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# Countryside Access and Environmental Protection: An American View of Britain's Right to Roam

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# Countryside Access and Environmental Protection: An American View of Britain's Right to Roam

Jerry L. Anderson\*

Public access rights, rights of way, public footpaths, public recreation

**Abstract:** The right to roam adopted in the UK as part of the Countryside and Rights of Way Act 2000 increased the public's ability to use private lands, some of which include sensitive natural resources. This paper first compares UK public access law to that the US, including constitutional limitations. The paper then analyses the historical, cultural, and legal differences that result in the two countries' divergent views on how to provide for countryside access. Finally, the paper will compare US and UK mechanisms to protect the environment while providing for public recreation.

## INTRODUCTION

In 2001, American pop singer Madonna and her husband, film producer/director Guy Ritchie, purchased Ashcombe House in south Wiltshire for nine million pounds. The singer presumably anticipated that the 1,132-acre property would afford her the level of privacy her virtually unequalled international celebrity requires. Initially, she had concerns about a public footpath that runs within 100 yards of the family's residence. After she found that walkers did not abuse the privilege, however, she became reconciled to the intrusion.<sup>1</sup> In fact, had she lodged a protest, she probably would have lost – as Andrew Lloyd Webber discovered, even celebrity status will not justify shifting a footpath if it will cause a detrimental impact on the public's use.<sup>2</sup>

But Madonna did protest when the public gained roaming rights over her land, in addition to the footpath. In 2000, Britain enacted the Countryside and Rights of Way Act (CRWA 2000), which opened up over two million acres of private land to public access. Any property classified as 'mountain, moor, heath, or downland' may be mapped as 'open country', over which the public is allowed to roam freely.<sup>3</sup> Lands qualifying for access comprise about 6.5 per cent of England, or about 865,000 hectares, including some of the country's most scenic real estate.<sup>4</sup>

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1 Press Release, Rambler's Association, *Rambler's Association Statement Regarding the Public Inquiry Concerning Access Land on Ashcombe House Estate* (18 June 2004), available at <http://www.ramblers.org.uk/news/archive/2004/madonnaverdictstatement.html>.

2 *Decision of Sec'y of State, Diversion of Echhinswell and Sydmonton Footpath No. 21* (30 May 1996), available at <http://www.hants.gov.uk/scrmxn/c19599.html> (rejecting diversion to protect privacy because it would lengthen footpath and lessen its amenities).

3 Countryside and Rights of Way Act 2000, Ch. 37, s. 1.

4 National Audit Office, Report by the Comptroller and Auditor General, 'The Right of Access to the Open Countryside', HC 1046 Session 2005–2006, 9 June 2006, at 1. CRWA applies only to England and Wales. In Scotland, private land is presumed to be free to walk on unless the owner has specifically excluded it.

The Countryside Agency informed Mr and Mrs Ritchie that it planned to classify about 350 acres of the family's estate as 'downland', which qualifies as 'open country' under the CRWA.<sup>5</sup> The Ritchies objected at a public inquiry, arguing that the land did not qualify as open country and that free access would violate their privacy rights under the European Convention on Human Rights. An independent inspector appointed to resolve the matter decided that only 130 acres, all of which were out of sight of Madonna's home, should be classified as downland and opened to access.<sup>6</sup> Because the public would therefore not be allowed near Madonna's residence, the inspector declined to consider the privacy aspects of the case.<sup>7</sup> Apparently the decision satisfied the famous couple, who dropped their opposition.

Nevertheless, the controversy highlights the contrast between British and American views of property rights. When Madonna objected to the proposal to open her land to the public, newspaper and blog commentators excoriated the singer for her 'American' view of property rights that selfishly placed her private desires over the public's paramount rights.<sup>8</sup> Although some were sympathetic to her heightened need for privacy, most seemed to feel she had too little regard for the public interest. In the United States, however, Madonna's view would have prevailed, as the landowner's right to exclude is deemed 'essential' to property ownership.

Madonna's case illustrates that the bundle of interests we designate as 'private property' may have a different composition, even in legal systems as closely related as those of the UK and US. Although Blackstone famously announced that the right to property consists of the 'sole and despotic dominion' over the *res*, to the 'total exclusion of the right of any other individual in the universe',<sup>9</sup> his British descendants have modified that dictum significantly. For reasons rooted in history, as well as in legal and cultural distinctions, in the United States the right to exclude has been protected with a zeal that countenances no modifications without compensation. This paper will contrast the British right to roam contained in CRWA 2000 with the American position regarding public access rights in private lands.

Importantly, the right to roam also impacts nature itself. For example, part of Madonna's land consisted of naturally regenerating woodland and the couple planned to plant additional trees on other parcels.<sup>10</sup> Once the land is designated 'open country', however, the landowner may not alter its character by planting trees. Natural forest regeneration may be impeded when seedlings are destroyed by walkers and deer. Thus, in this case CRWA may result in a decrease in forest habitat. In other areas now open for roaming, public access raises concerns regarding erosion, disturbance of wildlife (particularly ground-nesting birds), trampling of sensitive vegetation, disruption of grazing animals,

5 See Richard Savill, *Madonna Wins Partial Ban on Public Walking Across Estate*, Telegraph.co.uk, 19 June 2004, <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2004/06/19/nmadge19.xml> (last visited 2 February 2007).

6 See *ibid.*; Planning Inspectorate, Appeal Decision, CROW/3/M/03/1076 (17 June 2004), at 4–5, paras 20–22, available at [http://www.planning-inspectorate.gov.uk/access/appeals/central\\_southern/documents/1076.pdf](http://www.planning-inspectorate.gov.uk/access/appeals/central_southern/documents/1076.pdf) [hereinafter 'Madonna appeal'].

7 Madonna appeal, above n. 7, at 4, para. 20.

8 See, e.g., BBC, 'Oi! Get Off My Laaaand!', [www.bbc.co.uk/wiltshire/entertainment/days\\_out/madonna\\_ashcombe/madonna\\_ashcombe.shtml](http://www.bbc.co.uk/wiltshire/entertainment/days_out/madonna_ashcombe/madonna_ashcombe.shtml).

9 W. Blackstone, *2 Commentaries on the Laws of England* (Clarendon Press: 1765–69) 2.

10 Madonna appeal, Appellants' Combined Statement of Case, paras. 9.4, 9.7 and 9.10 (12 November 2003).

and increased incidence of fire.<sup>11</sup> This paper will compare the US and UK approaches to dealing with this conflict between public access and environmental harm.

## PUBLIC ACCESS RIGHTS IN THE UK

### COMMON LAW DEVELOPMENT

The need for public access rights arose during the inclosure period. Before inclosure, British commoners wandered freely over much of the lord's estate, especially land designated as 'waste' or 'commons'. Upon inclosure, footpaths and other public ways were often preserved in the inclosure order.<sup>12</sup> Other paths were implicitly accepted by the landowner, and some of them were later legally recognised by courts, using the doctrine of implied dedication.<sup>13</sup> Others remained in legal limbo until Parliament set up a comprehensive footpath mapping system in the 1949 National Parks and Access to the Countryside Act (NPACA), which provided greater certainty regarding the location of footpaths and greater protection against landowner misuse or extinguishment of these rights.

Roaming rights and other broader rights of access, however, did not fare as well initially. Courts upheld some customary rights of local inhabitants, including dancing, horse-racing, and playing cricket, if sufficiently certain.<sup>14</sup> Eventually, the Commons Registration Act of 1965 provided a statutory system of confirming the rights of local inhabitants 'to indulge in lawful sports and pastimes' established by customary use.<sup>15</sup> Nevertheless, the recognition of customary rights did not extend to a public right to roam, or *servitus spatiandi*. Customary rights were typically limited to a particular class of persons, and to particular areas, while roaming rights were sought for the public in general over vast expanses. Courts feared that, if they recognised a right to roam based on the common law of custom, property owners 'would virtually be divested of all open and unenclosed lands over which people have been allowed to wander and ramble as they pleased'.<sup>16</sup>

Thus, the British public increasingly turned to Parliament to provide greater roaming rights than the courts were inclined to grant.

### THE COUNTRYSIDE AND RIGHTS OF WAY ACT 2000

Public sentiment in favour of a right to roam has been brewing in the UK for over a century. In his 1868 treatise on Commons and Waste Land, Charles Elton noted that the failure of courts to provide greater public access rights was creating pressure on Parliament to declare a public right of exercise and recreation on waste lands.<sup>17</sup> The first legislative attempt occurred in 1884, when MP James Bryce introduced a bill, which was never passed, to establish a roaming right.<sup>18</sup> In 1939, the Access to Mountains Act did

11 See, e.g., Statement of the Royal Society for the Protection of Birds, Appendix 7, House of Commons, Env., Food and Rural Affairs, 12 March 2003.

12 Sir Robert Hunter, *The Preservation of Open Spaces, and of Footpaths and Other Rights of Way*, 2nd edn (Eyre & Spottiswoode: 1902) 314.

13 See, e.g., *Fitzpatrick v Robinson* [1828] G.IV. 585 at 594; *Bryant v Foot* [1867] 2 QB 161 at 181.

14 See generally C.I. Elton, *A Treatise on Commons and Waste Lands* (Wildy & Sons: 1868) 285–88.

15 Commons Registration Act 1965, Ch. 64, s. 22.

16 See *Blundell v Catterall* [1821] 5 B. & Ald. 268 (refusing to grant a common law right of access over private land to reach the seashore).

17 Elton, above n. 13 at 301.

18 UK Association of National Park Authorities, History of the National Parks, <http://www.nationalparks.gov.uk/index/learningabout/history.htm>.

include a process to provide greater public access to countryside areas.<sup>19</sup> Likewise, the NPACA in 1949 empowered government officials to issue access orders, upon the request of a county council, with compensation to the landowner. Both of these mechanisms, however, proved to be too cumbersome to be effective and were rarely used.

In the 1990s, public agitation for greater rights grew and included mass occupations of countryside areas by ramblers' rights groups.<sup>20</sup> In 1994, the Labour Party responded by making greater public access part of its platform.<sup>21</sup> So, when Labour ended 18 years of Conservative Party rule in 1997, the people expected action to be taken.<sup>22</sup> The Blair government began in February 1998 by issuing a consultation paper to solicit comments on how best to provide greater access to the countryside, especially mountain, moor, heath, down, and registered common land.<sup>23</sup>

Landowners, of course, feared that greater public access would result in a loss of property value due to the imposition of public access, increased costs of liability insurance, greater need for supervision of livestock, increased costs to repair fences and other damage, and even costs for the provision of access in the first place by installing stiles or kissing gates. At a minimum, landowner rights groups believed the government should compensate them for access or allow them to charge users in order to recoup these costs.<sup>24</sup> Local authorities and recreational users overwhelmingly opposed compensation, however, except perhaps for improvements necessary to facilitate the initial provision of access.<sup>25</sup>

In the end, the administration settled on a new statutory right of access to the open countryside, coupled with restrictions on the right to protect landowner interests.<sup>26</sup> The government estimated that costs to landowners would be minimal, especially on land that was not used for hunting.<sup>27</sup> Damage caused by access users, such as vandalism, erosion, littering, and stock worrying, was anticipated to be rare.<sup>28</sup> Although the government considered adopting a largely voluntary access plan with compensation incentives or the issuance of compulsory access orders, both options entailed much higher implementation and administration costs.<sup>29</sup> Moreover, experience with the voluntary approach under previous acts increased scepticism of that approach.<sup>30</sup> Given the low impact on landowners and the high value the public placed on access to these lands, the government believed it had struck the proper balance.<sup>31</sup>

19 Access to Mountains Act 1939, Ch. 39.

20 M. Shoard, *A Right to Roam: Should We Open Up Britain's Countryside?* (OUP: Oxford, 1999) 4 (describing 'The Land is Ours' movement).

21 *Ibid.* at 6.

22 *Ibid.* at 6–7. See, e.g., Labour Party, 1997 Manifesto (1997), <http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml> (last visited 20 January 2007) (promising public 'greater freedom to explore our open countryside').

23 Consultation Paper, Dept. for Env't, Food and Rural Affairs (Defra), *Access to the Open Countryside in England and Wales* (February 1998). See also Defra, *Appraisal of Options on Access to the Open Countryside of England and Wales* (March 1999), <http://www.defra.gov.uk/WILDLIFE-COUNTRYSIDE/access/index.htm> (last visited 17 January 2007).

24 Defra, *Analysis of Response to the Open Countryside Consultation Paper* (March 1999), <http://www.defra.gov.uk/WILDLIFE-COUNTRYSIDE/access/index.htm> (last visited 17 January 2007) (total annual costs to landowners estimated to be between £21 million and £88 million).

25 *Ibid.*

26 *Ibid.*

27 Defra, *Appraisal of Options*, above n. 22, at Ch. 7.

28 *Ibid.* at tbl. 7.1.

29 *Ibid.*, Executive Summary.

30 See DEFRA, *Access to the Open Countryside of England and Wales: the Government's Framework for Action* (March 1999), <http://www.defra.gov.uk/wildlife-countryside/access/>.

31 *Ibid.*

Under CRWA, the public has the right to wander over registered ‘common land’ and lands classified as ‘open country’, consisting of mountain, moorland, heath and downland.<sup>32</sup>

The public may freely enter lands classified as common land or open country ‘for the purposes of open-air recreation’, provided that they do not damage fences or gates.<sup>33</sup> Unlike a public right of way wanderers are not restricted to any particular linear route on these lands. The access is primarily for walking and picnicking; one may not hunt, light a fire, swim in non-tidal waters, remove plants or trees, ride a bicycle or horse, or disrupt lawful activities on the land.<sup>34</sup>

CRWA required the Countryside Agency (now Natural England) to prepare a definitive map of all registered common land and open country.<sup>35</sup> The agency issued maps in draft form, received comments, and then issued the maps in provisional form in 2004.<sup>36</sup> The landowner could then appeal the designation to the Secretary of State, who could appoint an inspector to investigate and decide the appeal.<sup>37</sup> The only ground for appeal with respect to open country designation was that the land did not in fact consist ‘wholly or predominately of mountain, moor, heath or down’.<sup>38</sup> Notably absent was any power to balance the rights of the public against the interests of the landowner. In Madonna’s case, for example, the inspector’s decision turned, at least ostensibly, on the qualities of the land itself rather than on the impacts of public use. Once all of the appeals were determined, the agency issued the maps in conclusive form.<sup>39</sup>

Not all mapped open country or registered common land is eligible for access designation. The CRWA exempts land that is ploughed or used as a park or garden.<sup>40</sup> Quarries, golf courses, and racecourses are also exempt. No land within 20 metres of livestock buildings may be included. CRWA also exempts any land covered by buildings, including the curtilage of that land, which would normally include the yard or fenced area around a dwelling house.<sup>41</sup>

Notably, CRWA does not compensate landowners for the imposition of this new right of public access, although local authorities may assist with costs of providing access. Landowners’ liability protection is enhanced, however, by limiting their duty of care to that owed to trespassers, rather than the higher level owed to invitees or licensees.<sup>42</sup> Moreover, the Act specifically provides that land occupiers will incur no liability for risks

32 CRWA 2000, s. 1.

33 Ibid. s. 2.

34 Ibid. Sch. 2.

35 Ibid. s. 4. Pursuant to Natural Environment and Rural Communities Act 2006, the functions of the Countryside Agency are now vested in Natural England. The Countryside Council for Wales prepares the map for Welsh open country. Land that was registered common land and land over 600 meters above sea level immediately qualified as open country without going through the mapping process. Ibid. s. 1.

36 Ibid. s. 5.

37 Ibid. s. 6; s. 8 (in Wales, the appeal goes to the National Assembly).

38 Ibid. s. 6.

39 For the detailed maps, see Natural England’s website, Countryside Access – Home, <http://www.countrysideaccess.gov.uk> (last visited 24 August 2007).

40 CRWA 2000, Ch. 37, Sch. 1 (Excepted Land).

41 Ibid.; see also Explanatory Notes to the Countryside and Rights of Way Act 2000, ¶ 13, available at <http://www.opsi.gov.uk/Acts/en2000/2000en37.htm> (explaining exemptions).

42 Ibid. s. 13; see also *British Railways Board v Herrington* [1972] 2 WLR 537 (toward trespassers, landowners have a limited duty not to act with ‘reckless disregard of their safety’). The property owner has a duty to warn of known latent deadly hazards, but has no duty to ascertain and warn of all hazards on the property. Ibid. Licensees, in contrast, should be warned of all known hazards, not merely the deadly ones, while invitees may sue due to injuries caused even by hazards unknown to the landowner. Ibid.

arising from natural features of the landscape or injuries incurred by passage across walls or through fences.<sup>43</sup> The landowner or occupier remains liable, however, for recklessly or intentionally creating risks.<sup>44</sup>

CRWA is a remarkable limitation on the right to exclude. For those landowners affected, the re-allocation of property rights means that they will have diminished privacy and possible damage to their land from a potential invasion of hikers or picnickers. Under British law, this diminution of landowner rights is primarily a political, rather than a constitutional question. However, the European Human Rights Convention does mandate the protection of individual property rights. Under Article 1 of the First Protocol (1P1), '[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.'<sup>45</sup> Article 1 modifies this protection by providing that a state may control property use 'in accordance with the general interest'.<sup>46</sup> The European Court of Human Rights interprets this provision as allowing restrictions on land use, without compensation, as long as there is a 'fair balance' between the public interest and the burden on the individual.<sup>47</sup>

The Court of Appeals recently applied this provision to CRWA's expansion of the government's nature preservation powers.<sup>48</sup> Pursuant to its authority under the 1968 Countryside Act, English Nature had entered into a voluntary management agreement under which the owner of a canal agreed to extensive restrictions on use in exchange for £19,000 per year.<sup>49</sup> Under the CRWA 2000, however, no compensation is required for restrictions on this nature.<sup>50</sup> Although the court found that these restrictions could have a significant economic impact,<sup>51</sup> the burden was outweighed by the public benefit (preventing harm to native flora and fauna) and therefore no compensation was necessary.<sup>52</sup> While this case did not involve roaming rights, it suggests that courts will use a balancing test to determine whether property rights under the European Convention have been violated.<sup>53</sup>

Clearly, the right to roam transfers a valuable property right from private landowners to the public, as the recent *Vixen Tor* case illustrates.<sup>54</sup> The owners of this popular landmark successfully removed it from open country designation after an inspector concluded there was 'some doubt' about the predominance of qualifying cover.<sup>55</sup> Eventually, the landowners offered to open access under a ten-year agreement, for payments totalling

43 CRWA 2000, s. 13; see also Explanatory Notes, above n. 40, ¶ 29.

44 CRWA 2000, s. 13.

45 Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5), Protocol 1, art. 1.

46 *Ibid.*

47 *James v United Kingdom* [1986] App. No. 8795/79, 8 EHRR 123, 156 (holding that the burden on a private owner must not be 'disproportionate'); *Papamichalopoulos v Greece* [1993] 16 EHRR 440, 451 ¶48 (requiring 'fair balance' between community interests and fundamental rights of individual).

48 *The Queen (on the Application of Traylor & Marina (Leven) Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWCA Civ 1580 (hereinafter *Leven*).

49 *Ibid.* These agreements were entered into pursuant to the Countryside Act 1968, s. 15.

50 English Nature declared the area a Site of Special Scientific Interest (SSSI) under the 2000 CRWA Act, Part III, which 'effectively replac[ed] voluntary agreement with mandatory control.' *Ibid.* ¶ 14.

51 *Ibid.* ¶ 16 (holding that impacts could be 'severely detrimental').

52 *Ibid.* ¶¶ 58, 71–72.

53 For a discussion of the application of the ECHR to CRWA's nature conservation restrictions, see C. Rodgers, 'Protecting Sites of Special Scientific Interest: The Human Rights Dimension', (2005) JPEL 997, 1005–07 (discussing *Leven* and similar decision in *R. (on the application of Fisher) v English Nature* [2003] EWHC 1599).

54 Appeal Decision, CROW/6/M/04/2889 to 2895 (2 March 2005).

55 *Ibid.* at 5, ¶ 22.

£400,000, which they said represented their costs.<sup>56</sup> In response, the Dartmoor National Park authority offered £1,500 per annum. As of June 2007, the two sides had been unable to agree on an access agreement and the site remains closed, despite continued sporadic protests.<sup>57</sup>

Thus, although CRWA clearly results in a shift of property rights from private owners to the public, it seems to be surviving claims that it impermissibly undermines individual rights. As discussed below, under American constitutional law the outcome would be quite different.

## ENVIRONMENTAL CONFLICTS

Although the CRWA 2000 gives English Nature expanded powers to protect sensitive areas, greater public access to the countryside could result in increased damage to natural resources. Of course, the Act allows only hiking and picnicking, so high-impact activities, such as horse-riding, mountain-biking, camping, or building fires, are prohibited, eliminating many concerns. There is always the possibility, however, that once the public gains access to a site, unauthorised activity may occur and may not be easily monitored.

Even walking, however, can involve significant environmental impacts. A hiker, especially one with a dog, may disturb wildlife, including ground nesting birds (such as the nightjar and woodlark), resulting in impacts on their breeding success and distribution.<sup>58</sup> Other animals may be impacted by need for constant flight.<sup>59</sup> Smokers may increase the risk of fire, vegetation may be trampled, erosion may be exacerbated, and dog excrement may alter nitrogen levels, affecting sensitive plants.<sup>60</sup>

CRWA attempts to handle these conflicts by allowing Natural England, to restrict or prohibit access to protect 'flora, fauna or geological or physiographical features'.<sup>61</sup> These restrictions may also be introduced by the national park authority or Forestry Commission where they have jurisdiction. These agencies may also restrict access when conditions present an increased risk of fire.<sup>62</sup> In addition, landowners may prohibit persons with dogs from entering grouse moors or fields or enclosures with sheep during lambing season.<sup>63</sup>

In addition to the formal restrictions, land managers may use other means to reduce access impacts.<sup>64</sup> For example, access points may be placed in strategic locations and

56 Dartmoor National Park Authority, Meeting Minutes (3 March 2006), app. 1, <http://www.dartmoor-npa.gov.uk> (last visited 15 January 2007). The landowners desired reimbursement for potential damage and litter from access users, as well as loss of farm income and income from charging admission to the site.

57 Dartmoor National Park Authority, Meeting Minutes (30 June 2006), <http://www.dartmoor-npa.gov.uk> (last visited 15 January 2007); British Mountaineering Council, 'Vixen Tor: The latest', available at <http://www.thebmc.co.uk/News.aspx?id=1944> (posted 14 June 2007).

58 See, e.g., Dorset Heathlands Interim Planning Framework, Appendix, at 3 (23 October 2006).

59 See, e.g., Trails and Wildlife Task Force, 'Planning Trails with Wildlife in Mind' (September 1998), available at <http://www.fs.fed.us/outdoors/naturewatch/start/planning/Trails-for-Wildlife-Handbk.pdf> (estimating the flight distances of various species to human disturbance).

60 Cornwall County Council, 'Dog fouling is changing dunes ecology, countryside officer warns', available at <http://www.cornwall.gov.uk/index.cfm/media/pdf/3/t/css/corporate/index.cfm?articleid=9564>.

61 CRWA, s. 26.

62 CRWA, s. 25(1)(a).

63 CRWA, s. 23. The grouse moor restrictions are limited to five years, while the lambing restrictions may last for only six weeks each year.

64 National Audit Office Report, at para. 3.13.



paths provided that will naturally lead walkers away from sensitive areas.<sup>65</sup> Signs or pamphlets can inform the public of potentially vulnerable areas and encourage responsible behavior.

While there are restrictions on much open access land, total prohibitions on access are rare. About a quarter of all access land (215,000 hectares) is restricted to people without dogs, based on its character as grouse moor.<sup>66</sup> On the other hand, as of November 2005 less than 1 per cent of access land had been placed entirely offlimits to human intrusion.<sup>67</sup> One prominent example is an area of sugar limestone in County Durham, which was excluded from open access due to its high vulnerability to erosion.<sup>68</sup>

Other laws may also apply to protect sensitive areas. For example, areas with sensitive plant or animal species may be designated SSSIs and/or European wildlife sites (Special Protection Areas or Special Areas of Conservation) protected by the Habitats Regulations.<sup>69</sup> For example, authorities managing the Dorset heaths, which contain SPA and SAC sites, are planning carefully to manage the pressures of increasing recreational use, which stem primarily from increasing urban development in the area. Proposed measures to protect the resource include high profile wardening to reduce unauthorised activity such as off-road cycling and provision of alternative sites or paths to divert users from sensitive areas.<sup>70</sup>

It is too early to tell whether the protections meant to blunt the impacts of roaming rights will be sufficient, especially since the public has as yet not fully taken up their increased access rights.<sup>71</sup> While the current restrictions will reduce potential damage, adjustments will surely be required as usage patterns become clearer. For example, although dog restrictions will help, studies indicate that even walkers without dogs will disturb the breeding of some nesting birds.<sup>72</sup> Whether education and information will be enough to prevent the conflict is not yet clear. Natural England is monitoring these effects and will presumably increase restrictions where necessary.<sup>73</sup>

## AMERICAN LAW OF PUBLIC ACCESS

### PUBLIC ACCESS RIGHTS

In the United States, public access to scenic areas will typically be found in some form of government-owned property, such as a state or national park. Americans do enjoy a wealth of trails on public lands, allowing long hikes through the breathtaking beauty of national parks, forests and wilderness areas.<sup>74</sup> Several long-distance trails – such as the

65 RSPB Statement, para. 2.5.

66 Ibid. at para. 3.12.

67 Ibid. at Table 13, p. 29.

68 Ibid. at Case Example 4, p. 28.

69 The Conservation (Natural Habitats) Regulations 1994.

70 Dorset Heathlands Interim Planning Framework (23 October 2006).

71 The government's audit report indicates that the public's knowledge of their public access rights and locations of access areas is gradually increasing. Ibid. at p. 1.

72 G. Murison, *The Impact of Human Disturbance on the Breeding Success of Nightjar* *Caprimulgus europaeus* on Heathlands in South Dorset, England, English Nature.

73 Audit Report, at para. 3.14.

74 See J.J. Vinch, 'The Telecommunications Act of 1996 and Viewshed Protection for the National Scenic Trails', 15 *J. Land Use & Envtl. L.* 93, 95 (1999) (describing the system of national trails).

Appalachian Trail (2,160 miles),<sup>75</sup> the Pacific Crest Trail (2,650 miles),<sup>76</sup> and the Continental Divide Trail (3,100 miles)<sup>77</sup> – simply dwarf their British cousins. Although these trails provide exceptional recreational opportunities, they do not serve exactly the same functions as the footpaths and roaming rights of Britain, because many are found on remote public lands inaccessible to all but serious hikers. Even those who live nearby may have to drive to get to a trailhead. Although modern property developments are incorporating more greenbelts and trails, for the vast majority of Americans there is still no possibility of walking out the front door to go for a nature walk.

While US courts have followed, for the most part, the reasoning of UK courts with regard to common law access rights, they differ in some particulars. In *McKee v Gratz*,<sup>78</sup> the US Supreme Court noted that, in some areas of the country, the strict right to exclude has been modified by a ‘common understanding’ that the public need not obtain the landowner’s permission to cross over unenclosed and uncultivated land, or even to hunt or fish, unless the landowner has expressly indicated a desire to exclude. This customary ‘licence’, the Court held, ‘may be implied from the habits of the country.’<sup>79</sup> Nevertheless, this licence could be revoked whenever the landowner desired, simply by posting ‘no trespassing’ signs or building fences.

Many states have codified these customary licence rights with ‘posting’ statutes, which allow public access unless the landowner has specifically erected signs prohibiting trespass.<sup>80</sup> Most of these statutes allow access only for hunting, however, and would presumably not apply to hiking or other recreational use. One exception is Alaska, which allows hikers to walk across ‘unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner to exclude intruders’, unless the owner posts or otherwise communicates notice against trespass.<sup>81</sup>

An irrevocable right of access would have to be based on common law doctrines of prescription, implied dedication, or custom. A prescription claim will founder if the court finds express or implied permission for the use, which they are typically quite willing to do.<sup>82</sup> The ‘right to roam’ also would be defeated by the ‘neighbor accommodation’ exception, used by some American courts, which presumes permissive use when the ‘claimed right-of-way traverses large bodies of open, unenclosed, and sparsely populated privately-owned land’.<sup>83</sup> While this doctrine may defeat an access claim based on prescription, it does encourage landowners to allow neighbours to freely traverse their property, knowing that they are not thereby in danger of relinquishing their right to exclude.

Obtaining access to private land based on implied dedication is equally difficult. The landowner must have somehow indicated an intention to dedicate the right of way, through his statements or conduct.<sup>84</sup> Generations of public wandering over land may not

75 National Park Service, Appalachian National Scenic Trail, FAQ, available at <http://www.nps.gov/appa/faqs.htm>.

76 Pacific Crest National Scenic Trail, available at <http://www.fs.fed.us/pct/>.

77 Continental Divide Trail Alliance, ‘The Trail Unites Us’, available at <http://www.cdtrail.org/page.php>.

78 260 U.S. 127, 136 (1922).

79 *Ibid.*

80 M.R. Sigmon, ‘Hunting and Posting on Private Land in America’, 54 *Duke L.J.* 549, 558–59 (2004).

81 Ak. St. §11.46.350(b).

82 *Algermissen v Sutin*, 61 P.3d 176 (N.M. 2002).

83 *Ibid.* at 182.

84 C.J.S. *Dedication* s. 16 (2007).

be enough, because, as the South Carolina Supreme Court put it, '[d]edication is not implied from the permissive, sporadic and recreational use of the property'.<sup>85</sup>

Public access rights based on customary use, such as the village green cases in England,<sup>86</sup> are not generally favoured in the United States. In *Graham v Walker*, the Connecticut Supreme Court rejected a claim for a right of way based on custom.<sup>87</sup> Residents of Blissville argued that their inhabitants, from time immemorial, had used the defendant's land to get to nearby Taftville and therefore claimed to have established a customary right of way.<sup>88</sup> The Connecticut Supreme Court noted that, although such public right of way could be established in England, it could not be recognised under American law.<sup>89</sup>

The most prominent decision recognising access based on custom came from the Oregon Supreme Court in *State ex rel. Thornton v Hay*, which recognised a public right of access to ocean-front beaches.<sup>90</sup> Relying on and extending the English doctrine of customary use, the court found that the public had used the dry-sand area along Oregon's Pacific coast 'as long as the land has been inhabited'.<sup>91</sup> Requiring a beach-by-beach determination based on prescription, the court found, would be unduly burdensome and unnecessary. 'Ocean-front lands from the northern to the southern border', the court determined, 'ought to be treated uniformly'.<sup>92</sup> The Oregon decision is unusual, however, and has been heavily criticised.<sup>93</sup> Most beach-front states do not recognise a customary public access right, although they may grant access for particular parcels using prescription or implied dedication doctrines.<sup>94</sup> In contexts other than beaches, US courts are even less likely to find a common law right of access for recreational purposes.<sup>95</sup>

Therefore, similar to the UK, US citizens have found little support in common law for public access to private land. In the US, however, citizens who turn to the legislature for statutory relief will probably be disappointed. Legislative adjustments to property rights are significantly limited by the US Constitution, making an American 'Right to Roam' law extremely unlikely.

## CONSTITUTIONAL LIMITATION ON PUBLIC ACCESS

The most salient difference between United States and British property law is the limitation on government intrusion contained in the takings clause of the Fifth Amendment to the United States Constitution. The language is strikingly simple: 'nor shall private property be taken for public use, without just compensation'.<sup>96</sup> While the US Supreme Court has often had difficulty identifying when regulations of land constitute a

85 *State v Beach Co.*, 248 S.E.2d 115, 119 (S.C. 1978).

86 E.g., *Fitch v Rawling*, *Fitch & Chatheiss*, 126 Eng. Rep. 614, 614–15 (C.P. 1795) (allowing cricket matches based on custom).

87 *Graham v Walker*, 61 A. 98, 99–100 (Conn. 1905).

88 *Ibid.*

89 *Ibid.* at 99–100 ('To a fluctuating body of that kind no estate in lands can be granted.').

90 *State ex rel. Thornton v Hay*, 462 P.2d 671, 676–78 (Or. 1969).

91 *Ibid.* at 676–77.

92 *Ibid.* at 676.

93 See, e.g., D.J. Bederman, 'The Curious Resurrection of Custom: Beach Access and Judicial Takings', 96 *Columbia L. Rev.* 1375, 1417 (1996) (critiquing Oregon beach decisions as 'judicial activism').

94 See S.W. Bender, 'Castles in the Sand: Balancing Public Custom and Private Ownership Interests on Oregon's Beaches', 77 *Oregon L. Rev.* 913, 914 (1998) (stating that most jurisdictions rely on 'parcel-specific doctrines of easements by prescription and implied dedication').

95 *Restatement (Third) of Property: Servitudes* § 2.18 cmt. f (2000) (most jurisdictions 'have been reluctant to recognize prescriptive rights to recreational uses other than on beaches').

96 U.S. Const., amend. V (also called the 'just compensation' clause).

compensable ‘taking’, there is little doubt that CRWA, by imposing public access without compensation, would be struck down by American courts as unconstitutional.

In Britain, the European Convention on Human Rights, given domestic effect by the Human Rights Act 1998, provides the limitation on excessive property deprivation and Parliament has provided compensation for most significant impacts on landowners.<sup>97</sup> In the case of CRWA 2000, Parliament did not compensate landowners, because the impacts of public access were anticipated to be minimal and not worth the cost of setting up a compensation mechanism. After all, the public would be allowed to walk only over lands, such as mountains or moors, that were not in productive use. In American courts, that sort of balancing approach to the question of compensation is precluded by Supreme Court precedent adopting a categorical approach to infringements on the right to exclude.

In *Kaiser Aetna v United States*, the US Supreme Court first enshrined the right to exclude as ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’<sup>98</sup> The case involved a private pond that had been connected to a nearby bay, which the government argued opened it to public use pursuant to the federal navigational servitude over all waters of the United States. The Supreme Court, however, rejected that argument, holding that requiring public access would amount to a taking of property without compensation in violation of the Fifth Amendment.<sup>99</sup> In so holding, the Court flatly stated that the ‘right to exclude, so universally held to be a fundamental element of the property right, falls within th[e] category of interests that the Government cannot take without compensation’.<sup>100</sup>

In later cases, the Supreme Court used *Kaiser Aetna* to make the right to exclude absolute. In *Loretto v Teleprompter Manhattan CATV*, the Supreme Court held that property owners could not be required, without compensation, to allow cable companies to install wires and cable boxes on their buildings, which even the Court characterised as a *de minimus* intrusion.<sup>101</sup> Nevertheless, the Court held that even the smallest infringement of the landowner’s right to exclude merited compensation. Similarly, in *Nollan v California Coastal Comm’n*,<sup>102</sup> the Supreme Court found that a landowner could not be made to dedicate a public right of way, without compensation, as a condition of obtaining a building permit.<sup>103</sup> The public’s need or desire for the easement did not avoid the constitutional proscription against taking a property right without paying for it.<sup>104</sup>

Thus, the American Supreme Court has refused to engage in the sort of balancing of interests that characterised Parliament’s decision to forego compensation for CRWA, and that the European Human Rights Court explicitly uses in examining property rights cases.<sup>105</sup> Justice William Brennan, writing in dissent in *Nollan*, would have used such a balancing test: he concluded that the beach-front access would have benefited the public far more than the slight intrusion on the landowner, and would have been consistent with

97 See discussion of Art. 1 of the First Protocol of the ECHR, above n. 47.

98 *Kaiser Aetna v United States* [1979] 444 US 164, 176.

99 *Ibid.* at 179–80.

100 *Ibid.*

101 *Loretto v Teleprompter Manhattan CATV Corp.* [1982] 458 US 419, 433.

102 *Nollan v California Coastal Comm’n* [1987] 483 US 825.

103 *Ibid.* at 833–34.

104 *Ibid.* at 837; see also *Dolan v City of Tigard* [1994] 512 US 374, 391, 395–96 (holding that a bike trail may be demanded as a condition of development permission only if access demanded is ‘rough[ly] proportional’ to the additional transportation burden caused by development).

105 Moreover, the ECHR gives countries a wide ‘margin of appreciation’ in determining the public interest side of the property rights equation. See, e.g., *James v United Kingdom* [1986] 98 ECHR (ser. A) 9, 32.

'settled expectations' regarding access.<sup>106</sup> Justice Brennan's balancing of interests approach did not prevail, however, either in *Nollan* or later cases.<sup>107</sup> Thus, unless the public's use ripens into a common law right of way by implied dedication, the type of public access conferred by CRWA could be obtained in the United States only by compensating the landowner.<sup>108</sup>

Congress's attempt to provide more public hiking and biking trails provides a good example of access rights triggering compensation. Under the 'rails-to-trails' amendment to the National Trail System Act (NTSA),<sup>109</sup> the Interstate Commerce Commission may preserve railroad rights of way for the future by allowing them to be used, on an indefinite 'interim' basis, as recreational trails.<sup>110</sup> However, most railroad easements specify that the right of way is lost when railroad use is abandoned. At that point, the property interest reverts to the fee owner, usually the adjacent landowner. Congress effectively re-wrote the terms of these easements by declaring, legislatively, that recreational trail use does not trigger the landowner's reversionary interest. The Court of Appeals for the Federal Circuit held that the conversion of railroad easements to recreational trail use constituted a taking of a property interest, requiring compensation under the 5th Amendment.<sup>111</sup> Using the Supreme Court's categorical analysis, the court held that the NTSA violated the landowners' right to exclude and therefore constituted a taking.<sup>112</sup>

The Rails-to-Trails case indicates how strictly American courts view the right to exclude.<sup>113</sup> Although a hiker or a biker might seem less of a burden on the adjacent landowner than a passing train, courts refuse to engage in any balancing of interests in protecting the right to exclude. Any intrusion is actionable, and even where the public already owns a right of way, its scope will be strictly construed. Similarly, any attempt to impose public access along the lines of CRWA would not be sustainable absent compensation.

The takings clause presents a significant limitation on many types of US land use control, including zoning, historic preservation, and wetlands or habitat regulation. Of course, if the US Congress were willing to provide compensation, it could enact a right to roam. However, as the section below explains, for many reasons, cultural and historical, Americans are unlikely to adopt that approach, because the public currently places more value on the landowner's right to exclude than on the public's right to roam.

## ENVIRONMENTAL PROTECTION

Because American recreational hiking takes place largely on public lands, agencies have a greater ability to control access to prevent environmental damage. At the federal level, a

106 *Nollan* at 853–54 (Brennan, J., dissenting) (calling intrusion 'minimal').

107 The *Nollan* decision was five to four, indicating some hope that the majority position will be modified in future cases, but for now, the pre-eminent place of the 'right to exclude' is assured.

108 Development permission might be conditioned on the grant of access rights, but only if the government could establish, for example, that a particular development would cause an increased burden on existing transportation systems and therefore require a footpath as an exaction. See *Dolan*, 512 US at 391 (describing requirements of 'rough proportionality' test).

109 Nat'l Trail System Act, 16 U.S.C. ss. 1241–1251 (2000).

110 16 U.S.C. s. 1247(d).

111 See *Preseault v United States*, 100 F3d 1525, 1531 (Fed. Cir. 1996).

112 *Ibid.* at 1540.

113 A notable exception is *State v Shack*, 277 A.2d 369 (N.J. 1971), a New Jersey Supreme Court case in which activists who came onto property to aid migrant workers were absolved of trespass charges. In thus modifying the right to exclude, the court noted that '[p]roperty rights serve human values. They are recognized to that end, and are limited by it.' *Ibid.* at 372.

variety of statutory mandates require the agency responsible for managing a particular category of public land to promulgate a management plan for the area. For example, the Fish and Wildlife Service (FWS), a branch of the Department of Interior, manages the National Wildlife Refuge system. Under its governing law,<sup>114</sup> the FWS is required to prepare a comprehensive conservation plan for each refuge, which is specifically designed to ensure that public use is compatible with the goal of habitat preservation and restoration. In addition, the National Environmental Protection Act requires the FWS to prepare an assessment of its management plan, to examine the impacts on the environment and possible alternatives.<sup>115</sup> Finally, the Endangered Species Act requires the FWS to refrain from implementing any action likely to jeopardise the existence of any species on the threatened or endangered list.<sup>116</sup>

For example, the FWS recently completed the conservation plan for the Rachel Carson National Wildlife Refuge, a 2,500-acre refuge stretching along the coast of Maine. The plan's goals specifically included public access to provide 'wildlife-dependent experiences', in order to 'increase appreciation and stewardship of coastal Maine wildlife and their habitats'.<sup>117</sup> Hunting and fishing is allowed, but only in areas in which it can be ecologically accommodated.<sup>118</sup> Hiking is generally restricted to specific trails and some sensitive areas are off-limits to public access completely.<sup>119</sup> Any proposed activity must be approved as being compatible with the refuge's mission.

Government agencies managing other US public lands have similar planning responsibilities. For example, the Bureau of Land Management, which manages 264 million acres of public land, is required by the Federal Land Policy and Management Act of 1976<sup>120</sup> to engage in planning that will provide for multiple uses. In designating areas suitable for particular uses, the plan is supposed to 'give priority to the designation and protection of areas of critical environmental concern'.<sup>121</sup> Thus, because public access in the US occurs in conjunction with an agency's on-going management of government land, the agency will generally have good information regarding the impacts of public use and be able to respond quickly to any concerns.

## EXPLAINING THE DIFFERING APPROACHES TO PUBLIC ACCESS

### HISTORICAL DIFFERENCES

In Britain, the public's claim to greater access rights is grounded firmly in their historic use of the property before inclosure. In many ways, CRWA can be seen as simply restoring public rights taken away centuries before. Under the feudal system, land was typically held subject to the interests of many holders. After the Norman Conquest, monarchs were deemed the eminent owners of all property and parcelled out large tracts to lords by royal

114 The National Wildlife Refuge System Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997, 16 USC § 668dd.

115 42 USC §1332(2)(C).

116 16 USC §1536(a)(2).

117 National Wildlife Service, Final CCP for Rachel Carson NWR, at pp. 1–13 (June 2007), available at <http://www.fws.gov/northeast/planning/>.

118 *Ibid.* at 4–50, 51.

119 Rachel Carson NWR, Guidelines, <http://www.fws.gov/northeast/rachelcarson/guidelines.html>.

120 43 USC §1701(a) *et seq.*

121 43 USC §1712 (c)(3).

edict.<sup>122</sup> Only the Crown owned the land itself: its subjects owned merely an estate or interest in the land. In return for services, a tenant might hold certain property of the lord, but neither could be said to be absolute owner.<sup>123</sup> Commoners made great use of the lord's wasteland, with rights ranging from grazing to gathering wood to gleaning grain after the harvest.<sup>124</sup> Historically, then, 'ownership' of British property has always been subject to the rights of others, either the royalty or lords above or the tenants or commoners below. In theoretical terms, property rights were in many ways functional rather than purely spatial.

In the United States, conversely, historical land distribution emphasised spatial rather than functional rights to land. American land was primarily granted to individual landowners in fee simple without encumbrances.<sup>125</sup> Some commons arrangements did exist in the colonies, but in most instances the colonists quickly reverted to a private ownership scheme. Commons arrangements also existed in other parts of the new nation, but by the early 19th century, such arrangements were virtually extinct.<sup>126</sup>

Immigrants were attracted to the United States precisely because of the opportunity for freehold tenure.<sup>127</sup> From the beginning of colonial history, a premium was placed on development to help the colonies gain a better foothold in the new world. An immigrant was given a parcel of land in fee, but the freehold was perfected only by actually settling and cultivating the land.<sup>128</sup> Thus, while English lords could allow their land to lie fallow or be used by others without fear it would be lost, American settlers knew that the land would be theirs only if it were transformed into productive property.

As the country expanded west under the ideal of 'manifest destiny', pioneers willing to brave the wilds were given expansive property rights as a reward. Under the various Homestead Acts, ownership could be established only by excluding others, with fences or walls, and by putting the land into useful production. Community rights in private lands were rare, both because they were not necessary, but also because they were antithetical to the whole ideal of development and enclosure. Timing also had something to do with the difference in property distribution; by the time most of the United States was being settled, the commons system was being phased out in Britain and many other societies.<sup>129</sup>

122 After the Norman conquest, all land in England was deemed to be held subject to the monarch's ultimate authority. J.H. Baker, *An Introduction to English Legal History*, 3rd edn (Butterworths: London, 1990) 257.

123 *Ibid.* at 262–63 (noting that neither lord nor tenant could be said to 'own' the land in an absolute sense). For a complete discussion of the system of estates and tenures, see Sir William Holdsworth, *An Historical Introduction to the Land Law* (Clarendon Press: Oxford, 1927) 48–77.

124 See generally N. Ubhi and B. Denyer-Green, *Law of Commons and of Town and Village Greens*, 2nd edn (Jordan Pub. Ltd.: 2006) 33–50.

125 E.T. Price, *Dividing The Land: Early American Beginnings of Our Private Property Mosaic* (Univ. of Chicago Press: 1995). In some cases, mineral rights were withheld from land grants.

126 S. Banner, 'The Political Function of the Commons: Changing Conceptions of Property and Sovereignty in Missouri, 1750–1850', 41 *American Journal of Legal History* 61 (1997), at 66.

127 Price, above n. 96 at 11.

128 *Ibid.* at 14, 343 ('attracting settlers and getting the land in production were the immediate aims of colonial land distribution').

129 See Banner, above n. 97 at 66 ('By the time the west was ready for distribution, there was no serious argument to place any productive land in commons.'). At about the same time as inclosure was changing the commons system in Britain, the movement away from common rights was also occurring in India, see V.A. Smith, *The Oxford History of India*, 4th edn (OUP: Oxford, 1982) 534–36, and in France, see W.H. Sewell, Jr, *Work and Revolution in France: The Language of Labour from the Old Regime to 1848* (Cambridge Univ. Press: Cambridge, 1980) 114, 134 (describing common rights destroyed by Revolution in favour of absolute property ownership). But see E. Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge Univ. Press: Cambridge, 1990) 58–102 (describing long-enduring communal property regimes).

Despite these fundamental differences, there are some parallels to the British experience of common rights preceding inclosure. The best examples come from the American West, where ranchers used the open range as a vast grazing commons and cowboys drove cattle hundreds of miles over open lands in the late 1800s. Similarly, traders and settlers moving west established long routes such as the Santa Fe and Oregon trails.<sup>130</sup> Yet, most of these trails either fell into disuse and were abandoned as public rights of way, or became highways. Therefore, footpaths or other public access rights were not typically reserved in government grants of land.

The greater opportunity for and broader distribution of land ownership in the United States reduced the need for public rights and lessened the class-based tension between landholders and non-landholders. In Britain, much land was concentrated in a small group of aristocratic owners who traced their holdings to royal grants. The general public resented the idea that ‘the privileged few could dictate the terms on which the countryside was used’.<sup>131</sup> In contrast, the American landowner class was much larger and less exclusive. Because most landowners earned their property through labour (homesteading) or service in a war, the public presumably felt they had earned the right to exclude and respected the corresponding rights of others.

## CULTURE

The British commitment to improving countryside access is grounded in values such as providing for transportation by foot, enhancing the enjoyment of nature, promoting mental and physical health, facilitating a historical and cultural connection, and building a sense of community. Cultural differences may lead Americans to place less emphasis on those values.

Significantly, there is no American equivalent to the UK’s Natural England agency, which is specifically committed to the promotion and preservation of the countryside and rural life.<sup>132</sup> Americans rely primarily on publicly-owned lands, which comprise over a third of all property, to provide recreational opportunities, such as hiking and picnicking. In Britain, where 80 per cent of land is privately owned, few government properties contain the natural scenic values suitable for public enjoyment. Therefore, enjoyment of nature in Britain necessarily must include in some measure private land.

The British tradition of walking in the countryside was originally a matter of necessity, of course. Footpaths or cross-country rambles were the primary means of getting from place to place, especially for villagers without access to a horse. While travel by foot is usually no longer required, footpaths and roaming rights continue to provide quick and pleasant access to town, in many cases avoiding unpleasant and circuitous walks on paved roads or the necessity of driving. In contrast, the far-flung pattern of American land development, which presumes that the automobile will be the main form of transport, largely precludes travel by foot.

Of course, public access to the countryside also serves less mundane values than simple transportation. The enjoyment of nature has long been touted by British writers as a tonic

130 US Department of the Interior, National Park Service, Oregon National Historic Trail, <http://www.nps.gov/oreg/> (last visited 12 January 2007).

131 Shoard, above n. 19, at 99.

132 See Natural Environment and Rural Communities Act 2006, §§1–2 (statutory powers and objectives of Natural England). Notably, Natural England is charged with promoting both nature conservation and public access to the countryside, goals which at times may be incompatible. *Ibid.* §2(2)(a) and (d).



to the stress of everyday life, allowing the walker to ‘rediscover something of a slower, quieter, more rooted existence’,<sup>133</sup> an advantage that becomes more important as the pace of life increases. As Wordsworth put it, a walk through nature provides a feeling of ‘tranquil restoration’,<sup>134</sup> an escape from the ‘dreary intercourse of daily life’.<sup>135</sup> Americans do not celebrate nature walks to that extent, perhaps. The American path is typically a straight affair, paved with asphalt, and some Americans view any physical activity as a competitive event, rather than as a mental restorative. Britain may also rely more on walking as a means of physical health, whereas Americans might be more apt to go to an indoor gym. Health officials are attempting to get Americans to develop a culture of walking to help combat a growing obesity problem.<sup>136</sup>

In a more metaphysical sense, walking provides a connection to the past. Washington Irving, an American visiting Britain, captured the concept beautifully when he wrote that paths ‘evinced a calm and settled security, and hereditary transmission of homebred virtues and local attachments, that speak deeply and touchingly for the moral character of the nation’.<sup>137</sup> Although Americans also appreciate historic values, as evidenced by historic preservation laws,<sup>138</sup> that reverence does not yet extend to trails. As Nathaniel Hawthorne noted on observing a revered footpath: ‘An American farmer would plough across any such path . . . but here, it is protected by law, and still more by the sacredness that inevitably springs up, in this soil, along the well-defined footprints of the centuries. Old associations are sure to be fragrant herbs in English nostrils, we pull them up as weeds.’<sup>139</sup>

Roaming rights also evoke a sense of community among those who share rights in the land, helping to break down class differences by establishing a connection between the common folk and the landed gentry.<sup>140</sup> Nature poet Kim Taplin notes that ‘[f]ootpaths were made by common men who were obliged to go afoot; they are open to all’.<sup>141</sup> In a similar vein, Elihu Burritt referred to footpaths as ‘the inheritance of our landless millions’.<sup>142</sup> Perhaps this factor is more important in Britain, where many of the most desirable walking areas are concentrated on wealthy estates, than in the US where land is more broadly distributed and public lands provide more hiking needs.

The right to roam is also supported by a moral claim that land is, at bottom, the ‘common inheritance’ of all.<sup>143</sup> While property has been parceled out to individuals for reasons of economic efficiency, some argue that the private owners’ claim remains subject to the paramount needs of the public.<sup>144</sup> There is broad agreement, of course, that the public has

133 Ibid. at 2.

134 W. Wordsworth, ‘Lines Composed a Few Miles above Tintern Abbey’, *The Poetical Works of William Wordsworth* (1882) in Wm. Knight (ed.) (Kessinger Pub.: 2004) at 161.

135 Ibid. at 164.

136 See, e.g., US Dept of Health and Human Serv., Press Release, ‘HHS Secretary Announces Development of Physical Activity Guidelines at National Prevention Summit’ (26 October 2006), available at <http://www.hhs.gov/news/press/2006pres/20061026.html>.

137 W. Irving, *The Sketch Book* 67–68, quoted in Kim Taplin, *The English Path* (Boydell Press: 1979), at 17.

138 See, e.g., Iowa Code, ss. 368.26, 403.17(10) (2006) (providing special land use protection for farms in the same family for a century or more). However, it must be said that American historic preservation laws exist only at the local or state level and therefore vary considerably.

139 N. Hawthorne, *Our Old Home* (1891) 69, quoted in Taplin, above n. 107, at 18.

140 Shoard, above n. 19, at 50–51 (noting that public has more of a ‘stake’ in the land it uses).

141 Taplin, above n. 107, at 17.

142 E. Burritt, *A Walk from London to John O’Groats*, 2nd edn (Sampson Low: London, 1864) 10.

143 J.S. Mill, *Principles of Political Economy* (1848) (Batoche: Ontario, 2001) Book II, Ch. II, s. 6 ([L]and of every country belongs to the people of that country’).

144 J.L. Anderson, ‘Takings and Expectations: Toward a “Broader Vision” of Property Rights’, 37 *Kansas L. Rev.* 529 (1989).

the right to prevent the individual landowner from harming the public, through planning legislation and other land use controls; the argument here goes further, however, to suggest that the public interest condition inherent in property ownership includes an affirmative right to use it for public benefit if necessary. Indeed, the moral argument suggests that individual freedom should include the right to walk wherever one pleases, unless the landowner can make a case that it is unduly burdensome.<sup>145</sup> John Stuart Mill argued that public access should not be denied 'except to the extent necessary to protect the produce against damage, and the owner's privacy against invasion'.<sup>146</sup>

In the US, however, the moral high ground seems to rest more often with the landowner, whose labour has, under the philosophy of John Locke, made the land an extension of himself and thus given him a natural right to exclude.<sup>147</sup> Indeed, Locke's writings heavily influenced the framers of the American Constitution and Bill of Rights, which contains the strong protection for property.<sup>148</sup> This Lockean vision contributes to a discourse dominated by individualist rather than communitarian notions.<sup>149</sup> While American planning laws place some restrictions on development, the landowner's interest may not be unduly diminished, regardless of the public interest at stake, and a permanent physical invasion will always require compensation, which may make a scheme like roaming rights cost-prohibitive.<sup>150</sup> In plain terms, in America the man with the fence wins.

An economic analysis of the right to roam also indicates that it may be more appropriate in Britain than the United States. In general, the right to exclude is economically efficient because it allows the owner to avoid the costs of monitoring the behavior of entrants, who 'may damage crops, commit thefts, and do other mischief'.<sup>151</sup> However, an exception to the general right to exclude may be efficient, where 'the would-be entrant would objectively value entry far more than the landowner would objectively suffer from the entry' and where the likelihood of damage to the landowner is likely to be slight.<sup>152</sup> Finally, modifications to the right to exclude should be sensitive to transactions costs associated with gaining the owner's permission to enter.<sup>153</sup>

The right to roam fares well under this test, at least in Britain. Parliament singled out precisely the type of land which the public placed a high value on entering, due to its scenic beauty and potential for open air recreation. Conversely, this category of land presents a low likelihood of harm from intrusion, because there is little to steal and no crops are grown on the mountain and moor. As discussed above, the potential for damage to wildlife habitat or other environmental harm must also be considered in this calculus,

145 See Shoard, above n. 19 at 147, 287–87.

146 Mill, above n. 113 at Book II, Ch. 2, s. 6. Mill complained about the 'pretension' of two dukes who shut off mountain scenery from public roaming merely so as not to disturb wild animals they wanted to hunt. Mill called it an 'abuse' of the right of property. *Ibid.*

147 J. Locke, *Two Treatises of Government*, 2nd edn (1690) in Peter Laslett (ed.) (Cambridge Univ. Press: Cambridge, 1967) 305–06. See also T.W. Merrill and H.E. Smith, 'The Morality of Property', 48 *Wm. & Mary L. Rev.* 1849, 1870–74 (2007) (arguing that right to exclude has moral basis, apart from pragmatic policy considerations).

148 M. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press: New York, 1991) 20–25.

149 *Ibid.* at 43–44.

150 For example, in *Lucas v South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Supreme Court announced a rule that eventually required South Carolina to compensate a landowner prevented by conservation restrictions from building in a sensitive beachfront area. After paying the money, the state ended up selling the property to a construction company for development in order to recoup the costs of the litigation.

151 R.C. Ellickson, 'Property in Land', 102 *Yale L.J.* 1315 (1993), at 1382.

152 *Ibid.* at 1382–83.

153 *Ibid.*

although the harm is difficult to value in economics terms and could be deemed minimal if the agency uses the protections afforded by CRWA effectively. Finally, the modification is justified because it is unlikely that individual landowners will enter into access agreements with the public or subsets thereof, even where it would be beneficial to both sides, because of prohibitive transactions costs.<sup>154</sup> Thus, as long as the right to roam is limited to those types of land where the balance tips most strongly in favour of public use, it probably comports with economic principles.

The US presents a different situation, however. Many mountainous areas or areas with sparse vegetation are already publicly owned,<sup>155</sup> while private land tends to be either cultivated or highly developed. Other privately owned areas of scenic beauty, in Wyoming or Montana, for example, may be too remote from large population centres to generate high demand for public access, reducing the value of that side of the equation. It would be difficult, perhaps, to carve out a category of land in the United States that would be the equivalent of moors or downland in combining a strong public access value with low private cost.

Nevertheless, at the local level there may be instances in which an equivalent calculus may prevail. In Iowa, for example, a unique geological formation called the Loess Hills runs along the Missouri River the entire length of the state.<sup>156</sup> The Hills, characterised by steep bluffs and sharp crests, were formed by extraordinarily deep wind-blown deposits of loess, particles of rock ground down by glaciers in the last Ice Age. Although loess this deep can be found only one other place on earth (Shaanxi, China), the vast majority of the land is privately-owned and not subject to either conservation restrictions or public access requirements. In certain parts of the Hills, the value of public access – for example, over non-productive lands, typically teeming with wildlife – might outweigh the harm to the landowner. Perhaps there are similar situations in other areas of the country. Under the Constitution, of course, compensation would have to be provided to the burdened landowners. Moreover, such an arrangement would require Americans to abandon their preference for a bright line between public and private land.

Overall, however, a review of the policies supporting the right to roam indicates they may carry less weight in the new world than the old, at least at present. For historical and cultural reasons, Americans jealously guard the private property owner's right to exclude, while finding the public needs for countryside access adequately met by other means, such as public property. Therefore, a state or the federal legislature is unlikely to adopt the equivalent of CRWA in the United States, even if it were constitutional. Yet, CRWA contains some interesting lessons Americans could profit from studying.

Britain's right to roam teaches us that the composition of the bundle of rights constituting 'private property' is not necessarily immutable, and that changes may be desirable to better reflect contemporary society's needs and values. Americans have become so accustomed to the sharp distinction between public and private property, that they have lost the

154 The Vixen Tor example, above, illustrates the difficulties inherent in reaching individual landowner agreements, which would be even worse without the landowner liability protections provided by CRWA. See S. Banner, 'Transitions Between Property Regimes', 31 *J. Legal Studies* 359 (2002) at 360–61; M.A. Heller, 'The Boundaries of Private Property', 108 *Yale L.J.* 1163 (1999) 1209–10 (arguing that *Nollan's* formalistic approach to labelling private property rights may block the 'optimal social level of use of beaches').

155 For example, in the arid regions of the West, such as Utah and Nevada, public lands comprise well over half of the total land area and include spectacular national parks, forests, and monuments. In scenic Alaska, the federal government owns around 90 per cent of the total land area. The Rocky Mountain National Park in Colorado is another good example of the ample public land in mountainous regions.

156 See US Geological Service, *Geology of the Loess Hills, Iowa*, available at <http://pubs.usgs.gov/info/loess/>.

ability to imagine possible gradations between the two.<sup>157</sup> The right to roam reminds Americans that the right to exclude need not be absolute.

Finally, the right to roam suggests that Americans should reconsider whether we have undervalued the public access side of this equation, and whether there are ways, consistent with our own culture and legal framework, to further the important public interests represented by CRWA. The British experience reminds us of the importance of ensuring public access to natural areas, even those on private lands. Americans, however, are more likely to use a different set of tools to achieve that goal, such as providing economic incentives for access agreements or providing a registry of open areas. As the nation matures and becomes more crowded, Americans may begin to place more emphasis on the public's freedom to roam and less on protecting an absolute right to exclude.

## CONCLUSION

Britain's resurrection of the right to roam causes other countries, such as the United States, to reconsider the values that support greater public access to the countryside. Given differences in our history, land ownership, and culture, not to mention our legal system, the United States is unlikely to emulate the CRWA. But the idea that the freedom to roam has trumped the right to exclude in Britain may encourage Americans to accommodate the public's need for access in ways that comport with our system.

Moreover, as the public begins to exercise its new ability to interact with nature, we must recognise that roaming may create undesirable impacts on the environment, which must be carefully monitored. The US model, which restricts public recreation to areas owned and managed by the government, naturally allows for greater control over the time, place, and manner of public access, to limit the effects of human intrusion. It may be more difficult for Natural England to assess and respond to environmental threats over millions of acres of private land. While CRWA provides the agency with some important tools, the proper balance between recreation and nature will be struck only if the agency has adequate information and is able to respond quickly to limit access when necessary. In some cases, the public must recognise that unrestricted access may well result in the deterioration or even destruction of the very resource they covet.

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157 Banner, above n. 97, at 63–64.