam as “the freedom to walk on open countryside away from paths and the ability to enjoy the natural environment responsibly and unhindered.” The Ramblers, *Your Right to Roam*, <http://www.ramblers.org.uk/go-walking/advice->

fication of the right to roam in CRoW was preceded by a number of legislative efforts to increase public access to unimproved land.⁹ The Labour Party’s 1997 electoral victory ushered in more dramatic changes as the Party began to act on its mutually reinforcing commitments to conservation and increased access to preserved countryside.¹⁰ Enactment of CRoW opened private lands to the public at the same time that it strengthened governmental powers to designate and protect Areas of Outstanding Natural Beauty (AONBs)¹¹ and Sites of Special Scientific Interest (SSSIs).¹²

Under CRoW, a member of the public may “enter and remain on any access land for the purposes of open-air recreation,”¹³ which might include such activities as walking, picnicking, and bird-watching.¹⁴ Access land includes registered common land and recognized “open country”; the latter refers to “mountain, moor, heath or down.”¹⁵ Some 8% of England and 21% of Wales is estimated to constitute access land.¹⁶ This land consists in part of the “Wuthering Heights country” of the West Yorkshire moors and areas of Dartmoor belonging to the Duchy of Cornwall.¹⁷ In 2009, the right to roam was extended to coastal land with the Marine and Coastal Access Act.¹⁸

for-walkers/your-access-rights/what-is-the-right-to-roam.aspx (last visited Apr. 2, 2014).

9. Two major legislative acts were the Law of Property Act 1925 and National Parks and Access to the Countryside Act 1949 (NPACA). See Natural England, *Commons Toolkit Fact Sheet 13: Public Access to Common Lands* (2010) (summarizing these and numerous other acts of British Parliament promoting public access to land). The former ensured access “for air and exercise” to commons within urban districts. Law of Property Act, 1925, c. 20, pt. 11, §193 (Eng.). The latter provided for the mapping of public rights-of-way and for land opened via voluntary agreement of the landowner. NPACA, 1949, c. 97, pt. 4, §51 & pt. 5, §59 (Eng.).
10. See Lovett, *supra* note 4, at 770 (describing “New Labour” politicians’ environmental and public access commitments and their consideration of various legislative options).
11. See CRoW, pt. 4, §82 (granting designating authority to the Countryside Agency in England and the Countryside Council in Wales).
12. *Id.* pt. 3, §75 (amending prior legislation to provide for more robust protections of SSSIs).
13. *Id.* pt. 1, §2.
14. Any open-air recreational activities cannot be barred by CRoW’s Schedule 2 restrictions or any other such limitations within CRoW.
15. CRoW pt. 1, §1.
16. See Chris Baker, *The Right to Roam*, GEOGRAPHICAL 28 (July 2005).
17. See Mark Rowe, *The Right to Roam, But Not for Years*, INDEPENDENT, Jan. 14, 2001, available at <http://www.independent.co.uk/environment/the-right-to-roam-but-not-for-years-701582.html>. As it turned out, access land also included a small part of the estate of Madonna and her former husband, Guy Ritchie. See Bryony Gordon, *The Day I Rambled Through Madonna’s Back Garden*, INDEPENDENT, May 7, 2004, available at <http://www.telegraph.co.uk/property/4815865/The-day-I-rambled-through-Madonnas-back-garden.html>.
18. Marine and Coastal Access Act, 2009, c. 23, pt. 9, §296(2) & (3) (Eng.) (“[T]hat there is a route for the whole of the English coast . . . [with] a margin of land . . . accessible to the public for the purposes of its enjoyment by them in conjunction with that route.”). See also Natural England, *The Coastal Access Scheme*, <http://www.naturalengland.org.uk/ourwork/access/coastalaccess/schemereview.aspx> (last visited Apr. 4, 2014).

Certain recreational activities are specifically prohibited by CROW, unless permitted through dedication.¹⁹ Roamers may not, for example, drive motor vehicles, light fires, remove or damage plants, hunt, or pursue commercial activities.²⁰ These restrictions minimize the potential for damage to the environment or to landowners' interests in use of their own land.²¹ Certain land is also exempted from CROW.²² For example, cultivated or improved lands such as farms, parks, and golf courses are excepted from access land.²³ Even when a landowner's private land is classified as access land, CROW permits temporary closures of public access,²⁴ in many cases simply at the landowner's discretion.²⁵ Outside such circumstances, however, landowners may incur fines for posting signs likely to deter roamers.²⁶

The road from enactment of CROW to actual public enjoyment of access lands was a long one.²⁷ An ambitious mapping project was a precondition to public realization of rights under CROW.²⁸ The project of classifying and clearly demarcating access land has been steadily accomplished for successive geographic areas.²⁹ A website is available through which roamers may search for land open to the public.³⁰ Roamers and landowners have a duty to respect a Countryside Code³¹ that promotes respectful relations between these groups and between roamers vis-à-vis one another.³² Significantly, CROW secured the right to roam, with its attendant obligations

of parties affected, without offering monetary compensation to landowners.³³

2. Public Access Rights to Private Land in the United States

The United States lacks any equivalent of Britain's right to roam, but enables opportunities for public access by other means. Roughly one-half of the states presume an implied right to enter unenclosed land where the landowner did not post prohibiting signs.³⁴ These access rights are focused mainly on facilitating hunting activities,³⁵ but other recreational uses may be covered by posting statutes.³⁶ In other states, the burden falls to the person wishing to enter private land to first secure permission from the landowner.³⁷ Additionally, a number of states have statutes providing for "open range" districts.³⁸

Besides posting rules, another important access mechanism is the public trust doctrine, which involves the use of beach land.³⁹ The public trust doctrine holds that "property held below the mean high-water line . . . is held by the State in trust for all people,"⁴⁰ whereas land above this line may be privately owned.⁴¹ Maine and Massachusetts have the most restrictive rules regarding seashore access,⁴² but most states allow for broader public access to the seashore.⁴³ Some states, such as New Jersey, recognize an expansive version of the public trust

19. CROW pt. 1, §16 (permitting enabling regulations for dedications that remove or relax Schedule 2 restrictions on activities and conduct on access land).

20. *Id.* sch. 2 ("Restrictions to be observed by persons exercising right of access").

21. *Id.* (proscribing acts damaging to the land and acts commercial in nature or relating to hunting, fishing, or trapping).

22. *Id.* sch. 1 ("Excepted land").

23. *Id.*

24. *Id.* pt. 1, c. 2 ("Exclusion or restriction of access").

25. *Id.* pt. 1, §22 (authorizing landowners to restrict access to the public after giving notice, but for no more than 28 days).

26. *Id.* pt. 1, §14 (prohibiting the placement or maintenance of any "notice containing any false or misleading information likely to deter the public from exercising" the right to roam).

27. See Rowe, *supra* note 17.

28. CROW pt. 1, §§4-11 (describing the duty of the government to draft and publish maps, facilitate an appeal process, and present maps in conclusory form subject to periodic review).

29. See Baker, *supra* note 16, at 28 ("The regime began operating in parts of the North West, the South East and the South of England last autumn [of 2004], in the rest of the North and in Wales in May [2005], and, after the South West, will come into force in East Anglia and the Midlands before the end of the year.").

30. See Natural England, *Crow & Coastal Access Maps*, <http://www.openaccess.naturalengland.org.uk/wps/portal/oasys/maps/> (facilitating searches for access land with optional time frame search). The CROW & Coastal Access Maps site is maintained by Natural England, an "Executive Non-departmental Public Policy responsible to the Secretary of State for Environment, Food and Rural Affairs." See Natural England, *About Us*, <http://www.naturalengland.org.uk/aboutus/default.aspx> (last visited Apr. 3, 2014).

31. See CROW pt. 1, §20 (calling for issuance and periodic revision of codes of conduct by the appropriate agencies in England and Wales).

32. In addition to Schedule 2 restrictions, duties of roamers include leaving gates as they were found and effectively controlling dogs; duties of landowners include ensuring ease of access for visitors and taking steps to guard against certain threats to roamers. See Natural England, *The Countryside Code*, <http://www.naturalengland.org.uk/ourwork/enjoying/countryside-code/default.aspx> (last visited Apr. 4, 2014).

33. This policy decision was not without controversy. See Paul Eccleston, *Call for Compensation Over Right-to-Roam Plans*, TELEGRAPH, July 22, 2008 (summarizing political demands for compensation for the extension of right to roam to coastal properties); ECONOMIST, *When in Roam*, Mar. 11, 1999 (stating in regard to CROW's enactment that "[t]he property rights of the few were trampled underfoot by the many").

34. See Robert M. Hynes, *Posted: Notice and the Right to Exclude*, 45 ARIZ. ST. L.J. 949, 951-52 (2013) (updating an earlier figure provided by another author) (citing Mark R. Sigmon, *Hunting and Posting on Private Land in America*, 54 DUKE L.J. 549, 584 (2004)).

35. See Anderson, *Redefining*, *supra* note 1, at 422 (clarifying that states' posting rules "generally allow access to private land for hunting").

36. *Id.* (explaining that in some posting states, "a hiker might presume permission to walk across unposted lands").

37. Mark R. Sigmon, *Hunting and Posting on Private Land in America*, 54 DUKE L.J. 549, 560 (2004) (adding that a few of these states require written permission).

38. See Ray Ring, *The New West Collides With Open Range Laws*, HIGH COUNTRY NEWS, Mar. 1, 2004 (summarizing the competing interests of proponents and opponents of the open range in open-range states).

39. See Forrest J. Bass, Local Gov't L. Symposium, *Calming the Storm: Public Access to Florida's Beaches in the Wake of Hurricane-Related Sand Loss*, 38 STETSON L. REV. 541, 542 (2009) (discussing the historical foundations for public beach access); Hope M. Babcock, *Should Lucas v. South Carolina Coastal Council Protect Where the Wild Things Are? Of Beavers, Bob-o-links, and Other Things That Go Bump in the Night*, 85 IOWA L. REV. 849, 889 (2000) (discussing early American common-law doctrines relevant to wildlife and wildlife habitat).

40. Bass, *supra* note 39, at 545-46.

41. *Id.*

42. See *In re Opinion of the Justices*, 313 N.E.2d 561, 566-67 (Mass. 1974) (answering that a bill permitting public access to the intertidal zone would, if enacted, violate the Takings Clause); *Bell v. Town of Wells*, 557 A.2d 168, 169 (Me. 1989) (holding the Public Trust in Intertidal Land Act unconstitutional).

43. See Sawers, *supra* note 7, at 672 (claiming that "[m]ost states authorize broad public access to the foreshore").

doctrine to ensure that the public will have access routes to the seashore.⁴⁴

Several common-law doctrines reflecting the English roots of American law may also be invoked to support public access claims.⁴⁵ One of these is prescription, whereby a claimant may try to establish an easement by demonstrating continuous adverse use of private land.⁴⁶ A second common-law mechanism for access is dedication, which may be expressed through a written instrument or implied through a landowner's conduct.⁴⁷ Another common-law doctrine, that of customary rights, was used by the Oregon Supreme Court to open access to dry-sand area along the state's entire coastline.⁴⁸ Hawaii also relied on custom to authorize public rights to coastal land access.⁴⁹

Finally, the United States maintains 59 national parks that are open to public use.⁵⁰ A national park is not quite the same thing in the United States as in England and Wales.⁵¹ In the former, the land itself is government-controlled⁵² and preservation of land virtually untouched by human influence is a key goal.⁵³ In the latter, some 74% of national park land is privately owned,⁵⁴ and there is no necessary tie between national parks and absence of human influence.⁵⁵ Indeed, "British National Parks contain farms, estates, villages and towns in which roughly 300,000 people go about their modern lives."⁵⁶ Whereas CRoW opened up large areas of land within British national parks for public use,⁵⁷ public access to national parks is taken for granted in the United States.

B. Start Walking? Key Issues Concerning an American Right to Roam

Despite the existence of means to gain public access to unimproved land in the United States, serious limitations

accompany each of these means as compared to a right to roam. As discussed above, access through posting rules is dependent on landowner consent, whereas a statutory right to roam would make access compulsory. Common-law doctrines may provide merely a path of access to other land, rather than open land to roaming, and it can be very difficult for plaintiffs to successfully use these doctrines.⁵⁸ Further, while the United States has an impressive system of national parks,⁵⁹ visiting them can require considerable time and planning.⁶⁰

Prof. Jerry L. Anderson has argued that it is highly unlikely, "[s]hort of a revolution in American thinking," that so great a modification in current property understandings as a statutory right to roam could occur in the United States.⁶¹ Two key reasons why no American right to roam seems forthcoming are the differing constitutional property protections in the United States and Britain and historical and cultural differences between the two societies.⁶² The U.S. Constitution explicitly includes property protections,⁶³ and American courts emphasize the landowner's right to exclude others from property.⁶⁴ Britain lacks similarly formal constitutional protection of property, and its political and judicial institutions favor a balancing of private and public interests in property considerations.⁶⁵ The right to roam also has a special historical significance in Britain that traces back to the medieval feudal system based in part on a shared land commons for the propertyless,⁶⁶ a history unshared by Americans.⁶⁷

Another legal scholar who has written on prospects for an American right to roam, Prof. Brian Sawers, offers a rather more optimistic perspective.⁶⁸ Sawers highlights those aspects of American historical practice evincing commitment to the commons.⁶⁹ Further, he suggests that, despite the U.S. Supreme Court's valuing of the right to exclude, there may be some constitutional openness, particularly regarding the status of unimproved land.⁷⁰ Issues of constitutional property protections and the cultural

44. *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984) (determining that dry sand areas that must be used to gain access to public beach areas may also be subject to public access).

45. See Anderson, *Redefining*, *supra* note 1, at 390-94, 423-26 (summarizing common-law doctrines as they relate to public access to private lands in the respective contexts of English and American law).

46. See Bass, *supra* note 39, at 547-48 (listing the elements of prescriptive easement).

47. See *id.* at 549 (defining express dedication); Anderson, *Redefining*, *supra* note 1, at 424 (defining implied dedication).

48. *State ex rel. Thornton v. Hay*, 254 Or. 594 (Or. 1969) (determining that the public may acquire an easement through customary use).

49. *In re Ashford*, 440 P.2d 76, 77-78 (Haw. 1968) (affirming the relevance of ancient Hawaiian custom to land disputes).

50. See NPS, *Units in the National Park System*, <http://www.nps.gov/news/upload/CLASSLST-401-updated-06-14-13.pdf> (last updated June 14, 2013).

51. See Federico Cheever, *British National Parks for North Americans: What We Can Learn From a More Crowded Nation Proud of Its Countryside*, 26 STAN. ENVTL. L.J. 247, 248 (2007) ("British National Parks defy almost every North American presupposition about what a national park is supposed to be . . .").

52. See NPS, *Frequently Asked Questions*, <http://www.nps.gov/faqs.htm> (last visited Apr. 1, 2014).

53. See Cheever, *supra* note 51, at 249 (calling the "image of presettlement conditions" the "guiding orientation for national park managers in North America").

54. See *id.*

55. *Id.*

56. *Id.* at 250.

57. See Baker, *supra* note 16 ("In national parks alone, new access land . . . will cover an area the size of Luxembourg.")

58. See Anderson, *Redefining*, *supra* note 1, at 423-26 (summarizing the inadequacies of common-law doctrines for creating robust public access to the countryside).

59. See NPS, *Find a Park*, <http://www.nps.gov/findapark/index.htm> (last visited Apr. 6, 2014).

60. See Anderson, *Redefining*, *supra* note 1, at 422 (explaining how many national park trails are "remote from civilization and inaccessible to all but serious hikers").

61. *Id.* at 433.

62. *Id.* at 426, 434.

63. U.S. CONST. amend. V (stating that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation").

64. Anderson, *Redefining*, *supra* note 1, at 426 (stating that U.S. Supreme Court precedent requires "a categorical approach to the right to exclude").

65. *Id.* (remarking on the British "balancing approach to the question of compensation").

66. *Id.* at 383 ("The roots of these access rights can be traced to the medieval feudal system.")

67. *Id.* at 418 ("In contrast, American land was initially distributed to individual landowners in fee simple without encumbrances.")

68. See Sawers, *supra* note 7.

69. *Id.* at 674-79 (providing an account of the open range in America).

70. *Id.* at 689 (arguing that there is no constitutional right to exclude).

and historical backdrop to their development are analyzed more closely below.

C. The U.S. Constitution and the Right to Roam

The right of property owners to exclude others has been viewed as fundamental throughout a series of Supreme Court cases, discussed in this part. This fundamental right supports a categorical physical invasion rule in takings jurisprudence, although both the right to exclude and physical invasion rule have been subject to criticism. Current takings doctrine presents an insurmountable obstacle for a right to roam without compensation, but the right to roam as a political demand could play a beneficial if indirect part in the direction of takings law.

I. An Essential Stick: The Right to Exclude and Supreme Court Takings Jurisprudence

According to Anderson, had the U.S. Congress enacted something similar to CRoW and not provided for compensation, the legislation “would almost certainly have been struck down by American courts as an unconstitutional taking.”⁷¹ The Fifth Amendment states “nor shall private property be taken for public use, without just compensation.”⁷² In *Kaiser Aetna v. United States*,⁷³ the Court held that “the ‘right to exclude,’ so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.”⁷⁴ The right to exclude is not, then, just any stick within the “bundle of rights” that constitute private property, but “one of the most essential.”⁷⁵

Post-*Kaiser* cases further entrenched an inflexible, “absolute” conception of the right to exclude. *Loretto v. Teleprompter Manhattan CATV Corp.*⁷⁶ established that “a permanent physical occupation,” even a de minimis one, is a taking “without regard to the public interests that it may serve.”⁷⁷ In *Nollan v. California Coastal Commission*,⁷⁸ the Court found that the government’s demand for a public right-of-way on private land can fit the meaning of a permanent physical occupation.⁷⁹ Even though “no particular individual is permitted to station himself permanently upon the premises,” the right was “permanent and continuous,” since “real property may continuously be traversed.”⁸⁰

Most regulatory takings cases will be analyzed under the multifactor test of *Penn Central Transportation Co. v.*

New York City.⁸¹ However, in light of the Court’s strong embrace of the right to exclude others from one’s private property, the *Kaiser-Loretto-Nollan* line of takings cases form the foundation for one of the Court’s two categorical takings rules.⁸² This is the permanent physical invasion rule. Given the Court’s association of a public right-of-way in *Nollan* with a permanent physical occupation, prospects for an American right to not simply “pass through” but “roam around” do seem grim. Yet, constitutional considerations of the right to roam do not end here, as some have suggested that *Kaiser* and its “fundamental right to exclude” progeny are not the last word on the constitutionality of the right to roam. The following sections examine these claims.

2. Questioning the Constitutional Status of the Right to Exclude

The *Kaiser* decision has been regarded as controversial not only for its holding granting central status to the right to exclude, but also for the allegedly very weak support for such a bold claim.⁸³ *Kaiser* cited three cases to back its positing of the right to exclude as a fundamental right.⁸⁴ One was a 1975 Court of Claims decision that addressed Native American title to land and how exclusion related to this tribal property issue.⁸⁵ The second case, from the U.S. Court of Appeals for the Fifth Circuit, concerned chattel property rather than land, and the text cited was mere dicta.⁸⁶ The third citation was to Justice Louis D. Brandeis’ dissenting opinion in a 1918 decision involving intellectual property rather than land,⁸⁷ and the *Kaiser* Court did not acknowledge that Justice Brandeis went on to claim that the right to exclude is qualified where “property is affected with a public interest.”⁸⁸ As Sawers has written, *Kaiser* fails to “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.”⁸⁹

Whence, then, came the right to exclude as so essential a stick in the bundle of property rights? According to Prof. John D. Echevarria, the 1980s saw a judicial context in which President Ronald Reagan’s appointments plus already-seated appointments by President Richard

71. Anderson, *supra* note 1, at 426.

72. U.S. CONST. amend. V.

73. 444 U.S. 164, 10 ELR 20042 (1979).

74. *Id.* at 179-80. *Kaiser* involved a landowner who dredged a private pond to create a marina, which the government claimed to be subject to a navigational servitude. *Id.* at 165-66.

75. *Id.* at 176.

76. 458 U.S. 419 (1982).

77. *Id.* at 426. *Loretto* involved a state requirement that a landowner allow a cable company to install small cable boxes and lines. *Id.* at 421-22.

78. 483 U.S. 825, 17 ELR 20918 (1987).

79. *Id.* at 832. In *Nollan*, the public right-of-way was to provide beach access. *Id.* at 829.

80. *Id.*

81. 438 U.S. 104, 124, 8 ELR 20528 (1978) (multifactor test considerations include the “economic impact of the regulation on the claimant,” the “extent to which the regulation has interfered with distinct investment-backed expectations,” and “the character of the governmental action”).

82. The other is the per se rule, created by *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, 22 ELR 21104 (1992), pertaining to those very rare cases where a court determines that government action has deprived the landowners of all viable economic use of the property.

83. See Anderson, *Redefining*, *supra* note 1, at 427; Sawers, *supra* note 7, at 667-68.

84. *Kaiser*, 444 U.S. at 180 n.11 (1979).

85. *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1394 (Ct. Cl. 1975).

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

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

88. *Id.*

89. Sawers, *supra* note 7, at 668.

M. Nixon to the Court helped move it “toward a more pro-property, less communitarian, interpretation of the Takings Clause.”⁹⁰ The Court created confusion as to the relationship between its takings jurisprudence and due process jurisprudence, and produced a less deferential test for unconstitutional takings than had previously existed.⁹¹ Although the distinction between due process violations and unconstitutional takings was clarified in *Lingle v. Chevron U.S.A., Inc.*,⁹² the central importance of the right to exclude has remained. Yet, historical evidence, Echevarria argues, suggests that the purpose of the Takings Clause was not about protection against regulatory land use policies, but rather about wartime quartering of troops and possible abolition of slavery.⁹³

Sawers turns to the history and purpose of the Takings Clause to make a more ambitious claim about the Constitution and the right to exclude. Asserting that the primacy of a right to exclude “is a recent development in American law,”⁹⁴ Sawers argues that an originalist approach to the right to exclude would lead to the conclusion that there is no such constitutional right.⁹⁵ “The historical evidence is overwhelming,” he writes, “that property in land [when the Fifth Amendment was incorporated in 1868] did not include a right to exclude from unimproved land.”⁹⁶ As such, originalism would permit states to either grant landowners the right to exclude, as a small number of states did in 1868, or refrain from recognizing such a right.⁹⁷ States should properly have discretion, then, to place greater or lesser weight on the importance of the landowner’s capacity to exclude, and therefore to enact a right to roam where public interest is present.⁹⁸

Finally, at least one scholar, Prof. Edward L. Rubin, has concluded that a careful reading of the Fifth Amendment suggests that it does not vest in individuals a “right” to private property at all.⁹⁹ Rather, it creates a right to due process relevant when government deprives an individual of property as punishment, and—in the case of regulatory takings—a right to just compensation when government acts against an individual by taking her private property.¹⁰⁰ Significantly, compensation is not due, Rubin argues,

where an individual’s property becomes implicated in the consequences of a general law, which is “part of the political process’s vicissitudes,” a process that affords property owners the opportunity to influence legislation.¹⁰¹ “That is why,” Rubin explains, “the government need not compensate the landowner for downsizing his property [as a consequence of a legislative act], but is required to provide compensation if” it acts against a particular individual by taking private property.¹⁰²

3. The Right to Roam and the Fifth Amendment

Ultimately, criticisms of the role of the right to exclude in key Supreme Court regulatory takings cases may be persuasive, but the door remains closed to any right to roam without compensation until the physical invasion rule loses its categorical character. The “slender reed”¹⁰³ by which the fundamental right to exclude hangs, the proper historical situating of exclusion rights, and the close examination of the purpose of the Takings Clause are each important pressure points in prevailing takings doctrine. These points do not, however, change the fact of strong, Constitution-based protections against uncompensated permanent physical occupations.¹⁰⁴

As Echevarria describes, the physical invasion rule has become firmly entrenched, ironically in part because of legal strategizing by attorneys representing the government in takings claims.¹⁰⁵ “For tactical reasons,” he writes, such attorneys “highlighted the distinction between physical invasions and use restrictions in an effort to better insulate use restrictions from takings claims.”¹⁰⁶ Echevarria points specifically to CRow to show the upshot of such maneuvering.¹⁰⁷ Britain’s right to roam exemplifies the way that “some invasions, in truth, impose only modest burdens on property,” yet such legislation is precluded in the United States by an absolute rule against physical invasions.¹⁰⁸

Perhaps, though, the right to roam has a place in the next wave of Takings Clause strategizing that will influence a new round of takings cases decided by a Court that has changed again in composition. Whether regulatory takings doctrine develops an originalist inflection, as discussed above, or instead is informed by the notion that “property rights represent[] a societal balance of interests, which should be subject to constant re-evaluation and revision in light of current needs and norms,”¹⁰⁹ an American

90. John D. Echeverria, *From a “Darkling Plain” to What?: The Regulatory Takings Issue in U.S. Law and Policy*, 30 Vt. L. Rev. 969, 972.

91. *Id.* at 973 (describing the “essential nexus” test in *Nollan*, 483 U.S. 825 (1987)).

92. 544 U.S. 528, 35 ELR 20106 (2005) (concluding that the “substantially advances” test formula “prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence”).

93. Echeverria, *supra* note 90, at 975 (citing John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1292-93 (1996)).

94. Sawers, *supra* note 7, at 668.

95. *Id.* at 689.

96. *Id.* (referring to evidence cited in his work (674-79) concerning the open range and free-range livestock as well as hunting, fishing, and foraging).

97. *Id.* at 689 (“If property law in 1868 determines what landowner rights must be recognized and preserved, those rights over unimproved land are few and far between.”).

98. *Id.*

99. Edward L. Rubin, *The Illusion of Property as a Right and Its Reality as an Imperfect Alternative*, 2013 Wis. L. Rev. 573, 598-605 (2013).

100. *Id.* at 603.

101. *Id.* at 603-04.

102. *Id.* at 603.

103. See Anderson, *Redefining*, *supra* note 1, at 427.

104. Nor would it help to try to argue that the activity of walkers traversing unimproved land is wrongly construed as “permanent physical occupation,” as *First English Evangelical Lutheran Church v. County of Los Angeles*, 492 U.S. 304, 318, 17 ELR 20787 (1987), established the requirement of compensation in cases of temporary takings.

105. See Echeverria, *supra* note 90, at 978.

106. *Id.*

107. *Id.*

108. *Id.* (“[S]uch a measure would be dead on arrival constitutionally in the United States, at least for the foreseeable future.”).

109. Jerry L. Anderson, *Comparative Perspectives on Property Rights: The Right to Exclude*, 56 J. LEGAL EDUC. 539, 539 (2006).

right to roam could have a future, if not a present. The question remains, however, whether the right to roam has sufficient cultural “fit” in America to be pertinent to the trajectory of takings jurisprudence. This question is explored below.

D. *The Traction of the Right to Roam in the United States*

Substantial differences exist between the British and American Constitutions and cultures. These differences have important implications for the question of whether the right to roam is viable as part of an American environmental agenda. The historical-cultural right-to-roam narratives of the two countries are not, however, so distant as typically perceived. This point opens the possibility of an American embrace of the right to roam as part of its environmental justice movement.

I. Constitutional and Cultural-Historical Differences

The differences between the histories and cultures of Britain and the United States ground reasonable doubts about the potential for American acceptance of the right to roam. In Britain, the right to roam is about far more than the ability to “go for a ramble.”¹¹⁰ Under the medieval system of feudalism, those who did not enjoy property at the will of the sovereign—landless peasants—had claim to use of the commons and scrounged a sustainable independence by such use.¹¹¹ A centuries-long process of enclosure divested the peasantry of their right to the commons and eventually replaced peasants’ capacities for independence with early industrial wage-labor.¹¹² As author and activist Marion Shoard describes in a thorough study of the right to roam, since enclosure, Britons have claimed their right to access rural countryside as a resistance campaign against class oppression that has often involved acts of civil disobedience.¹¹³ Viewed in this light, CRoW was a partial winning back of what previously could be claimed by all.¹¹⁴ In addition to this history of controversial and divisive enclosure, the activity of walking through the countryside also has a widely held and distinctive cultural value for Britons,¹¹⁵ one reflected in countless works of English literature.¹¹⁶

The United States, in contrast, was founded in part using the inducement of private land ownership. Landed

independence was a promise to settlers who could successfully cultivate and make productive use of the land.¹¹⁷ Interestingly, the starkly inegalitarian, post-feudal English class system that was shunned by the colonists became the historical backdrop to the leveling legislation of CRoW, while American settlement encouraged the belief that the propertyless had none to blame but themselves. Further, the Revolutionary era spotlighted Lockean ideals of pre-political “natural” rights, including property, which set the philosophical stage for conceptions of property ownership as an absolute right.¹¹⁸

Americans also do not share the same broadly culturally embedded love of walking as Britons. As Anderson puts it, Americans tend to lead a “hermetically sealed existence,” moving “from their air-conditioned houses to their air-conditioned cars to their air-conditioned offices” with little interaction with the natural environment.¹¹⁹ Plenty of Americans enjoy hiking, but hikes are often well-planned events as opposed to a feature of the day-to-day lifeworld.¹²⁰ The right to roam at least appears, then, to have little relevance to American property law.

2. An American Iteration of the Right to Roam?

A second look at American history and culture suggests that the possibility of right-to-roam advocacy in the United States is not a misfit of social values. Sawers unearths the history of the commons in America, claiming that “[u]ntil the late nineteenth century, open access was the norm in the United States.”¹²¹ Such access centered on hunting, fishing, and the pasturing of livestock.¹²² America experienced its own enclosure period, during which the open range was closed mainly by statute and in piecemeal fashion.¹²³ As enclosure progressed with increasing pressure from large landowners and railroad companies wanting to avoid liability for livestock killed by their trains, it “faced significant resistance from the remainder of the population.”¹²⁴

It would also be difficult to describe the history of American property rights without touching upon its racial dimension. As recounted by Prof. William Cronon, lands inhabited and used by Native Americans were routinely claimed by colonists on the theory that Native Americans had no property interests in uncultivated, unenclosed

110. See Anderson, *Redefining*, *supra* note 1, at 415 (describing the British and continental European emphasis on walking as part of cultural identity).

111. See Cheever, *supra* note 51, at 266-68.

112. *Id.*

113. MARION SHOARD, *A RIGHT TO ROAM* 137-204 (2000).

114. See Anderson, *supra* note 1, at 379 (“Rather than a radical nationalization of private property rights, then, CRoW can be viewed as an attempt to regain a balance between public and private rights to land that was upset during the enclosure period.”).

115. *Id.* at 415.

116. *Id.* at 378 (“The romantic vision of a rural walk is enshrined in English literature, from the poetry of William Cowper, John Clare, Thomas Hardy, and William Wordsworth to the novels of Jane Austen.”).

117. *Id.* at 419 (stating that “immigrants were attracted to the United States precisely because of the opportunity for freehold tenure,” and that “[a]s the country expanded west under the ideal of ‘manifest destiny,’ settlers willing to brave the wilds were given expansive property rights as a reward”).

118. See Rubin, *supra* note 99, at 588 (describing John Locke’s theory that “the natural right to possess property and to retain the property one possessed was carried forward into civil society” as “a major theme in the natural rights tradition”).

119. Anderson, *supra* note 1, at 434.

120. See *The Joy of Walking*, ECONOMIST, Dec. 17, 2011, available at <http://www.economist.com/node/21541720> (pointing to the need for the American hiker to often pack supplies in preparation for isolation, as, for example, during the weeklong gaps between towns on the Appalachian Trail).

121. Sawers, *supra* note 7, at 674 (arguing that the “right to exclude was largely a creation of the Legal Realist[]” school of thought).

122. *Id.* at 674-79.

123. *Id.* at 679-84.

124. *Id.* at 680.

land.¹²⁵ Little wonder, it might be noted, that American conceptions of property would shift over time to more formalistic rather than functional, use-based approaches. Then, too, any enclosure narrative is incomplete without acknowledgment of the influence of southern planters who were concerned about the loss of labor control over emancipated slaves.¹²⁶ Closure of the range would thwart opportunities for independent livelihood, and compel African-Americans to undertake field labor as surely as propertyless Britons were pushed en masse into the mills and factories of early industrialism.¹²⁷

Even America's singular founding story, with its promise of property ownership in return for hard work, has strong implications for property access views. This promise lies at the historical roots of the American Dream, a vision already cracked but perhaps outright shattered by the Great Recession.¹²⁸ America is not an ownership society for many—a racially disproportionate many¹²⁹—and this fact has been painfully felt as New Deal-era social welfare ventures continue to decay.¹³⁰ Importantly, lack of access to nature is especially pronounced among the poorest within American cities.¹³¹ One response to the urban experience of what has been dubbed “nature deficit disorder”¹³² has been the flourishing of nature programs designed to bring urban youth into greater contact with nature.¹³³ In light of the race- and class-relevant features of American property history, and the increasing recognition of the value of engagement with the natural environment, the right to roam might easily take its place within the still-vibrant American environmental justice movement.¹³⁴

III. Concluding Reflections on an American Right to Roam

An American right to roam fashioned in the style of Britain's CRoW law would undeniably run into constitutional trouble due to the formalistic physical invasion rule within current takings doctrine. Yet, this need not mean giving up on the idea of such a right to roam and its benefits, including aesthetic enjoyment and physical and mental well-being.¹³⁵ If the heart of property's value is human autonomy,¹³⁶ then, as Prof. Hanoch Dagan argues, “public interest” considerations are not truly external to a coherent conception of property.¹³⁷ This is because ownership structures can conceivably be both a means for individuals to pursue their chosen ends and a device precluding such pursuit.¹³⁸ Reasonable property rights doctrine would have the wherewithal to balance interests, including that of public access to private unimproved land.¹³⁹ Fortunately, as argued above, there are numerous recognized weaknesses in the state of takings law that could open a window for change, and a right to roam is not so alien to American history and culture as one might suppose.

There are several common objections to the right to roam that merit brief response. These are the concerns about invasion of privacy,¹⁴⁰ landowner liability,¹⁴¹ and the possibility of environmental or property damage.¹⁴² Britons' experience with CRoW provides some guidance for each of these issues. Regarding privacy, CRoW prohibits roamers from coming within a certain set distance of private homes (20 meters, the equivalent of 65 feet), including curtilage.¹⁴³ CRoW also ensures that landowners' liability standard in relation to roamers is no higher than that for trespassers.¹⁴⁴ Finally, as discussed above, delicate natural spaces are protected by CRoW in addition to public access to certain private lands, and anxious warnings about the imminent trampling of wildlife habitats by roamers do not seem warranted in retrospect.

125. WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* 56-70 (1983).

126. See Sawers, *supra* note 7, at 683 (As “[p]lanters reported that blacks refused plantation labor when any alternative existed,” emancipation “presented Southern planters with the ‘question of labor control’”). Sawers also claims that the “role of race in enclosure . . . is rarely discussed and entirely neglected by current discussions of the right to exclude.” *Id.* at 675.

127. *Id.* at 683.

128. See Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 *FORDHAM L. REV.* 1607, 1608-09 (2010) (stating that “[w]e are now experiencing the deepest economic crisis since the Great Depression and, not surprisingly, we are witnessing a similar reassessment of deep-seated property norms”).

129. See Selena E. Ortiz & Frederick J. Zimmerman, *Race/Ethnicity and the Relationship Between Homeownership and Health*, 103 *AMER. J. PUB. HEALTH* e122 (Apr. 2013) (citing statistics of grossly disproportionate net worth among whites in comparison to Latinos and African Americans, and discussing the effects of racial discrimination on prospects for home ownership).

130. See Arthur F. McEvoy, *Environmental Law and the Collapse of New Deal Constitutionalism*, 46 *AKRON L. REV.* 881, 900-07 (describing the decay of New Deal-era regulatory structures, and including in his description 1990s takings law that favored owners' development-for-profit interests over statutory protections of land).

131. See Juan-Carlos Solis & Brother Yusef Burgess, *Connecting to Nature: Engaging Urban Children and Youth*, *NAI INT'L CONF.* 203 (2010) (“In the U.S. most children and youth, particularly those living in large urban areas, have little or no significant contact with the natural world.”).

132. *Id.*

133. See, e.g., Sara Kupper, *Back to Nature: Urban Kids Reap Rewards From Exploring the Outdoors*, *MEDILL REP.*, Nov. 27, 2013, available at <http://news.medill.northwestern.edu/chicago/news.aspx?id=226134>.

134. The environmental justice movement has been incorporated into more “mainstream,” governmental institutions. See U.S. Environmental Protection Agency, *Environmental Justice*, <http://www.epa.gov/compliance/environmentaljustice/> (last visited Apr. 6, 2014).

135. See Anderson, *supra* note 1, at 413-14.

136. See Hanoch Dagan, *Inside Property*, 63 *U. TORONTO. L.J.* 1, 13 (2013) (“Many property institutions are often justified—and rightly so—as *loci* of individual autonomy, as important means for securing people's ability to be authors of their own lives.”).

137. *Id.* at 19 (asserting that a “pluralistic set of liberal values” is itself critical to people's autonomy).

138. *Id.* at 13 (arguing that unreasonably “limiting the opportunities of some people” will undermine “the role of property in facilitating people's self-determination”).

139. *Id.* (“Exclusionary practices that unreasonably limit the mobility of the excluded persons—a mobility crucial to their forming, revising, and pursuing their own ends—must thus be invalidated.”).

140. See Anderson, *Redefining*, *supra* note 1, at 413 (noting that Americans have “traditionally emphasized the privacy concerns of the landowner”).

141. *Id.* at 408 (writing that British landowners were “justifiably concerned about their potential liability to injured roamers. What if a child decides to jump in a farm pond and drowns? What if a hiker is injured by livestock or slips and falls down a rocky slope?”).

142. See Aubrey Buxton, *There Is No “Right” to Roam*, 274 *CONTEMP. REV.* 113, 113 (1999) (expressing concern that CRoW would mean “invading and trampling over wild countryside in Britain without regard for its natural habitat and wildlife”).

143. CRoW, sch. 1(2) & (3).

144. *Id.* pt. 1, §13.

It is also worth remarking in closing that some qualified form of an American right to roam is not out of the question, should takings doctrine never budge on the matter of physical invasions. As discussed in this Article, examples include the possible evolution of the current scheme of permissive access into an effort to increase knowledge about posting rules and, in cooperation with landowners,

create a more formal structure of maps marking publicly accessible lands for roamers.¹⁴⁵ Or a statutory right to roam could be worked out, but include a landowner compensation scheme.¹⁴⁶ In short, should a CRoW-like initiative be out of reach, there is still more than one path to walk to get to the natural beauty of rural, unimproved private lands understood as public goods.

145. Hynes, *supra* note 34, at 953-54 proposes a similar plan that incorporates technological advancements.

146. See Anderson, *Redefining*, *supra* note 1, at 405, for an account of compensation cost estimates in the case of British landowners during debates about CRoW.