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The Right to Exclude Others from Private Property: A Fundamental Constitutional Right

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Part II: Discussions on the National Level

Chapter 2: Property Rights

The Right to Exclude Others From Private Property: A Fundamental Constitutional Right

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I. INTRODUCTION

Property rights, and particularly rights in land, have always been fundamental to and part of the preservation of liberty and personal freedom in the United States.[1] They are particularly so today.[2] The

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1. For a summary of the thirteenth and fourteenth centuries roots of our present constitutional principles and the treatment of property rights through the late 1980s, see Norman Karlin, *Back to the Future: From Nollan to Lochner*, 17 SW. U. L. REV. 627, 638 (1988) ("To the framers [of the Constitution], identifying property with freedom meant that if you could own property, you were free. Ownership of property was protected."). *See also* JAMES W. ELY, THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 26 (1992) (quoting ARTHUR LEE, AN APPEAL TO THE JUSTICE AND INTERESTS OF THE PEOPLE OF GREAT BRITAIN IN THE PRESENT DISPUTE WITH AMERICA (4th ed. 1775)); 2 BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND (l767); Chicago B & Q R. Co. v. Chicago, 166 U.S. 226, 235 (1897). For a series of essays on property rights in America between the seventeenth and twentieth centuries, see LAND LAW AND REAL PROPERTY IN AMERICAN HISTORY (Kermit L. Hall ed,. 1987).

2. *See* ELY, *supra* note 1; W.J.F. Realty Corp. et al. v. New York, 672 N.Y.S. 2d 1007,

right to exclude others is a fundamental aspect of those property rights.[3] In 1918 Justice Brandeis observed that "[a]n essential element of individual property is the legal right to exclude others from enjoying it."[4] More recently, Professor Richard Epstein, in his seminal work on property and takings, describes "[t]he notion of exclusive possession" as "implicit in the basic conception of private property."[5] It is so recognized in the first edition of the American Law Institute's Restatement of the Law of Property:

> Section 7 Possessory Interests in Land
>
> A possessory interest in land exists in a person who has (a) a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land.[6]

Professor Jan Laitos describes the right to exclude as one of those "rights valued so highly, that the abolishment will result in the offending law being declared unconstitutional."[7] The Fifth Amendment to the U.S. Constitution states, in relevant part: "[N]or shall private property be taken for public use, without just compensation."

The United States Supreme Court has clearly and unequivocally stated that the right to exclude is a fundamental element of this

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1008 (1998): Carol Rose, *Property as the Keystone Right*, 2 NOTRE DAME L. REV. 329 (1996); William W. Van Alstyne, *The Recrudescence of Property Rights As the Foremost Principle of Civil Liberties: The First Decade of the Burger Court*, 43 LAW AND CONTEMP. PROBS. 66 (1980).

3. *See* STEVEN J. EAGLE, REGULATORY TAKINGS § 7.2 (1999); DWIGHT MERRIAM & FRANK MELTZ, THE TAKINGS ISSUE 199-128 (1999); JAN LAITOS, LAW OF PROPERTY PROTECTION § 5.03[A] (1999). Daniel Mandelker touched upon this issue in § 2.09 of his widely-used and well-regarded treatise, LAND USE LAW (4th ed. 1997), as well as in his casebook with RICHARD A. CUNNINGHAM & JOHN M. PAYNE, PLANNING AND CONTROL OF LAND DEVELOPMENT 131-32 (4th ed. 1995), and in Daniel R. Mandelker, *New Property Rights and the Takings Clause*, 81 MARQUETTE L. REV. 9 (1997).

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

5. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 63 (1985).

6. RESTATEMENT OF PROPERTY § 7 (1936).

7. Laitos, *supra* note 3, § 5.16.

constitutionally-protected right to private property, that physical intrusion (particularly if permanent), whether by government or by private parties acting under government permission, violates that right, and that individuals given a permanent and continuous right to pass over private property amounts to such physical occupation.[8] Moreover, it has cited the above-quoted Restatement section with approval in several cases discussing property rights and the right to exclude.[9]

This article discusses the fundamental nature of the right to exclude as it emanates not only from decisions of the U.S. Supreme Court but from selected federal circuit and state appellate court decisions. As appears below, the right to exclude applies to both government and private activity on private land, whether the activity is the result of governmental attempts to secure a public interest or of theories associated with stronger rights emanating from custom and public trust.

II. GOVERNMENT ACCESS-SEEKING AND THE RIGHT TO EXCLUDE

Federal Courts have clearly recognized the fundamental nature of the right to exclude in cases where the government attempts to secure access to private property. Perhaps the strongest language comes from the U.S. Supreme Court's opinion in *Kaiser-Aetna v. United States*.[10] There, the Army Corp of Engineers claimed that certain improvements to Kuapa Pond in Hawaii Kai—a large residential development in Honolulu—resulted in a navigational servitude, which precluded the pond's owners from denying public access to the pond.[11] As described by the Court: "The Government contends that as a result of one of these improvements . . . the owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others."[12] In holding that "the government's attempt to create a public right of

8. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

9. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-36 (1982); Kaiser Aetna v. United States, 444 U.S. 164 (1979).

10. 444 U.S. 164 (1979).

11. *See id.* at 168.

12. *Id.* at 176.

access to the improved pond goes so far beyond ordinary regulation...as to amount to a taking under the logic of Pennsylvania Coal v. Mahon,"[13] the Court said:

> [W]e hold 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 just compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather the imposition [of the servitude] will result in an actual physical invasion of the privately owned marina. And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation.[14]

In a different context, the Court decided in *Loretto v. Teleprompter Manhattan CATV Corp*. that the government-authorized placement of cable television cables and a small silver box on the rooftop of a multi-family, multistory building was a sufficient violation of the constitutionally protected right to exclude to warrant compensation.[15] The Court declared that while it has often upheld regulation of property use where deemed necessary to promote the public interest, "[a]t the same time, we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause."[16] The Court continued, "Although this Court's most recent cases have not addressed the precise issue before us, they have emphasized that physical invasion cases are special and have not repudiated the rule that any permanent physical occupation is a taking."[17]

Describing such physical occupation as "the most serious form of invasion of an owner's property interests," the Court "borrow[ed] a metaphor: the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a

13. *Id*. at 178.
14. *Id*. at 179-89 (emphasis added) (footnote and citations omitted).
15. *See* 458 U.S. 419, 421 (1982).
16. *Id*. at 426 (citations omitted).
17. *Id*. at 432.

slice from every strand."[18] The Court placed particular emphasis on the adverse effects of such an invasion:

> Moreover, an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property. As [another part of the opinion] indicates, property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require as well that the owner permit another to exercise complete dominion literally adds insult to injury. Furthermore, such an occupation is qualitatively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent or nature of the invasion.[19]

Changing the metaphor somewhat, in *Hodel v. Irving*, the Court reiterated that the right to exclude is one of the most important sticks in the bundle of rights that comprise private property.[20] In holding unconstitutional a law that required interests in land to escheat to the Sioux Indian Tribe upon the owner's death, the Court compared the loss of the right to devise to the loss of the right to exclude:

> The character of the Governmental regulation here is extraordinary. In Kaiser Aetna v. United States, we emphasized that the regulation destroyed "one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others." Similarly, the regulation here amounts to virtually the abrogation of the right to pass on a certain type of property—the small undivided interest—to one's heirs.[21]

The Court also concentrated on the right to exclude in *Lucas v. South Carolina Coastal Council*, indicating that in the event of regulations that compel the property owner to suffer a physical

18. *Id.* at 435.
19. *Id.* at 436 (citations omitted).
20. *Id.*
21. *Hodel*, 481 U.S. at 716.

invasion, "no matter how minute the intrusion and no matter how weighty the public purpose behind it, we have required compensation."[22]

The Ninth Circuit Court of Appeals has, as it must, closely followed the principles laid down by the United States Supreme Court in protecting the fundamental right to exclude others from private property. For instance, in *Hall v. City of Santa Barbara* the court relied heavily on the Loretto decision in concluding that mobile home park owners could challenge as a taking an ordinance that compelled them to offer leases of unlimited duration:[23]

> Property rights in a physical thing have been described as the rights "to possess, use and dispose of it." To the extent that the government permanently occupies physical property, it effectively destroys each of these rights. [T]he owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of rights.[24]

Similarly, in *Evers v. County of Custer*, the Court held that a county declaration of intention to convert an ostensibly private road to a public thoroughfare amounted to an unconstitutional taking.[25] Citing *Kaiser Aetna*, the Ninth Circuit said: "'The County did everything it could, short of actually tearing down the gates, to open the road to members of the public, and officially endorsed their use of the road. A property owner's right to exclude others is 'universally held to be a fundamental element of the property right.'"[26]

The Eleventh Circuit followed the same principle in *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, LTD*.[27] In

22. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).

23. Hall v. City of Santa Barbara, 833 F.2d 1270, 1276 (9th Cir 1986). In finding the rent control ordinance before it to have actually transferred some of the landlord's property interest to tenants contrary to the Fifth Amendment, the court was later found to be in error by the U.S. Supreme Court in *Yee v. City of Escondido*, 503 U.S. 519 (1992).

24. 833 F.2d at 1277 (emphasis in original) (citation omitted).

25. 745 F.2d 1196 (9th Cir. 1984).

26. *Id.* at 1201 (emphasis added).

27. 953 F.2d 600 (11th Cir. 1992).

that case the court focused on the right to exclude in questioning the constitutionality of a U.S. law that was interpreted by a lower court to grant franchised cable companies the right to use pubic easements previously dedicated for electrical, telephone, and video services. Specifically, the court declared: "When the government appropriates an owner's right to exclude another's physical presence without paying the owner just compensation, the government violates the takings clause."[28] A property owner's right to exclude another's physical presence must be tenaciously guarded by the courts.[29]

The Federal Circuit recognized the fundamental nature of the right to exclude in *Hendler v. United States*.[30] In holding that the EPA had taken the "plaintiff's right to exclude" and thus, private property, by installing wells on his land, the Court said:

> In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession—the right to exclude strangers, or for that matter friends, but especially the government. The notion of exclusive ownership as a property right is fundamental to our theory of social organization. In addition to its central role in protecting the individual's right to be let alone-the ability to exclude freeriders—is now understood as essential to economic development, and to the avoidance of wasting of resources found under common property systems.[31]

The D.C. Circuit Court extended the primacy of the right to exclude to personal property in *Nixon v. The United States*:

> More importantly, the [law] has completely abrogated Mr. Nixon's right to exclude others from the materials. As the court has confirmed time and time again, the right to exclude others is perhaps the quintessential property right.[32]

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28. *Id*. at 604-05.
29. *Id*. at 605.
30. 952 F.2d 1364 (Fed. Cir. 1991).
31. *Id*. at 1374-75 (emphasis in original) (citations omitted).
32. *Id*. at 1286 (citing *Kaiser Aetna*, 444 U.S. at 179; *Loretto* 458 U.S. at 433; *Hodel* 481 U.S. at 704).

Finally, in *LeClair v. Hart*, the Seventh Circuit agreed that the "right to exclude others is generally 'one of the most essential sticks in the bundle of rights that are commonly characterized as property'" in rejecting the argument that an unauthorized IRS recording of plaintiff's possessions was not a seizure because it did not involve a confiscation of property.[33]

State appellate courts have recognized the right to exclude others as a fundamental attribute of property ownership in Hawaii,[34] Washington,[35] Pennsylvania,[36] Mississippi,[37] Kentucky,[38] Massachusetts,[39] New Hampshire,[40] Maine,[41] Rhode Island,[42] Michigan,[43] and New Jersey.[44]

In Eaton v. B.C.&M.R.R., the New Hampshire Supreme Court became one of the earliest state courts to clearly recognize that the right to exclude is a fundamental property interest the taking of which is unconstitutional without just compensation.[45] In *Eaton* a railroad company acting under legislative authority destroyed a ridge during construction of a road and thereby precipitated the flooding of an adjacent property.[46] In considering whether the legislature had the power to sanction the flooding without providing compensation, the court explained that a taking of property is not limited to those cases where a property title is confiscated.[47] Rather, the court stated that a

33. LaClair v. Hart, 800 F.2d 692 (7th Cir. 1986) (citing *Kaiser Aetna*, 444 U.S. at 176).

34. Kalipi v. Hawaiian Trust Co., Ltd., 656 P.2d 745, 749 (Haw. 1982).

35. Margosa Associates v. City of Seattle, 854 P.2d 23 (1993); Sintra, Inc. v. City of Seattle, 879 P.2d 765, 771 (1992).

36. *Petition of Borough of Boyertown*, 466 A.2d 239, 245 (Pa. Comm. Ct. 1983).

37. Clanton v. Hathorn, 600 So. 2d 963, 965 (Miss. 1992).

38. Southland Development Corp. v. Ehrler's Dairy, Inc., 468 S.W.2d 284, 286 (Ky. Ct. App. 1971).

39. Opinion of the Justices, 313 N.E.2d 561 (Mass. 1974).

40. Opinion of the Justices, 649 A.2d 604, 611 (N.H. 1994).

41. Bell v. Town of Wells, 557 A.2d 168, 178 (Me. 1989).

42. Steven Harris v. Town of Lincoln, 668 A.2d 321, 327 (R.I. 1995).

43. City of Lansing v. Edward Rose Realty, Inc., 502 N.W.2d 638, 642 (Mich. 1993); Bott v. Comm. of Natural Resources, 327 N.W.2d 838, 851 (Mich. 1982); Grand Rapids Booming Company v. Morris Jarvis, 30 Mich. 308 (1874); Vanderlip v. City of Grand Rapids, 41 N.W. 677, 682 (Mich. 1889).

44. Gardner v. New Jersey Pinelands Commission, 593 A.2d 251, 262 (N.J. 1991).

45. 1872 WL 4329 (1872).

46. *Id.* at 504-05.

47. *Id.* at 512.

taking occurs whenever the rights that inhere in property, including the right to exclude, are denied:

> If property in land consists of certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference "takes," pro tanto, the owner's "property." The right of indefinite user (or of using indefinitely) is a essential quality . . . This right of user necessarily includes the right and power of excluding others from using the land. From the very nature of these rights of user and exclusion, it is evident they cannot be materially abridged without, ipso facto, taking the owner's "property."[48]

Similarly, in *Grand Rapids Booming Company v. Morris Jarvis*, a logging company acting under color of statute backed up a river with its equipment and logs and thereby caused the flooding of nearby private property.[49] In considering whether the statute authorized the uncompensated flooding of land, the court emphasized that it is the incidents of ownership, including the right to exclude, not just the title, that are legally protected:

> Is not the idea of property in, or title to lands, apart from, and stripped of all its incidents, a purely metaphysical abstraction, as immaterial and useless to the owner as "the stuff that dreams are made of?" Is it not a much less injury to him, if it can injure him at all, to deprive him of this abstraction, than of the incidents of property, which alone render it practically valuable to him? And among the incidents of land, or anything else, is not the right to enjoy its beneficial use, and so far to control it as to exclude others from that use, the most beneficial, the one most real and practicable idea of property, of which it is a much greater wrong to deprive a man, than the mere abstract idea of property without incidents?[50]

Not surprisingly, the court held that the "legislature had no constitutional power to give the company the right to flood these

48. *Id.* at 511.
49. 30 Mich. at 311.
50. *Id.* at 320-21.

lands against the will of the owner, without just compensation, at least."

The Michigan court's respect for the right to exclude has not diminished with the passage of time. For instance, it rejected the "recreational boating test" as the standard for determining navigability in *Bott v. Michigan*, because it "would deny riparian and littoral owners the right to exclude others, a right inherent in the concept of private property."[51] Later, in the 1993 case of *City of Lansing v. Rose*, the Michigan Supreme Court found that an owner's right to exclude trumped the City's power to condemn property on behalf of a private cable company. Specifically, the court stated: "In light of Continental's extensive private interest, we find [the] asserted rationales for mandatory access to [plaintiff's] property to be insufficient to overcome [plaintiff's] right to exclude others from its private property."[52]

The Wisconsin Supreme Court reached a similar result in *Noranda v. Strom*.[53] There, the court rejected the argument that a Wisconsin statute requiring a mineral exploration company to divulge geological data to the state could alter the company's property rights to the extent that compensation was not required for the taking because, "although a state may redefine property rights to a limited extent, it lacks the power to restructure rights so as to interfere with traditional attributes of property ownership, such as the right to exclude others."[54] The court concluded that the statute requiring Noranda to give up its right to exclude was a "government intrusion of a serious character" and therefore amounted to an unconstitutional taking.[55]

III. THE RIGHT OF A PROPERTY OWNER TO EXCLUDE UNDER THE FIFTH AMENDMENT'S PROPERTY CLAUSE APPLIES TO PRIVATE INDIVIDUALS AS WELL AS TO THE GOVERNMENT

As noted by Laurence H. Tribe in his authoritative treatise on

51. 327 N.Y.2d at 851.
52. 502 N.W.2d 646.
53. 335 N.W.2d 596 (1983).
54. *Id*. at 603-04.
55. *See id*. at 630.

constitutional law:[56]

> An important premise underlying all three of the foregoing cases[57] . . . is that uncompensated physical invasions by third parties acting under the express authorization of government are just as unconstitutional as are takings in which the government itself is the trespasser. . .. A taking is a taking regardless of whether the invasion of property is committed by the government or by a private party acting at government's invitation.[58]

This analysis is clearly reflective of the Court's response to the City of New York's contention in Loretto that intrusion by private parties should be treated "differently": "We disagree. A permanent physical occupation authorized by state law is a taking without regard to whether the state, or instead a party authorized by the state, is the occupant."[59]

A. Regular Use, As Well As Permanent Occupancy, Is an Unconstitutional Invasion Violating the Right to Exclude

A careful reading of the *Loretto* case will disclose that the Court had before it, and therefore refers often to, a permanent physical invasion. However, as Professor Frank Michelman observes in his often-cited and quoted (by the Court in *Loretto* and federal appeals courts) article on property and takings:

> The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents or the public at large, "regularly" use, or permanently occupy, space or a thing which theretofore was understood to be under private ownership.

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56. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988).

57. The cases reviewed by Tribe include Loretto v. Manhatten Teleprompter CATV Corp., 458 U.S. 419 (1982), Kaiser Aetna v. United States, 44 U.S. 164 (1979), and Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

58. Tribe, *supra* note 56, at 604-05 n.33 (citations omitted).

59. Loretto v. Manhattan Teleprompter CATV Corp., 458 U.S. 419, 432-33 n.9 (1982).

> Just as we say, when government behaves as though it owns an easement of way over my land (by regularly passing through), that it has "taken" the "property" consisting of such an easement and therefore must pay for it, we may say that when government behaves as though it owns a servitude burdening my land . . . it has "taken" the "property" consisting of the servitude and therefore must pay for it.[60]

That the United States Supreme Court views such "regular use" like passing back and forth over private land as the

Loretto equivalent of permanent occupation is crystal clear from its 1987 opinion in *Nollan v. California Coastal Commission*.[61] There, the Court held that imposing a condition of public access across a private beach for a shoreline management permit was a taking of property requiring compensation under the Fifth Amendment. Citing both the *Loretto* and *Kaiser Aetna* cases and referring to the rule in the former that a permanent physical occupation is a taking regardless of either the economic impact on the owner or the benefit to the public, the Court said:

> We think a 'permanent physical occupation' has occurred, for the purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.[62]

In the same paragraph, the Court reiterated that "[w]e have repeatedly held that, as to property reserved by its owner for private use, 'the right to exclude [other is] "one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" The Court further observed that "[t]o say that the appropriation of a public easement across a landowner's premises does not constitute a taking of a property interest but (as Justice Brennan contends) 'a mere restriction on its use' is to use words in a manner that deprives

60. *Id*. at 1186 (emphasis added).
61. 483 U.S. 825 (1987).
62. *Id*. at 832.

them of all their ordinary meaning."[63]

Finally, in *Dolan v. City of Tigard* a property owner's loss of the right to exclude again led the Court to more strictly scrutinize a local government's attempt to exact an easement across private property.[64] In *Dolan* the City of Tigard sought a public greenway across a property owner's land in exchange for a permit that would allow the owner to expand a hardware store.[65] Situated along a river bank, the city required the greenway so as to mitigate a flood hazard that it concluded would result from the owner's construction of a parking lot.[66] Rejecting the contention that the greenway was reasonably related to the impact of the hardware store construction, the court said:

> The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control. The difference to petitioner, of course, is the loss of her ability to exclude others. As we have noted, this right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.[67]

Relying on *Pruneyard Shopping Center v. Robins*,[68] the City of Tigard subsequently argued that the hardware store owner's right to exclude others was compromised because the property at issue was commercial in nature.[69] However, the Court rejected the city's reliance on *Pruneyard* on the ground that, unlike in *Pruneyard*, "petitioner [in *Dolan*] would lose all rights to regulate the time in which the public entered onto the greenway, regardless of any interference it might pose with her retail store. Her right to exclude would not be regulated, it would be eviscerated."[70] While affirming that the city's dedication demands invaded the owner's right to

63. *Id.* at 831 (citations omitted).
64. 512 U.S. 374 (1994).
65. *Id.* at 379-80.
66. *Id.* at 382.
67. *Id.* at 393. (Citing *Kaiser Aetna*, 444 U.S. at 176).
68. 447 U.S. 74 (1980) (holding that under the California Constitution, the California Supreme Court could recognize free speech rights that permitted a person to distribute pamphlets on the premises of a large shopping center without the owner's consent).
69. 512 U.S. at 393.
70. *Id.* at 393-94.

exclude to a degree that triggered constitutional scrutiny, the Court nevertheless neglected the implicit question of whether the right to exclude was diminished by its holding in Pruneyard.

B. Pruneyard Does Not Diminish the Right to Exclude

In *Pruneyard Shopping Center v. Robins*,[71] the U.S. Supreme Court considered whether a shopping center owner's "right to exclude others" was violated when the California Supreme Court decided that free speech protections in the California Constitution allowed individuals to circulate petitions on the property without the owner's consent.[72] In holding that the California court's interpretation did not affect an unconstitutional taking of private property by violating the owner's right to exclude, the court said, "appellants have failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'"[73]

At first glance, *Pruneyard* might appear to undermine the right to exclude others so explicitly protected by *Kaiser Aetna* and *Loretto*. However, *Pruneyard* is clearly distinguishable from those cases on the following grounds: 1) The property owner in *Pruneyard* was already inviting the general public onto his premises but sought to exclude only those with whose speech he disagreed; 2) The owner was unable to show that an unchecked right to exclude was a central part of the economic value of his property;[74] and 3) the owner's attempt to exclude implicated the first amendment right to free speech, to which the courts have always accorded the greatest deference.[75]

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71. 447 U.S. 74 (1980).
72. *Id*. at 88.
73. *Id*. at 84.
74. *See* RONALD D. ROTUNDA & JOHN E. NOWACK, TREATISE ON CONSTITUTIONAL LAW 729 (3d ed. 1999).
75. *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 567-568 (1972) (stating "the courts properly have shown a special solicitude for the guarantees of the First Amendment."); *In re* Lane, 79 Cal. Rptr. 729 (1969) (stating "Certainly the paramount and preferred place given the First Amendment freedom of speech right in our democratic system should be accorded precedence over the mere 'naked title' of [the] market owner['s] interest in the premises").

There is yet a fourth basis for distinguishing *Pruneyard*: its emphasis on the right of states to expand civil liberties. The Court essentially invited the states to expand the reach of the First Amendment's free speech guarantees to private activities, especially in contexts like the commercial shopping center at issue in *Pruneyard*.[76] Yet, few state courts have either amended their constitutions or applied existing constitutional free speech provisions more broadly. Moreover, of the half-dozen states that have done so,[77] many have recently retreated on grounds ranging from applicable free election guarantees[78] to traditional state action requirements.[79]

In *Commonwealth v. Hood*[80] for instance, the Supreme Judicial Court of Massachusetts declined to extend to non-election related speech an earlier decision recognizing a right under the Massachusetts Constitution's free election clause to gather on private property signatures for placement of a candidate on a state ballot.[81] Indeed, the court rejected outright the argument that free speech and assembly provisions in the Massachusetts Constitution permitted such activities on private property.[82]

Similarly, in *Southcenter Joint Venture v. National Democratic Policy Committee*,[83] the Washington Supreme Court relied on the doctrine of state action in reversing an earlier decision allowing advocacy groups to demonstrate and solicit signatures at a shopping mall.[84] In *Southcenter Joint Venture* the court declared that "[t]he free speech provision of the State of Washington . . . affords protection to the individual against actions of the State. It does not protect an

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76. *See* Brady C. Williamson & James A. Friedman, *State Constitutions: The Shopping Mall Cases*, 1998 WIS. L. REV. 883, 887-88 (1998), and Kevin Gray & Susan Francis Gray, *Civil Rights, Civil Wrongs and Quasi-Public Space*, 1 EUROPEAN HUMAN RIGHTS L. REV. 46 (1999).

77. The states that have recognized some form of a right to speech on private property are New Jersey, Colorado, Oregon, Massachusetts, Washington, and Pennsylvania. *See id.*

78. *See* Commonwealth v. Hood, 452 N.E.2d 188 (Mass. 1983).

79. *See* Southcenter Joint Venture v. National Democratic Policy Comm., 780 P.2d 1282 (Wash. 1989); Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Insurance Co., 515 A.2d 1331 (Pa. 1986).

80. 452 N.E. 2d 188 (Mass. 1983).

81. *See* Batchelder v. Allied Stores Int'l, Inc., 445 N.E.2d 590 (Mass.1983).

82. *See* Commonwealth v. Hood, 452 N.E.2d at 191.

83. 780 P.2d 1282 (Wash. 1989).

84. *See* Alderwood Assocs. V. Washington Envtl. Council, 635 P.2d 108 (Wash.1981).

individual against the actions of other private individuals. The free speech provision of our state constitution thus does not afford . . . a constitutional right to solicit contributions and sell literature at the mall."[85] Further, the court emphasized that "'property [does not] lose its private character merely because the public is generally invited to use it for designated purposes.'"[86]

Finally, in *Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Insurance Co.*,[87] the Pennsylvania Supreme Court substantially limited the reach of *Commonwealth v. Tate*,[88] in which the court held that state action was not required to implicate Pennsylvania's free speech and assembly provisions so that individuals were permitted to pass out leaflets at a private college.[89] In *Western Pennsylvania Socialist 1982 Campaign*, the court refused to allow individuals to solicit signatures at a shopping mall against the owner's consent, concluding that, despite its holding in *Tate*, the Pennsylvania Constitution is only "a limit on our state government's general power."[90] The court distinguished its holding in *Tate* on the basis that the college had transformed itself into a public forum by allowing the public "to walk its campus freely and use many of its facilities" and by holding public events,[91] while the shopping mall owner had precluded the mall from becoming a public forum by "adhering to a strict no political solicitation policy."[92] Thus, it is clear that some of the courts that have accepted *Pruneyard*'s invitation to expand free speech rights to private property have been careful to do so only where the private property owner has not fully exercised the right to exclude.

85. 780 P.2d at 1285.
86. *Id.* at 1292 (quoting Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972)).
87. 515 A.2d 1331 (Pa. 1986).
88. 432 A.2d 1382 (Pa. 1981).
89. *See* Commonwealth v. Tate, 432 A.2d at 1387-88.
90. Western Pennsylvania Socialist 1982 Campaign, 515 A.2d at 1335.
91. *Id.* at 1337.
92. *Id.*

C. Custom, Public Trust and the Right to Exclude

U.S. courts have increasingly relied on customary rights[93] and the rights of the public in public trust laws[94] to derogate from private property rights, and in particular, the right to exclude others. Thus, for example, in *Public Access Shoreline v. Hawaii County Planning Commission (PASH)* the Hawaii Supreme Court declared that native Hawaiians (approximately one-fifth of the population) have the right to go upon any public or private land in the state in the exercise of traditional customary rights protected by the state constitution.[95] Similarly, the Supreme Court of Oregon based its decision in *State ex rel Thornton v. Hay* to disallow private owners from fencing portions of beachfront lots on the customary rights of Oregon citizens to traverse dry sand areas along the coast.[96]

There is, however, a clear counter-trend as well. In the area of customary law, the Oregon Supreme Court temporarily retreated from the sweeping language in *State ex rel Thornton in McDonald v. Halvonson*, noting inconsistencies in *Thornton* and stating that "nothing in [*Thornton*] fairly can be read to have established beyond dispute a public claim by virtue of 'custom' to the right to recreational use of the entire Oregon coast."[97] Similarly, in upholding

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93. *See, e.g.*, Public Access Shoreline Hawaii v. Hawaii County Planning Commission, 903 P.2d 1246 (Hawaii 1995); State ex rel Thornton v. Hay, 462 P.2d 671 (Or. 1969); Stevens v. City of Cannon Beach, 894 P.2d 449 (Or. 1993), *cert. denied*, 114 S. Ct. 1332 (1994) (Scalia, J., dissenting); *See generally* DAVID L. CALLIES, CUSTOM AND PUBLIC TRUST: BACKGROUND PRINCIPLES OF STATE PROPERTY LAW? 30 ELR 10003 (2000); David Bederman, *The Curious resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996); and Paul Sullivan, *Traditional and Customary Revolutions: The Law of Custom and Conflict of Traditions in Hawaii*, 20 U. HAW. L. REV. 99 (1999).

94. *See, e.g.*, Orion Corp. v. State, 747 P.2d 1062 (Wash.1987), *cert. denied*, 486 U.S. 1022 (1988); National Audubon Society v. Superior Court of Alpine Co., 658 P.2d 709 (Cal. 1983); Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984). *See generally* David L. Callies, *Custom and Public Trust: Background Principles of State Property Law?* 30 ELR 10003 (2000); Pearson, *Illinois Central and the Public Trust Doctrine in State Law*, 15 VA. ENVTL. L.J. 713 (1996); Searle, *Private Property Rights Yield to the Environmental Crisis: Perspectives on the Public Trust Doctrine*, 41 S.C. L. REV. 897 (1990); Richard Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986).

95. 903 P.2d 1246 (Hawaii 1995).

96. 462 P.2d 671 (Or. 1969).

97. MacDonald, 780 P.2d at 724.

a trespassing conviction in *State of Hawaii v. Hanapi*,[98] the Hawaii Supreme Court limited the settings in which the Native Hawaiian customary rights identified in *PASH* could interfere with private property: "To clarify PASH, we hold that if property is deemed 'fully developed,' i.e., lands zone and used for residential purposes with existing dwellings, improvements and infrastructure, it is *always* 'inconsistent' to permit the practice of traditional and customary Native Hawaiian rights on such property."[99]

In a pattern established by the Massachusetts Supreme Court in Opinion of the Justices, some state courts have emphasized the essential nature of the right to exclude in cases dealing with public trust. In Opinion of the Justices, the Massachusetts court considered whether a bill that created a public "on-foot right-of-passage" across intertidal lands amounted to a taking of private property. In finding the proposed legislation a probable taking, the court said:

> The permanent physical intrusion into the property of private persons, which the bill would establish, is a taking of property within even the most narrow construction of the phrase possible under the Constitutions of the Commonwealth and the United States. . .. The interference with private property here involves a wholesale denial of an owner's right to exclude. If a possessory interest in real property has any meaning at all it must include the general right to exclude.[100]

In *Bell v. Town of Wells*, the Supreme Judicial Court of Maine echoed the Massachusetts opinion in considering the constitutionality of a bill which granted the public a broad recreational easement over private coastal property.[101] Specifically, the court agreed that "[i]f a possessory interest in real property has any meaning at all it must include the general right to exclude others" and concluded that the imposition of the easement effected an unconstitutional taking

98. 970 P.2d 485 (Hawaii 1998).

99. State v. Hanapi, 970 P.2d at 494-95 (emphasis in original). In a footnote the court noted that "[t]here may be other examples of 'fully developed' property [besides residential] . . . where the existing uses of the property may be inconsistent with the exercise of native Hawaiian rights." *Id.* at 495 n.10.

100. *Id.* at 611 (emphasis added).

101. *Bell*, 557 A.2d at 176.

because "[t]he interference . . . involves a wholesale denial of an owner's right to exclude the public."[102]

The New Hampshire Supreme Court followed Maine and Massachusetts in Opinion of the Justices.[103] There, the court considered whether a bill, which would have recognized a public easement in all the "dry sand area" along New Hampshire's coast, including privately owned areas, affected an unconstitutional taking. Citing *Bell* the court explained that, "[i]f a possessory interest in real property has any meaning at all it must include the general right to exclude others."[104] Moreover, the court found that, as in Bell, "[a]lthough the bill does not completely deprive private property owners of the use of their property, '[t]he interference with private property here involves a wholesale denial of an owner's right to exclude the public.'"[105] Relying in part on *Nollan v. California Coastal Commission*,[106] the court concluded that the imposition of an easement, and the denial of the right to exclude which would flow therefrom, was an unconstitutional taking.

Finally, there is the dissent by Justice Scalia to the U.S. Supreme Court's denial of a petition for a writ of certiori in the *Stevens* case: "There was no testimony in this record showing use of the narrow beach on the back of the cove. . .. The doctrine of custom announced in [*Thornton*] simply does not apply to this controversy . . . because there is no factual predicate for the application of the doctrine."[107] Justice Scalia subsequently concluded that the "newfound doctrine of 'custom' is a fiction."[108]

IV. THE RIGHT TO EXCLUDE GOES INTERNATIONAL

The right to exclude has achieved international status with the 1999 opinion of the European Court of Human Rights in *Case of*

102. *Id.* at 178.
103. 649 A.2d 604 (N.H. 1994).
104. *Id.* at 611 (quoting Bell v. Town of Wells, A.2d 168, 178 (Me.1989)).
105. *Id.*
106. 483 U.S. 825 (1987).
107. 114 S. Ct. at 1335.
108. *Id.*

Chassagnou and Others v. France.[109] Before the Court was the French Loi Verdeille,[110] which provides for the statutory pooling of hunting grounds. The effect on the plaintiffs (three farmers) was to force them to become members of a municipal hunters' association and to transfer hunting rights to the association, with the result that all members of the association may enter their property for the purpose of hunting.[111] The government of France claimed that the interference with the applicants' property was minor since they had not been deprived of the right to use their property and all they had lost was the right to prevent other people from hunting on their land.

However, the Court found that while it was "undoubtedly in the general interest to avoid unregulated hunting and encourage the traditional management of game stocks,"[112] (clearly the purpose of the Loi Verdeille) the interference with the applicants' fundamental right to peaceful enjoyment of their land was "disproportionate":

> [Notwithstanding] the legitimate aims of the Loi Verdeille when it was adopted, the Court place the applicants in a situation which upsets the fair balance to be struck between protection of the right of property and the requirements of the general interest. Compelling small landowners to transfer hunting rights over their land so that others can make use of them in a way which is totally incompatible with their beliefs imposes a disproportionate burden which is not justified.[113]

V. CONCLUSION

The right of a landowner to exclude others is a fundamental part of the equally fundamental Constitutional Right to the enjoyment of private property. The right is clearly articulated in decisions of the U.S. Supreme Court, Federal appellate courts, and state appellate

109. 1999 Eur. Ct. H.R. (25088/94, 28331/95 and 28443/95) (April 29 1999).
110. Law No. 64-696 of July 10, 1964.
111. *See supra* note 109, at para. 13.
112. *Id*. at para. 79.
113. *Id*. at para. 85. For a more detailed treatment of this case, see David L. Callies, Case Note, Chassaghou and Others v. France, *European Court of Human Rights, Apr. 29, 1999*, 2 BUS. L. INT'L 109 (2000).

courts. Logically, the Restatement of the Law and respected Constitutional law treatises also conclude that the right to exclude is a fundamental right. It is a right rich in judicial support and a right that is fundamental to a free society. It is therefore appropriate, as the host of state courts discussed above have done, to take some care in formulating or reforming ancient doctrines such as custom that grant others the right to go on the land of another in a fashion that would otherwise amount to a trespass. Doctrines such as custom and public trust may very well be "background principles of state property law"[114] under certain correctly circumscribed conditions, but if adopted without limitation, they threaten to swallow up that which is, at least so far, a fundamental property right guaranteed by the Fifth Amendment to the U.S. Constitution.[115]

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114. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).
115. *See, e.g.*, Callies, Bederman, and Sullivan, *supra* note 93.