New Life for the Unlawful Inclosures Act: Immunizing Corner-Crossers from State Trespass Actions

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In many parts of the rural western United States, the land is divided into rectangular parcels that alternate between private and public ownership, so as to resemble a checkerboard. Some of those public parcels are "corner-locked," meaning that they meet other public parcels only at a corner. It is technically not possible to access corner-locked parcels without at least briefly hovering over a private parcel, which constitutes trespass on the private parcel under the ad coelum doctrine.

Since the COVID-19 pandemic has increased demand for outdoor tourism, more people have been endeavoring to reach the public parcels by "corner-crossing" from one public parcel to the other. Private landowners have taken issue with the intrusions over their land that result. The corner-crossing is a trespass by the letter of state trespass law, but corner-crossers argue that the Unlawful Inclosures Act of 1885 immunizes them from trespass liability.

This Comment explores the extent to which the Unlawful Inclosures Act does so. It examines the relevant case law and concludes, based on the text and historical backdrop of the Act, that landowners may not sue corner-crossers for the momentary trespasses they effect. It argues that this reading follows from the open-range doctrine in effect in the rural West when the Act was passed.

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INTRODUCTION

In 2021, four outdoorsmen sought to hunt on a parcel of public land in rural Wyoming owned by the Bureau of Land Management (BLM). Their presence on the BLM land was entirely legal. But how they accessed this particular parcel of land is a different story. The hunters were first charged with criminal trespass. After those charges were dismissed, the hunters then faced a civil action in federal court.[1] Their plight has drawn extensive media attention.[2]

The public parcel in Wyoming that the outdoorsmen wanted to reach is rectangular and surrounded on all four sides by land owned by Iron Bar Holdings LLC. It touches another public parcel only at its corner.[3] Iron Bar had erected a fence, complete with "No Trespassing" signs, all the way to the corners of its land, so as to close off any access across the corner from public parcel to public parcel.[4] But the outdoorsmen were undeterred: they used an A-frame ladder to pass over the fence, in an attempt to "corner-cross"[5] onto the public parcel from the corner-adjacent public parcel that they could legally reach.[6]

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1 Angus M. Thuermer Jr., *Hunters Face New Corner-Crossing Trespass Charges*, WYOFILE (May 3, 2022), https://perma.cc/HZ4V-FT57.

2 *See, e.g.*, Michael Allen, *The Hunters, the Landowner, and the Ladder that Triggered a Wyoming Showdown*, WALL ST. J. (Nov. 10, 2022), https://www.wsj.com/articles/hunting-land-access-dispute-wyoming-11668094125; Ben Ryder Howe, *It's Public Land. But the Public Can't Reach It*, N.Y. TIMES (Nov. 26, 2022), https://www.nytimes.com/2022/11/26/business/hunting-wyoming-elk-mountain-access.html.

3 *See* Allen, *supra* note 2.

4 *Id.*

5 For a description of an attempted corner-crossing, see Thuermer Jr., *supra* note 1.

6 Allen, *supra* note 2.

This drew the ire of Iron Bar. The company's owner promptly reported the men to the sheriff for trespassing. Iron Bar argued that even though the outdoorsmen never physically touched down on its land, they must have hovered at least briefly over it as they passed over the ladder. Under the *ad coelum* doctrine, a commonly accepted facet of U.S. property law, a property owner's right to exclusive dominion over his land extends through the column of air above the land.[7] Therefore, an entry into that column is as much a trespass as an entry onto the physical surface of the land itself. Practically, there is no way to pass over an infinitesimal corner without also passing over the adjoining parcels, either on land or in the air.[8] Therefore, there is no way to cross from one corner to another without committing a trespass by the letter of state trespass law. The Carbon County district attorney brought trespassing charges against the outdoorsmen; the jury acquitted, perhaps in an act of jury nullification.[9]

But Iron Bar did not stop there. They have now brought civil trespass charges against the outdoorsmen, seeking a declaratory judgment that corner-crossing is disallowed, an injunction forbidding future corner-crossing of their land, and monetary damages "in an amount to be proven at trial."[10] In May 2023, a judge in the District of Wyoming granted summary judgment in relevant part

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[7] *See, e.g.*, Nancy Jean Strantz, *Rights to Ground Water in North Dakota: Trends and Opportunities*, 71 N.D. L. REV. 619, 628 & n.28 (1995); Herrin v. Sutherland, 241 P. 328, 331–32 (Mont. 1925) (finding that firing a shot over private land can constitute a trespass because the landowner's rights extend above and below the surface of the land).

[8] Mackay v. Uinta Dev. Co., 219 F. 116, 118 (8th Cir. 1914); *see also* Leo Sheep Co. v. United States, 440 U.S. 668, 678 (1979) ("Because of the checkerboard configuration, it is physically impossible to [corner-cross from one public land parcel to another] without some minimum physical intrusion upon private land.").

[9] *Cf.* Sam Lungren, *New Criminal Charges Dropped, but Corner Crossing Case Could Still Set Precedent*, THE MEATEATER (May 11, 2022), https://perma.cc/F3H3-3FDN (noting that after the jury acquitted on the 2021 trespassing charge, the prosecutor dropped similar charges against three of the same defendants relating to a 2020 case with similar facts, and observing that many counties in Wyoming do not prosecute for corner-crossing criminal trespass anymore). The acquittal was likely nullification because the facts presented made it clear that the outdoorsmen hovered over the private property. Therefore, there was no way for the jurors to find as a matter of fact and law alone that no trespassing occurred.

[10] First Amended Complaint at 1, 7, Iron Bar Holdings, LLC v. Cape, No. 22-CV -00067 (D. Wyo. Nov. 1, 2022).

to the corner-crossers.[11] Iron Bar has appealed to the Tenth Circuit. Until the Tenth Circuit rules on the case, it will be considered open for the purpose of this Comment.

The outdoorsmen may find immunity in a law nearly 140 years old. In 1885, Congress passed the Unlawful Inclosures Act[12] (UIA) to counteract "range wars," a practice prevalent in the second half of the nineteenth century in which cattlemen would attempt to control thousands of acres of public land they did not own by monopolizing water sources and fencing off public land to prevent others from grazing it.[13] The part of the UIA now codified at 43 U.S.C. § 1061–66 makes it unlawful to construct enclosures that exclude others from the public lands and to claim exclusive use of or dominion over any public lands.[14] In *Camfield v. United States*,[15] the Supreme Court held that a fence obstructing access to public land can violate § 1061 even if the fence is constructed completely on private land.

Iron Bar's fence appears to fall squarely within the category of fences disallowed under § 1061, per *Camfield*.[16] Section 1061 of the UIA disallows fences that obstruct access to public land, and § 1063 disallows some other means by which a private landowner might attempt to keep others off public land. It seems clear that the purpose of § 1061 is at least partly to protect the public's right of access to public parcels—there is no other reason to prohibit fences constructed entirely on private land.[17] But if landowners can successfully sue corner-crossers for civil trespass, with the trespass charges acting effectively as an invisible barricade to public land, then the purpose of § 1061 is entirely frustrated. Prohibiting the fence has no effect if the real threat of trespass charges poses an equally effective—or in this case more effective—deterrent.

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11 *See* Iron Bar Holdings LLC v. Cape, 2023 WL 3686793, at *13 (D. Wyo. May 26, 2023). There is no indication that any other corner-crossing case has gone to civil trial in the recent years; most of the UIA cases occurred in the first few decades after it was passed in 1885. *See infra* Part II.

12 43 U.S.C. §§ 1061–1066.

13 *Leo Sheep*, 440 U.S. at 683.

14 43 U.S.C. § 1061 (declaring unlawful "[a]ll inclosures of any public lands . . . to any of which land included within the inclosure the person . . . making or controlling the inclosure had no claim or color of title made or acquired in good faith").

15 167 U.S. 518 (1897).

16 *See infra* Part II (discussing *Camfield*).

17 *See infra* Part II.

In *Mackay v. Uinta Dev. Co.*,[18] the Eighth Circuit, relying primarily on the aforementioned purposivist argument, held that the UIA preempts state trespass actions against corner-crossers.[19] But courts in the early twentieth century were much more amenable to purposivist arguments than they are today.[20] And in *Leo Sheep Co. v. United States*,[21] the Supreme Court cast doubt on whether the UIA creates any right of access to public lands, which could be interpreted to overrule *Mackay*.[22] This Comment will explore the extent to which the text, structure, and history of the UIA support the conclusion that it prohibits state civil trespass actions against corner-crossers.[23] It will analyze the law behind *Mackay* in light of the doubt cast on it by *Leo Sheep* and conclude that *Mackay* is and should continue to be good law, which would resolve the case here in the outdoorsmen's favor.

In parts of eleven states in the rural West, land ownership is comprised of rectangular parcels alternating between private and public ownership, such that the ownership structure resembles a checkerboard on a map.[24] Each corner of the checkerboard creates an access problem to the corner-locked public parcel. As such, the access problem that the Wyoming outdoorsmen encountered is duplicated for more than 8.3 million acres of public land.[25] The origin of the checkerboard is somewhat murky, but it is known to have developed from land grants to railroads in the mid-nineteenth century. Wishing to provide incentives to railroad companies to expand across the continent, Congress granted them parcels of land

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18 219 F. 116 (8th Cir. 1914).

19 *See infra* Part II (discussing *Mackay*).

20 *See generally* Remarks from Judge Diarmuid F. O'Scannlain to St. John's University School of Law (Sept. 29, 2017), *in "We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303 (2017) (discussing how Justice Antonin Scalia's presence on the Court prompted the bipartisan embrace of textualist statutory interpretation).

21 440 U.S. 668 (1979).

22 *Cf.* 2 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 15:9 (2d ed. 2023). A judge in the District of Wyoming held that *Mackay* still controls the question and that *Leo Sheep* does not overrule *Mackay*. *Iron Bar*, 2023 WL 3686793, at *9–10.

23 Some of the arguments presented in this Comment may support the notion that the UIA immunizes corner-crossers from *criminal* trespass liability as well, but that question is outside this Comment's scope due to the infrequency of prosecution and conviction for criminal trespass arising from corner crossings. *See* Lungren, *supra* note 9.

24 *The Corner-Locked Report*, ONXMAPS.COM, https://perma.cc/HDK5-4VQD. The eleven states are Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. *Id.* Over two-thirds of corner-locked acres are located in Arizona, Nevada, and Wyoming. *Id.*

25 *Id.*

that abutted the proposed paths their tracks would take through rural areas.[26] Some congressmen argued that the remaining ungranted tracts could then be sold for double the cost so that the project would finance itself; it is not clear whether they were taken seriously, and at any rate, the plan to receive the double funding was apparently never borne out.[27] It appears that there was no concern generally about the access problem that the corner-locked parcels would later present.[28]

In 2020 and 2021, rural states in the West, including Oregon, Idaho, Wyoming, South Dakota, Utah, and Arizona, have experienced increased rates of in-migration. Simultaneously, the popularity of outdoor activities has increased due to the COVID-19 pandemic.[29] These two factors combined suggest that demand for access to rural public lands is probably increasing. Therefore, suits like Iron Bar's may become more common if more people begin attempting to corner-cross. A resolution to the question of whether the UIA protects the public's right to corner-cross over private lands to reach public parcels may soon be needed, though states may begin taking legislative action to protect corner-crossers as well.[30]

Part I of this Comment will explore more concretely the incentives that encourage landowners to violate the UIA and keep corner-crossers off their land. Part II will examine the relevant UIA case law from passage to present day. Part III will demonstrate why the UIA creates immunity for corner-crossers by setting out the legal mechanism for immunity, examining the statutory text in detail, and describing the relevant history of the UIA's passage. Part IV will demonstrate that the statutory and historical interpretations are consistent with the existing case law. Part V will address some counterarguments.

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26 *See* PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 357–59 (1969).

27 *See id.*; *see also* George E. Powers, Jr., *Gamesmanship on the Checkerboard: The Recurring Problem of Access to Interlocked Public and Private Lands Located Within the Pacific Railroad Land Grants*, 17 LAND & WATER L. REV. 429, 429–30 (1982).

28 Powers, *supra* note 27, at 430–31.

29 *See* Aaron Wagner, *How Has the COVID-19 Pandemic Affected Outdoor Recreation in America?*, PENN STATE HEALTH & HUM. DEV. (Jan. 24, 2022), https://perma.cc/KX7X-A5A2; *see also* Xcaret Nuñez, *Rural America Grew in the Pandemic's Early Days. But Mostly Recreational Counties Saw Gains*, NEB. PUB. MEDIA (Jan. 26, 2023), https://perma.cc/425H-DT53.

30 *See* Jason Blevins, *Colorado Corner-Crossing Property Legislation Poised for Comeback Following Wyoming Ruling*, COLO. SUN (June 5, 2023), https://perma.cc/DXY9-2XBW.

I. BACKGROUND OF THE PROBLEM AND INCENTIVES

Because lawsuits are costly, it is reasonable to assume that a landowner will bring one only when they either are motivated to stop an ongoing harm or believe they have suffered damages. This Part will examine different potential land layouts where corner-crossing may occur and determine under what circumstances a landowner may have an incentive to bring suit.

On its own, a corner-crossing lasting only a few seconds over the aerial column of a rural parcel several acres in size seems to cause virtually no damage to the parcel's owner. The corner-crosser may not touch down upon the land, and even if they did, it is unlikely that they would cause damage to that corner of the land or otherwise reduce the landowner's enjoyment of it. But the landowner may well have an interest in keeping others off an adjoining public parcel if they desire to use that parcel for themselves.[31]

Land ownership patterns in many swaths of the rural West resemble checkerboard patterns of alternating public and private ownership from a bird's-eye view.[32] The checkerboard took form when, in the late nineteenth and early twentieth centuries, the federal government granted ownership of alternating parcels of land in the rural West to railroad companies, which then gradually resold the parcels to individuals.[33] Prospective buyers discovered that, due to the checkerboard pattern, they could gain control over much more land than just the amount they purchased: "Because of the checkerboard arrangement . . . if a rancher purchased 50 sections and fenced only his outside sections, he obtained control of 30 or 40 alternate government sections inside his fences. Thus, a rancher would obtain the use of two acres for every acre purchased."[34] While the rancher would not have legal title to the public lands so enclosed, "the federal government was invariably unable to enforce its rights to the public domain sections" because the private owners could build fences up to the corners of their own land and enforce their right to exclusion against anyone attempting to enter the public land.[35] As such, "this method was long one

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31 *See infra* note 38.

32 *See* Allen *supra* note 2.

33 *See* Leo Sheep Co. v. United States, 440 U.S. 668, 670–78 (1979).

34 Valerie Weeks Scott, *The Range Cattle Industry: Its Effect on Western Land Law*, 28 MONT. L. REV. 155, 160 (1967) (citing ERNEST STAPLES OSGOOD, THE DAY OF THE CATTLEMAN 212 (1929)).

35 *Id.*

of the ranchers' most successful devices for controlling large amounts of land."[36]

Against this backdrop, it becomes clearer why a landowner might object to a corner-crossing: he is not concerned about the access to the column above his corner, but rather to the public parcel his parcels surround over which he desires de facto exclusive use.[37] Indeed, it would not be surprising if some sellers of the private land surrounding the corner-locked public parcels have represented to subsequent buyers that they would have essentially exclusive access to the public lands the parcels surround.

Figure 1 provides a visual example of how landowner A could fence his lands so as to effectively exclude others from the public parcel. Landowner A will be able to use the public parcel in the center of the Figure exclusively for his own purposes. Such use itself is not prohibited—he has the same right of access to the land as do the would-be corner-crossers—but exclusion of others may be, per the UIA.[38] The Iron Bar landowner owns all of the private parcels surrounding the public one onto which the corner-crossing occurred,[39] so Iron Bar is analogous to landowner A here. Indeed, Iron Bar believes that the value of the land it owns includes the benefit of exclusive access to the BLM land it surrounds.[40]

Note that the fencing in Figure 1 facially violates § 1061 of the UIA because it encloses the public land to exclude others.[41] This Comment endeavors to determine whether threatened state

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[36] *Id.*

[37] There is reason to believe that the landowners in the present-day cases care more about their use of the public land than the corner of their property. As an example, see Allen, *supra* note 2 (describing an event where a ranch manager challenged an individual who legally landed an airplane on a corner-locked public parcel without ever crossing below the Federal Aviation Administration's airspace threshold and another case where the landowner's only defense of his need of the column of corner area was his potential future need to construct a building in that area, despite apparently not having found such a need yet).

[38] *See* 43 U.S.C. § 1061.

[39] *See* Allen, *supra* note 2.

[40] *See* Angus M. Thuermer Jr., *Expert: Corner Crossing Would Diminish Ranch Values 'At Least 30%'*, WYOFILE (Dec. 22, 2022), https://perma.cc/EV89-XQQB (finding that a real estate agent asserted in an affidavit that he would "discount the ranch by 30% if corner crossing was declared legal"). Note that if Iron Bar is asserting a right of exclusive use of the public land in assessing the value of its private land, that assertion violates the text of § 1061. *See* 43 U.S.C. § 1061 ("[A]nd the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States . . . without claim, color of title, or asserted right as above specified as to inclosure, is likewise declared unlawful, and prohibited.").

[41] *See* discussion of *Camfield*, *infra* Part II.

trespass actions that create the same restrictions as the fences in Figure 1 are also barred by either § 1061 or § 1063.

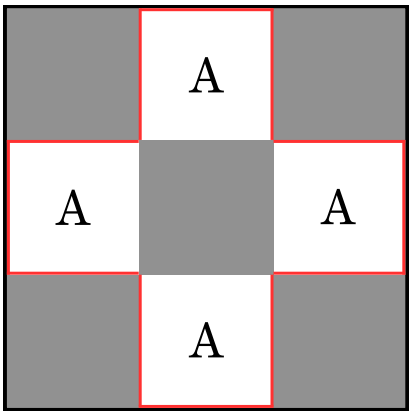

Figure 1. The light squares are privately owned by landowner A. The dark squares are public parcels. Landowner A constructs the fences indicated by the red lines. The fences are physically located on A's land, but they have the effect of excluding others from the public parcel in the center, effectively allowing A to use it exclusively.

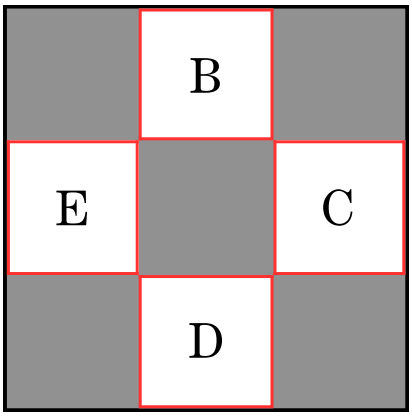

Figure 2. Here, landowners B, C, D, and E have fenced in their parcels completely. While it is still impossible for others to reach the public parcel in the center, none of the surrounding landowners appear to be interested in using it themselves—if they were, they would not have separated it from their own parcel with a fence and cut off their own herd's access to the public grazing land—nor could they feasibly exclude any of the other three owners from joining them in using the public parcel. Therefore, there is less concern that these landowners are taking advantage of the checkerboard layout to enrich their own land holdings, and it is also less likely that any of them would object to a corner-crossing onto the public parcel in which they apparently have no interest.

Some of the cases discussed in Part II will consider a landowner wishing to fence in (and therefore, presumably, exclude others from) his parcel completely, separating it from the corner-locked parcel as well as from the surrounding parcels. These landowners differ from those who solely wish to fence in their own land and have no concern about the neighboring public parcel—but whose fences may incidentally close off a public parcel from access—a layout exemplified in Figure 2. In contrast to the landowner in Figure 1, the landowner in Figure 2, apparently having no interest in accessing the public parcel, lacks any incentive to sue someone who corner-crosses his fence because the corner cross does not seem to detract at all from the value of his property.[42] These hypothetical scenarios illustrate that it is more likely that conflicts between landowners and corner-crossers will arise when the landowner has both some intention of using the public parcel that his parcel corner-locks and the means to use his own parcels (or to confederate with other nearby landowners) to effectively exclude the public from entry.

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[42] Damages for trespass can be compensatory, calculated based on the actual monetary damage done to the property. *See, e.g.*, Kaminsky v. Missouri, 2007 WL 3046381, at *1 (E.D. Mo. Oct. 10, 2007) (citing Rodrian v. Seiber, 551 N.E.2d 772, 774 (Ill. App. 1990)). An act of corner-crossing does not reduce the value of the land over which the crosser briefly hovers at all, so there is seemingly no compensatory damages award available to plaintiffs. But courts sometimes award punitive damages for intentional trespass. *See, e.g.*, Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 161 (Wis. 1997) (awarding punitive damages because the actual damages from the trespass were very low and would not provide deterrence to trespassers sufficient to vindicate the landowner's right to exclude others). Courts in some jurisdictions have held that punitive damages are not available for mere "technical invasion[s]" of a plaintiff's rights where no actual harm has occurred. *See, e.g.*, Feld v. Feld, 783 F. Supp. 2d 76, 77 (D.D.C. 2011) (citing Maxwell v. Gallagher, 709 A.2d 100, 104–05 (D.C. 1998)); McLain v. Boise Cascade Corp., 533 P.2d 343, 347 (Or. 1975) (approving the trial court's decision to strike a punitive damages claim when "there was no evidence of intent to harm, harass or annoy the plaintiff [and] [t]he [trespass] took place near the boundaries of plaintiff's property"). *But see, e.g.*, Martin v. Glass, 84 So.3d 131, 135 (Ala. Civ. App. 2011) ("Our caselaw has recognized that the wantonness necessary for the imposition of punitive damages as to a civil trespass claim is shown by *mere knowledge* on the part of the defendant[ ] of the invasion of the plaintiff's rights." (alteration in original) (emphasis added) (quotation marks omitted) (quoting Hickox v. Vester Morgan, Inc., 439 So.2d 95, 101 (Ala. 1983)).

In this Comment, the relevant question is what the landowner might lose if the trespass is allowed, not what windfall the landowner might come into for suing. In other words, no landowner purchases land with the expectation that it will provide value in the form of punitive trespass damages. Therefore, even if punitive damages may be available in a given case, they will not be considered as part of the landowner's incentives in preventing corner-crossing for purposes of this Comment. Note also that a landowner whose individual lot is subject to corner-crossing may also fear that if corner-crossing is allowed, then more significant trespasses could be allowed next.

Because corner-crossers are, as such, more susceptible to the ire of Figure 1–type landowners than of Figure 2–style landowners, this Comment will focus on the former and ignore the latter. Even if Figure 2–style landowners could overcome the UIA and sue for trespass, they lack incentives to do so. As a result, the UIA will effectively estop state trespass actions against corner-crossers even if Figure 1–type owners are the only ones affected.

II. UIA CASE LAW

This Part details the legal history of the UIA. When courts first interpreted the UIA around the turn of the twentieth century, they converged upon an interpretation that clearly included a public right to access corner-locked parcels. But in *Leo Sheep*, the Supreme Court cast doubt on that holding, and it is currently not clear to what extent the UIA interacts with corner-crossing as a result.

First, the text of the UIA. There are two relevant provisions: § 1061 and § 1063. Section 1061 provides:

> All inclosures of any public lands in any State or Territory of the United States . . . made, erected, or constructed . . . to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title . . . are declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is forbidden and prohibited.[43]

And § 1063 provides:

> No person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct . . . any person from peaceably entering upon . . . any tract of public land . . . or shall prevent or obstruct free passage or transit over or through the public lands.[44]

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[43] 43 U.S.C. § 1061. Note that § 1061 seemingly targets landowners attempting to behave like landowner A in Figure 1—it specifically outlaws enclosures within which public land is *included*. The enclosure in Figure 1 includes public lands, whereas none of the enclosures in Figure 2 do.

[44] 43 U.S.C. § 1063.

Courts have examined both of these sections, though with only scant reference to the statutory text, in answering questions similar to the one presented in the case of the Wyoming outdoorsmen. The following cases chart the key UIA trajectory to date.

A. *Camfield v. United States*: The First Major Step

Camfield was the first Supreme Court case to test the limits of the UIA. The defendant, who owned many private parcels in a checkerboard area in Colorado, built fences strategically around the outside of some of the parcels, effectively fencing in the twenty-thousand acres of public land that alternated with his parcels in the checkerboard. Figure 3 depicts the land parcels at issue in *Camfield*. The United States sought to compel removal of the fences under the UIA.[45]

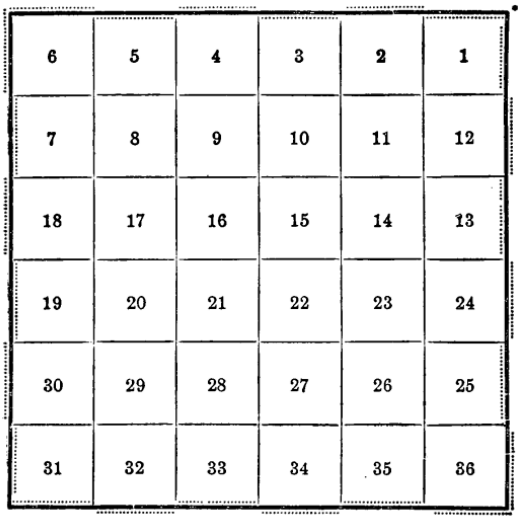

Figure 3. Map from the opinion in *Camfield v. United States*. The defendant in *Camfield* owned the odd-number parcels, with the same alternating pattern continuing beyond the edges of the grid pictures. By constructing fences, which are represented by the dotted lines, the defendant effectively excluded the public from the even-number parcels, which were public domain. Note that none of the fences sit on any public parcel of land.

[45] *Camfield*, 167 U.S. at 519.

1. The UIA applies to inclosures located wholly on private land.

Camfield squarely addressed a critical question to the analysis of the UIA: whether the statute applies to fences located entirely on private land. The Supreme Court answered in the affirmative. If it had answered in the negative, the UIA would have been rendered mostly toothless because the government can already remove fences located on public land without relying on the UIA.[46] The Court's reasoning was as follows.

First, the Court noted that defendants who use strategic fences on their own land to keep others off the public land "are certainly within the letter of [§ 1061]."[47] The Court reasoned that even though the fencing was situated entirely on the defendant's own land, it "did [e]nclose public lands of the United States to the amount of 20,000 acres, and there is nothing tending to show that [defendant] had any claim or color of title to the same."[48]

The defendant's main argument was that interpreting the UIA to restrict actions taken on their own land would be unconstitutional and beyond the federal government's police power.[49] But the Court held that it is within the federal government's police power to prohibit fences on private land if they inclose the public land because those fences pose a nuisance to access of the public land.[50] The Court therefore held that it is constitutional for the UIA to apply to inclosures located wholly on private land. The Court did not delve into whether the text of the UIA actually supports application to fences on private land—even given that such an application is constitutional—but as the rest of this Part will demonstrate, all courts agree that it does.

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46 *See id.* at 524.

47 *Id.* at 522.

48 *Id.*

49 *Id.*

50 *Camfield*, 167 U.S. at 522–23, 525. It is likely that the specific enumerated power of the federal government to prohibit nuisances is found in Article IV, Section 3, Clause 2 of the U.S. Constitution: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

2. *Camfield*'s scope is limited to Figure 1–type landowners.

In dicta not directly related to the holding, the *Camfield* court limited its holding to instances where, "under the guise of enclosing his own land, [the landowner] builds a fence which is useless for that purpose, and can only have been intended to enclose the lands of the Government."[51] The Court maintained that landowners "doubtless have the right to" fence in their own separate parcels, regardless of the effects any such fences might have on access to the surrounding corner-locked parcels.[52] In other words, the *Camfield* Court seemed to believe that landowner A's fences in Figure 1 would pose a nuisance and therefore be disallowed under § 1061, but landowners B–E in Figure 2 would be perfectly within their rights to fence in their parcels as shown in Figure 2, even though the effect on the public's attempts to reach the public parcel in the center is identical in the two scenarios. This potentially strange result was dismissed as not a matter of practical importance because it would only become necessary to fence in individual plots once the land was more densely populated and access roads were put in place, which would nullify the access problem.[53] But it must be noted that the *Camfield* Court analyzed the UIA distinctly from the perspective of the landowner's actions, not the potential access of any would-be corner-crosser.

The perspective does not bear substantially on the inquiry: as discussed in Part I, Figure 2–type landowners have little incentive to keep people off the public land, so there is little risk that such a landowner would go to the trouble of suing a corner-crosser. *Camfield* squarely covers Figure 1–type landowners, which are the type that pose the most significant threat to corner-crossers and which are the focus of this Comment. Therefore, the fact that *Camfield* may cabin its holding to those actively intending to appropriate public lands for their own purposes will not change the practical results for which this Comment advocates.

However, the dicta is troubling vis-à-vis the power of the UIA to protect corner-crossers. If the Court truly meant that landowners "doubtless have the right to" fence in their own separate parcels even if those fencings would render access to a public parcel impossible,[54] then it might follow that the landowners would also

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[51] *Id.* at 527–28.

[52] *Id.*

[53] *Id.* at 528.

[54] *Id.* at 527.

"doubtless have the right" to exclude others, including corner-crossers, from their land, the UIA notwithstanding. This reasoning resurfaces in *Leo Sheep*, discussed below.

Note that *Camfield* considered the legality of fences alone, not trespass charges. Interestingly, though, there were swinging gates located at the corners of the parcels through which the public could access the public domain by corner-crossing.[55] One wonders if the *Camfield* owners hoped that allowing the public to access via the swinging gates would be enough to defray the UIA suit. It apparently was not.

B. Other Early Cases Involving the UIA

The first case to address what is now referred to as corner-crossing was *Mackay v. Uinta Dev. Co.*[56] In *Mackay*, the plaintiff sought a declaratory judgment that he could bring his sheep onto corner-locked public parcels across private parcels without facing a charge of trespass.[57] In granting the declaratory judgment, the Eighth Circuit first cited *Camfield* for the proposition that the UIA applies to inclosures located wholly on landowners' private lands.[58] From that proposition, the court reasoned that the UIA therefore "prohibit[s] every method that works a practical denial of access to and passage over the public lands."[59] In reaching that conclusion, the court relied mostly on the purpose of the UIA and the pragmatic importance of ensuring that members of the public may continue to reach the public lands.[60] Finally, the court held that a landowner claiming dominion over parcels that he has caused to become corner-locked violates the UIA and therefore cannot recover in trespass "for an invasion of an alleged right founded upon his own violation of the statute."[61]

Mackay is a strong circuit precedent supporting the proposition that the UIA does indeed prevent landowners from bringing trespass suits against corner-crossers; indeed, the identical holding today (if not foreclosed by *Leo Sheep*, discussed below) would squarely resolve the issue at hand against Iron Bar in favor of the

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55 *Camfield*, 167 U.S. at 520.

56 219 F. 116 (8th Cir. 1914). Note that the facts in *Mackay* took place in Wyoming, *id.* at 117, which was part of the Eighth Circuit in 1914.

57 *Id.* at 118.

58 *Id.* at 119 (citing *Camfield*, 167 U.S. at 119).

59 *Id.*

60 *Mackay*, 219 F. at 118–19.

61 *Id.* at 120.

corner-crossers. But the *Mackay* decision makes scant reference to the statutory text—an element much more important to today's appellate courts.[62] And *Mackay*'s reasoning seemingly extends well beyond the nuisance argument central to the holding of *Camfield*, the case from which it derives authority vis-à-vis the reach of the UIA. Therefore, *Mackay* must be read in concert with the other relevant cases before it can be relied upon to support any conclusions about the issue at hand.

Two other circuit court cases from the early twentieth century also support the proposition that the UIA creates a right of passage to the corner-locked public parcels. In *Golconda Cattle Co. v. United States*,[63] the Ninth Circuit allowed challenged fences to remain because they were not intended to enclose any government land, evidenced by the fact that "various openings were left in [the fences] at points most frequently used by cattle and other animals in their passage to and from the grazing lands of the United States."[64] Because the fences "admitted of reasonable access by the public to the public domain," they could not "be properly held to unlawfully inclose the lands of the United States."[65] *Golconda Cattle* did not speak directly to the trespassing issue, but it clearly held that whether the fences are unlawful turns on whether the public can cross through them—and therefore over the private land—to reach the public parcels. Such an inquiry would be purely academic if the landowners had the right to exclude the public from crossing with threats of trespass action. Therefore, it can be concluded that the *Golconda Cattle* court assumed that the public had the right to cross the private lands through the gaps in the fences to reach the corner-locked public grazing lands of the United States.

In a similar case to *Golconda Cattle*, a North Dakota defendant's fence came under fire in *Stoddard v. United States*.[66] But unlike in *Golconda Cattle*, the fence in *Stoddard* included openings only where passage would be obstructed by natural features

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62 *See* O'Scannlain, *supra* note 20.

63 214 F. 903 (9th Cir. 1914).

64 *Id.* at 908–09.

65 *Id.* at 909.

66 214 F. 566 (8th Cir. 1914).

like buttes and gullies—rendering the fence effectively impassable.[67] The Eighth Circuit concluded that the fence therefore constituted a complete obstruction to the passage of range stock onto a public parcel.[68] Because the UIA was, in the court's opinion,

> intended to prevent the obstruction of free passage or transit for any and all lawful purposes over public lands [and because] free herding and grazing of cattle on the public lands is a legitimate use to which they may be put . . . Congress must have had the preservation and protection of this use in mind in [enacting the UIA].[69]

Therefore, the court concluded that the fence violated the UIA and needed to be modified to provide the public with access to the federal land. Presumably, the *Stoddard* court expected the instant fence to resemble the approved fence in *Golconda Cattle* upon completion. Once again, the court in this case cited *Camfield* for the proposition that the UIA's reach extends to fences constructed entirely on private property.[70] The defendant argued that the UIA does not apply to livestock, implicitly conceding that it applies to people.[71] In making that concession, the defendant made clear that the commonly accepted reality of the time was that the UIA did in fact protect the public's right to cross over private land to reach public land, free of trespass liability. Indeed, the *Stoddard* decision would have no effect whatsoever if the private landowner could turn around and sue for trespass any person who attempted to cross through the newly created openings in the fence.

The contrary outcomes in the *Golconda Cattle* and *Stoddard* cases must be traced to the only meaningful difference in their facts: whether the fences afforded people (and perhaps animals) access to the public lands. If the landowner could lawfully sue anyone using those gaps to cross, then there would be no reason for the two cases to come out in opposite ways: in neither would the composition of the fence have a material effect. It distinctly follows from these two cases, as it does from *Mackay*, that courts around the turn of the twentieth century believed that the UIA

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67 *Id.* at 568.
68 *Id.*
69 *Id.* at 568–69.
70 *Id.* at 569 (citing *Camfield*, 167 U.S. at 518).
71 *Stoddard*, 214 F. at 568.

guaranteed access to the public lands via corner-crossing and disallowed landowners to sue corner-crossers for trespass.

Clearly, if the analysis were to end here, the holdings chronicled so far would squarely support the outdoorsmen in the current case. But the *Leo Sheep* decision makes less clear whether the reasoning essential to these cases ought still be relied upon.

C. *Leo Sheep*

The UIA case law encountered a major turning point in *Leo Sheep Co. v. United States*,[72] which called into question some of the holdings in the previous cases. In *Leo Sheep*, the federal government wanted to construct a road across a checkboard corner to connect a corner-locked public parcel to an accessible public parcel.[73] Necessarily, such a road would partly be located on private land, due to the infinitesimal size of the corner. The government sought judgment that when Congress granted the private parcels in the checkerboard at issue in 1862, it reserved to itself an implied easement by necessity, without which it would not be able to access its lands.[74] The Supreme Court rejected the argument that the government can reserve an easement by necessity because the government can always use its eminent domain taking power to achieve the same result, meaning that the easement was never truly *necessary*.[75]

The government also raised the possibility that the holding in *Camfield* established its right to construct the road under the UIA.[76] The Court rejected this argument as well.[77] The opinion reasoned that the UIA's purpose is limited to unlawful inclosures and claims by private landowners to public areas of land to which they do not possess a claim.[78] The opinion observed further that the landowners in the instant case were not attempting to claim the public parcel—they just did not want the road to be built on their private land.[79] The Court found the land layout in at issue more similar to the situation depicted in Figure 2 than in Figure 1.

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72 440 U.S. 668 (1979).
73 *Id.* at 669.
74 *Id.* at 679.
75 *Id.* at 679–80.
76 *Id.* at 684–85.
77 *Leo Sheep*, 440 U.S. at 685.
78 *See id.* (quoting *Camfield*, 167 U.S. at 528).
79 *Id.*

Because dicta in *Camfield* noted that the landowners in a Figure 2–type situation were fully within their right to enclose their land, the Court concluded that the government, *a fortiori*, could derive no right to build a road from the UIA under *Camfield*.[80]

The *Leo Sheep* Court cited both § 1061 and § 1063 in discussion,[81] but it then applied the *Camfield* test, which concerned only § 1061. Section 1061 concerns only unlawful inclosures constructed by private parties and private parties' attempts to claim land without color of title. Therefore, it is not surprising that the *Leo Sheep* Court reached the conclusion it did: no argument was (or could have been) made that the denial of permission to build a road constituted an "inclosure."

The *Leo Sheep* opinion highlighted dicta from *Camfield* that the UIA does not foreclose a landowner's ability to inclose his own land completely, so long as the inclosure does not include public land within it.[82] This discussion has called into question whether *Mackay* and its progeny are still good law with respect to corner-crossing[83]: if the UIA does not disallow a landowner to fence in his own land completely—practically allowing him to exclude the public from crossing over it—then there seems to be no argument that a corner-crosser somehow has the right to cross over the private land to reach public land.

There are important distinctions between *Leo Sheep* and the corner-crossing issue at bar. For one, because the landowners in *Leo Sheep* more closely resemble Figure 2–type landowners, it could be argued that *Leo Sheep* does not disturb the *Mackay* holding vis-à-vis Figure 1–type landowners.[84] Put another way, one could argue that the rights of passage found in *Mackay* are still available whenever *Camfield* is in effect—which is only in Figure 1–type situations. Also, the government's desire to build an entire road is both more significant of an intrusion and less related to the purpose of the UIA, which is to prevent landowners from restricting access to and co-opting public parcels.

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80 *See id.*

81 *Id.* at 684.

82 *Leo Sheep*, 440 U.S. at 685 (citing *Camfield*, 167 U.S. at 528).

83 *See* COGGINS & GLICKSMAN, *supra* note 22, at § 15:9.

84 The *Leo Sheep* holding focused only on *Camfield* and made no mention of overruling *Mackay*.

D. Aftermath of *Leo Sheep*

The only notable case to apply the UIA after the *Leo Sheep* decision is *United States* ex rel. *Bergen v. Lawrence*.[85] In *Bergen*, the government sought to remove a fence located on the defendant's private land because the fence obstructed antelope from reaching a corner-locked public parcel they used for grazing in winter months.[86] The fence and land parcels are shown in Figure 4 below. The district court held that the fence at issue was identical to the one in *Camfield* and had the effect of providing the neighboring landowner with exclusive access to the public parcel that the antelope needed to reach.[87] The court agreed that *Camfield* controlled and found that the fence constituted a nuisance.[88] The Court distinguished *Leo Sheep* by observing that while the latter applied to easements across public land, it was not creating an easement here; rather, it was requiring abatement of the fences as a nuisance that obstructed the antelope from passing.[89] Indeed, the court explicitly declined to rule on whether the defendant had the right to exclude the antelope through other means, instead cabining its holding strictly to the illegality of the fence.[90]

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85 848 F.2d 1502 (10th Cir. 1988).
86 *Id.* at 1504.
87 *Id.* at 1504–05.
88 *Id.* at 1506–07.
89 *Id.* at 1506.
90 *Bergen*, 848 F.2d at 1507 n.7.

EXHIBIT 1

SOURCE: U.S. Department of Interior, Bureau of Land Management
Rawlins Quad (SE-13) (Revised April 1981). Adapted.

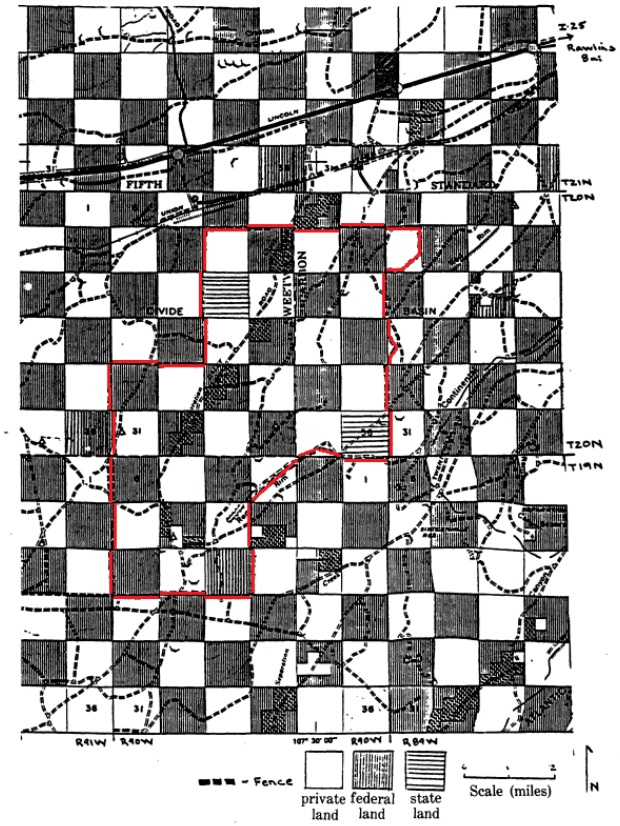

Figure 4. The map of the enclosure (which, to the best of the author's determination, is represented by the red line) at issue in *Bergen*. Note that the fence appears similar to and serves a purpose similar to the fence at issue in *Camfield*.

The *Bergen* opinion cited the district court opinion on review[91] with approval. The district court opinion discussed *Camfield*, *Mackay*, and *Stoddard*, finding that those cases together support the proposition that the UIA "was intended to prevent the obstruction of free passage or transit for any or all lawful purposes over public lands."[92] It then held that the defendant's fence posed a nuisance to the antelope attempting to reach their grazing lands on the corner-locked public parcel.[93]

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91 United States *ex rel.* Bergen v. Lawrence, 620 F. Supp 1414 (D. Wyo. 1985).

92 *See id.* at 1417 (quoting *Stoddard*, 214 F. at 568–69).

93 *See id.* at 1416.

The *Bergen* circuit opinion did not cite its precedent from *Mackay* (the Tenth Circuit was carved out of the Eighth Circuit in 1929, after *Mackay* was decided, so the Tenth Circuit would have inherited the *Mackay* precedent).[94] But the fact that the Tenth Circuit generally cited the district opinion approvingly may imply that *Mackay* is also still good law, in the Tenth Circuit at least, vis-à-vis Figure 1–type landowners.

III. LEGAL BACKGROUND AND STATUTORY INTERPRETATION

With the uncertainty as to whether the UIA creates a right of access for corner-crossers identified, this Part will now examine the text, structure, and historical backdrop of the UIA to seek a resolution. First, Section III.A will discuss the legal mechanism the UIA can use to prevent landowners from suing corner-crossers, assuming the landowners have relied upon an unlawful inclosure in bringing the trespass action. Section III.B will continue by inquiring as to what exact types of inclosures are unlawful—specifically, whether the UIA is limited to fences or whether other means of exclusion, like trespass actions, also fall within its scope. Section III.C will conclude that in light of the textual structure of the UIA and the historical backdrop against which it was passed, any means by which a landowner seeks to prevent trespassing is prohibited as the basis for a trespass suit.

A. Legal Mechanism for Corner-Crosser Immunity

The UIA does not specifically mention trespass actions. Section 1061 prohibits unlawful inclosures, and § 1063 prohibits anyone from using force, threats, intimidation, or fencing or inclosing to prevent or obstruct others from entering upon a tract of public land. This Section articulates the two mechanisms—unclean hands and preemption—by which the prohibition on inclosures could immunize corner-crossers from trespass actions.

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[94] *See* United States v. Hercules, Inc., 929 F. Supp. 1418, 1424 (D. Utah 1996) ("[P]rior Eighth Circuit precedent, under the accepted rule, would apply in the Tenth Circuit.").

1. Unclean hands.

In twenty-six states, a landowner must provide notice to potential trespassers that their land is private and not open to visitors in order to bring a trespass action.[95] In the corner-crossing context where actual damages to the land caused by briefly hovering over it are zero, landowners can meaningfully prevail over corner-crossers only by asserting punitive damages, which are available primarily in intentional trespass actions where the defendant acts with "intentional disregard of the plaintiffs' rights."[96] As such, there probably needs to be notice—by fence, sign, or some other means—to corner-crossing defendants that they are entering a private area in order for a landowner to recover punitive damages, regardless of the jurisdiction.[97]

Suppose that a hypothetical Wyoming landowner encloses his land with a fence that violates the UIA. Now suppose that a hypothetical trespasser scales that fence for the purpose of corner-crossing onto a public parcel. If the landowner wishes to sue the trespasser, he must introduce evidence that he provided notice to the intruder that trespassing was not allowed. He will introduce the presence of the fence as that evidence. But the fence is illegal under § 1061. There is a general principle of common law that

> courts of justice will not assist a person who has participated in a transaction forbidden by statute to assert rights growing out of it, or to relieve himself from the consequences of his own illegal act. Whether the form of the action is in contract or in tort, the test in each case is, whether, when all the facts are disclosed, the action appears to be founded in a violation of law, in which the plaintiff has taken part.[98]

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[95] *See* Richard M. Hynes, *Posted: Notice and the Right to Exclude*, 45 ARIZ. ST. L.J. 949, 952 n.10 (2013) (citing Mark R. Sigmon, Note, *Hunting and Posting on Private Land in America*, 54 DUKE L.J. 549, 584 (2004)).

[96] 7 AMERICAN LAW OF TORTS § 23:37; *see also supra* note 42.

[97] It is difficult to assert that an accused trespasser acted intentionally if there was no physical notice at the site of the trespass that the land he was entering was private. *See, e.g.*, Matlack v. Mountain W. Farm Bureau Mut. Ins. Co., 44 P.3d 73, 79 (Wyo. 2002) ("[S]traying across an unmarked property boundary to cut trees would constitute an accident while deciding to cut trees on property which is clearly marked with no trespassing signs would not.").

[98] Kessinger v. Standard Oil Co., 245 Ill. App. 376, 380 (1925). In *Cole v. Taylor*, the court stated:

> The general rule is: that a person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or

Therefore, the defendant could argue that the plaintiff may not bring the trespass action because it would not be possible for the plaintiff to prevail without relying on his illegal action of constructing the fence. Note that the *Mackay* court relied in part on essentially this reasoning.[99]

This argument would extend to any inclosure that violates the UIA. Therefore, if "No Trespassing" signs also constitute inclosures under § 1061 (as the next sections will argue they do), then they would similarly be disallowed as bases for trespass actions under the above doctrine.

2. Preemption.

An alternative mechanism by which the UIA could prohibit landowners from suing corner-crossers is through federal preemption. Preemption comes in several varieties; the relevant one here is conflict preemption.[100] Conflict preemption has been found to apply quite broadly in the past and has been further divided into physical impossibility preemption and obstacle preemption.[101] Physical impossibility preemption occurs when it is physically impossible to comply with both state and federal law, while obstacle preemption occurs in "cases in which courts think that the effects of state law will hinder accomplishment of the purposes behind federal law."[102]

The argument that § 1061 bars state trespass suits against corner-crossers is most strongly based in physical impossibility preemption.[103] The argument goes as follows: Suppose that a landowner sues a corner-crosser for trespass. Suppose further that that landowner can successfully assert all of the elements of civil

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> immoral act or transaction to which he is a party . . . or where he must base his cause of action, in whole or in part, on a violation by himself of the criminal or penal laws.

301 N.W.2d 766, 768 (Iowa 1981) (citing 1A C.J.S. *Actions* § 13).

99 *See supra* note 61 and accompanying text.

100 Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226 (2000).

101 *Id.* at 228.

102 *Id.* at 229.

103 The purpose of the UIA was seemingly to ensure that the public can access the public lands, as is their right. Insofar as state trespass charges against corner crossers pose an obstacle to that purpose, the UIA likely preempts the operation of such state law as a matter of obstacle preemption. But obstacle preemption has fallen out of favor with courts recently as presumptions against preemption have grown stronger. *See id.* at 230. Therefore, physical impossibility preemption will be used in this Comment to make a more robust case.

trespass in the given state. For example, the landowner can show that he had properly posted "No Trespassing" signs as required by state law to recover for intentional trespass and that he has video evidence that the corner-crosser had hovered over the so-demarcated land.[104] But suppose also, for the sake of argument, that those signs are illegal as applied to corner-crossers under § 1061. The state judge will have two choices: allow the trespass action even though it was predicated on a sign that is disallowed by federal law, or dismiss the action even though all of the requisite elements were satisfied under state law.

The judge will not be able to give effect to both state law and federal law in this circumstance and must therefore choose which to apply.[105] Under the Supremacy Clause of the U.S. Constitution,[106] the judge must give effect to the federal law over the state law and dismiss the suit. Assuming, then, that § 1061 does indeed make the sign illegal as applied to corner-crossers, then it also has the effect of preempting trespass suits that are predicated on the illegal sign.

B. Textual Analysis of § 1061 and § 1063

The preceding hypothetical assumed that the UIA prohibits one or more elements of the trespass action (or the bringing of the trespass action itself). The rest of this Part will argue that the text of the UIA does indeed prohibit essential elements of the trespass action. There are two sections that potentially could do so: § 1061 and § 1063.

Recall that the relevant part of § 1061 provides:

> All inclosures of any public lands in any State or Territory of the United States . . . made, erected, or constructed . . . to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title . . . are declared to be

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104 *See, e.g.*, IDAHO CODE § 6-202(2)(b)(iii); *see also* Greenfield Fam. Tr. v. Olive Fountain Land Co., 516 P.3d 96, 105 (Idaho 2022) (finding that the plaintiff bears burden of proof in civil trespass action).

105 This exact dilemma came up in *Mackay v. Uinta Dev. Co.*, 219 F. 116, 120 (8th Cir. 1914). The *Mackay* court held that the judge could not allow a plaintiff to recover on a trespass action that by its nature violates federal law. *See supra* note 61 and accompanying text.

106 *See* Nelson, *supra* note 100, at 231.

> unlawful, and the maintenance, erection, construction, or control of any such inclosure is forbidden and prohibited.[107]

And that the relevant part of § 1063 provides:

> No person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct . . . any person from peaceably entering upon . . . any tract of public land . . . or shall prevent or obstruct free passage or transit over or through the public lands.[108]

The key question, therefore, is whether a landowner's expression of exclusive dominion over his land—which manifests as the threat of trespass action against a would-be corner-crosser, who must briefly hover over the private land to reach the public parcel—is included as either a type of "inclosure" prohibited under § 1061 or as a type of "threat[ ]" prohibited under § 1063. If either condition obtains, then the UIA most likely prohibits such trespass suits, and corner-crossers can access the public lands free of fear of legal repercussions. Each section will be analyzed in turn.

1. Section 1061.

This Section will consider the definition of *inclosure* at the time of the UIA's passage and the statute's structure to posit that the threat of trespass actions against corner-crossers constitutes an "inclosure" for purposes of the statute.

The relevant definition of "inclose" from the 1884 version of *Webster's Practical Dictionary of the English Language*[109] is "[t]o surround, shut in, confine on all sides, encompass"[110] And an "inclosure" is defined as "[a]ct of, state of being, or thing which is inclosed; space contained; that which incloses; a barrier, fence."[111]

These definitions lead to one of two conclusions: an "inclosure" for the purposes of § 1061 includes either anything that

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107 43 U.S.C. § 1061.

108 43 U.S.C. § 1063.

109 This dictionary is selected because the current Supreme Court majority view is that the appropriate textual inquiry begins with determining the meaning of the text at the time that it was enacted and because the Supreme Court has often cited Webster's Dictionary. *See* Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018); *see also* Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 479–80 & n.10 (1979) (citing the edition of Webster's dictionary contemporaneous with passage of the statute). The UIA was enacted in 1885.

110 *Inclose*, WEBSTER'S PRACTICAL DICTIONARY OF THE ENGLISH LANGUAGE (1884).

111 *Id.*

has the effect of confining or shutting up public lands or only physical barriers like fences. If the first conclusion is the right one, then the UIA most likely prohibits trespass actions against corner-crossers as discussed in Section A above.

Admittedly, the fact that the dictionary definition specifically mentions "fences" lends some support to the proposition that "inclosures" are strictly limited to physical barriers. But it is also possible to conclude that fences received special mention merely because they are the most common way to inclose land, not because fences are a necessary ingredient of an "inclosure"—Congress could have just said "fences" if that was what it meant. That Congress chose a broader word, "inclosures," implies that it meant to include barriers that were not just physical in nature. Indeed, in § 1063, the statutory language includes the phrase "any fencing or inclosing," which demonstrates at least that Congress probably did not mean for "inclosure" in § 1067 to include fences alone.[112] The inclosures to which § 1061 refers must be "made, erected, or constructed" to fall under the statute's reach. The words "erected" and "constructed" seem obviously limited to physical barriers, but the word "made" has a broader reach—to *make* is relevantly defined by Webster's as "to cause to exist . . . to cause to be or become."[113] Therefore, the "made, erected, or constructed" qualification does not foreclose either possible reading of § 1061.

Physical barriers certainly occupy an important place in the scope of § 1061, important enough to be given direct attention with words like "erected" and "constructed." But the presence of other words that do not necessarily relate to physical barriers, such as "inclosure" and "made," suggests that § 1061 covers more than just physical barriers. Therefore, more analysis of the structure and history of the UIA as a whole will be needed to reach a conclusion.

2. Section 1063.

The text of § 1063 provides that "[n]o person, by force, threats, intimidation, or by any fencing or inclosing, or any other

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[112] Words are presumed to have a consistent meaning throughout a statute. IBP, Inc. v. Alvarez, 546 U.S. 21, 34 (2005). If "inclosing" meant the exact same thing as "fencing," then to include both terms would be redundant. Therefore, due to the presumption against redundant usage, the broader word "inclosing" in § 1063 should include more than just "fencing." *See* Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 669 (2007). It follows that if Congress meant for § 1061 to cover fencing alone, it would have used the word "fence" instead of the word "inclosure" there.

[113] *Make*, WEBSTER'S PRACTICAL DICTIONARY OF THE ENGLISH LANGUAGE (1884).

unlawful means, shall prevent or obstruct . . . any person from peaceably entering upon . . . any tract of public land . . . or shall prevent or obstruct free passage or transit over or through the public lands."[114] A "threat" is relevantly defined by the 1884 edition of *Webster's Practical Dictionary* as a "declaration of an intention or determination to inflict punishment, loss, or pain on another."[115] And the word "threat" has been used to describe the implied impending prospect of litigation both in the modern day and at the time that the UIA was passed,[116] so it is plausible that a threat of litigation against a corner-crosser is unlawful under § 1063.

It may be that the "threats" at issue are limited to *unlawful* threats by the language "any other unlawful means" found later in the list.[117] But as discussed above, threats of trespass actions that are based on unlawful inclosures cannot be brought. Therefore, threats of trespass actions that are predicated upon violations of § 1061 would also be disallowed as unlawful threats under § 1063. If a landowner is not allowed to threaten a trespass action by § 1063, then to actually bring the trespass action must, *a fortiori*, also violate § 1063. Therefore, a judge faced with such a trespass action would be in an identical position as the judge discussed above and once again would have to dismiss the lawsuit so as to give effect to the federal law that makes the bringing of the suit illegal.[118]

This analysis indicates that trespass actions violate § 1063 if they are based on inclosures that violate § 1061. Because it is not

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114 43 U.S.C. § 1063.

115 *Threat*, WEBSTER'S PRACTICAL DICTIONARY OF THE ENGLISH LANGUAGE (1884).

116 *See, e.g.*, Abels v. JBC Legal Grp., P.C., 428 F. Supp. 2d 1023, 1027 (N.D. Cal. 2005) (stating that to "threaten[ ] litigation" can violate the Fair Debt Collection Practices Act); Horne v. McRae, 30 S.E. 701, 707 (S.C. 1898) ("[B]eing frightened at the *threat of litigation*, [plaintiffs] entered into an agreement with [defendant]." (emphasis added)).

117 This interpretation employs the maxim of *noscitur a sociis*, which means "that a word is known by the company it keeps." Jarecki v. G. D. Searle & Co., 367 U.S. 303, 307 (1961). The *noscitur a sociis* canon suggests that one word in a list should be interpreted in the context of other words in the list. Applied here, the word "threats" is interpreted consistently with the member of the list "other unlawful activity," from which it follows that only those threats that are unlawful are covered. The *noscitur a sociis* canon "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Id.*

118 Persons generally have the right to bring litigation as part of their First Amendment right to petition the government. *See* U.S. CONST. amend. I. Therefore, it seems very unlikely that Congress meant that any threat of litigation could violate § 1063. But it is likely that unlawful threats of baseless litigation would be included in § 1063, especially because threats of baseless litigation are not protected by the First Amendment. Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 743 (1983).

clear from the text whether "inclosures" is limited to fences or whether it spans anything that could have the effect of keeping people off the public land, the next course of action is to examine the historical backdrop against which the UIA was passed.

C. The History of the UIA and the Open-Range Doctrine in the West

In determining the scope and extent of land grants in the West, the Supreme Court has stated as follows:

> The solution of [ownership] questions [involving the land grants at issue] depends, of course, upon the construction given to the acts making the grants; and they are to receive such a construction as will carry out the intent of Congress . . . *To ascertain that intent we must look to the condition of the country when the acts were passed.*[119]

Therefore, the property law backdrop against which the UIA was passed must be examined here to ascertain its meaning more clearly. This Section asserts that, analyzed against the historical backdrop of the open-range doctrine in the rural West, "inclosure" must include barriers that are not strictly physical in nature.

The western United States of the late nineteenth century looked very different from the contemporaneous eastern United States and from England, on whose laws the U.S. common law is based. Because the common law of property evolves through collective experience and adapts to fit the needs of society,[120] it is not surprising that different common law norms took hold in the rural West than those in the more densely populated East.

One notable common law feature of the rural West in 1885 is the open-range doctrine, under which a landowner could not recover for incidental trespass except on land that he had fenced in—i.e., the "open range" was free for the roaming.[121] The open-range doctrine was recognized in all levels of state and federal courts, including the Supreme Court, and is or was codified in

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[119] Leo Sheep Co. v. United States, 440 U.S. 668, 682 (1979) (emphasis added) (quoting Winona & St. Peter R.R. Co. v. Barney, 113 U.S. 618, 625 (1885)). Recall that the railroads' checkerboard parcels were originally government land grants. *See supra* note 26 and accompanying text.

[120] Shelby D. Green, *No Entry to the Public Lands: Towards a Theory of a Public Trust Servitude for a Way over Abutting Private Land*, 14 WYO. L. REV. 19, 58 (2014).

[121] *See infra* notes 125–126 and accompanying text.

many states as well.[122] This Section will chronicle a brief history of the open-range doctrine and then discuss its applicability to the interpretation of "inclosure" in § 1061.

1. History of the open-range doctrine.

The property law reality for cattle ranchers looked very different in the nineteenth-century West compared to the East or in England. In the East, parcels were mostly compact and located directly next to one another, not interspersed with tracts of public land.[123] As such, cattlemen had to coexist with their neighbors in relatively close proximity. From that state of affairs arose the traditional common law of agricultural property rights, namely that livestock owners have a duty to prevent their cattle from running at large and are held strictly liable for any damages caused by strays.[124] In the West, by contrast, so much open land was available, population was so sparse, public land was so ample, and herds were so much larger in size that it made more sense for livestock to be allowed to roam free.[125] Thus, the open-range doctrine developed in the West, under which livestock owners were immunized from liability for wandering stock unless an animal trespassed on land surrounded by a fence.[126] As a corollary, if a landowner wished to exclude others' stock from his land, the only way he could do so was to erect fences; he would otherwise find no relief in the courts for cattle wandering onto his unfenced land.

The open-range doctrine was accepted as custom in the territories of westward expansion, where territorial legislatures began to codify it. For example, territorial Montana codified its open-range custom as early as 1865.[127] All of the states with corner-locked parcels retain at least some form of law that either codifies some aspect of the open-range doctrine or requires a fence to recover for trespass in some circumstances—ten by statute,[128] and

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122 *See infra* notes 127–131 and accompanying text.

123 *See* Ryan M. Archer, *Searching for the Montana Open Range: A Judicial and Legislative Struggle to Balance Tradition and Modernization in an Evolving West*, 63 MONT. L. REV. 197, 203 (2002).

124 *See id.*

125 *See id.*

126 *See id.* at 204.

127 *See id.*

128 *See* IDAHO CODE § 25-2118 (providing that no person has a duty to keep domestic animals off any highway traversing or located on the open range); NEV. REV. STAT. § 568.360 (same); MONT. CODE § 81-4-210 (allowing purebred bulls to run on open range); OR. REV. STAT. 607.261 (same); WASH. REV. CODE § 16.24.190 (same); ARIZ. REV. STAT. § 3-

one, Wyoming, by common law.[129] Wyoming's Supreme Court has gone so far as to declare that Wyoming has always been an open-range state due to the customs of land use observed by settlers dating back to before its statehood.[130]

The open-range doctrine has been recognized in federal jurisprudence as well. In an 1890 case highly relevant to the corner-crossing issue, *Buford v. Houtz*,[131] the U.S. Supreme Court had to consider whether a plaintiff who owned the odd-numbered parcels in a checkerboard could recover from a defendant who drove his herd over those private parcels because to do so was the only means to reach the even-numbered public parcels.[132] The Court held for the defendant, reasoning that "there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States . . . shall be free to the people who seek to use them where they are left open and unenclosed."[133] The *Buford* Court explicitly declined to apply to lands of the rural West the

> principle of law derived from England and applicable to highly cultivated regions of country, that every man must restrain his stock within his own grounds, and if he does not do so, and they get upon the unenclosed grounds of his neighbor, it is a trespass for which their owner is responsible.[134]

1427 (landowner in rural area can recover for damages of trespass by animals only if land is fenced); COLO. REV. STAT. § 35-46-102 (same); N.M. STAT. § 77-16-3 (same); UTAH STAT. § 4-24-205 (same); CAL. FOOD & AGRIC. CODE §§ 17122, 17128 (providing that a landowner may not take up stray animals found on his premises unless they are enclosed with a "good and substantial fence").

[129] *See* Stilwell v. Nation, 363 P.2d 916, 917–18 (Wyo. 1961); *see also* WYO. STAT. §§ 11-33-102, 108 (providing that landowners may vote to make a certain area a "livestock district," in which animals may not run at large and a lawful fence is not required to bring a trespass action. Presumably, therefore, animals may run at large outside of livestock districts).

[130] *See* Coby Dolan, *Examining the Viability of Another Lord of Yesterday: Open Range Laws and Livestock Dominance in the Modern West*, 5 ANIMAL L. 147, 155 n.64 (1999) (first citing Garretson v. Avery, 176 P. 433 (Wyo. 1918); and then citing *Stilwell*, 363 P.2d 916).

[131] 133 U.S. 320 (1890).

[132] *Id.* at 321, 325–26.

[133] *Id.* at 326. Note that although *Buford* was decided after passage of the UIA, the Court did not rely on the UIA in determining that this customary license existed. *See id.*

[134] *Id.*

The *Buford* holding therefore demonstrates that there was a customary right in 1890 to *intentionally* drive one's herd across private parcels to reach corner-locked public parcels.[135]

As the West became more populated, the common law evolved. For example, in *Lazarus v. Phelps*,[136] the open-range doctrine was qualified to provide that ranchers whose cattle consumed the grass on another's private land while being intentionally driven across it may owe compensation to the landowner for the grass consumed—a change that allowed intruded-upon landowners to recover for their loss without removing the right of others to graze their herds on corner-locked public lands.[137]

2. The meaning of § 1061 in light of the open-range doctrine.

Because the meaning of a statute must be determined with reference to the time it was enacted, and because the property law backdrop against which the UIA was enacted is relevant to the determination of its meaning,[138] this Section first attempts to determine whether the word "inclosures" means (1) any implementation that obstructs access to the public lands or (2) only physical barriers that render at least some public land inaccessible to others. This Section will then demonstrate that, owing to the open-range doctrine, both interpretations would have led to identical results at the time the UIA was enacted. As a result, it is necessary to determine how the UIA has evolved alongside changes in property law, including the scaling back of the open-range doctrine. This Section will conclude by performing that analysis.

In the open-range West, the only way to keep others from grazing on one's own land with both legal and practical certainty was by constructing fences.[139] Therefore, by excluding fences that

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[135] *See Buford*, 133 U.S. at 323 (finding that defendants successfully alleged that they have a right to graze their cattle on the public parcels, which necessarily requires that they cross the private parcels).

[136] 152 U.S. 81 (1894).

[137] *See id.* at 85 (imposing a duty to compensate a neighbor for the grass consumed by a rancher's cattle if the rancher deliberately drove their cattle onto their neighbor's land, but not if the cattle accidentally trespassed by straying). Note that Wyoming still immunizes a rancher whose herd unintentionally strays onto and depastures unfenced lands. *See* R.O. Corp. v. John H. Bell. Iron Mountain Ranch Co., 781 P.2d 910, 911 (Wyo. 1989) (holding that a plaintiff must establish intentional trespass to recover, which requires putting the defendant on notice that the entry is unauthorized); *accord supra* notes 42, 96.

[138] *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2468 (2020).

[139] *See* Scott, *supra* note 34, at 168–71 (observing that the advent of barbed-wire fencing made it possible for the first time for ranchers to keep others' herds off their land).

inclose the public land, the UIA was prohibiting any means by which one might exclude others from reaching the public lands to graze their herds.[140] In other words, in the open-range West, the two possible meanings of "inclosures" folded exactly into each other for the purposes of access to the public lands: Congress did not need to consider other means of exclusion from the public lands because physical barriers were the only practical means by which one could exclude another from reaching public land in the open-range West.[141] Statutory original public meaning must be understood in light of the realities of the circumstances against which the statute was passed.[142] Therefore, at the time of enactment, the effect of § 1061 would be identical whether the first or second interpretation prevailed.[143]

Even if it was possible to bring an action for intentional trespass on land where there was no fence, it would have been very difficult to do so in practice. *See id.* at 171 ("The great spaces posed a problem in fact finding. Evidence gathering was a tedious and unrewarding task. In those days of inaccurate recording, tracing the ownership of a piece of property was a difficult task.").

[140] As such, it seems that the UIA attempted to codify into statutory law the same custom that the *Buford* Court observed five years later. *See supra* notes 131–135 and accompanying text.

[141] Note that some trespass actions, like a claim by one rancher of land over which another held valid title, could still be brought regardless of whether a fence was present; indeed, such a claim would directly violate § 1061. But otherwise, given that the land at issue was divided into large parcels suitable primarily for ranching, *see* Scott, *supra* note 34, at 156, 159, the main intrusions about which a western rancher was concerned were those of other ranchers attempting to graze their herds on his land. *See id.* at 169–71. Therefore, this Comment will proceed under the assumption that fencing was necessary as a practical matter to keep others off one's land.

[142] *See McGirt*, 140 S. Ct. at 2468.

[143] Admittedly, this coinciding of the two meanings is accurate only in areas where the open-range doctrine was the law. The UIA contains no language limiting its effectiveness to those parts of the country, so one might argue that if applied elsewhere, the distinction between fencing and other barriers could have mattered even contemporaneously to the UIA's passage. But it seems clear that range wars in the Western territories were the UIA's main focus: that is where the risk of private claims over large swaths of public land was most prevalent. *See* 16 CONG. REC. 1478 (1885) (statement of Sen. George Vest) ("[T]he evil that [H.R. 5479] seeks to remedy is in the Territories."); *see also* 43 U.S.C. § 1062 (specifically referencing territorial courts, which supports the idea that the UIA explicitly contemplates range wars in the territories). Note that in the territories specifically, there may not have been any local law regarding access to the lands, meaning that Congress was the only body capable of preventing range wars (which would not have been true anywhere in the developed East in 1885, where state property laws ruled). *See* William Blume & Elizabeth Brown, *Territorial Courts and the Law: Unifying Factors in the Development of American Legal Institutions, Influences Tending to Unify Territorial Law* (pt. 2), 61 MICH. L. REV. 467, 473 (1963) (demonstrating that Congress frequently passed laws governing the territories, and noting that in many cases the territorial governing bodies were quite limited as to what local laws they could enact). From this observation it follows that Congress was likely specifically interested in the territories and the West

Because the two meanings would lead to the same result, nobody at the time would have endeavored to determine which meaning was more correct, and there is no basis for assuming that Congress specifically meant one or the other at the time. But they do not lead to an identical result anymore. While the open-range doctrine still exists in some form in many states, including several that feature the checkerboard,[144] the law has evolved as those states have grown more populous. Notably, it is now possible and practicable, due to advances in recordkeeping and GPS technology, to bring trespass actions for entries onto land that is not fenced in—for example, land that is posted with "No Trespassing" signs.[145] As such, the question becomes how § 1061 itself has evolved. Was it left behind with the open-range doctrine, such that it applies only to physical inclosures even though those are no longer the only way to keep people off one's private land? Or did it incorporate by reference whatever other ways private landowners may in the future attempt to assert exclusive use over the public lands?

Of those two possibilities, the second seems more justifiable when considering the historical backdrop of the UIA. The UIA was enacted as a response to "range wars," under which cattlemen sought to take advantage of the checkerboard pattern by claiming exclusive grazing rights over the public lands that their private parcels caused to be corner-locked.[146] Sections 1061 and 1063 are specifically designed to prevent private parties from claiming exclusive dominion over public lands and from wrongfully excluding others from those public lands.[147] Regardless of the type of barrier—a fence, a "No Trespassing" sign, or a threat of trespass action—if the UIA prevents people from accessing the land, it has the identical effect of allowing the landowner to assert exclusive use and occupancy of the public land. Therefore, it seems that the most plausible conclusion is that "inclosure" incorporates by reference any such barrier, whether of a physical or

generally in enacting the UIA, so it is not unfaithful to focus interpretation of the statute's meaning on land patterns in the rural West.

144 *See supra* note 128 and accompanying text.

145 *See* Hynes, *supra* note 95, at 952 n.10 (observing that in twenty-six states, the posting of "No Trespassing" signs or other physical markers suffice, as a matter of state law, to provide notice to trespassers that they will face consequences for entering the area).

146 *Leo Sheep*, 440 U.S. at 683–84; *see also supra* notes 34–36 and accompanying text.

147 *See* 43 U.S.C. §§ 1061, 1063.

purely legal variety. To conclude otherwise would ascribe to Congress the bizarre intention to declare the problem of range wars closed as soon as the common law evolved past the open-range doctrine.[148] Historically and structurally, it is simply much more plausible that "inclosure" means any mechanism by which a private landowner might "assert[ ] [ ] a right to the exclusive use and occupancy of any part of the public lands."[149] The contrary interpretation would also ignore the observation that § 1061 employs the word "inclosure," rather than "fence" or "physical barrier."

IV. CONSISTENCY WITH THE CASE LAW

This Part will test the conclusion that the UIA immunizes corner-crossers against the case law in *Camfield* and *Leo Sheep*, the two prevailing Supreme Court cases interpreting the UIA.[150] It will determine that the interpretation of "inclosure" that includes both physical and purely legal barriers is consistent with those cases.

A. The *Camfield* Nuisance Argument

The baseline holding in *Camfield*, for which it has been most frequently cited, is that the UIA's influence extends onto fences built solely on private land.[151] But dicta from *Camfield* states that if the purpose of the enclosure is not to enclose public land, then the landowner's right to construct it is not disturbed by the UIA.[152] Rather, the Supreme Court determined that the UIA disallows fences only when they present a nuisance—in this case, as a barrier to access of the public land.

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148 And originalism does not require one to ascribe such an intention to Congress. *See* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2356 (2015) ("[A] word can have a fixed abstract meaning even if the specific facts that meaning points to change over time.").

149 43 U.S.C. § 1061.

150 *See supra* notes 46–50, 76–78 and accompanying text.

151 *See* Camfield v. United States, 167 U.S. 518, 524 (1897):

> It needs no argument to show that the building of fences upon public lands with intent to enclose them for private use would be a mere trespass, and that such fences might be abated by the officers of the Government or by the ordinary processes of courts of justice. To this extent no legislation was necessary to vindicate the rights of the Government as a landed proprietor.

152 It would not be disturbed by the UIA because of the landowner's exclusive dominion over their private property. *See id.* at 527–28.

Land-based nuisances are defined as actions taken by one landowner that reduce another landowner's ability to enjoy their land.[153] Fences have been classified as nuisances before, as observed in *Camfield*.[154] But for the fence to pose a nuisance, it must obstruct some *rightful* manner by which another landowner—in this case the public—may enjoy its land. In other words, for the fence to qualify as a common law nuisance, it must have the effect of preventing some lawful use of public land that the public would be able to enjoy but for the fence's presence. Note that a fence can be a nuisance even though the landowner builds it entirely on their own land, as they would otherwise have the right to do;[155] the key element that makes a fence a nuisance is that its presence creates an evil that imposes on someone else's rightful freedom.

The evil that the offending fence in *Camfield* represented was allowing the landowner to monopolize the corner-locked public parcel at everyone else's expense.[156] Therefore, the logic of *Camfield* necessarily implies that the UIA creates a right of access to the public parcel; if it did not, then depriving the public of access would not constitute an evil.

Nowadays, landowners like Iron Bar are attempting to use other types of barriers (like "No Trespassing" signs and trespass actions) to perpetuate that same evil. So it must follow from the *Camfield* logic that those other types of barriers are also nuisances that are disallowed under the UIA. In other words, the nuisance logic of *Camfield* necessitates the conclusion that the *Camfield* Court would determine today that the word "inclosures" in the UIA includes barriers that are not purely physical in nature (and would have determined the same then, had the question not been moot due to the open-range doctrine).

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[153] In *Cassel-Hess v. Hoffer*, the court stated:

> The term nuisance signifies in law such a use of property or such a course of conduct as, irrespective of actual trespass against others or of malicious or actual criminal intent, transgresses the just restrictions upon use or conduct which the proximity of other persons or property in civilized communities imposes upon *what would otherwise be rightful freedom*.

44 A.3d 80, 85 (Pa. Super. Ct. 2012) (emphasis added) (quoting Kramer v. Pittsburgh Coal Co., 19 A.2d 362, 363 (Pa. 1941)).

[154] *See Camfield*, 167 U.S. at 523 (citing Rideout v. Knox, 19 N.E. 390, 391 (Mass. 1889)).

[155] *See* Lee Anne Fennell, *Owning Bad*, *in* CIVIL WRONGS AND JUSTICE IN PRIVATE LAW 415, 423 (Paul B. Miller & John Oberdiek eds., 2020).

[156] *See Camfield*, 167 U.S. at 524–25 ("But the evil of permitting persons, who owned or controlled the alternate sections, to enclose the entire tract, and thus to exclude or frighten off intending settlers, finally became so great that Congress passed [the UIA].").

Recall that in *Mackay*, *Stoddard*, and *Golconda Cattle*, the circuit courts established precedent under which the UIA implicitly creates a right of access to corner-locked public parcels.[157] Those courts' reasoning basically followed the same nuisance logic from *Camfield* in focusing on whether the barrier kept people out, not what kind of barrier it was.[158]

B. Distinguishing *Leo Sheep*

As discussed above, the *Leo Sheep* holding has caused doubt as to whether cases like *Mackay* are still good law.[159] Specifically, the *Leo Sheep* Court restated the *Camfield* dicta that a landowner has the right to fence in his own land, even if that fencing makes it impossible to reach the public land, as long as the fence does not serve a purpose of keeping others off of public land and reserving that public land for the adjacent private landowner.[160] Therefore, the *Leo Sheep* Court concluded that the UIA created no right for the government to build a road across private land.

Leo Sheep does not cast doubt upon the interpretation of the UIA posited here. As discussed in Part I, the target of the UIA is Figure 1–type landowners who intend to exclude others from the public land. The landowner in *Leo Sheep* was a Figure 2–type landowner whose objection to the road did not stem from a desire to co-opt the public land, but rather from a desire not to have the intrusion of the road on their own land. So, while *Leo Sheep* reiterates the *Camfield* dicta that nobody has the right to complain when a landowner fences in his own land for a legitimate purpose,[161] its holding does not detract from *Camfield*'s (and therefore *Mackay*'s) application of the UIA against Figure 1–type landowners.

Indeed, the *Leo Sheep* opinion embarks on a similar analysis to this Comment, observing that when the UIA was passed in 1885, "[t]he order of the day was the open range . . . and the type of incursions on private property necessary to reach public land

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157 *See supra* Section II.B.

158 *See supra* Section II.B.

159 *See supra* notes 22, 83, and accompanying text.

160 *Leo Sheep*, 440 U.S. at 685 (quoting *Camfield*, 167 U.S. at 528).

161 *See id.* (quoting *Camfield*, 167 U.S. at 528).

was not such an interference that litigation would serve any motive other than spite."[162] And the Court distinguished *Buford* rather than overruling it.[163] The Court observed that in *Buford*, the ranchers attempting to bring their cattle across private land as the only way to reach a public parcel were protected through the open-range grazing custom.[164] It then distinguished the facts in *Leo Sheep* by observing that no such custom enshrines the right to build a road across private land.[165]

The discussion of nuisance and *Buford* in *Leo Sheep* evinces that rather than overruling cases like *Mackay*, the *Leo Sheep* Court believed that those precedents are alive and well vis-à-vis landowners who attempt to co-opt the public land for their own purposes. Therefore, there is no reason to conclude that *Mackay*, which would directly protect the hunters being sued by Iron Bar, is not still good law.[166]

V. POTENTIAL COUNTERARGUMENTS AND POINTS OF FURTHER RESEARCH

This Part addresses some possible counterarguments to this Comment's interpretation of the UIA. The main counterargument to the analysis above is that it relies on too tortured of a meaning of the word "inclosure." It is admittedly possible that "inclosure" should woodenly be limited to fencing only, with no regard to the common law backdrop at the time of enactment, the evolution of the common law in the intervening years, or the structure and clear purpose of the statute. But even a rigid textual understanding would have to contend with the argument that Congress chose a word inherently more flexible than, e.g., "fence." And it would have to ignore the senselessness of the outcome that would result, wherein courts or the executive branch could order removal of a fence without simultaneously having any effect on what could pass over the newly opened land (given that anyone aiming to cross where the fence used to be could analogously be deterred by a "No Trespassing" sign combined with the threat of a lawsuit).[167]

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[162] *Id.* at 685–86.

[163] *See id.* at 687 n.24.

[164] *Id.*

[165] *Leo Sheep*, 440 U.S. at 687 n.24.

[166] *Accord* Iron Bar Holdings LLC v. Cape, 2023 WL 3686793, at *10 (D. Wyo. May 26, 2023).

[167] The Court's mode of analysis has turned decidedly more textualist since Justice Scalia's time on it. *See generally* Remarks from O'Scannlain, *supra* note 20. But the Court

Another potential counterargument stems from the evolution of land use in the West: while the West was largely uninhabited in 1885, it is now much more populous, to such an extent that the open-range doctrine has been significantly reduced in scope from the days of *Buford*. From that counterargument, it could be asserted that because the lands in question are now in states rather than territories, and because those states have implemented their own property law—which apparently allows trespass suits against corner-crossers to go forward—the UIA no longer applies. But the UIA has not been repealed, and the Supremacy Clause still places it above state law. Furthermore, the evil that it sought to remedy still exists, with the Iron Bar case as a prime example. Therefore, so long as § 1061 is still on the books, it has the same meaning as it always did. To argue that it applies to fences but not to "No Trespassing" signs or trespass actions leads back to the counterargument discussed before this one.

Landowners who disagree with the interpretation of the UIA posited in this Comment might argue that it lacks a limiting principle, such that it would allow the public all kinds of access to their private land in ways that might frustrate their use of it. But the text of § 1063 and the ideas set out in *Lazarus*, *Stoddard*, and *Golconda Cattle* provide an effective limiting principle. "No person . . . shall prevent or obstruct . . . any person from peaceably entering upon . . . any tract of public land" means that to be in compliance, a landowner must afford those who wish to access the public land some access.[168] *Stoddard* and *Golconda Cattle* demonstrate this principle: the landowner in the former lost because his openings in the fence did not provide sufficient access to the public land; the landowner in the latter won because his did. So, as long as a landowner creates some minimally sufficient allowance for people to access the public parcel (rather than attempting to keep them off with the inconvenience of filing trespass suits for a trespass lasting only mere seconds), they have nothing to fear from the UIA.

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has not completely abandoned purposivist reasoning, especially in applying canons of constructions to statutory text. *See* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1319–27 (2020). Therefore, because the purposivist analysis of the UIA seems so clearly to suggest that it immunizes corner-crossers, *see supra* notes 60–62 and accompanying text, it is plausible to assume that courts would, at least implicitly, take the purpose into account in resolving the textual ambiguities.

168 43 U.S.C. § 1063.

In *Lazarus*, a landowner was able to recover for the damage done to their property by someone intentionally crossing over it to reach the public land.[169] Landowners who fear ancillary damage to their land caused by those seeking access to the public parcel can thus rest assured that *Lazarus* limits the immunity from suit only to crossing, not to causing damage or to taking actions that otherwise reduce the value of the land as a result of the corner-crossing. So, for example, a landowner like Iron Bar could feel confident that any damage caused to its property by corner crossing would be recoverable; what is not recoverable is the value of its exclusive use of the public parcel, which was never allowed in the first place under the text of § 1061.

Some corollaries of the result here may deserve further research. If the UIA does allow for the operation of state trespass law against corner-crossers, for what damages would corner-crossers be held liable? Iron Bar argues that the outdoorsmen who corner-crossed on its land caused it millions of dollars in damages because, if corner-crossing is allowed, Iron Bar will be required to add miles of extra fence to protect its land from intrusions by the public. But that theory cannot be correct for two reasons. For one, the four individual corner-crossers could not be held liable for mitigation efforts to prevent all future trespassers. Per *Lazarus,* they would only have to pay for any damage they themselves caused *on that individual trespass*, which must be vanishingly small. Secondly, if the public is now entitled to corner-cross on Iron Bar's land, then that is not the fault of the corner-crossers, but of the operation of the UIA itself. Therefore, any damages that result from future corner-crossers accessing the public lands that Iron Bar surrounds are attributable to the action of the UIA, not to the actions of the corner-crossers. So, it would not be coherent to require particular corner-crossers to compensate landowners for loss of value caused by all future corner-crossers.

If the corner-crossers are not liable, then do the landowners have any recourse? Any recovery the landowner might seek for this application of the UIA would probably follow either in judicial takings, whereby the landowner would be claiming that the application of the law by the courts deprives them of a right they

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169 *See supra* note 137 and accompanying text. Recall that landowners may not recover for depasturing caused by animals that incidentally, not intentionally, stray onto unfenced lands in areas covered by the open range doctrine. *See supra* note 137.

had when it bought the property,[170] or in regulatory takings, whereby the landowner would argue that the UIA itself caused a drastic reduction in the value of their land.[171] Takings are beyond the scope of this Comment, but it is unlikely that a court's interpretation of a statute written in 1885 (and already interpreted in the corner-crossers' favor in *Mackay*)[172] could give rise to a takings claim nearly 150 years later. Furthermore, the requirement that a small corridor on the corner of a plot sized in the hundreds or thousands of acres be left open to foot traffic may constitute such a de minimis taking as to make its pursuit in court infeasible. Empirical analysis and research into the judicial takings doctrine would be required to answer the takings questions presented here more fully. Of course, if the landowner reasonably relied on a representation by its seller or real estate agent that the parcel included exclusive use of the adjacent public parcel, there is always the possibility of a recovery for misrepresentation.[173]

CONCLUSION

That the UIA bars landowners from suing corner-crossers for trespass likely makes sense to the lay person: the corner-crossers barely (or never) touch the private land, and all of the substantial actions they take occur on the public land. But the *ad coelum* doctrine technically makes even a corner-crossing over only the parcel's air column a trespass, absent the UIA. An interpretation of the UIA that immunizes corner-crossers from liability is consistent both with the Act's purpose—to disallow landowners from excluding others from the public lands and claiming them for their own use without title—and with how the word "inclosure" in the statute would have been understood against the common

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[170] The judicial takings doctrine, under which a landowner attempts to recover for loss of land value resulting from a judicial change in the law, has a rocky history and has only occasionally been applied in the United States. *See* Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV.1449, 1463–70 (1990). But a case like this could certainly qualify as a loss of value to land as a result of a judicial decision, so the doctrine may at least merit consideration here.

[171] Normally, the regulation must reduce the land's value to such an extent that it is tantamount to an eminent domain taking. *See* 29A C.J.S. *Eminent Domain* § 567 (2023). But there is a movement for partial regulatory takings, under which lesser decreases in land value might also qualify. *See* Hannah Jacobs, Note, *Searching for Balance in the Aftermath of the 2006 Takings Initiatives*, 116 YALE L.J. 1518, 1527–29 (2007).

[172] *See* Mackay v. Uinta Dev. Co., 219 F. 116, 119 (8th Cir. 1914).

[173] *See, e.g.*, Hulse v. First Am. Title Co. of Crook Cnty., 33 P.3d 122, 142 (Wyo. 2001) (citing Richardson v. Hardin, 5 P.3d 793, 797 (Wyo. 2000)).

law backdrop of the American West's open-range doctrine. It is also consistent with the text of the act itself, insofar as "inclosure" seems to include more than just fences. Therefore, there is a strong case to be made that the UIA indeed protects corner-crossers who seek to reach the public land without interfering with private lands along the way. Contrary to some opinions, *Leo Sheep* does not overrule *Mackay*. And at any rate, the attempt by landowners like Iron Bar to keep corner-crossers off public land appears identical in purpose and effect to the disallowed fences in *Camfield*.

The sides in the Iron Bar case approach the issue from wildly different vantage points: the corner-crossers cannot understand how they could be denied access to public land, and the landowners feel that they purchased exclusive access to the public land when they bought their ranch. If the landowners lose on appeal, they may have recourse against their seller for misrepresenting the character of the land they purchased; otherwise, it seems they may be forced to accept that the definition of *public land* means that access to the land is open to the public. As the West becomes more populated and people continue to discover the benefits of leisure in the great outdoors, landowners will have to get used to the notion of sharing the public lands with the public.