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Access, Exclusion, and Value

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Jonathan Klick & Gideon Parchomovsky, *The Value of the Right to Exclude: An Empirical Assessment*, 165 **U. Pa. L. Rev.** (forthcoming 2016), available at [SSRN](#).

The concepts of exclusion and access occupy the minds of many property scholars. We regularly debate the problems with, and benefits of, exclusion. We talk about how foundational the right to exclude is, and should be. We talk about whether and when the right to exclude should bend to accommodate other interests. And we talk about the value of exclusion. While these debates have filled many pages in law journals and hours of panel discussions, Professors Jonathan Klick and Gideon Parchomovsky noticed that something was missing from the discourse: empirical evidence.

They seek to fill that void with *The Value of the Right to Exclude: An Empirical Assessment*, forthcoming in the University of Pennsylvania Law Review. The authors undertake their analysis by examining the effect of the passage of right-to-roam laws in England and Wales on property values (P. 5 n.18), perhaps motivated to quantify Professor Henry Smith's statement that "giving the right-to-roam stick to a neighbor or to the public affects the value of the remaining property."¹ These laws give members of the public some recreational access—for activities like walking and hiking—to some private property. Klick and Parchomovsky's article suggests that even small limitations on the right to exclude that result from right-to-roam laws can significantly decrease property values.

Klick and Parchomovsky begin by laying out the debates in the literature surrounding the importance of the right to exclude. On the one hand, we have what the authors call the "pro-exclusion camp," who view the right to exclude as perhaps "the most defining feature of property." (P. 11 n.62, citing Hanoch Dagan, **Reconstructing American Legal Realism and Rethinking Private Law Theory** 164-65 (2013).) In contrast, the authors also lay out the views of those in the progressive property movement. These scholars—whom Klick and Parchomovsky call "pro-access"—generally reject the idea that the right to exclude is the key to property. Progressive property scholars also believe that the "moral foundation of property is human flourishing."² Thus, these scholars seek to increase recognition of public access to, and interest in, private property. This setup is important, because it allows Klick and Parchomovsky to identify a fundamental divide between property law theorists with respect to how central the right to exclude actually is. And as they explain, "[i]f courts accept the proposition that the right to exclude is the sine qua non of private property ... it would significantly undermine the ability of the state to advance the other goals of the progressive property movement. ... Conversely, if courts accept the view that the right to exclude is merely another stick in the property bundle ... it would give the state the liberty to adopt policies that curb owners' right to exclude with impunity." (P. 16.)

[Right-to-roam laws](#) present an appropriate [lens through which to examine](#) the balance between access and exclusion, and thus the value of exclusion. As Klick and Parchomovsky point out, the right-to-roam law adopted in England and Wales occupies a middle ground; it is not overly invasive because private property owners can still exclude a number of activities, and members of the public are allowed to roam over only certain parts and types of land. And there are convincing efficiency and distributive justice justifications for adopting a public right to roam. So, if we were to pass a similar law in the U.S., thereby placing at least some restriction on the right to exclude, how might it affect property values? Here is where the empirical element of the authors' work comes into play.

In order to examine the value of the right to exclude in this context, the authors looked at the net change in real estate prices in England and Wales for areas where a great deal of land was affected by the passage of the right-to-roam statute as compared to areas where less property was affected. What they found suggests "that the passage of the right to roam statute in 2000 led to substantial declines in real estate prices in those counties and municipal authorities

where a relatively large fraction of the land area was designated as access land.” (P. 39, examining data from 1995-2014 in their analysis.) Further, the effect was enduring; the authors did not find a recovery and normalization of the market over time. Thus, they determined that the right to exclude holds great value to private property owners, and even a slight infringement upon that right in order to allow greater public access may cause property values to drop.

The authors acknowledge potential limitations in the design of their study, but try to control for those issues when possible. However, because land subject to the right to roam is often rural and open, it may not be encumbered by houses, and thus it is hard to know whether changes in the housing sales prices that the authors analyzed can be attributed to the right to roam; there are so many factors that affect real estate values, including distances from urban centers of commerce and deindustrialization. Further, even if we accept the authors’ conclusion—that even a slight reduction in a property owner’s right to exclude could negatively impact the value of that owner’s private property—it is still unknown what the net impact of something like a right to roam may be. That’s because the study does not include a measure of the subjective benefit that members of society at large gain through increased access to private land, though the authors recognize that this is harder to measure and quantify.

The authors state, “[t]o the extent that access rights and exclusion rights are capitalized into real estate values, this suggests that the loss of exclusion rights dominates the increase in access rights.” (P. 5.) But they recognize that it is also possible that the benefit to the public at large is not sufficiently captured by local private property values, and thus those benefits could outweigh the costs imposed on the landowners. Perhaps in a follow-up piece, the authors could conduct qualitative interviews to try to capture, and then compare, some information about the public benefit. While the article at hand focuses on costs, the grand debate about tradeoffs between access and exclusion could be furthered even more if we had empirical data about the value of exclusion relative to access.

These points notwithstanding, the article still makes an important contribution to the literature. We now have some empirical grounding to refer to in our discussions about the right to exclude. Were the United States to adopt a right-to-roam law, the government might be required to pay just compensation to affected landowners; this study assists in determining how much that compensation might be.³ The article also contributes to debates about value in other contexts, such as eminent domain and privately owned public open space. Both policymakers and property theorists are well-served by attempts to quantify the value of exclusion.

1. Henry E. Smith, *Property is Not a Bundle of Rights*, 8 **Econ. J. Watch** 279, 286 (2011).
2. Gregory S. Alexander, *Intergenerational Communities*, 8 **Law & Ethics Hum. Rts.** 21, 24 (2014).
3. We must, of course, consider the different histories and cultures of England and Wales as compared to the U.S.; we cannot be certain that the value of the right to exclude would be the same here.

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