The Right to Exclude: People, Animals, and Pollution

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The Supreme Court has deemed the right to exclude one of the most fundamental property rights. Accordingly, the Court has offered the right to exclude heightened protection under the Takings Clause. However, the Court has left significant uncertainty about the scope of the right to exclude that is protected under takings doctrine. For instance, does the Takings Clause require compensation if the government, pursuant to the Comprehensive Environmental Response and Liability Act (CERCLA), requires a landowner to house another party's pollutants?

This Comment draws from property theory and analytical jurisprudence to offer a new approach to takings analyses concerning the right to exclude. First, it argues that the right to exclude is strictly a Hohfeldian claim-right, or a legal position created by imposing a duty not to invade on someone else. An important implication of this definition for takings challenges to environmental regulation is that the property right to exclude is strictly a right against persons but not against animals or pollution. Second, this Comment addresses what it means for the right to exclude to be enforceable. It argues that government action that renders the right to exclude unenforceable should count as a taking. However, the right to exclude can be enforceable through a variety of means, so the right could remain enforceable absent a particular means of enforcement. Applying this framework to CERCLA, this Comment concludes that CERCLA does not abrogate landowners' right to exclude.

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INTRODUCTION

The brick smelter smokestack towering over the secluded community of Anaconda, Montana is taller than the Washington Monument.[1] From 1908 until the Anaconda smelter's closure in 1981, the structure formed part of the largest copper reduction operation in the world.[2] Over the course of the twentieth century, the Anaconda Copper Mining Company refined tens of millions of pounds of copper ore mined from the "Richest Hill on Earth," twenty-six miles west in Butte.[3] Today, the Anaconda smokestack, mounds of black slag, and tailings ponds remain as visual reminders of this industrial history. Within the soil surrounding the smokestack are other, less visible remnants of the smelting operation: hazardous substances, including lead, arsenic, copper, chromium, barium, cadmium, zinc, and manganese.[4]

During Anaconda's industrial peak, one of Montana's "copper kings" claimed that the sulfurous fumes that billowed over the landscape "were vital to health as a disinfectant for disease" and that airborne arsenic "gave Butte women their beautiful, pale complexions."[5] However, this narrative soon became untenable. Several toxic waste disasters during the 1970s drew public attention to the dangers posed by environmental contamination.[6] In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act[7] (CERCLA) "to promote

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1 Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1346 (2020); *see also* LAURIE MERCIER, ANACONDA: LABOR, COMMUNITY, AND CULTURE IN MONTANA'S SMELTER CITY 1 (1954).

2 MERCIER, *supra* note 1, at 10.

3 *Atlantic Richfield*, 140 S. Ct. at 1346 (quoting MICHAEL P. MALONE, THE BATTLE FOR BUTTE 34 (1981)).

4 Fifth Amended Complaint at 4, United States v. Atl. Richfield Co., (D. Mont., July 6, 2020) (No. CV-89-39), 2020 WL 3096640.

5 KATE BROWN, DISPATCHES FROM DYSTOPIA: HISTORIES OF PLACES NOT YET FORGOTTEN 127 (2015).

6 *See, e.g.*, Martha L. Judy & Katherine N. Probst, *Superfund at 30*, 11 VT. J. ENV'T L. 191, 192–93 (2009). The most prominent incident involved contamination at Love Canal in Niagara Falls, New York, which reached the front page of the *New York Times* in August 1978. Donald G. McNeil Jr., *Upstate Waste Site May Endanger Lives*, N.Y. TIMES, Aug. 2, 1978, at A1.

7 Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601–9675).

'the timely cleanup of hazardous waste sites'" and to ensure that polluters pay for cleanups.[8] CERCLA directed the Environmental Protection Agency (EPA)[9] to compile a priority list of sites eligible for cleanup, known as the National Priorities List (NPL).[10] The cleanup program established by CERCLA focuses on sites listed on the NPL, which are referred to as "Superfund" sites.[11] The first NPL, published by the EPA in 1983, included the three hundred–square-mile area around the Anaconda smelter.[12] Today, more than thirty-five years later, the EPA continues to manage remediation work at the site with the Atlantic Richfield Company (ARCO), the site's current owner.[13]

While CERCLA was enacted to promote remediation of contaminated sites, it sometimes has the opposite effect. CERCLA envisions the EPA as the sole conduit for remediation work. Thus, § 122(e)(6) prohibits potentially responsible parties[14] (PRPs) from taking any remedial action at Superfund sites without EPA approval.[15] In *Atlantic Richfield Co. v. Christian*,[16] a case involving cleanup at the Anaconda Superfund site, the Supreme Court held that landowners can qualify as PRPs solely by owning land in Superfund sites, even if they were not responsible for the site's contamination.[17] As a result, even "innocent" landowners might need EPA approval to remove pollutants. The EPA can be hostile to

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8 Burlington N. & S.F.R. Co. v. United States, 556 U.S. 599, 602 (2009) (quoting Consol. Edison Co. of N.Y. v. UGI Util., Inc., 423 F.3d 90, 94 (2d Cir. 2005)); *see also* Alexandra B. Klass, *CERCLA, State Law, and Federalism in the 21st Century*, 41 SW. L. REV. 679, 682 (2012) (discussing the purposes of CERCLA).

9 Technically, CERCLA directs the President to act, but the President has delegated that authority to the EPA. *See* Exec. Order No. 12,580, 3 C.F.R. § 193 (1988).

10 42 § 9605(a)(8)(A)–(B), 9605(c)(1).

11 *See* Judy & Probst, *supra* note 6, at 197–99.

12 Amendment to National Oil and Hazardous Substance Contingency Plan; National Priorities List, 48 Fed. Reg. 40,658, 40,667 (Sept. 8, 1983) (codified at 40 C.F.R. pt. 300).

13 *Atlantic Richfield*, 140 S. Ct. at 1347.

14 The list of "covered persons" in § 107, the Act's liability section, determines who is a PRP. *Id.* at 1352. Section 107 defines four categories of covered persons: (1) the current owner and operator of a vessel or facility; (2) the person who owned or operated a facility at the time when hazardous substances were disposed of there; (3) any person who arranged for the disposal or treatment of hazardous substances at a facility or vessel; and (4) any person who transported hazardous substances to a disposal or treatment facility, vessel, or site. 42 U.S.C. § 9607(a). Amendments to CERCLA have added limited exemptions, but liability remains expansive. *See, e.g.*, Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, § 102, 115 Stat. 2356, 2356–57 (2002) (codified in scattered sections of 42 U.S.C. §§ 9601–9675).

15 *Atlantic Richfield*, 140 S. Ct. at 1352.

16 140 S. Ct. 1335 (2020).

17 *Id.* at 1352.

such requests. During the *Atlantic Richfield* litigation, the EPA signaled that it would reject the plaintiff-landowners' plans, which were more aggressive than the agency's, because private remediation could interfere with the EPA's own cleanup.[18]

Justice Neil Gorsuch, partially dissenting in *Atlantic Richfield*, suggested that allowing the federal government to "order innocent landowners to house another party's pollutants involuntarily" would "invite weighty takings arguments under the Fifth Amendment."[19] At the end of this statement, Justice Gorsuch cited *Loretto v. Teleprompter Manhattan CATV Corp.*,[20] the foundational case in the Supreme Court's physical takings jurisprudence. *Loretto* announced that permanent physical occupations by the government are per se takings, meaning that the government must pay compensation under the Fifth Amendment's Takings Clause.[21]

Justice Gorsuch was the only member of the Court to raise a takings issue in *Atlantic Richfield*. However, only a year later, six Justices—including Justice Gorsuch—issued a major victory to property-rights advocates. In *Cedar Point Nursery v. Hassid*,[22] the Court held that the Fifth Amendment's Takings Clause requires the government to compensate property owners whenever the government "appropriates a right to invade" property, even temporarily, because of "the central importance to property ownership of the right to exclude."[23] *Cedar Point* overruled a key component of *Loretto*, which had treated permanent occupations of land as per se physical takings but temporary invasions of land as possible takings.[24] Thus, *Cedar Point* expanded the scope of the per se rule for physical takings—the same rule that Justice Gorsuch suggested was implicated in *Atlantic Richfield*.

So far, *Cedar Point*'s full effects are unclear. But the dissenting Justices and some scholars have suggested that *Cedar Point* could vastly expand Takings Clause liability. In his dissent in

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18 Brief for United States as Amicus Curiae at 20–21, *Atlantic Richfield*, 140 S. Ct. 1335 (No. 17-1498); *see also Atlantic Richfield*, 140 S. Ct. at 1347–48.

19 *Atlantic Richfield*, 140 S. Ct. at 1364 (Gorsuch, J., dissenting in part).

20 458 U.S. 419 (1982).

21 *Id.* at 426.

22 141 S. Ct. 2063 (2021).

23 *Id.* at 2072–73.

24 *Compare Cedar Point*, 141 S. Ct. at 2074 (holding that "a physical appropriation is a taking whether it is permanent or temporary"), *with Loretto*, 458 U.S. at 435 n.12 (explaining that "[t]he permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude" and that "[n]ot every physical *invasion* is a taking" (emphasis in original)).

Cedar Point, Justice Stephen Breyer noted that "large numbers of ordinary regulations in a host of different fields [ ], for a variety of purposes, permit temporary entry onto (or an 'invasion of') a property owner's land."[25] One scholar has even raised alarm about the possibility that *Cedar Point*'s holding will jeopardize a host of antidiscrimination laws that "take" employers' right to exclude vulnerable categories of individuals.[26]

In the wake of *Cedar Point*, this Comment returns to the potential Takings Clause violation raised by Justice Gorsuch in *Atlantic Richfield*. Does CERCLA § 122(e)(6), by requiring PRPs to obtain EPA permission for cleanup on private land, abrogate the Anaconda landowners' right to exclude, causing a physical taking? The answer to this question carries implications for the constitutionality of environmental regulations beyond CERCLA. For instance, do habitat protections for endangered species abrogate landowners' rights to exclude the protected species, as some plaintiffs have argued?[27] To address these issues, this Comment examines the scope of the right to exclude.

Part I provides background on the Takings Clause. It explains the bundle-of-rights conception of property, which informs the Supreme Court's interpretation of the Takings Clause. Part I then describes the development of the Court's implicit takings doctrine.

Part II explores two questions about the right to exclude. First, what does the "right to exclude" mean? Part II argues that the right to exclude in property law is a Hohfeldian claim-right, or "the legal position created through the imposing of a duty on someone else."[28] Second, what does it mean for the right to exclude to be enforceable? This issue is important for takings analyses because for a right to be genuine (as opposed to nominal), the right must be enforceable.[29] Part II argues that government action that

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[25] *Cedar Point*, 141 S. Ct. at 2087 (Breyer, J., dissenting). For instance, Justice Breyer suggested that *Cedar Point* called into question regulations authorizing inspections of meat food products, coastal wetlands, historic resources during the rehabilitation process, premises where dairy products are produced, foster care facilities, private preschool programs, assisted living facilities, and solid-waste-management facilities, among other examples. *Id.* at 2087–88.

[26] *See* Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 196–98 (2021).

[27] *See, e.g.*, Seiber v. United States, 364 F.3d 1356, 1360–62 (Fed. Cir. 2004); Boise Cascade Corp. v. United States, 296 F.3d 1339, 1341–43 (Fed. Cir. 2002); Southview Assocs., Ltd. v. Bongartz, 980 F.2d 84, 92 (2d Cir. 1992).

[28] Matthew H. Kramer, *Rights Without Trimmings*, *in* A DEBATE OVER RIGHTS: PHILOSOPHICAL ENQUIRIES 7, 9 (1998).

[29] *See id.*

renders the right to exclude unenforceable should count as a taking, and it identifies measures of enforceability.

Part III evaluates claims that environmental regulations abrogate landowners' property right to exclude. It establishes that if the right to exclude is a claim-right, then the right is against people but not animals or things. Part III then turns to CERCLA. It argues that the right in question is a landowner's right to exclude a person-polluter such as ARCO. CERCLA does not directly abrogate this right because the statute does not authorize anyone to deposit contaminants on others' land. Therefore, if CERCLA causes a physical taking, it would be because the statute denies the enforceability of a landowner's right to exclude a person-polluter. Part III argues that this right remains enforceable because CERCLA imposes significant legal liability on polluters, which is sufficient enforcement for a landowner's right to exclude to be genuine.

I. THE TAKINGS CLAUSE

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation."[30] Initially, the Supreme Court applied the Takings Clause to require compensation only for explicit physical appropriations of property by condemnation.[31] However, in two cases at the turn of the twentieth century, *Pumpelly v. Green Bay Co.*[32] and *Pennsylvania Coal Co. v. Mahon*,[33] the Court extended its constitutional takings doctrine to "implicit takings," or takings that arise outside the context of eminent domain. First, the Court held that construction of a government-authorized dam that permanently flooded private land and certain state regulations of coal mining required payment of just compensation because of the severity or nature of the consequences for property owners.[34] Then, in *Mahon*, the Court established that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[35]

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30 U.S. CONST. amend. V.

31 *See* James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 40–41 (2016); *see also Cedar Point*, 141 S. Ct. at 2071 ("Before the 20th century, the Takings Clause was understood to be limited to physical appropriations of property.").

32 80 U.S. 166 (1871).

33 260 U.S. 393 (1922).

34 Krier & Sterk, *supra* note 31, at 41.

35 *Mahon*, 260 U.S. at 415.

This Part examines the Court's approach to determining which government actions go "too far."[36] Section A explains the bundle-of-rights conception of property, which is dominant in American law and informs the Court's interpretation of the Takings Clause. Section B describes the development of the Court's implicit takings doctrine since *Mahon*.

A. The Bundle-of-Rights Conception of Property

Defining property is difficult. While the layperson likely thinks of property in terms of the right to possess a tangible thing, the legal concept of property is incorporeal. Property law encompasses many different rules, rights, and duties that regulate a wide range of relationships.[37] Furthermore, the objects of property rights are diverse, including not just material resources such as land and manufactured objects but also intellectual property in ideas and inventions, bank accounts, bonds, stocks, and—arguably—welfare benefits.[38] As a result of this heterogeneity, private property resists general definition. Some writers have even argued that the legal conception of property is impossible to define.[39] However, for the past several decades, the bundle-of-rights conception of property has remained dominant in U.S. law and Anglo-American legal philosophy.[40] Indeed, the Supreme Court has generally applied the bundle-of-rights conception in property cases.[41] This Section describes the bundle-of-rights conception of property at a theoretical level before Section B discusses its application by the Court.

The bundle-of-rights conception emerged as a combination of Profesor Wesley Hohfeld's analysis of rights and Professor A.M.

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[36] *Id.*

[37] *See* JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 26–29 (1990) (describing the legal relations involved in the ownership of a car).

[38] *See id.* at 30; Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970) ("It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property.").

[39] *See* WALDRON, *supra* note 37, at 26–30 (describing skepticism about whether private property is definable).

[40] *See* J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 712–14 (1996) (describing understandings of property in mainstream Anglo-American legal philosophy); *see also* JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL H. SCHILL & LIOR JACOB STRAHILEVITZ, PROPERTY 177 (9th ed. 2018) (describing the bundle-of-rights conception of property as "conventional among lawyers").

[41] *See, e.g.*, *Loretto*, 458 U.S. at 435; Horne v. Dep't of Agric., 576 U.S. 350, 361–62 (2015).

Honoré's "incidents" of ownership.[42] Hohfeld insisted that a so-called right *in rem* is not the right to a thing but is instead part of a class of similar, though separate, claims residing in a single person against very many persons.[43] In his influential 1961 paper *Ownership*, Honoré identified eleven legal rights, duties, and other features, or incidents, of ownership.[44] Combining these analyses, the "bundle" in the bundle-of-rights conception of property is made up of different rights and other legal relations.

To illustrate, consider the proverbial Blackacre. If *A* owns Blackacre, then *A* has the right to exclude *B*, *C*, and *D* from Blackacre (and *B*, *C*, and *D* have correlative duties not to enter). *A* also has the right to use Blackacre in various ways. At the same time, *A*'s rights are limited. For instance, *A* may not build on her land in such a way as would cause the building to collapse on *B*'s land (and vice versa). In addition, *A*'s ownership gives *A* the power to change these legal relations by transferring ownership. *A* could sell Blackacre to someone else. *A* could also make a smaller change by, for instance, selling *B* a temporary right-of-way over Blackacre, which is one "stick" in the bundle of rights that constitutes *A*'s ownership of Blackacre. These examples show that the bundle-of-rights conception of property "involves a constellation of [ ] elements, correlatives, and opposites" that "are the relations that constitute property."[45]

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[42] *See* Penner, *supra* note 40, at 724 (quoting STEPHEN R. MUNZER, A THEORY OF PROPERTY 23 (1990)). The *Restatement of Property* even begins with a "Hofheldian outline of rights and duties." *Id.* at 714 (citing RESTATEMENT OF PROPERTY intro., §§ 1–5 (AM. L. INST. 1936)).

[43] Hohfeld defines rights *in personam* and rights *in rem* as "paucital" and "multital," respectively:

> A paucital right, or claim (right *in personam*), is either a unique right residing in a person (or group of persons) and availing against a single person (or single group of persons); or else it is one of a few fundamentally similar, yet separate, rights availing respectively against a few definite persons. A multital right, or claim (right *in rem*), is always one of a large class of fundamentally similar yet separate rights, actual and potential, residing in a single person (or single group of persons) but availing respectively against persons constituting a very large and indefinite class of people.

WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 72 (Walter W. Cook ed., 1923) (emphasis omitted).

[44] A.M. Honoré's eleven "standard incidents of ownership" are: (1) the right to possess; (2) the right to use; (3) the right to manage; (4) the right to the income of the thing; (5) the right to the capital; (6) the right to security; (7) the right or incident of transmissibility; (8) the right or incident of absence of term; (9) the prohibition of harmful use (10) liability to execution; and (11) residuary character. A. M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107, 112–28 (Anthony Gordon Guest ed., 1961).

[45] STEPHEN R. MUNZER, A THEORY OF PROPERTY 23 (1990).

The bundle-of-rights conception of ownership leaves unresolved at least two significant points of ambiguity relevant to the Fifth Amendment's Takings Clause. First, what are the contours of the bundle of rights? Professors Richard Epstein and Margaret Radin have offered opposite answers to this question. Epstein has argued that property is a freestanding bundle of rights comprised of any valuable entitlement that can form the subject of a market transaction secured by a legal right.[46] On the other hand, Radin has argued that the contours of the bundle of rights are determined by the moral, legal, political, and legislative context.[47] On Radin's view, some government regulations, such as rent control, may be properly characterized as reflecting a cultural redefinition of the property right itself rather than as "taking" sticks from the bundle of rights.[48] The Supreme Court does not go as far as Radin, but it has recognized that "background principles" of state property and nuisance law place restrictions upon ownership that "inhere in the title itself."[49] Therefore, government regulations that proscribe uses of property that were already unlawful under background principles of law do not count as takings because such uses fall outside the contours of the bundle.[50]

The second ambiguity concerns whether certain sticks are necessary for a bundle to constitute ownership. When does a deprivation of sticks from the bundle rise to the level of taking property? The challenge is that different combinations of sticks can be equally characterized as ownership. For instance, if *A* concedes a right-of-way over Blackacre to *B*, *A* retains ownership over Blackacre, even though *A*'s bundle of rights is now smaller.

Honoré framed his list of incidents of ownership in such terms, explaining that:

> [T]he listed incidents are not individually necessary, though they may be together sufficient, conditions for the person of inherence to be designated 'owner' of a particular thing in a given system. As we have seen, the use of 'owner' will extend to cases in which not all the listed incidents are present.[51]

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46 *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 35–104 (1985).

47 *See* MARGARET JANE RADIN, REINTERPRETING PROPERTY 168–77 (1993).

48 *Id.* at 175–76.

49 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

50 *Id.* at 1029–30.

51 Honoré, *supra* note 44, at 112–13.

Again, the property literature offers several potential approaches to resolving this ambiguity in the bundle-of-rights conception. At one extreme, Epstein has argued that government regulation that strips an owner of any stick in the bundle counts as a taking.[52] But the more standard view emphasizes the relative importance of different property rights and reaches the conclusion that deprivations of certain rights should be treated more seriously than deprivations of other rights. Several leading property scholars, from Sir William Blackstone to Professor Thomas W. Merrill, have argued that the right to exclude is the core of property ownership.[53] The next Section discusses the Supreme Court's approach, which distinguishes between types of deprivations.

B. The Supreme Court's Implicit Takings Doctrine

The Supreme Court has frequently endorsed the bundle-of-rights conception of property.[54] Consistent with the standard version of this view, the Court stated in *Andrus v. Allard*[55] that "the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."[56] At the same time, the Court has deemed the right to exclude "one of the most treasured" property rights, citing Blackstone's and Merrill's accounts of property as exclusion.[57] Consistent with the Court's prioritization of property owners' right to exclude, *Cedar Point* established that "appropriations of a right to invade are per

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52 *See* EPSTEIN, *supra* note 46, at 57–62.

53 *See* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 744, 752 (1998) (arguing that "the right to exclude is the *sine qua non*" of property, in part because "if we start with the right to exclude, it is possible with very minor clarifications to derive deductively the other major incidents that have been associated with property"); J.E. PENNER, THE IDEA OF PROPERTY IN LAW 71 (1997) (presenting the argument that "the right to property is a right to exclude others from things which is grounded by the interest we have in the use of things"); 2 WILLIAM BLACKSTONE, COMMENTARIES *2 (describing the right of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe").

54 *See* United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945); *Loretto*, 458 U.S. at 435; *Horne*, 576 U.S. at 361–63.

55 444 U.S. 51 (1979).

56 *Id.* at 65–66.

57 *Cedar Point*, 141 S. Ct. at 2072–73.

se physical takings."[58] Thus, if the only stick destroyed by government action is the right to exclude, the action could count as a taking. This Section explains the development of the Court's implicit takings doctrine and the implications of *Cedar Point* for takings claims involving an owner's right to exclude—such as the takings claim suggested by Justice Gorsuch in *Atlantic Richfield*.

The Court has developed two basic frameworks for analyzing takings claims. The Court typically applies the multifactor balancing approach developed in *Penn Central Transportation Co. v. New York City*.[59] This approach considers three principal factors: (1) "the economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action."[60] Government actions analyzed under the *Penn Central* approach are rarely recognized as Fifth Amendment takings.[61]

For certain categories of government action that the Court has deemed property restrictions of the most serious character, the Court applies a per se rule that always requires compensation, instead of the *Penn Central* approach.[62] In 1982, in *Loretto*, the Supreme Court announced the first per se rule in takings doctrine: "[A] permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine."[63] The Court justified this rule on the grounds that permanent physical occupations destroy every stick in the bundle of rights that constitutes

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58 *Id.* at 2077. This rule has several exceptions that are discussed later in this Section.

59 438 U.S. 104 (1978).

60 *Id.* at 124. Average reciprocity of advantage is often considered another *Penn Central* factor. *See* DUKEMINIER ET AL., *supra* note 40, at 1063.

61 A study of more than two thousand reported decisions from 1979 through 2012 found that regulatory takings claims analyzed under the multifactor approach have an "abysmal rate of success." Krier & Sterk, *supra* note 31, at 59, 64; *see also* F. Patrick Hubbard, Shawn Deery, Sally Peace & John P. Fougerousse, *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of* Penn Central Transportation Company*?*, 14 DUKE ENV'T L. & POL'Y F. 121, 141 (2003) (finding that property owners prevailed in only 9.8% of 133 randomly selected cases that cited *Penn Central*).

62 *See, e.g.*, *Loretto*, 458 U.S. at 426 (describing a physical intrusion by the government as "a property restriction of an unusually serious character for purposes of the Takings Clause" and holding that "when the physical intrusion reaches the extreme form of a permanent physical occupation, . . . 'the character of the government action' . . . is determinative" and "a taking has occurred" (quoting *Penn Cent.*, 438 U.S. at 124)).

63 *Id.* at 432.

ownership.[64] It described the bundle as containing the rights to possess, to use, and to dispose.[65]

The issue in *Loretto* can be understood as primarily concerning the right to exclude. *Loretto* arose when a landlord sued the Teleprompter Corporation and Teleprompter Manhattan CATV for installing a half-inch cable on her property to provide cable television (CATV) services to tenants.[66] A New York statute provided that a landlord could not interfere with installation of CATV facilities or demand payment from any CATV company beyond what a state commission determined was reasonable, which was $1.[67] Drawing from the discussion of the bundle-of-rights conception of property in Section A, the "stick" taken by the New York statue can be described as the right to exclude CATV installation workers and facilities, which leads to deprivations of other rights (the rights to possess, to use, and to dispose).

The *Loretto* Court emphasized the distinction between complete and partial deprivations of property interests along the temporal dimension. The Court explained that "[t]he permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude."[68] On this ground, the Court distinguished *Loretto* from *PruneYard Shopping Center v. Robins*.[69] In *PruneYard*, the Court upheld a state constitutional free speech right for individuals to engage in leafletting at a privately owned shopping center that was open to the public.[70] The *Loretto* Court explained that because shopping center owners could still impose reasonable time, place, and manner restrictions on leaflet distributors, *PruneYard* involved a government-authorized "temporary physical invasion," unlike the "permanent physical occupation" in *Loretto*.[71] After *Loretto*, temporary physical invasions were still only possible takings, subject to the *Penn Central* test.

Similarly, the Court distinguished partial and complete deprivations of the right to use in developing its second (and, so far,

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64 *Id.* at 435–36.

65 *Id.*

66 *Id.* at 422–24.

67 *Loretto*, 458 U.S. at 423–24. The controversy arose because the lower court had determined that the type of wire that crossed the plaintiff's property was not covered under the statute, meaning that there was no compensation available. *Id.* at 424–25.

68 *Id.* at 435 n.12.

69 447 U.S. 74 (1980).

70 *Id.* at 78–79, 83.

71 *Loretto*, 458 U.S. at 434.

final) per se rule for implicit takings. Under *Lucas v. South Carolina Coastal Council*,[72] the government must compensate landowners when it enacts a regulation that "denies all economically beneficial or productive use of land."[73] The Court has held that deprivations must be complete across spatial and temporal dimensions for *Lucas*'s per se rule to apply. A regulation that limits only "air rights"[74] or that applies only for a limited duration[75] falls outside the scope of *Lucas*. Making these distinctions—along the spatial dimension for the *Lucas* rule or along the temporal dimension for both the *Lucas* and *Loretto* rules—can be awkward because divisions of property along temporal and spatial dimensions, through mechanisms such as leaseholds and easements, are central to black letter property law.[76]

In *Cedar Point*, the Court backtracked on the distinction between partial and complete deprivations when it comes to physical takings. *Cedar Point* held that the Constitution requires the government to compensate property owners whenever it "appropriates a right to invade" property.[77] The specific dispute in *Cedar Point* centered on the constitutionality of a California Agricultural Labor Relations Board regulation that required agricultural employers to allow union organizers access to the employers' farms for up to three hours per day, 120 days per year.[78] Looking back at its own precedent, the Court identified an underlying principle that "government-authorized physical invasions," whether permanent or temporary, are "takings requiring just compensation," given "the central importance to property ownership of the right to exclude."[79] Thus, the Court implicitly overruled a key part of *Loretto* and expanded the scope of per se takings.[80]

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72 505 U.S. 1003 (1992).

73 *Id.* at 1015.

74 *Penn Cent.*, 438 U.S. at 136–38.

75 *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 331–32 (2002) (holding *Lucas* inapplicable to a regulation that prohibited any economic use of the land for a thirty-two-month period).

76 *See, e.g.*, *Mahon*, 260 U.S. at 412–15 (considering a takings challenge to a state statute that forbade mining coal in an area where a mining company had retained the rights to remove coal but had conveyed the surface rights).

77 *Cedar Point*, 141 S. Ct. at 2072–73.

78 *Id.* at 2069–70.

79 *Id.* at 2073.

80 The Supreme Court distinguished *PruneYard* on new grounds, explaining that "[l]imitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public." *Id.* at 2077.

Recognizing the potentially broad reach of the rule that "appropriations of a right to invade are per se physical takings,"[81] the *Cedar Point* Court carved out four exceptions. First, "mere trespass[es]," "not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right."[82] Second, some "physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights."[83] For instance, the Court flagged regulation of nuisances,[84] instances of public or private necessity,[85] enforcement of criminal law,[86] and reasonable searches[87] as physical invasions that would fall under this exception. Third, "the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking."[88] Lastly, to preserve *PruneYard*, the Court created a fourth exception for "business[es] generally open to the public."[89] The Court explained that "[l]imitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public."[90] Until more litigation arrives in the courts, the scope of these exceptions will remain uncertain.

II. CHARACTERIZING THE RIGHT TO EXCLUDE

As discussed in Part I, the Supreme Court has deemed the right to exclude one of the most fundamental property rights. Accordingly, the Court has offered the right to exclude heightened protection under the Takings Clause. After *Cedar Point,* "appropriations of a right to invade are per se physical takings," outside

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81 *Id.* at 2077.

82 *Cedar Point*, 141 S. Ct. at 2078, 2080. For instance, the Court suggested that a "truckdriver parking on someone's vacant land to eat lunch" would constitute the type of physical invasion that constitutes a "mere trespass." *Id.* at 2078 (quotation marks omitted) (quoting Hendler v. United States, 952 F.2d 1364, 1377 (Fed. Cir. 1991)).

83 *Id.* at 2079.

84 *Id.* (citing *Lucas*, 505 U.S. at 1029–30).

85 *Id.* at 2079 (citing RESTATEMENT (SECOND) OF TORTS §§ 196–197 (1964)).

86 *Cedar Point*, 141 S. Ct. at 2079 (citing RESTATEMENT (SECOND) OF TORTS §§ 204–205 (1964)).

87 *Id.* (citing Camara v. Mun. Ct. of City & Cnty. of San Francisco, 387 U.S. 523, 538 (1967)).

88 *Id.*

89 *Id.* at 2077.

90 *Id.* (first citing *Horne*, 576 U.S. at 364; and then citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 832 n.1 (1987)).

a few exceptions.[91] The Court held that "allowing union organizers to traverse [private property] at will for three hours a day, 120 days a year" constituted an "abrogation of the right to exclude" and caused a taking.[92] But the Court left significant uncertainty about the scope of the right to exclude that is protected under takings law after *Cedar Point*. The question remains: How expansive are the exceptions?[93] In addition, and more importantly for this Comment, can the government abrogate a landowner's right to exclude through actions other than entering or authorizing entry by third parties onto the owner's land?

In *Atlantic Richfield*, the Supreme Court held that, under CERCLA § 122(e)(6), the EPA could order landowners in Superfund sites "to house another party's pollutants involuntarily."[94] Put another way, the regulation, as applied, may bar landowners from removing (or excluding) pollutants from their land. As Justice Gorsuch suggested, the key to resolving whether § 122(e)(6) effects a taking is determining whether the regulation, when applied in this way, takes landowners' right to exclude and therefore counts as a physical appropriation of property under *Cedar Point*. If the per se rule governing physical takings does not apply, then the *Penn Central* test would apply. As noted in Part I, this test is unfavorable to plaintiffs. A leading lower court case noted that diminutions in property value must generally exceed 85% for regulations to be recognized as takings under *Penn Central*.[95] The plaintiff landowners in *Atlantic Richfield* would almost certainly be unable to satisfy this prong of the test. Therefore, this Comment, which addresses Justice Gorsuch's dissent, focuses on an owner's right to exclude as protected under the Supreme Court's physical takings doctrine.

The takings issue raised by *Atlantic Richfield* is not squarely addressed by *Cedar Point*. *Cedar Point* involved "government-authorized invasions of property"[96] by union organizers. In contrast, *Atlantic Richfield* involved a regulation that, as applied, prohibited certain landowners from removing pollutants already located on their land. CERCLA does not authorize actors or third parties to invade property with pollutants.

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91 *Cedar Point*, 141 S. Ct. at 2077.

92 *Id.* at 2074.

93 See *supra* Part I.B.

94 *Atlantic Richfield*, 140 S. Ct. at 1364 (Gorsuch, J., dissenting in part).

95 Brace v. United States, 72 Fed. Cl. 337, 357 (2006), *aff'd*, 250 F. App'x 359 (Fed. Cir. 2007).

96 *Cedar Point*, 141 S. Ct. at 2074.

A range of other government regulations operate similarly to CERCLA in preserving the status quo. For instance, local historic preservation laws prevent property owners from altering buildings.[97] Town ordinances prohibit gravel excavation below the water table.[98] And various statutes require landowners to maintain critical habitats for endangered species, which can limit private landowners' ability to exclude the endangered species from their land.[99] Courts have rejected takings claims brought against each of these regulations, based on various rationales.

One example stands out for its analysis of the right to exclude. In *Boise Cascade Corp. v. United States*,[100] the plaintiff-landowner, Boise Cascade, alleged a physical taking under *Loretto* "based on the denial of its right to exclude spotted owls from its property."[101] The case arose after a district court enjoined Boise Cascade from logging without a special permit in order to prevent harm to spotted owls that nested on Boise Cascade's land.[102] Northern spotted owls were listed as threatened species under the Endangered Species Act,[103] which prohibits harming listed animals.[104] In rejecting Boise Cascade's takings claim, the Federal Circuit characterized *Loretto* as involving "a forced government intrusion," and the court distinguished occupation by wild owls because the "government has no control over where the spotted owls nest, and it did not force the owls to occupy Boise's land."[105]

The Federal Circuit did not address the antecedent question of whether a property owner's right to exclude encompasses a right to exclude animals.[106] Nor have other courts done so when

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97 *See, e.g.*, *Penn Cent.*, 438 U.S. at 109–12, 138 (upholding the constitutionality of New York City's 1965 Landmarks Preservation Law, which, among other provisions, required owners of buildings designated as landmarks to seek approval from the Landmarks Preservation Commission before altering any exterior architectural features).

98 *See* Goldblatt v. Town of Hempstead, 369 U.S. 590, 591–92 (1962).

99 *See, e.g.*, Boise Cascade Corp. v United States, 296 F.3d 1339, 1355–57 (Fed. Cir. 2002) (rejecting a takings challenge to an injunction against logging in a protected spotted owl habitat); Southview Assocs., Ltd. v. Bongartz, 980 F.2d 84, 93–95 (2d Cir. 1992) (rejecting a takings challenge to a government prohibition on developing a property in a way that destroyed an active deeryard).

100 296 F.3d 1339 (Fed. Cir. 2002).

101 *Id.* at 1342.

102 *Id.*

103 Pub. L. No. 93-205, 87 Stat. 884 (codified at 16 U.S.C. §§ 1531–1544).

104 *Id.* at 1341.

105 *Id.* at 1354–55.

106 The Federal Circuit specifically avoided this question, calling the plaintiff's right to exclude owls a "putative property interest." *Boise Cascade*, 296 F.3d at 1354.

faced with similar takings claims.[107] This question is relevant because if landowners do not hold a right to exclude animals from their land, then the plaintiff's physical takings claim in *Boise Cascade* could have been immediately dismissed—a nonexistent right cannot be abrogated. Similarly, for the *Atlantic Richfield* plaintiff landowners to have a valid claim under *Cedar Point*, an occupation by pollutants must implicate the landowners' property right to exclude.

In *Boise Cascade*, the Federal Circuit skipped straight to the question of what it means for the government to abrogate a property owner's right to exclude. By limiting *Loretto* to forced government intrusions, the Federal Circuit implied that government action only abrogates an owner's right to exclude when it forces an intrusion.[108] This conclusion would make *Cedar Point* inapplicable to any regulation—including CERCLA—that prevents landowners from removing persons, animals, or things from their land after an unauthorized invasion. The conclusion that only forced government intrusions abrogate a property owner's right to exclude depends on several questionable assumptions about the right to exclude. First, it presupposes that the property right to exclude does not entail the right to physically remove an intruder. Second, it presupposes that the right to physically remove an intruder is unnecessary for some other version of the right to exclude to be enforceable—or, alternatively, that government action that renders the right to exclude unenforceable does not count as taking that right.[109]

The foregoing discussion reveals a need for a more robust understanding of what a property owner's right to exclude means and how the right should or must be enforced. This Part addresses both issues. Section A argues that the right to exclude is a Hohfeldian claim-right, or the legal position created by imposing

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[107] For instance, in rejecting a takings claim premised on an owner's right to exclude deer through constructing a residential subdivision, the Second Circuit did not address whether an owner holds a property right to exclude deer. Instead, the court relied in part on the since-rejected distinction between the permanent physical occupations and the temporary physical invasions that were featured in *Loretto*. The court explained that "[t]o the extent the Board has allowed the deer to 'invade' Southview's land, this 'invasion' is relatively minor, consisting of an occasional, seasonal, and limited habitation." *See Southview Assocs.*, 980 F.2d at 94–95.

[108] *Boise Cascade*, 296 F.3d at 1354–55.

[109] A genuine right must be enforceable. Kramer, *supra* note 28, at 9. Therefore, government action that denies the enforceability of the right to exclude could count as taking the right.

a duty not to invade on others.[110] Section B argues that because a genuine right must be enforceable, regulation that denies the enforceability of a property owner's right to exclude should count as a taking under *Cedar Point*. At the same time, the right to exclude may be enforceable through a variety of means, so action that denies one means of enforcement does not necessarily render the right unenforceable. Part III then applies this characterization of the right to exclude to takings analyses of environmental regulations, including the endangered species protections in *Boise Cascade* and CERCLA.

A. Defining the Right to Exclude

The concept of exclusion in property law is overwhelmingly described by the Supreme Court and property scholars as a "right to exclude."[111] But because rights come in several different forms, the precise meaning of that phrase is ambiguous. Property scholars and courts largely ignored this definitional question until a 2006 article by Professor Shyamkrishna Balganesh, which argued that the right to exclude in property law is a Hohfeldian claim-right.[112] Under this definition, the content of the right to exclude is defined by the correlative duty that the right to exclude imposes on others not to invade.[113] Section A of this Part describes alternative definitions for the right to exclude and defends Balganesh's conclusion that the right to exclude is a claim-right.

In his analysis of possible conceptions of the right to exclude, Balganesh considers variants that focus on the primary right as well as variants that focus on the secondary right (also called the remedy).[114] But a secondary right depends on the existence of a primary right; therefore, the question of what the primary right

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110 HOHFELD, *supra* note 43, at 71.

111 *See, e.g.*, Merrill, *supra* note 53, at 730 (arguing that "the right to exclude others is more than just 'one of the most essential' constituents of property—it is the *sine qua non*"); PENNER, *supra* note 53, at 71 (arguing that "the right to property is a right to exclude others from things which is grounded by the interest we have in the use of things"); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (discussing the "right to exclude others"); Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (same); *Lucas*, 505 U.S. at 1044 (same); *Nollan*, 483 U.S. at 831 (same).

112 *See generally* Shyamkrishna Balganesh, *Demystifying the* Right *to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593 (2008).

113 HOHFELD, *supra* note 43, at 38–39.

114 Balganesh considers four possible conceptions: "(1) the claim-right to exclude; (2) the privilege-right to exclude; (3) the right to vindicate one's ownership through enforcement; and (4) the right to an exclusionary remedy." Balganesh, *supra* note 112, at 610.

entails is logically prior. This Section focuses on the definition of the primary right to exclude. The next Section discusses remedies as part of addressing the issue of enforceability.

1. Alternative definitions of the right to exclude.

Balganesh identifies two possible conceptions of the primary right to exclude: as a claim-right or as a privilege.[115] Both stem from Hohfeld's analysis of rights. As discussed in Part I.A, Hohfeld's analysis led to the bundle-of-rights conception of property that is dominant in U.S. law. Beyond this application, Hohfeld's system for describing the form of rights remains widely accepted.[116] In his article *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, Hohfeld distinguished between claim-rights, duties, privileges, no-rights, powers, immunities, liabilities, and disabilities, which he grouped into pairs of opposites and correlatives.[117] Hohfeld termed these legal concepts "jural relations."[118] The important conceptual distinction for analyzing the right to exclude is between claim-rights and privileges.

Under Hohfeld's scheme, a claim-right is strictly the correlative of a duty.[119] In other words, a claim-right "is the legal position created through the imposing of a duty on someone else."[120] Because the content of a claim-right is defined by the nature of the duty that it imposes on another person, all claim-rights are "against persons."[121] For instance, Hohfeld explained that if *A* is fee-simple owner of Blackacre, "*A* has multital legal rights, or claims, that others, respectively, shall not enter on the land, that they shall not cause physical harm to the land, etc., such others being under respective correlative legal duties."[122] In this example, Hohfeld assumed that by virtue of *A*'s ownership of Blackacre, *A* possesses a claim-right to exclude (i.e., the claim

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115 *Id.*

116 *See generally* Leif Wenar, *Rights*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2021).

117 HOHFELD, *supra* note 43, at 36.

118 *Id.* at 35–36.

119 *Id.* at 71.

120 Kramer, *supra* note 28, at 9.

121 HOHFELD, *supra* note 43, at 76 n.30; *see also* Balganesh, *supra* note 112, at 603, 611; Arthur L. Corbin, *Rights and Duties*, 33 YALE L.J. 501, 502 (1924) (defining a claim-right as "a relation existing between two persons when society commands that the second of these two shall conduct himself in a certain way (to act or to forbear) for the benefit of the first").

122 HOHFELD, *supra* note 43, at 96 (emphasis omitted).

that others shall not enter on Blackacre). The correlative legal duty of *A*'s claim-right to exclude is *B*'s duty not to invade.

The right to exclude could also—or instead—be defined as a privilege. In contrast to claim-rights, which exist against persons, privileges "exist 'to, over, or against' the land."[123] The counterpart of a privilege is a "no right" in others concerning the privileged action.[124] A privilege "offers its holder the opportunity to perform a positive act unfettered by another's claims."[125] Returning to the example of *A*, Hohfeld explains:

> A has an indefinite number of legal privileges of entering on the land, using the land, harming the land, etc., that is, within limits fixed by law on grounds of social and economic policy, he has privileges of doing on or to the land what he pleases; and correlative to all such legal privileges are the respective legal no-rights of other persons.[126]

Thus, if the right to exclude were defined as a privilege, the law would grant the property owner the option of using her property in such a way as to exclude others from it.[127] In the context of land, exclusionary use could involve building a fence. The correlative "no-right" in *B* means that *B* has no claim-right to halt the fence construction.

Enforcement is different for claim-rights and privileges. A claim-right holder or a fiduciary can enforce a genuine claim-right by mobilizing government coercion.[128] For instance, if *A* has a claim-right to exclude *B* from Blackacre and *B* invades *A*'s land, *A* may bring a trespass action against *B*. Unlike a claim-right holder, a privilege-holder has no recourse to the mechanisms of public governance.[129] This is because while the counterparty to a privilege has no claim-right to halt the privileged action, the counterparty may nonetheless hold a privilege that interferes.[130]

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123 *Id.* at 77.

124 *Id.* at 38–39 (explaining that "the correlative of X's privilege of entering [on the land] is manifestly Y's 'no-right' that X shall not enter").

125 Balganesh, *supra* note 112, at 604.

126 HOHFELD, *supra* note 43, at 96.

127 Balganesh, *supra* note 112, at 613; *see also* Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1861 n.96 (2006) (describing "exclusionary vibes" and "exclusionary amenities" as Hohfeldian privileges of property ownership).

128 Kramer, *supra* note 28, at 9.

129 *Id.* at 10–11. Professor Matthew Kramer used the term "liberties," which is synonymous with the term "privileges" as used in this Comment.

130 *Id.*

Consider an example outside the context of land: If *A* holds a privilege to express her opinions on a public matter, *B* cannot say that her claim-rights are violated when *A* speaks. But *B* holds privileges that allow *B* to interfere with *A*'s speech in various ways, such as by speaking over *A*. In this situation, *A* cannot ask the government to prevent *B* from interfering.

In most real-world situations, privileged actions are protected by rights—the "shielding" thesis.[131] For instance, *A*'s privilege to speak is protected, albeit imperfectly, by *A*'s right to be free from physical assaults. *B* may not physically prevent *A* from speaking, and *A* has recourse to the legal system if *B* does so. Through this mechanism, privileges often receive indirect protection from the law via shielding claim-rights that are enforceable through legal remedies. This phenomenon explains why privileges and claim-rights are often conflated.[132] However, they are analytically distinct, and the distinction is important for defining the right to exclude.

2. The right to exclude as a claim-right.

The right to exclude could be defined as: (1) a claim-right; (2) a set of exclusionary privileges; (3) either a claim-right or a set of exclusionary privileges; or (4) both a claim-right and a set of exclusionary privileges. This Section defends Balganesh's conclusion that the right to exclude that is recognized in property law is strictly a Hohfeldian claim-right.

Balganesh argued that the right to exclude is a claim-right.[133] First, Balganesh argued that if we are to continue characterizing the right to exclude as an integral part of property ownership, the right must have a consistent formulation—or else we must accept the belief that property has no fixed meaning (a belief he rejects).[134] As between the claim-right and the privilege

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131 *See id.* at 11–13 & n.3; *see also* Balganesh, *supra* note 112, at 605.

132 Balganesh, *supra* note 112, at 605.

133 *Id.* at 618.

134 According to Balganesh, "an attribution of contextual fluidity to our definition of property would undermine its integrity as an institution of independent moral significance" and would "lend itself to a form of property skepticism—the belief that the term and institution of property are meaningless constructs whose content and significance tend to vary across time." *Id.* at 617 & n.85. Balganesh argued "that property is indeed a meaningful concept with a few identifiable unifying features, the primary one of which remains the right to exclude," so he concluded that the right to exclude must have a consistent formulation. *Id.* at 617 n.85. Others have agreed that the right to exclude is the unifying feature of property. *See, e.g.*, Merrill, *supra* note 53, at 744; Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 373 (1954). *But see* Henry E. Smith, *The*

formulations of the right to exclude, Balganesh argued for the claim-right formulation because the privilege formulation would be "untenable as the basis for an ordered system of property."[135] To have value, exclusionary privileges depend on the owner's ability to exercise them, such as her ability to build and monitor a fence.[136] Where a privilege to exclude exists without a shielding claim-right to exclude, owners would have to rely on self-help to exclude others, leading to a potentially anarchic situation that would favor the strong and powerful.[137] On this basis, Balganesh argued that the right to exclude must involve a claim-right to exclude.[138]

Balganesh's analysis does not foreclose the possibility that the law vests *both* an exclusionary claim-right and exclusionary privileges in a property owner. That is, the law could impose a duty on third parties to not enter a property owner's land while also affording the owner the privilege of building a fence.[139] But when U.S. courts write about "the right to exclude" in the context of property law, they refer to a unitary right that generally conforms to the claim-right conception. In other words, U.S. property law does not support the position that the right to exclude entails both a claim-right to exclude and a set of exclusionary privileges.

Courts' use of the Hohfeldian claim-right conception of the right to exclude is evidenced when, in property litigation, courts focus on a putative trespasser's duty to exclude herself from others' property. In the typical trespass case involving a physical invasion of land, liability depends on the putative trespasser's duty

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Thing About Exclusion, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 95, 98 (2014) (arguing that the unifying thread in property law is not the right to exclude but "the *thing* of property" (emphasis added)).

135 Balganesh, *supra* note 112, at 617.

136 *Id.* at 614.

137 *Id.* at 617–18.

138 *Id.*

139 In fact, Professor Lior Strahilevitz has argued that property law should provide more recognition for exclusionary privileges because they can be more valuable than exclusionary claim-rights to some property owners. Strahilevitz argued that privilege-based exclusionary strategies are particularly useful to a property owner in the presence of information asymmetries, like when the property owner has less information than a prospective entrant about the entrant's characteristics. By emitting exclusionary "vibes" or building exclusionary amenities, an owner signals which types of entrants are welcome and then delegates the sorting process to the potential entrants themselves based on the entrants' own knowledge of their personal characteristics. *See* Strahilevitz, *supra* note 127, at 1861 n.96, 1869–71.

to exclude herself[140] and, perhaps, on whether necessity or another doctrine nonetheless justified entry.[141] Similarly, in litigation over some forms of intangible property, such as ownership of news information, the key question asked by courts is whether the putative trespasser had a duty to exclude herself, not what tools a publisher can legally use to exclude third parties (e.g., by keeping the information secret).[142] Trade secrets law offers a possible counterexample,[143] but this Comment agrees with other scholars that rights to trade secrets are not properly characterized as property.[144]

Moving to new considerations, the very ability of a property owner to bring an action for trespass depends on the property owner holding a recognized claim-right to exclude. As explained earlier in this Section, interference with an exclusionary privilege is not actionable. That is, if a landowner held the exclusionary privilege to build a fence around her land but held no other exclusionary right, the owner would be free to build a fence but could not sue somebody for breaking through the fence. Clearly, this does not describe U.S. property law.

On the other side, exclusionary privileges are often limited by statutes or the common law. For instance, in most states, landlords lack the privilege to use self-help to retake possession of a leased property from a tenant in possession, even if the landlord is legally entitled to possession because the tenant held over after the lease ended or breached terms of the lease.[145] In *Berg v. Wiley*,[146] the case that established the rule prohibiting self-help in such circumstances in Minnesota, the Minnesota Supreme Court reasoned that "there is no cause to sanction [ ] potentially disruptive self-help where adequate and speedy means are provided for

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[140] *See, e.g.*, Desnick v. Am. Broad. Cos., Inc., 44 F.3d 1345, 1351–53 (7th Cir. 1995) (holding that defendants did not commit a trespass after obtaining consent to enter an ophthalmic clinic).

[141] *See, e.g.*, Ploof v. Putnam, 71 A. 188, 189 (Vt. 1908) (discussing the doctrine of necessity).

[142] *See, e.g.*, Int'l News Serv. v. Associated Press, 248 U.S. 215, 235–36 (1918) (explaining that "each party is under a duty so to conduct its own business as not unnecessarily or unfairly to injure that of the other").

[143] Trade secrets law protects information only if owners take reasonable precautions to maintain confidentiality. DUKEMINIER ET AL., *supra* note 40, at 147.

[144] *See, e.g.*, Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125, 1153 n.148 (2000); *accord* Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CAL. L. REV. 241, 243–47, 259–60 (1998).

[145] DUKEMINIER ET AL., *supra* note 40, at 506.

[146] 264 N.W.2d 145, 151 (Minn. 1978).

removing a tenant peacefully through judicial process."[147] The court held that "the only lawful means to dispossess a tenant who has not abandoned nor voluntarily surrendered but who claims possession adversely to a landlord's claim of breach of a written lease is by resort to judicial process."[148] The option to use self-help to remove a holdover tenant, such as by changing locks, is an exclusionary privilege—and the court in *Berg v. Wiley* denied that landlords in Minnesota possess this exclusionary privilege by virtue of their right to exclude.

One prominent property scholar has also implicitly endorsed the conception of the right to exclude in property law as strictly a Hohfeldian claim-right. Professor James Penner, who expounded a notion of property focused on exclusion in his book *The Idea of Property in Law*, argued that "[t]he right to property itself is the right that correlates to the duty *in rem* that all others have *to exclude themselves* from the property of others."[149] This is—almost explicitly—a description of a Hohfeldian claim-right. Furthermore, Penner rejected the privilege conception of the right to exclude. He argued that the right to property "is a right of exclusion, certainly, but it is not the right physically or by order or otherwise (say by putting up fences) actually to exclude others from one's property."[150] As described above, the right to put up fences is an exclusionary privilege.

Penner also asserted that "[a]ny true right of an owner to exclude others"—that is, any exclusionary privilege, such as building a fence—"must be understood to be an auxiliary right which enforces or protects the right to property."[151] This part of Penner's analysis highlights a relationship between claim-rights and privileges that is the inverse of the relationship described by the shielding thesis. While claim-rights may protect privileges, the opposite is also true: privileges may protect claim-rights. For Penner, the correct way to understand the right to exclude is as a claim-right, which is enforced and protected by (but does not entail) exclusionary privileges.

The takeaway of the foregoing discussion is that scholars have shown that the right to exclude is properly conceived of as strictly a claim-right. Courts have agreed, implicitly endorsing

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147 *Id.* at 151.

148 *Id.*

149 PENNER, *supra* note 53, at 71 (emphasis in original).

150 *Id.*

151 *Id.*

the claim-right formulation of the right to exclude and rejecting the privilege formulation. First, in trespass cases, courts focus on whether the putative trespasser has a duty to exclude herself. And by holding trespassers liable for trespass, courts presume that landowners hold a claim-right to exclude; with only exclusionary privileges, landowners would have to rely on self-help to exclude others from their land because there would be no duty on others to stay away. Second, courts have implicitly rejected privilege formulations of the right to exclude by holding that landowners do not possess various exclusionary privileges, such as the privilege to lock out a holdover tenant. Furthermore, Balganesh and Penner have provided a theoretical grounding for adopting the claim-right formulation of the right to exclude. Part III will discuss important implications of this definition for takings challenges to environmental regulations such as CERCLA.

B. Enforcing the Right to Exclude

How a right should be enforced is a separate question from whether a right exists. Hohfeld's scheme says nothing about how a claim-right should be enforced. Nonetheless, for a claim-right to be genuine, as opposed to nominal, it must be enforceable.[152] If government regulation denies the enforceability of a claim-right, it renders that right nominal and effectively takes the right. Therefore, a full characterization of the right to exclude must address what enforceability of the right means.

The common understanding of what it means to enforce a claim-right is to seek judicial enforcement. For instance, a property owner can enforce her right to exclude by bringing an action for trespass against an invader. The central characteristic of legal remedies is that they are ultimately backed by the physical power of the state (i.e., the threat of jail).[153] As discussed in Part II.A, exclusionary privileges are not enforceable in this way.

But litigation is not the only means by which the right to exclude can be enforced. For instance, physical force may be used to

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[152] *See* Kramer, *supra* note 28, at 9. The location of the enforcement power is unimportant to the claim-right's status as a genuine claim-right (as opposed to a nominal claim-right). *Id.* at 9, 34. Children still have claim-rights even though other parties, such as their parents, have control over their claims. *Id.* at 70. Likewise, enforcement power could fall in the hands of a government agency. For instance, in the context of claim-rights granted to persons under the criminal law, enforcement power is vested in prosecutors. *See id.* at 70–72.

[153] *See* MARK R. REIFF, PUNISHMENT, COMPENSATION, AND LAW 41 (2005).

exclude an invader, either by barring entry or by expelling the invader.[154] In *Punishment, Compensation, and Law*, Professor Mark Reiff identified six categories of means of enforcement: "(1) physical force; (2) strategic power; (3) moral condemnation and regret; (4) social criticism and the withdrawal of the benefits of social cooperation; (5) automatic enforcement; and (6) legal sanctions."[155]

What measure of enforcement is necessary for a claim-right to be properly considered enforceable? One approach would be to simply look at whether a legal remedy is available. However, this approach falls short because the availability of a legal remedy does not necessarily mean that a right is likely to be respected—i.e., that the remedy will deter violations—or that the right-holder is likely to be able to obtain adequate compensation after a violation.[156] Courts have recognized this problem. For instance, in the canonical property case *Jacque v. Steenberg Homes, Inc.*,[157] the Supreme Court of Wisconsin awarded punitive damages for an egregious intentional trespass to land on the grounds that "a right is hollow if the legal system provides insufficient means to protect it."[158]

An alternative approach to determining whether a right is enforceable requires measuring the total amount of enforcement that is available and asking whether that amount is sufficient.[159] Reiff lays out such an approach.[160] He differentiates previolation and postviolation stages of enforcement.[161] At the previolation stage, the purpose of enforceability is to encourage the rights beneficiary to act as if the right will not be violated so that she will "be willing to expose [herself] to the risk of violation that engaging in social cooperation necessarily entails."[162] For instance, in a society where the right to exclude is not enforceable, people would be inclined to overinvest in expensive security equipment.[163] Per Reiff, a right is considered enforceable in the previolation state of affairs if "the threat of punishment is sufficient to make the

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154 *Id.* at 20.
155 *Id.* at 18.
156 *Id.* at 44.
157 563 N.W.2d 154 (Wis. 1997).
158 *Id.* at 160.
159 *See* REIFF, *supra* note 153, at 44.
160 *Id.*
161 *Id.* at 46.
162 *Id.* at 87–88.
163 *Id.* at 51–52.

beneficiary rationally believe that potential violators will prefer to remain in the previolation state of affairs" or "if the promise of compensation is sufficient to make the beneficiary rationally indifferent to the possibility that a violation might occur."[164] The threat of punishment could come from legal remedies or from other means, although legal remedies are the typical source.

In the postviolation stage, enforceability serves the goals of deterrence and retribution.[165] Deterrence plays a particularly large role in a calculation of postviolation enforceability of property rights because property rights are amenable to repeated violation.[166] If the right beneficiary's primary concern is deterrence, then the measure for previolation enforceability would also be appropriate for postviolation enforceability.[167] Where deterrence is not the primary concern, a test for enforceability can be derived from the goal of retribution.[168] Reiff describes the purpose of retribution as "punishing the violator in such a manner and to such an extent that the beneficiary no longer feels a desire to retaliate in an excessive or unlawful manner."[169] The associated test for enforceability considers the combined effect of punishment and compensation:

> No punishment is required if the compensation available is sufficient to make the beneficiary indifferent to the violation, and no compensation is required if the punishment available is equivalent to the [uncompensated] suffering [of the beneficiary] caused by the violation, but any deficiencies in one *can* be made up for by the presence of the other.[170]

Under Reiff's approach to testing enforceability, government action could erase the enforceability of a claim-right to exclude either by lowering the threat of punishment to potential violators or by reducing the compensation available to the property owner for a violation. Conceivably, such action could count as a taking under *Cedar Point*, even if it does not involve a government-authorized invasion. When a claim-right becomes unenforceable, it is no longer a genuine claim-right, so government action that

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164 REIFF, *supra* note 153, at 98.
165 *See id.* at 112–41.
166 *Id.* at 113.
167 *Id.*
168 *See id.* at 116.
169 REIFF, *supra* note 153, at 119.
170 *Id.* at 172 (emphasis in original) (citations omitted); *see also id.* at 134.

renders a property owner's right to exclude unenforceable can be understood as abrogating the property owner's right to exclude.

In more concrete terms, what type of enforcement is sufficient to vindicate the right to exclude? Case law suggests that the availability of either injunctive relief or monetary damages could constitute sufficient enforcement. The appropriate choice—and, in the case of monetary damages, the amount of damages required—will depend on the facts of the case. Courts typically grant injunctions for trespasses,[171] the quintessential violation of a property owner's right to exclude. However, this practice is not universal—after all, injunctive relief is an equitable remedy granted at the discretion of the court, not an entitlement.[172] For instance, in the trespass context, courts routinely deny injunctive relief in cases arising from innocent encroachments—where one property owner mistakenly built a structure on a neighboring owner's property.[173] And in *eBay Inc. v. MercExchange, L.L.C.*,[174] the Supreme Court reversed an award of injunctive relief in a patent infringement case because the lower courts failed to properly apply the test for injunctive relief.[175] In his concurrence, Chief Justice John Roberts noted that, despite "the difficulty of protecting a right to exclude through monetary remedies," a patentee is "not entitle[d] . . . to a permanent injunction."[176] These cases suggest that government action that prevents a landowner from accessing injunctive relief for a trespass would not necessarily render that landowner's right to exclude unenforceable because money damages could constitute sufficient enforcement.

This Part has established that the right to exclude in property law is strictly a claim-right. Furthermore, to be genuine, a landowner's right to exclude must be enforceable. The necessary amount of enforcement for the right to be deemed enforceable depends on the facts. Government action can abrogate a property owner's right to exclude in two ways: by relieving others of the duty not to enter the owner's land, which directly abrogates the right to exclude, or by reducing the amount of enforcement available below the sufficient level, which renders the right to exclude

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171 *Cf.* Balganesh, *supra* note 112, at 642.

172 *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982).

173 Balganesh, *supra* note 112, at 646.

174 547 U.S. 388 (2006).

175 *Id.* at 394.

176 *Id.* at 395 (Roberts, C.J., concurring) (emphasis omitted).

nominal. Part III applies this framework to analyses of environmental regulation.

III. APPLICATION TO ENVIRONMENTAL REGULATION

This Part discusses the implications of Part II's characterization of the right to exclude for takings analyses involving environmental regulation. Section A of this Part examines the question raised in this Comment's earlier discussion of *Boise Cascade* of whether the right to exclude applies against animals or things. In light of the characteristics of a Hohfeldian claim-right, this Comment concludes that the right to exclude should only be considered a right to exclude persons. However, this distinction is functional: as trespass law already establishes, a landowner's right to exclude is violated when a person causes an animal or thing to enter onto another's land. The conclusion that the right to exclude applies only against persons not only flows from the definition of a claim-right but is also consistent with judicial precedent and functional considerations in property law.

Section B applies the foregoing analysis to the takings issue raised by Justice Gorsuch in *Atlantic Richfield*. It concludes that the entry of pollutants onto the Anaconda landowners' properties implicated their right to exclude ARCO, which released the pollutants. But CERCLA does not effectuate a taking because while it denies landowners one means of enforcement—physically removing the pollutants—others remain, including the landowners' ability to sue for compensatory damages.

A. The Right to Exclude People, Animals, and Things

An important implication of defining the right to exclude as strictly a Hohfeldian claim-right is that the right exists only against people, not things or animals. Claim-rights are defined in terms of their correlative duty, and the law imposes no duties on things or animals.[177] Any right to exclude animals or things from land is an exclusionary privilege, or a freedom possessed by the landowner to perform a positive act.[178] Thus, if government regulation bars a property owner from excluding owls from her land, the physical takings doctrine developed in *Loretto* and *Cedar*

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[177] *Cf.* HOHFELD, *supra* note 43, at 76 n.30 (citing WILLIAM MARKBY, ELEMENTS OF LAW 97–98 (6th ed. 1905)).

[178] *See supra* Part II.A.2.

Point is inapplicable.[179] To succeed in a takings challenge, the property owner in this scenario must bring a claim under a different takings doctrine. A plaintiff-landowner must either establish that a regulation has permanently denied "all economically beneficial or productive use of land,"[180] triggering a taking under *Lucas*, or the owner must prevail under the *Penn Central* test.

The characterization of the right to exclude as strictly against persons can be defended on nonformalist grounds—i.e., it is more than an inference from Hohfeld's analysis. One defense is descriptive. Whenever courts have recognized physical takings, the invasion or occupation in question is by a person, at least functionally. Another defense comes from the societal context in which the property right to exclude emerged. The Supreme Court's attitude toward the right to exclude seems to correspond to the liberal picture of private property as a "sovereign island."[181] Given this context, it makes sense to treat incursions by other people differently from incursions by wild animals or things. The rest of this Section explains both defenses in greater detail.

1. The descriptive defense.

At this point, a reader might wonder how *Loretto* can be consistent with this Comment's descriptive claim. After all, the government regulation in *Loretto* authorized an occupation of the plaintiff's apartment building by CATV cables but was recognized as violating the landowner's right to exclude. The explanation is straightforward: the CATV cables were installed by third parties—agents of Teleprompter Corporation and Teleprompter Manhattan CATV.[182] The Supreme Court's opinion emphasized that fact.[183] Functionally, the physical occupation at issue in *Loretto* was an occupation by (corporate) persons. Within the common law of trespass—another method of protecting property owners' right to exclude—it is well established that persons are liable for trespass not only when they personally enter another's land

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179 *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 302 (2002) ("The longstanding distinction between physical and regulatory takings makes it inappropriate to treat precedent from one as controlling on the other.").

180 *Lucas*, 505 U.S. at 1015.

181 Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 774 (1964).

182 *See Loretto*, 458 U.S. at 421–22.

183 *See id.* at 440 (distinguishing cases about the State's "broad power to regulate housing conditions in general" from the *Loretto* regulation by recognizing that "[i]n none of these cases [about general regulations], however, did the government authorize the permanent occupation of the landlord's property by a third party").

but also when they intentionally cause a thing to be or remain there.[184] To satisfy the intentionality requirement, "[i]t is enough that an act is done which will to a substantial certainty result in the entry of the foreign matter."[185]

The same rationale explains other cases where courts have held that invasions or occupations by things counted as physical takings. For instance, in *Hendler v. United States*,[186] the Federal Circuit recognized a physical taking under *Loretto* after the EPA installed groundwater-monitoring wells on the plaintiff-landowner's property.[187] The important point is that the wells were installed by the EPA. Similarly, in *Pumpelly*, the Supreme Court held that the Wisconsin government had taken property under the state equivalent of the Fifth Amendment's Takings Clause when it authorized the construction of a dam that permanently flooded private land.[188]

Government restrictions on exclusionary privileges, on the other hand, are generally analyzed under Supreme Court takings precedent regarding the right to use—and not as physical takings. Thus, zoning ordinances, which implicate landowners' ability to take actions such as building fences (i.e., to exercise exclusionary privileges), are analyzed under *Penn Central*.[189] So too, ultimately, was the restriction on harming owls by logging that was at issue in *Boise Cascade*.[190] Some exclusionary privileges are exercised via actions other than land uses, and as the law currently stands, these privileges are protected under doctrines other than the Fifth Amendment's Takings Clause. For instance, Professor Lior Strahilevitz argues that property owners may select to emit "exclusionary vibes" as a strategy to deter prospective entrants.[191] Since "vibes" involve communication rather than land use, they are analyzed under First Amendment doctrine.[192]

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184 *See* RESTATEMENT (FIRST) OF TORTS § 158 cmt. h ("The actor without himself entering the land may invade another's interest in its exclusive possession by throwing, propelling or placing a thing either on or beneath the surface of the land or through the air space above it.").

185 *Id.*

186 952 F.2d 1364 (Fed. Cir. 1991).

187 *See id.* at 1369, 1377.

188 *Pumpelly*, 80 U.S. at 176, 181.

189 *Cedar Point*, 141 S. Ct. at 2072. *See also generally* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding the constitutionality of a zoning ordinance).

190 296 F.3d at 1354 ("Although plaintiffs have stated a claim for a regulatory taking, they have not stated a claim for a 'physical occupation' taking under *Loretto*.").

191 *See* Strahilevitz, *supra* note 127, at 1851.

192 *Id.* at 1878.

2. The historical defense.

Finally, this Section turns to the societal context in which the property right to exclude became recognized. As discussed in Part I.A, moral, legal, political, and legislative context is relevant to determining the scope of the property right in our legal regime.[193] After all, the property right is a creation of society with no independent content. Society's—and the Supreme Court's—reasons for protecting the right to exclude support the conclusion that incursions by people are more serious than incursions by animals and things, so the two types of incursions should be protected by different rules.

Professor Harold Demsetz's influential article *Toward a Theory of Property Rights* explained the emergence of exclusive private property rights as part of an evolution toward more efficient social rules.[194] He explained that "[c]ommunal property results in great externalities" because holders of communal property rights do not bear the full costs of their activities—the "tragedy of the commons" problem.[195] The emergence of exclusive private property rights helped internalize these externalities. The private owner, "by virtue of his power to exclude others, can generally count on realizing the rewards associated with husbanding the game and increasing the fertility of his land. This concentration of benefits and costs on owners creates incentives to utilize resources more efficiently."[196]

Per Demsetz's account, the right to exclude serves the end of putting land to its highest and best use. But this is not the whole story: the goal of efficient resource use does not explain why the Supreme Court has treated the right to exclude as far more important than the right to use, since those rights both serve that goal. What makes the forced installation of a half-inch cable on an apartment building in *Loretto* a more serious restriction than the prohibition against erecting an office tower in *Penn Central*?[197] After all, development restrictions impede a landowner's ability

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[193] The Supreme Court has held that "background principles" of state property and nuisance law inhere in the title itself, so any restrictions that these background principles impose on property owners are not takings. *See supra* notes 47–50 and accompanying text.

[194] *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 349, 355–56 (1967).

[195] *Id.* at 355.

[196] *Id.* at 356.

[197] *Compare Loretto*, 458 U.S. at 438 (recognizing a taking), *with Penn Cent.*, 438 U.S. at 137–38 (rejecting a takings challenge).

to use her land in a profitable way to a far greater extent than a single cable.

The explanation relates to another end that is served by the right to exclude: individual autonomy. Liberal ideology pictures property as "a small but sovereign island of [one's] own."[198] The forced sharing of space with other people conflicts sharply with this picture, which is deeply rooted in the American psyche. In *Loretto*, the Supreme Court noted that "an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property," given that "property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property."[199]

Incursions by animals or things do not inflict the same kind of psychological injury on property owners. When an owl builds a nest on a private property, the owner's expectation of privacy is not violated. Thus, it makes sense to treat incursions by people differently from incursions by animals or things, just as incursions by people are treated differently from negative restrictions of the kind in *Penn Central*. In other words, it makes sense that the property right to exclude applies strictly against people and is protected under the *Loretto*/*Cedar Point* per se rule but that any right to chase away animals or to remove things from one's land falls under the right to use, with its weaker protections.

The next Section connects the foregoing analysis to the takings issue raised by Justice Gorsuch in *Atlantic Richfield*. For now, it is enough to say that a landowner holds no right to exclude pollutants—but the landowner does have a right to exclude third-party polluters. Therefore, entry by pollutants can still violate a landowner's right to exclude if the entry was caused by a third party who was under a duty not to invade.

B. Application to CERCLA

This Section applies the foregoing analysis to the takings issue raised by Justice Gorsuch in *Atlantic Richfield*. Is it a taking for the EPA to "order innocent landowners to house another

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[198] Reich, *supra* note 181, at 774; *see also* RADIN, *supra* note 47, at 130–31; BLACKSTONE, *supra* note 53, at *2 (describing the right of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe").

[199] *Loretto*, 458 U.S. at 436 (emphasis in original).

party's pollutants involuntarily"[200] under authority delegated by CERCLA?

The lesson of Part III.A is that the plaintiff-landowners in *Atlantic Richfield* do not have a right to exclude pollutants, since pollutants are not persons. If the landowners' right to exclude is implicated, it is because ARCO, as the successor in interest to the Anaconda Mining Company, caused pollutants to enter onto the plaintiff-landowners' properties, effectuating a trespass. Corporations, unlike pollutants, do have a duty not to invade others' property. In this case, the presence of pollutants in smelter smoke was well-known long before the Anaconda Smelter closed in 1981.[201] When the plaintiff-landowners sued ARCO for trespass, causation was never in question.[202] A trespass suit is one means for a landowner to enforce her right to exclude. Thus, the relevant question for a takings analysis is whether the EPA appropriated the landowners' right to exclude ARCO by preventing that suit.

The EPA never authorized ARCO to deposit pollutants on the plaintiff-landowners' properties. This means that if the EPA's actions count as a taking, it must be because those actions rendered the landowners' right to exclude unenforceable. As discussed in Part II.B, the enforceability of a claim-right turns on the whether the measure of enforcement is sufficient. Notably, CERCLA does not relieve polluters such as ARCO of liability for invading others' land with pollutants. Congress's overarching purpose in enacting CERCLA was "to promote 'the timely cleanup of hazardous waste sites' and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination."[203] Reflecting the "polluter pays" principle, CERCLA establishes an expansive liability scheme that imposes retroactive, strict, and often joint and several liability for cleanups on a broad classification of responsible parties.[204] Moreover, alongside CERCLA, landowners retain the right to bring state law claims for nuisance and

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[200] *Atlantic Richfield*, 140 S. Ct. at 1364 (Gorsuch, J., dissenting in part).

[201] Only three years after the smelter closed, the EPA added the Anaconda Smelter site to its inaugural NPL, which listed the most polluted sites in the country. Section 317(c) of the Surface Transportation Assistance Act of 1982, 48 Fed. Reg. 40,667 (Sept. 8, 1983) (codified at 40 C.F.R. § 300).

[202] *See generally* Christian v. Atl. Richfield Co., 358 P.3d 131 (Mont. 2015).

[203] Burlington N. & S.F.R. Co. v. United States, 556 U.S. 599, 602 (2009) (quoting Consol. Edison Co. of N.Y. v. UGI Util., Inc., 423 F.3d 90, 94 (2d Cir. 2005)); *see also* Klass, *supra* note 8, at 682 (discussing the purposes of CERCLA).

[204] Judy & Probst, *supra* note 6, at 195; 42 U.S.C. § 9607.

trespass against polluters.[205] State law causes of action provide remedies for certain types of harms not addressed by the statute, such as health damages.[206] In addition, landowners may bring state law claims against polluters to fund remediation efforts in excess of what the EPA requires under CERCLA.[207]

But CERCLA does constrain the types of remedies that are available to certain plaintiffs who bring nuisance and trespass suits; if the statute creates any takings liability for the government, it would be because of this restraint. This effect arises because § 122(e)(6) provides that "no potentially responsible party may undertake any remedial action at [a Superfund site] unless such remedial action has been authorized by [the EPA]."[208] The *Atlantic Richfield* Court held that, as a matter of statutory interpretation, current owners of land in Superfund sites may qualify as potentially responsible parties (PRPs) regardless of whether they caused contamination (i.e., even if they are "innocent").[209] If they are PRPs, those innocent landowners who seek restoration damages in a nuisance or trespass suit must secure EPA preapproval for their restoration plan.[210] If the EPA denies approval for the restoration plan and state law requires that remediation damages be spent on remediation itself, plaintiffs cannot seek remediation damages because they cannot conduct remediation. This catch-22 was exactly the situation in *Atlantic Richfield*.[211]

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[205] *See Atlantic Richfield*, 140 S. Ct. at 1350, 1355. A trespass action arises from an invasion of a property owner's interest in exclusive possession while a nuisance action arises from an interference with the owner's interest and private use and enjoyment, and both actions may coexist in a case. RESTATEMENT (SECOND) OF TORTS § 821D cmts. d, e (1979).

[206] *See* Judy & Probst, *supra* note 6, at 195.

[207] For instance, the plaintiff-landowners in *Atlantic Richfield* proposed a maximum soil-contamination level of fifteen parts per million (ppm) of arsenic, versus the 250-ppm level selected by the EPA. *Atlantic Richfield*, 140 S. Ct. at 1347–48.

[208] 42 U.S.C. § 9622(e)(6). The statute defines "remedial action" to include:

> [S]uch actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment.

42 U.S.C. § 9601(24).

[209] *Atlantic Richfield*, 140 S. Ct. at 1352.

[210] *Id.*

[211] Under Montana law, an injured party must establish that an award will actually be used to restore the relevant property in order to collect restoration damages. *Id.* at

However, compensatory damages, such as for health damages and diminution in property value, remain available.

Therefore, the key question for this takings analysis is whether depriving a landowner of remediation damages in a potential nuisance or trespass suit renders the landowner's right to exclude effectively unenforceable. The answer seems to be no. Under Reiff's tests, postviolation enforceability is achieved if a sufficiently significant amount of compensation and a sufficiently significant amount of punishment are both available, even if some component of the beneficiary's injury is noncompensable.[212] In the context of pollution emissions, state law compensatory damages can be substantial,[213] and CERCLA itself imposes extensive liability on polluters to fund cleanup. If compensation comes from the violator, as would be the case here, the same payment can constitute both compensation and punishment.[214] As a result, CERCLA should not be considered to render any property owners' right to exclude unenforceable.

The above analysis forecloses any path for property owners to argue that CERCLA effectuates a per se physical taking under *Cedar Point*. At issue is landowners' right to exclude polluters such as ARCO. CERCLA does not authorize entry by polluters. In addition, CERCLA does not significantly interfere with the enforceability of this right. Landowners retain the ability to sue polluters for trespass and nuisance. And while the EPA may apply CERCLA to some landowners in such a way that these landowners cannot sue for remediation damages, the remaining means of enforcement are sufficient that these landowners' right to exclude remains vindicated. To summarize, any right of a landowner to remove pollution from her land or to sue for remediation damages is neither entailed by the right to exclude nor required for the right to exclude to be enforceable, so forcing a landowner to house

1347. The landowners did not seek EPA authorization for their proposed remediation plan, and in litigation, the EPA signaled strong opposition to granting authorization. The EPA asserted that the proposed remedial measures would "conflict with, and in significant respects would *undo*, EPA's selected response action." Brief for United States as Amicus Curiae at 21, *Atlantic Richfield*, 140 S. Ct. 1335 (2020) (No. 17-1498) (emphasis added).

212 REIFF, *supra* note 153, at 167–68.

213 The plaintiff-landowners in *Atlantic Richfield* eventually settled with ARCO in 2021, presumably based on claims for compensatory damages and for more than a nominal sum (the settlement terms were not disclosed). *See Montana Residents, ARCO Settle Longtime Contamination Suit*, U.S. NEWS (June 8, 2021), https://www.usnews.com/news/best-states/montana/articles/2021-06-08/montana-residents-arco-settle-longtime-contamination-suit.

214 REIFF, *supra* note 153, at 168.

another party's pollutants does not abrogate the owner's right to exclude.[215]

CONCLUSION

This Comment uses the takings issue raised by Justice Gorsuch in *Atlantic Richfield* as a case study to explore conceptions of property and the right to exclude. This investigation has renewed relevance in the wake of *Cedar Point*, which expanded takings liability to encompass any appropriation of a property owner's right to exclude.

Existing property scholarship and courts' takings jurisprudence reveal that the right to exclude is a Hohfeldian claim-right. This definition has important implications for takings analyses involving the right to exclude. First, a property owner's right to exclude does not entail exclusionary privileges, such as the privilege to build a fence, although such privileges may help enforce a property owner's right to exclude. Second, the right to exclude is strictly a right to exclude persons but not animals or things. This conclusion flows from the definition of the right to exclude as a claim-right, or the correlative of a duty not to invade, because the law imposes no duties on things or animals. It can also be defended as a correct description of case law. In addition, the origins of the property right to exclude support the conclusion that invasions by persons should be treated more seriously than invasions by animals or things.

For many environmental regulations, takings liability under the Supreme Court's physical takings doctrine can be disposed of based on this Comment's argument that the property right to exclude is strictly against persons. For instance, this framework provides an explanation for why *Cedar Point* is inapplicable to state regulations that force landowners to keep columns of coal in

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[215] It is also worth noting that landowners are likely better off under CERCLA. This does not bear, however, on whether a government regulation abrogates a landowner's right to exclude, which is the key question for takings analyses under *Cedar Point* and the focus of this Comment. Before CERCLA, contamination was addressed, if at all, through state law causes of action such as nuisance and trespass. *See generally, e.g.*, Morgan v. High Penn Oil Co., 77 S.E.2d 682 (N.C. 1953) (nuisance action); Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970) (nuisance action); Martin v. Reynolds Metals Co., 342 P.2d 790 (Or. 1959) (trespass action). Landowners were free to privately enforce their rights to exclude by suing polluters for damages (including remediation damages) and conducting their own cleanups. However, that regime failed to prevent the types of high-profile toxic waste disasters that motivated CERCLA's enactment. *See* Judy & Probst, *supra* note 6, at 192. CERCLA puts the EPA at the center of cleanup efforts, which requires that individual landowners give up autonomy over remediation on their properties.

place to prevent subsistence: landowners have no right to exclude coal from their land.[216] Similarly, endangered species regulations do not implicate landowners' right to exclude because this right does not extend against wild animals such as owls. However, property owners do hold the right to exclude person-polluters, who, as natural or corporate persons, have a corresponding duty not to invade. Therefore, an environmental regulation could cause a physical taking under *Cedar Point* to the extent that it abrogates this right directly or by rendering this right unenforceable.

This Comment applies the foregoing framework to the question of whether CERCLA causes a physical taking. CERCLA does not authorize invasions by government actors or third parties, so it does not directly abrogate property owners' right to exclude. In addition, because CERCLA imposes significant legal liability on polluters, property owners' right to exclude polluters remains enforceable. The ability of a property owner to physically remove a pollutant deposited by a third party is only one means of enforcing her right to exclude the third party, and money damages available under CERCLA and the common law provide sufficient alternative enforcement. As a result, this Comment concludes that CERCLA does not cause a physical taking. Property owners could still bring a challenge to CERCLA under *Penn Central*, but the *Penn Central* approach is unfavorable to plaintiffs.

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[216] *Cf. generally Mahon*, 260 U.S. 393.