FISHHOOKS AND TRIPWIRE: A PARTICULARIZED IMPLEMENTATION OF THE RIGHT TO ROAM TO THE APPALACHIAN TRAIL

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No man made the land: it is the original inheritance of the whole species … The land of every country belongs to the people of that country.
- John Stewart Mill[1]

I. INTRODUCTION

In order to reach Erwin, Tennessee from the southern terminus of the Appalachian Trail, a hiker must traverse 342.8 miles[2]—not even a quarter of the length of the trail.[3] While hiking those 342.8 miles, hikers have confronted and conquered hundreds of challenges, including gear mishaps, physical injury, mental exhaustion, and dwindling finances.[4] Hikers prepare in advance to overcome many of these expected obstacles, however, few if any hikers expect to run into fishhooks hanging dangerously at eye level.[5] The U.S. Forest Service officials blame these dangling fishhooks, invisible trip-lines, and threatening signs on a "dispute

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[1] John Stuart Mill, Principles of Political Economy With Some of Their Applications to Social Philosophy 142, 200-01 (People's ed., London, Longmans, Green, Reader, & Dyer 1866).

[2] *See* Hiking Distance Calculator from Springer Mountain, Ga., to Nolichucky River-Erwin, Tenn., TRAIL DISTANCE, https://traildistance.com/ [https://perma.cc/59UH-326T].

[3] *See* NATIONAL PARK SERVICE, https://www.nps.gov/appa/index.htm [https://perma.cc/NX3M-8Q2J].

[4] *See* Zach Davis, *21 Appalachian Trail Statistics That Will Surprise, Entertain and Inform You*, REI COOP J., https://www.rei.com/blog/hike/21-appalachian-trail-statistics-that-will-surprise-entertain-and-inform-you [https://perma.cc/YEY7-Y3YA].

[5] *See Appalachian Trail Hikers Get Warning*, THE WASHINGTON POST (July 10, 1990), https://www.washingtonpost.com/archive/lifestyle/1990/07/10/appalachian-trail-hikers-get-warning/01bfd9f9-9108-4f84-a84c-e904ffb766c7/?utm_term=.7505a325d3ec [https://perma.cc/4Q2P-HL5S].

between the government and landowners who fear their land will be seized."[6]

The Appalachian Trail (AT) is known as America's most famous footpath.[7] It was conceptualized and implemented by progressive forester, Benton MacKaye, in 1921 in an attempt "to provide jobs for rural workers, opportunities for spiritual and physical health … and land protection from profit-motivated exploiters."[8] The Appalachian Trail Conference (now Appalachian Trail Conservancy, hereinafter ATC) was organized as a volunteer-based nonprofit in 1925 and is responsible for managing and protecting the trail.[9] In the 1930s the ATC "relied on informal, handshake agreements between" their own volunteers and private landowners in order to build the trail—agreements that proved insufficient after World War II.[10]

The end of World War II brought heightened timber production, city sprawl, and an increase in outdoor recreation, all of which combined to substantially interfere with the initial route of the AT.[11] If the AT was going to last, the ATC needed help from the federal government. This call for help was answered when Congress passed the National Trails Act in 1968, officially naming the AT part of the National Park system.[12] In 1978, the Act was dramatically amended in order to "expedite land acquisition for the AT corridor."[13] Through a series of "get tough" acquisition policies introduced in 1977, the park service was able to condemn property if the land fell inside the park and the landowner "attempted to improve or develop a structure on an unimproved property."[14] This kept the agency from having to compensate landowners for any future rise in property value. Not surprisingly, these policies spurred opposition to the park service and concern about the "expanding power of the federal government and its infringement … on property rights."[15]

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[6] *Id.*

[7] Sarah Mittlefehldt, *The Peoples Path: Conflict and Cooperation in the Acquisition of the Appalachian Trail*, 15 ENVTL. HIST. 4, 643 (2010).

[8] *Id.* at 646.

[9] *See id.* at 644.

[10] *Id.* at 647.

[11] *See id.*

[12] *See id.* at 649.

[13] *Id.*

[14] *Id.* at 650.

[15] *Id.* at 651.

Today, the AT is approximately ninety-nine percent public land that the government acquired either through eminent domain,[16] consenting sales by private landowners, easements, exchanges, or donations.[17] About 10 percent of private landowners along the trail have refused government offers, often resulting in eminent domain acquisition and deep-seated bitterness against the AT.[18] Some resentful, angry landowners have retaliated against eminent domain takings by burning AT shelters, intimidating hikers, or vandalizing vehicles parked at trailheads.[19]

Although the United States often boasts its history of strong property rights laws, the concept of the right to roam is seemingly foreign here. The right to roam, or freedom to roam, is the general public's right to freely traverse and access public or privately owned land for exercise and recreation.[20] The United States does not recognize the right to roam and instead looks to government acquisition of private land to build a vast inventory of public lands for individual access.[21] The right to roam is recognized in several European countries, including Great Britain, Scotland, and Scandinavia.[22] For example, Great Britain and Scotland enacted the Countryside and Rights of Way Act (CRoW) in 2000 and The Land Reform (Scotland) Act in 2003, respectively.[23]

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[16] *See 75th Anniversary of the Completion of the Appalachian Trail*, APPALACHIAN TRAIL CONSERVANCY, http://www.appalachiantrail.org/promo/75th-anniversary [https://perma.cc/C75C-4RC4].

[17] *See* Debbie M. Price, *Landowners Losing to Appalachian Trail Acquisition: If the National Park Service Needs Land, it Tries to Negotiate with the Owner. But if the Owner Refuses to Sell, the Government Can Condemn the Property*, BALTIMORE SUN (Jan. 29, 1997), http://articles.baltimoresun.com/1997-01-29/news/1997029103_1_eminent-domain-appalachian-trail-physioc [https://perma.cc/3N8C-SRLP].

[18] *See* Debbie M. Price, *Appalachian Trail's Neighbors Fighting a Losing Battle with U.S. Park Service*, BALTIMORE SUN (Mar. 9, 1997), http://articles.latimes.com/1997-03-09/news/mn-36391_1_appalachian-trail [https://perma.cc/3BVS-9J4K].

[19] *See Getting to the Trail*, APPALACHIANTRAIL.ORG, http://appalachiantrail.org/home/explore-the-trail/transportation-options [https://perma.cc/D2YB-CGCV]; *see Appalachian Trail Hikers Get Warning*, *supra* note 4.

[20] *See* Jess Kyle, *Of Constitutions and Cultures: The British Right to Roam and American Property Law*, 44 ENVTL. L. REP. NEWS & ANALYSIS 10898, 10898–99 (2014).

[21] *See id.*

[22] *See* John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 NEB. L. REV. 739, 743 (2011) (discussing the right to roam in Scotland and Great Britain); s*ee also* 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, 211-12, 261 (2011) (discussing the right to roam in Scandinavia and the European continent).

[23] *See* Kyle, *supra* note 20, at 10898; *see also* Lovett, *supra* note 22, at 741, 766.

CRoW, in particular, does not provide the "landowner compensation for public access."[24]

As applied to the United States as a whole, it is likely that the right to roam would fail miserably. William Blackstone's conception of property as the "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe" continues to be championed by Americans today.[25] But, what if the right to roam is solely applied to the narrow corridor of the AT? When it comes to the AT it seems that the right to exclude may be hindering a more socially beneficial use of property, impeding conservation efforts, and fueling landowner resentment. Applied to the AT, the right to roam might appease private landowners in the long term, allowing them to maintain ownership over property that has been in their family for centuries, while also protecting the environment encompassing the trail and those enjoying it from acts of vandalism.

With the codification and enactment of right to roam statutes and acts in several European countries, many scholars have weighed in on both the advantages and disadvantages of such a right. Professor Henry Smith of Harvard Law School posits "giving the right-to-roam stick to a neighbor or to the public affects the value of the remaining property."[26] Professors Jonathan Klick and Gideon Parchomovsky of the University of Pennsylvania Law School built upon Smith's warning, explaining that CRoW's "passage led to statistically significant and substantively large declines in property values in areas … that were more intensively affected by the Act relative to areas where less land was designated for increased access."[27] More importantly, scholars simply do not see a way in which the right to roam would work in America with its explicit Constitutional property protections and case law emphasizing "the landowner's right to exclude others from property."[28] Professor Jerry L. Anderson best encapsulates the above by stating "[s]hort of a revolution in American thinking" the

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[24] *See* Kyle, *supra* note 20, at 10898.

[25] 2 WILLIAM BLACKSTONE, COMMENTARIES, *2.

[26] Henry E. Smith, *Property is Not Just a Bundle of Rights*, 8(3) ECON. J. WATCH 279, 286 (Sept. 2011).

[27] Jonathan Klick & Gideon Parchomovsky, *The Value of the Right to Exclude: An Empirical Assessment*, 165 U. PA. L. REV. 917 (2017).

[28] *See* Kyle, *supra* note 20, at 10901.

possibility of America accepting a statutory right to roam is unlikely.[29]

In contrast, Professor Brian Sawers argues that the right to roam was an important part of early American history and present-day landowners "would gain something of value from a right to roam, even at the same time that they lose the right to exclude."[30] Sawers explains that "[l]andowners could expect an 'average reciprocity of advantage,' thus no taking."[31] It is also argued that the right to roam increases development potential on rural parcels that cannot be used for agrarian purposes and would not have public foot traffic otherwise.[32] The combination of the right to roam and private ownership create a market in which restaurants, waysides, and hostels are profitable.[33] Scholars also argue that unimproved lands, like those the AT pass through, do not present "spatial or temporal conflicts," as "these lands are rarely used by their owners … and public use will usually be light."[34]

This note asserts that applying the right to roam to the AT would foster an improved relationship between private landowners and the trail, resulting in safer conditions for those enjoying the trail, diminished need for government implementation of eminent domain, and better conservation of the "national significant scenic, historic, natural or cultural qualities" of the trail itself.[35] In Part II, this note will discuss the history and current state of the right to roam in America. Part III will examine relevant right to roam statutes codified in Europe and analyze the advantages and disadvantages of each, specifically why the right to roam was the most practical application of property law. Finally, Part IV of this note will demonstrate that the application of the right to roam to the AT as introduced through an amendment to the National Trails System Act of 1968 would alleviate disputes between private landowners and the government, promote protection of the trail,

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[29] Jerry L. Anderson, *Britain's Right to Roam: Redefining the Landowner's Bundle of Sticks*, 19 GEO. INT'L ENVTL. L. REV. 375, 433 (2007).

[30] Brian Sawers, *Article: The Right to Exclude from Unimproved Land*, 83 TEMP. L. REV. 665, 670 (2011).

[31] *Id.*

[32] *See id.* at 691.

[33] *See id.*

[34] *Id.* at 695.

[35] 16 U.S.C. § 1242 (2018).

and build upon existing statutory language, which lends itself to the underlying principles of the right to roam.

II. AMERICA'S PAST AND PRESENT RELATIONSHIP WITH THE RIGHT TO ROAM

While the general perception is of an America fundamentally entrenched in private property rights; she actually has a rich history of traveling rights and public access to commons, which demonstrates the appropriate foundation for presenting a specific right to roam regime. Section A will discuss examples of a modified right to roam found in America before and during the twentieth century. For example, in early America, the public had the right to travel freely on unfenced land, even if landowners objected.[36] Section B will examine the current state of the right to roam in American property law and ask if any remnants of early American public access remain in today's law.

A. Early America

Characteristics of a legal right to roam in America can be found as early as the seventeenth century in New England hunting laws.[37] Laws were created that "allowed New Englanders to cross undeveloped private land to fish or hunt fowl on public lakes"[38] and soon after were changed to allow access to hunting on such undeveloped private land. While the United States Constitution did not protect the right of Americans to enter unenclosed land to hunt, both Vermont and Pennsylvania "ratified constitutions recognizing and protecting such a right."[39] In fact, the Vermont constitutional provision is still in effect today, stating: "The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed, and in like manner to fish in all boatable and other waters (not private property) under proper regulations …"[40]

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[36] *See* Sawers, *supra* note 30, at 665.

[37] *See* Mark R. Sigmon, *Hunting and Posting on Private Land in America*, 54 Duke L. J. 549, 555 (2004).

[38] *Id.*

[39] *Id.* at 556.

[40] VT. CONST. § 67.

While Vermont and Pennsylvania were the only two states with constitutional provisions, many early state courts recognized the right to hunt on unenclosed private land.[41] In fact, in a 1922 U.S. Supreme Court case, *McKee v. Gratz*,[42] the court "recognized a presumption in American law that unenclosed land was open to hunters."[43] Extraordinarily, in 1984 Justice Thurgood Marshall reaffirmed the following language from *McKee*:

> The strict rule of the English common law as to entry upon a close must be taken to be mitigated by common understanding with regard to the large expanses of unenclosed and uncultivated land in many parts at least of this country. Over these it is customary to wander, shoot and fish at will until the owner sees fit to prohibit it. A license may be implied from the habits of the country.[44]

The last portion of the language above demonstrates a third method used to ensure access to private land for hunters—posting statutes. If a landowner wanted to prohibit entry upon their land by hunters, he needed to post a sign declaring that hunting was not allowed.[45] "These statutes fostered the presumption that private land was open to hunters and required affirmative acts on the part of landowners to exclude hunters."[46] Early state hunting laws dating back to the 1650s demonstrate that public access to private land was routine in pre-twentieth century America and can be considered a background principle of law.[47]

Another example of early American law with underlying principles similar to the right to roam are found in laws protecting wandering cattle. "While there is evidence of a person's right to roam, the historical record of livestock roaming is even richer."[48] In 1854, the Supreme Court of Alabama decided *Nashville &*

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[41] *See* Sigmon, *supra* note 37.
[42] McKee v. Gratz, 260 U.S. 127, 136 (1922).
[43] Sigmon, *supra* note 37, at 557.
[44] *Id.*
[45] *See id.* at 558.
[46] *Id.*
[47] *See id.*
[48] Sawers, *supra* note 30, at 674.

Chattanooga Railroad Co. v. Peacock, which held that a railroad was liable for a farmer's cow killed by a locomotive while "roaming at large."[49] Although the cow was roaming at large, the railroad was still liable because "under the Alabama Code unenclosed lands were treated as common pasture." [50] This case and a similar Georgia case, *Macon & Western Railroad Co. v. Lester*, demonstrate that private landowners either had to protect their land by fencing it in or allow trespass by roaming cattle.[51] The Alabama court also noted that railroads could not insist on owners of cattle preventing such cattle from wandering onto train tracks.[52]

The history of livestock roaming in America helps to "supplement the more limited evidence of human roaming," which gives a better understanding and more complete picture of open access in the early United States.[53] First, "foraging livestock" are much more intrusive than "wandering people." [54] For example, freely roaming livestock can easily trample, consume, or generally destroy other's crops, grazing land, or structures. Humans are often passive and obedient travelers gaining access in order to arrive at a specific destination. Wandering livestock present a nuisance, where wandering humans are typically paid no mind by private landowners. Therefore, it is intuitive to surmise the open range that first existed for livestock included a right to roam for individuals. Where there was an open range, there were wandering animals, and owners eventually needed to find their livestock, which often required public access to private land. "When lawmakers expand landowner rights, the most intrusive use is the first to be limited."[55]

Second, private land was first enclosed to keep out livestock, not humans. While fencing private land allowed landowners to keep in (or out) wandering livestock, it "did not translate into a landowner's right to exclude, fencing livestock out invariably meant that the public had a right to roam." [56] It is important to remember that in early America (particularly pre-

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[49] Nashville & C. R. Co. v. Peacock, 25 Ala. 229, 231 (Ala. 1852).
[50] *Id.*
[51] *See* Macon & W. R.R. Co. v. Lester, 30 Ga. 911, 914 (Ga. 1860).
[52] *See* Nashville, 25 Ala. 229 (Ala. 1852).
[53] Sawers, *supra* note 30, at 674.
[54] *Id.* at 675.
[55] *Id.*
[56] *Id.*

twentieth century) fences and roads were not in abundance and "people were accustomed to crossing unenclosed land."[57]

While public access hunting is one of the most prolific examples of a modified right to roam in early America, public access for fishing and gathering also provide examples of a legal right to roam woven into the foundation of early American property law. In *Marsh v. Colby* (1818), the Michigan Supreme Court found that "it has always been customary … to permit the public to take fish in all the small lakes and ponds of the State."[58] Similar to hunting, fishing was a popular public use of unimproved land.

B. Current State of the Right to Roam in American Property Law

In the late nineteenth century, along with the piece-meal closing of the open range, "landowners' right to exclude people expanded."[59] A Georgia court held that this process of open range enclosure "would require a revolution in our people's habits of thought and action," giving weight to the assumption that the expansion of a landowner's right to exclude prompted similar reactions.[60] Throughout the years, a private property owner's right to exclude continued to gain support in the form of statutes and case law, culminating in the 1979 United States Supreme Court decision *Kaiser Aetna v. United States*.[61] While the case focuses much more attention on navigation than the right to exclude, it makes the "sweeping conclusion that property must include a right to exclude."[62] Courts have fallen back on *Kaiser Aetna*'s broad right to exclude, using it as precedent even though *Kaiser Aetna*'s factual background is unusual and the cases citing it are dissimilar. The case involved a disagreement over a dredged passage between a privately-owned lagoon and the ocean. Once dredged by marina developers, the Army Corps of Engineers sought a navigational servitude over the lagoon. The majority held that "the right to exclude, so universally held to be a fundamental

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[57] *Id.* at 676.
[58] Marsh v. Colby, 39 Mich. 626, 627 (Mich. 1978).
[59] Sawers, *supra* note 30, at 680.
[60] Macon & W. R.R. Co. v. Lester, 30 Ga. 911, 914 (Ga. 1860).
[61] Kaiser Aetna v. United States, 44 U.S. 164 (1979).
[62] Sawers, *supra* note 30, at 667.

element of the property right, falls within [the] category of interests that the Government cannot take without compensation."[63]

The holding in *Kaiser Aetna* is problematic because it is grounded in three questionable cases. The first, *United States v. Pueblo of San Ildefonso*, discusses exclusion through the lens of Indian title, [64] which is different because "Indian tribes are sovereigns, not proprietors, so exclusive possession establishes political boundaries, not private rights." [65] Second, the *Kaiser Aetna* court cites dicta from *United States v. Lutz*,[66] which is about the rights a property owner has over their chattel, including the right to exclude. However, the "opinion does not address property in land." [67] Third, the *Kaiser Aetna* court only partially cites Justice Brandeis' dissent in *International News Service v. Associated Press*.[68] The *Kaiser Aetna* court cuts Brandeis' message in two, only including the section that says "an essential element of individual property is the legal right to exclude others from enjoying it," without including the rest of the sentence, which goes on to say "if the property is affected with a public interest, the right of exclusion is qualified."[69] *Kaiser Aetna* has been credited with standing for the proposition that "the U.S. Constitution defined property to include a right to exclude, a right beyond a state's power to regulate."[70]

A majority of states presume land is open to the public until the landowner acts to close access. For example, posting rules, as discussed in Section A, have stood the test of time and are still widely utilized by many states. "About half the states have enacted 'posting' rules, which generally allow access to private land for hunting, without the landowner's specific permission, unless the land has been posted with 'no trespassing' signs." [71] More importantly, "in at least some of these states, the statutory requirement of posting to prohibit access could apply to

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[63] Kaiser, 444 U.S. at 179-80.

[64] United States v. Pueblo of San Ildefonso, 513 F.2d 1383 (Ct. Cl. 1975).

[65] Sawers, *supra* note 30, at 667.

[66] United States v. Lutz, 295 F.2d 736 (5th Cir. 1961).

[67] Sawers, *supra* note 30, at 668.

[68] Int'l News Serv. v. Assoc. Press, 248 U.S. 215, 248-67 (1918) (Brandeis, J., dissenting).

[69] *Id.* at 250.

[70] Sawers, *supra* note 30, at 668.

[71] Anderson, *supra* note 29, at 422.

recreational access as well as to hunting, which would allow a hiker to presume permission to walk across unposted lands."[72] While posting statutes do not necessarily equate to the right to roam, they do "codify a common law notion of implied permission based on custom that has historically prevailed in most American states."[73] These codifications certainly exhibit characteristics of a qualified right to roam, as they recognize an implied permission to enter private land, but with the understanding that the landowner may revoke this permission at any time. This is in contrast to what could be called the more "pure" right to roam in England, which establishes "irrevocable public access rights based on custom."[74]

While there are few prominent examples easily found, an irrevocable public access right based on custom does exist in Oregon with regard to a recognized public right of access to oceanfront beaches. In *State ex rel. Thornton v. Hay*,[75] the Oregon Supreme Court dismissed the possibility of utilizing the doctrine of prescription to allow public access and instead relied on "the English doctrine" of custom, finding that "the public had used the dry sand area along Oregon's Pacific coast 'as long as the land has been inhabited.'"[76] The court explained that "requiring a beach-by-beach determination based on prescription … would be unduly burdensome and unnecessary,"[77] and "ocean-front lands from the northern to the southern border … ought to be treated uniformly."[78] In fact, in a 1993 follow-up case, *Stevens v. City of Cannon Beach*,[79] the Oregon Supreme Court "determined that [the] declaration of public access rights based on custom did not constitute a taking of beachfront owners' property rights," and "the public's right of access should be considered one of the 'background principles' of state law that inhere in every property owner's title."[80] Together, these two cases describe a property owner as never possessing the right to exclude the public from beaches in

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[72] *Id.*

[73] *Id.* at 423.

[74] *Id.*

[75] State *ex rel.* Thornton v. Hay, 462 P.2d 671, 676-77 (Or. 1969).

[76] Anderson, *supra* note 29, at 425.

[77] *Id.*

[78] Thornton, 462 P.2d at 676; Anderson, *supra* note 29, at 425.

[79] Stevens v. City of Cannon Beach, 854 P.2d 449, 456-57 (Or. 1993) (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028-29 (1992), *and* Dolan v. City of Tigard, 854 P.2d 437, 442 (Or. 1993)).

[80] Anderson, *supra* note 29, at 425.

the first place, thus recognizing that "*Thornton* did not destroy a previously existing right."[81] Oregon's beach access doctrine based on custom begins to look like a modified right to roam across public land for recreational purposes. However, this "public right of customary access is limited to beachfront property; public access for recreational purposes in contexts other than beaches finds even less support in the courts."[82]

Overall, the right to exclude has gradually become one of the most powerful property law tools used by American courts today in decisions regarding public access to private land. This development is noticeable looking back at an America that wandered and roamed much more than it does today, with state hunting, fishing, and gathering laws that presumed public access to private land without an affirmative statement otherwise, as well as an open range for livestock, implying a de facto open range for humans. Once America began enclosing the open range, the right to exclude people from private property was expanded across the country. Americans have successfully divided their daily personal lives from constant interaction with nature, moving from one air-conditioned structure to the next, and doing so not on their own two feet, but in a car. Wandering and roaming today is more likely attributed to the homeless and hikers.

III. THE RIGHT TO ROAM IN EUROPE

The right to roam is not limited to a particular footpath; rather, the right to roam gives wide-ranging access, "allowing the public to wander freely over private meadows or other uncultivated private lands."[83] Or, stated another way, "the right to roam empowers the general public to hike and engage in minimally intrusive recreational activities on qualifying private properties."[84]

Section A of Part III will discuss the history, mechanics, advantages, and disadvantages of Great Britain's Countryside and Rights of Way Act, which was enacted in 2000. Section B will discuss more expansive right to roam regimes found in Scotland,

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[81] *Id.*
[82] *Id.*
[83] *Id.* at 380.
[84] Klick & Parchomovsky, *supra* note 27, at 935.

under the Land Reform Scotland Act 2003, and in Scandinavia, under what is called "everyman's right."[85]

A. Great Britain's Countryside and Rights of Way Act

Great Britain has a long and controversial history of the right to roam, beginning with ancient roots in public access and wandering, moving toward extinguishing roaming rights by enclosing private land, then a gradual wane back toward greater public access with the rise of the industrial revolution, and finally turning to a present day codified right to roam statute enacted in Great Britain.

Great Britain's Countryside and Rights of Way Act was prefaced by the Law of Property Act of 1925 and then the National Parks and Access to the Countryside Act of 1949.[86] The enactment of both Acts laid crucial groundwork for a successful twenty-first century right to roam by recognizing public rights of access to land held in common for "air and exercise" and encouraging private landowners to "enter agreements that granted the public access rights over private lands with local authorities."[87] Finally, in 2000, Great Britain enacted a right to roam in the Countryside and Rights of Way Act (CRoW). CRoW "classifies private land that contains mountains, moors, heath, or downland as 'open country,' and requires landowners to allow the public to roam freely across these lands."[88] CRoW opens up millions of acres of classified private land to the public, allowing people to partake in outdoor recreation.[89] Private landowners who have lost their right to exclude public access to their land do not receive any compensation for this limitation on their right to exclude.[90] CRoW was successfully enacted due to a number of factors, but most importantly, there is a longstanding history and culture surrounding the right to roam the British countryside, allowing the public to fully enjoy its amenities.[91]

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[85] *Id.* at 944.
[86] *See id.* at 941.
[87] *Id.*
[88] Anderson, *supra* note 29, at 377-78.
[89] *See id.* at 378.
[90] *See id.*
[91] *See id.*

Jerry Anderson, a law professor at Drake University Law School writes that, "numerous public footpaths crisscross private lands, and both the government and private groups … zealously guard these rights-of-way against encroachment. Under a theory of implied dedication, British courts have consistently recognized the public's continued enjoyment of common rights to certain private lands historically used by the citizenry."[92] CRoW was enacted to help resolve the longstanding negative reaction by British citizens to an extended period of enclosure of private lands.[93] The backlash to the enclosure of private lands can be explained as class outrage at the enclosure of what had long been considered the commons.[94] "Enclosure converted communal land into private land, profoundly affecting commoners' rights and English society in general."[95] The loss of a general right to roam in Great Britain resulted in public outcry and protest against enclosure of the commons.[96] Parliament listened to the public discontent and responded with "a gradual shift back to greater" public access.[97] CRoW should not be viewed as a "radical nationalization of private property rights," because it was enacted to "regain a balance," that was lost "between public and private rights to land during the enclosure period."[98]

The mechanics of CRoW involve a classification of land as either "common land" or "open country" before public access can be granted.[99] The public may freely enter appropriately classified lands in order to enjoy outdoor recreation, as long as they do not damage any gates or fences.[100] This access is granted primarily "for walking and picnicking; one may not hunt, light a fire, swim in … waters, remove plants or trees, ride a bicycle or horse, or disrupt lawful activities on the land."[101] There are several specific limitations to CRoW's right to roam beyond those mentioned above. For example, the right to roam does not apply to bodies of freshwater, cultivated agricultural areas or sports fields (golf

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[92] *Id.*
[93] *See id.* at 378-79.
[94] *See id.*
[95] *Id.* at 379.
[96] *See id.*
[97] *Id.*
[98] *Id.*
[99] *Id.* at 406.
[100] *See id.* at 407.
[101] *Id.*

courses).[102] Hikers are limited to traveling on foot and are also prohibited from accessing land within 60 feet of a dwelling, including "parks and gardens, thereby creating a 'privacy zone' for landowners in the ground adjacent to their homes."[103]

Landowners, in turn, must give the public open access to their properties with no posting stating otherwise.[104] Under CRoW, private landowners "are exempt from tort liability for harm to hikers caused by natural features of the property or resulting from an improper use of gates, fences, or walls.[105] This exemption of tort liability does not extend to obstacles and risks on the land that have been intentionally or recklessly created and, as a result, cause harm to hikers.[106] "For example, if an owner releases her cattle to graze on the property and one cow attacks a visitor, the owner would be held liable for the injury sustained by the visitor."[107]

While CRoW has been successfully implemented and in place for almost eighteen years in Great Britain, it would be unfair to ignore a glaring negative result of the enactment. Through a carefully executed and extensive study done in 2017, law professors Jonathan Klick and Gideon Parchomovsky set out to measure the value of the right to exclude to private property owners by analyzing the effect of CRoW legislation in England on "property values by comparing affected and non-affected parcels before and after the legislation."[108] Klick and Parchomovsky "found that the formalization of the right to roam, though only minimally invasive, led to a statistically significant and substantively important drop in property values."[109] However, it is also important to recognize that although implementation of the right to roam may lead to a decline in individuals' property value, it is necessary to engage in a cost-benefit analysis and "to evaluate the benefit that may arise from increasing public access to private property."[110]

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[102] *See* Klick & Parchomovsky, *supra* note 27, at 942.
[103] *Id.*
[104] *Id.* at 943.
[105] *Id.*
[106] *See id.*
[107] *Id.*
[108] *Id.* at 965.
[109] *Id.* at 965-966.
[110] *Id.* at 966.

B. The Right to Roam in Scotland and Scandinavia

Surprisingly, the amount of public access granted under CRoW pales in comparison to the scope of the right to roam in Scotland and Scandinavian countries. In Scotland, the right to roam was established by the Land Reform Scotland Act of 2003 and "covers the entire territory of the country" with fewer "exclusions and exemptions" in place than CRoW.[111] Specifically, the right to roam in Scotland permits public access to "grassy sports fields" and allows a much wider range of activities, like "such activities as organized educational tours, orienteering, bicycle riding, rock climbing, swimming, and camping."[112] Notably, the Scottish legislature avoids bright-line rules demarcating the exact distance at which hikers must stay away from private landowner's dwellings.[113] Instead, it requires that hikers provide owners with a "reasonable measure of privacy and refrain from unreasonably disturbing them" and private landowners can exclude visitors "only to the extent necessary to give them a reasonable degree of privacy in their *homes*."[114] The downside to an unclear "privacy zone" for landowners has "created uncertainty as to the precise scope of the right and has necessitated judicial intervention in some cases."[115]

Scandinavian countries have expanded the scope of the right to roam even further than the Land Reform Scotland Act of 2003 and Great Britain's CRoW. The right to roam can be traced to "ancient historic roots and is widely known as 'everyman's right,'" or *allemansratten*.[116] The public are granted access and encouraged to partake in recreational activities on land and water alike, allowing "swimming, sailing, canoeing, and rowing."[117] Hikers are also allowed to gather "berries, flowers, and mushroom" for consumption, and have permission to set up tents and camp "for up to two days … as long as tents are positioned at least 500 feet away from the nearest house and the privacy of the landowners is

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[111] *Id.* at 943.
[112] *Id.*
[113] *Id.* at 943-44.
[114] *Id.*
[115] *Id.*
[116] *Id.* at 944.
[117] *Id.*

respected."[118] Norway codified the customary right to roam in 1957 under the Outdoor Recreation Act, allowing landowners to exclude the public from cultivated land known as innmark, unless it is covered by snow.[119] All other land, called utmark, is open to the public. [120] Norway, Sweden, Finland, Denmark, Switzerland, Austria, and even Germany have different variations of the right to roam, however, all balance the landowner's interests against the public's interest in outdoor recreation.[121] Also, "the right to roam never extends to home and garden, nor to anything that would damage the land, including grazing or motorsports."[122]

While there are clear disadvantages to the codification of the right to roam, as evidenced in Professors Klick and Parchomovsky's empirical study, the right to roam has proven to be successful as a mainstay in European property law doctrine. With some countries never straying from the right to roam, and others experiencing a rebirth of this recognition of public access to private property, the right to roam stands as an impressive example of what could be in other countries.

IV. THE RIGHT TO ROAM AS APPLIED TO THE APPALACHIAN TRAIL

While there is an abundance of case law on the right to exclude and several academic articles written on different aspects of the right to roam, none address the possibility of applying the right to roam to the AT or other famous long-distance hiking trails. Past and present private land ownership disputes with the government have created chronic resentment among residents of communities surrounding the trail, occasionally resulting in vandalism against hikers and destruction of the trail itself. Applying the right to roam to the AT would foster an improved relationship between private landowners and the trail, resulting in safer conditions for those enjoying the trail, diminished need for government implementation of eminent domain, and better conservation of the "national significant scenic, historic, natural or

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[118] *Id.*
[119] *See* Sawers, *supra* note 30, at 687.
[120] *See id.*
[121] *See id.* at 688.
[122] *Id.*

cultural qualities of the trail itself."[123] This Note argues that a right to roam on the AT could and should be adopted through an amendment to the National Trails System Act of 1968 as a solution to the problems hikers, landowners, and the government face.

Establishing a right to roam on the Appalachian Trail is one of the only viable and resolute solutions that would successfully replace the government's need to exercise condemnation proceedings on private landowners along the trail. 16 USCA § 1246(g) of the National Trails System Act explains that "the appropriate Secretary may utilize condemnation proceedings without the consent of the owner to acquire private lands or interests therein pursuant to this section only in cases where, in his judgment, all reasonable efforts to acquire such lands or interests therein by negotiation have failed, and in such cases he shall acquire only such title as, in his judgment, is reasonably necessary to provide passage across such lands."[124] There are well established and accepted alternatives to eminent domain used extensively to create the AT, however, none provide the optimal answer. The AT is a singular phenomenon in the United States, which begs a tailored and unique application of property law that is unnecessary for less populated long-distance hiking trails like the Pacific Crest Trail, which was established long after much of the western lands it winds through were amassed through government acquisition and held for public use. The right to roam offers a consistent, efficient, and simple alternative to the contentious use of condemnation and the tedious creation of piece-meal easements along its 2,180-mile length.

Three notable and unique characteristics are attributable to the right to roam, setting it apart from other property law doctrines. First, "the right to roam implicates a relatively minimal intrusion on owners' right to exclude." [125] This allows private property owners to maintain ownership of their land while tailoring the use of the land to the specific needs of both the hiker and the landowner, ensuring "that hikers do not interfere with owners' possession or use rights." [126] This characteristic is of particular significance with regard to the AT because most

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[123] 16 U.S.C. § 1242 (2018).
[124] *Id.*
[125] Klick & Parchomovsky, *supra* note 27, at 936.
[126] *Id.*

condemnation proceedings along the trail have occurred with respect to unimproved private property, that is "land that does not have certain basic required services necessary to utilize it for other purposes." [127] In other words, unimproved property does not include electricity, street access, water, or telephone services, and unless the landowner has pitched a tent or built a rustic cabin, no one is living on the land. In effect, the right to roam would grant an average reciprocity of advantage to both the landowner and the AT, allowing the private landowner to retain ownership of the land, with the AT providing a minimally intrusive route for hikers through a piece or section of their land. After analyzing Professors Klick and Parchomovsky's empirical study on declining land value after implementation of CRoW in England, some may argue that even this minimal intrusion will cause a decrease in the value of their land. [128] However, the footpaths and trails of CRoW frequently pass through land occupied by private homes and estates, in contrast to the route of the AT, where it is rare to run into any personal residence situated near forests and mountains. In fact, it can be argued that the existence of the AT near a tract of private property could provide a valuable opportunity for the landowner. The development potential is less limited with a right to roam, as "the landowner can develop the parcel into a restaurant or guesthouse," or hostel, whereas without the right to roam, there is very little ability to profit from such a tract of land.[129]

Second, implementing a right to roam provides greater efficiency and justice, as "it is often necessary to gain access to multiple parcels to complete a certain hike or trail."[130] When the general public attempts to access the right to gain entry onto private land by using "voluntary market transactions," they would very likely run into the dual problems of "high transaction costs and strategic holdouts."[131] Strategic holdouts occur when private landowners refuse any offer in an effort to gain as much bargaining power as possible, leading to a larger payout for them at the end of the deal. In the case of the AT, these strategic holdouts might not

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[127] James Kimmons, *Unimproved Land in Real Estate*, THE BALANCE (Sept. 8, 2017), https://www.thebalance.com/unimproved-land-2867360 [https://perma.cc/LFJ2-KP7S].

[128] Klick & Gideon, *supra* note 27, at 922.

[129] Sawers, *supra* note 30, at 691.

[130] Klick & Gideon, *supra* note 27, at 936.

[131] *Id.* at 937.

be so smart because the government will resort to condemnation proceedings to acquire the land at market value, which is often less valuable than the special sentiment that the land provides the owner. Also, many find distributive justice in the right to roam because it "benefits the public at large at the expense of potentially affluent property owners by making the latter's lots subject to roaming rights."[132]

Third, the right to roam has been codified in England, Wales, and Scotland, all of which are common law countries who share an analogous history in property to the United States.[133] The Constitution's Fifth Amendment "Takings Clause," which states that private property shall not be "taken for public use, without just compensation,"[134] presents a glaring challenge to the right to roam's lack of compensation to private landowners who give up an all-encompassing right to exclude, the right to roam arguably conforms to historic principles of property law discussed in Part II of this note, negating any potential conflict with the constitution. Moreover, the right to roam's origins as a background principle of law paired with the recent reemergence of the progressive property movement, reducing a landowner's right to exclude along the AT by introducing the right to roam does not require a revolution in thought about American property law.

As a movement "predicated on the idea that property, like all other legal institutions, should advance human flourishing," progressive property advocates maintain that property policy must recognize both the needs of landowner and society at large.[135] The property owner's right to exclude is meaningful, but it must sometimes give way to broader needs and values, thus "endorsing a pluralistic vision of property."[136] Under this vision, property should "advance a wide range of values," spanning from individual interests to "social interests, such as environmental stewardship, civic responsibility, and aggregate wealth," to general interests.[137] As a result of such a pluralistic vision, it follows that the right to exclude does not represent the full essence of American property

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[132] *Id.*
[133] *See id.*
[134] U.S. CONST. amend. V.
[135] Kick & Parchomovsky, *supra* note 27, at 936-37.
[136] *Id.* at 934.
[137] *Id.*

law.[138] "The emergence of the progressive property movement has resurrected the 'bundle of rights' property law analogy and has put renewed pressure to scale back the right to exclude."[139] While the right to roam embodies many of the values approved by the progressive property movement, it also offers a tailored solution to the issues currently plaguing landowners along the route of the AT, those hiking the AT, and the AT itself.

CONCLUSION

This note does not attempt to argue that a nationwide adoption of the right to roam in America would be successful, or even a good idea. Instead, this note posits that the Appalachian Trail is suffering from the inconsistent and inefficient application of current American property law doctrines, specifically, condemnation proceedings against private landowners as explained in § 1246 of The National Trails System Act,[140] and that a particularized implementation of the right to roam to the Appalachian Trail would remedy the negative effects created by the government's use of eminent domain. Applying the right to roam to the Appalachian Trail would allow private landowners to maintain possession of their land while also granting a narrow and minimally intrusive right-of-way to hikers passing through. Eliminating the need for condemnation proceedings and instead fostering an average reciprocity of advantage through the right to roam would lessen landowner and local community resentment against the Appalachian Trail and its hikers. As a result, the right to roam might appease private landowners in the long term, allowing them to maintain ownership over property that has been in their family for centuries, while also protecting the environment encompassing the trail and those enjoying it from acts of vandalism.

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[138] *See id.*
[139] *Id.*
[140] *See* 16 U.S.C. § 1246 (2018).