

Recreational Access Rights: A View from Abroad

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The Conventional American View

- ▶ "Give someone the right to exclude others from a valued resource . . . and you give them property. Deny someone the exclusion right and they do not have property."

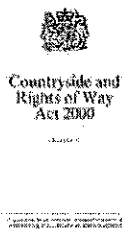
- ▶ Thomas Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730 (1998).
 - ▶ *Kaiser Aetna v. United States*, 44 U.S. 164, 176 (1979)
 - ▶ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982).
 - ▶ *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).

Not Everyone in the U.S. Agrees

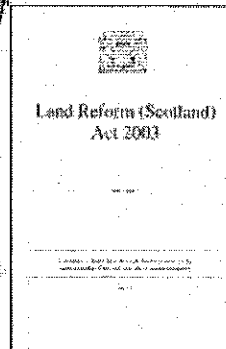
- ▶ Exclusion is an important interest, but sometimes exclusion has to give way to other human values.
- ▶ "Property rights serve human values. They are recognized to that end, and are limited by it." *State v. Shack*, 277 A.2d 369 (N.J. 1971).
- ▶ We have no difficulty in finding that . . . the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit." *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 879 A.2d 112 (N.J. 2005).

What do our friends in the U.K. have to say about exclusion and recreational access?

England and Wales



Scotland



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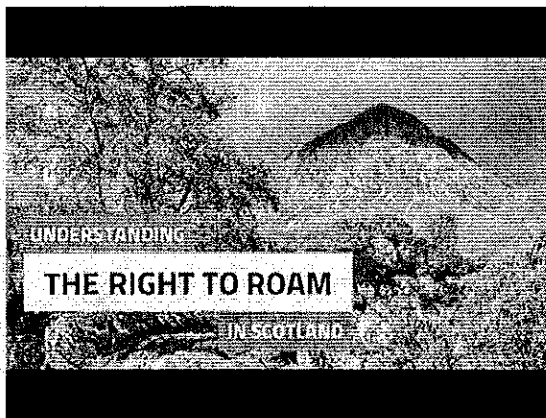
- ▶ Countryside and Rights of Way Act 2000 2000, c. 37 (Eng. & Wales) (CRoW Act).
- ▶ Provides a "right to roam" on narrowly defined "access lands."
 - ▶ "Mapped open country" = "mountain, moor, heath or down."
 - ▶ "Coastal lands" (but not inland waterways).
 - ▶ Registered Common Land.
 - ▶ About 8-12% of England and Wales.
 - ▶ Top down, "partial," mapped-based approach.

National Park and Open Access Land in England

National Parks CRoW Open Access Land

Source: Adapted from National Park and Open Access Land in England

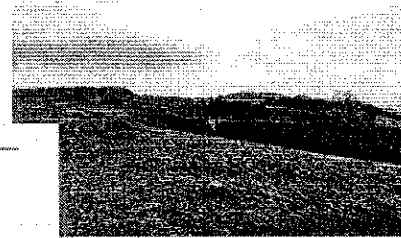
What do our friends in the U.K. have to say about exclusion and recreational access?



Scotland

- ▶ Part 1 Land Reform (Scotland) Act, 2003 (A.S.P. 2) (LRSa)
- ▶ Provides a "right of responsible access" almost everywhere in Scotland.
 - ▶ All land and inland water are presumed to be subject to access.
 - ▶ A bottom up, "universalist" approach.

England & Wales - Mountain, Moor, Heath and Down (Not Improved or Semi-Improved Grassland)



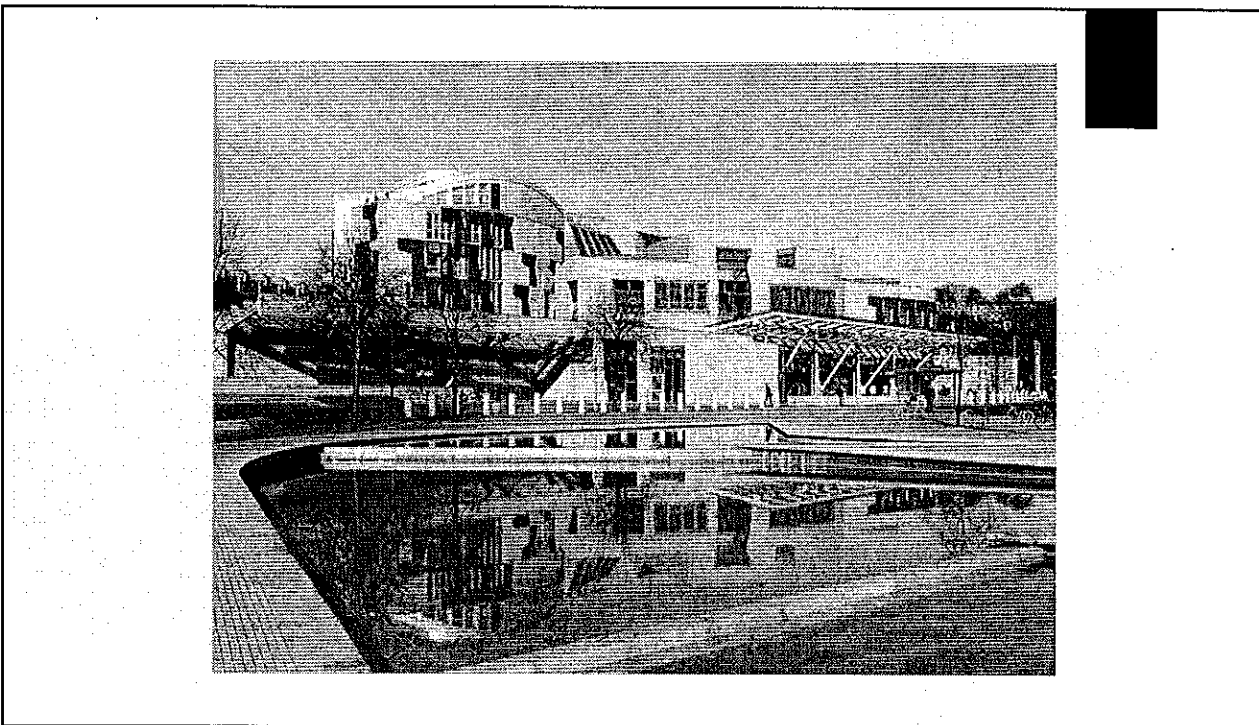
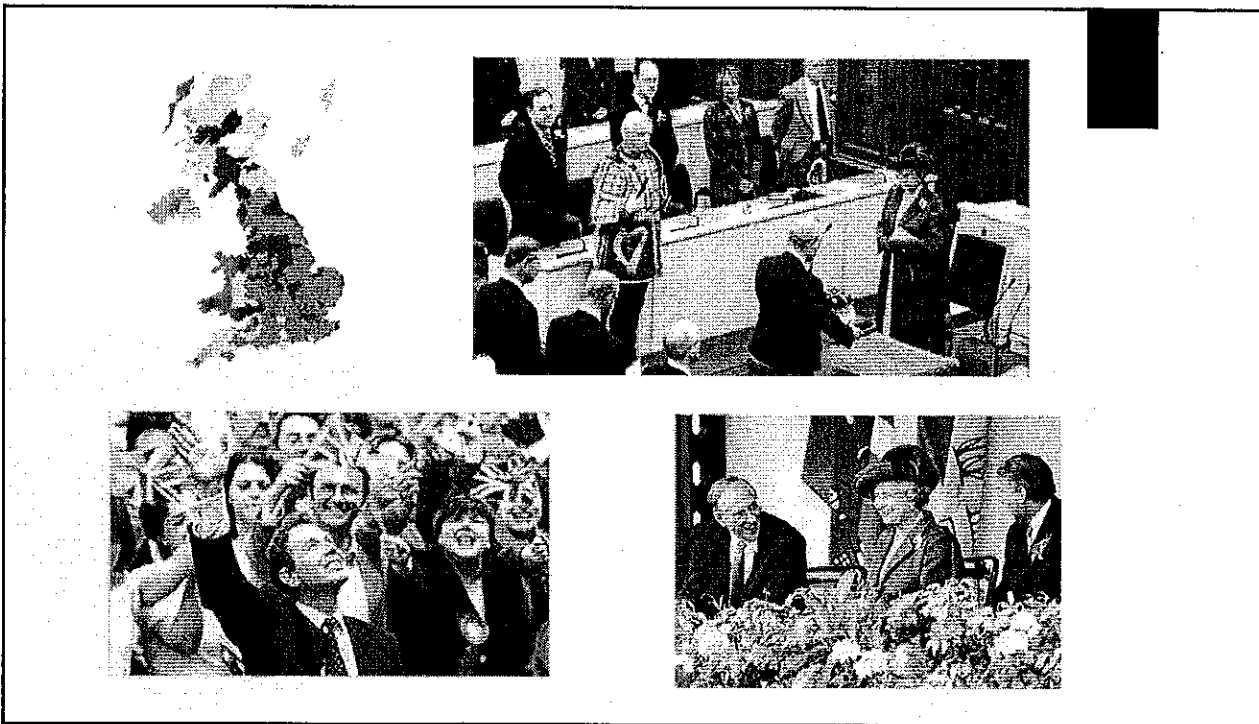
What historical, legal, and social factors led to this legislation?

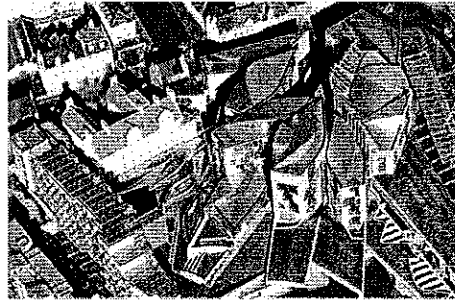
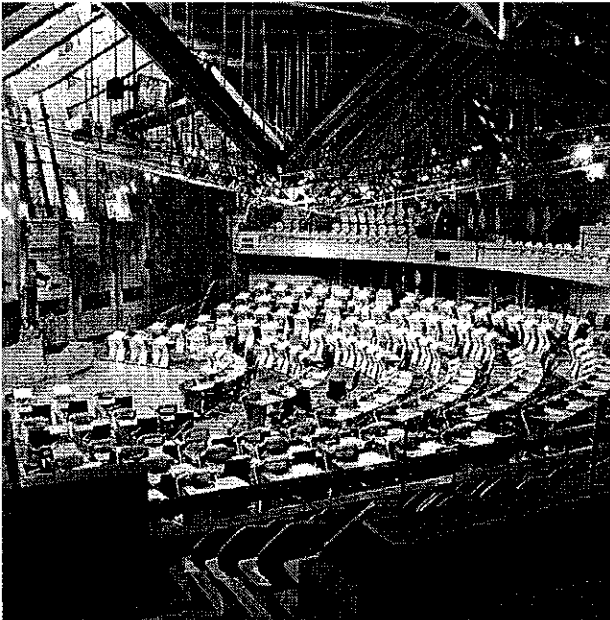
England and Wales

- ▶ Loss of historic common access and use rights resulting from the enclosure movement.
- ▶ Limited public access along historical footpaths established by custom.
- ▶ Law of Property Act 1925 – public access over “common lands” in urban and metropolitan areas and some rural areas like Lake District.
- ▶ National Parks and Access to the Countryside Act (1949) (NCAPA).

Scotland

- ▶ Dissatisfaction with the state of land ownership
 - ▶ Highly concentrated rural landownership.
 - ▶ Concern about absentee owners and neglect or mismanagement of land.
 - ▶ Historical Memory – The Highland Clearances.
- ▶ Decade long process of consensus and trust building between landowners and access advocates (1990s).
- ▶ Political Change (1997 Election) and Devolution

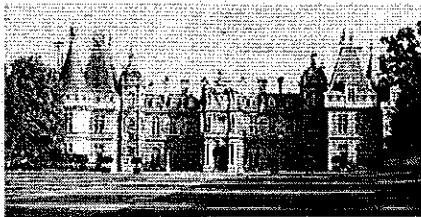




Where You Cannot Go

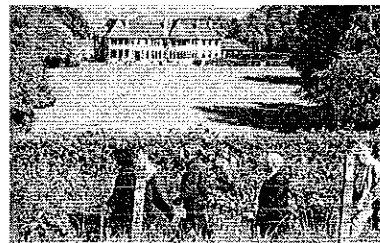
England and Wales

- ▶ Within 20 meters of a dwelling or a "park or garden" surrounding a home.



Scotland

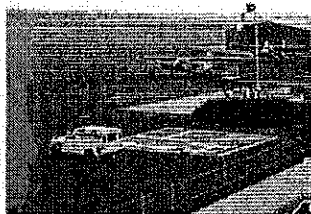
- ▶ Land that comprises, in relation to a house or any other shelter, "sufficient adjacent land to enable persons living there to have reasonable measures of privacy in that house or place and to ensure that their enjoyment of that house or place is not unreasonably disturbed."



Where You Cannot Go

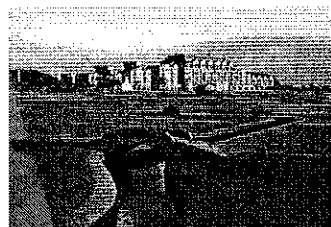
England and Wales

- ▶ Curtilage of non-residential buildings and structures
- ▶ Golf courses, race courses and aerodromes



Scotland

- ▶ Agricultural fields in production
- ▶ Woodlands where "tree seedlings" have been planted
- ▶ Curtilage of non-residential buildings and structures
- ▶ Golf courses and sports fields when match is underway (But no access to greens anytime.)



What You Can (and Cannot) Do

England and Wales

- ▶ Open Air Recreation
- ▶ Access "on Foot"
 - ▶ No cycling, horseback riding, mountain biking, cross country skiing.
- ▶ Basically take a walk, have a picnic and go home.

Scotland

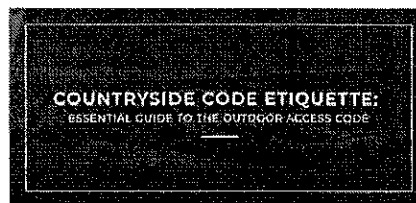
- ▶ Be on land or water for most forms of non-motorized recreational access.
 - ▶ Allowed – walking, hiking, running, orienteering, horseback riding, canoeing, sailing, mountain biking, and even "wild camping."
 - ▶ Not allowed – fishing and hunting.
- ▶ Carrying on an educational activity.
- ▶ Cross non-exempt land to get from one place to another.

Key Limit on Access in Scotland

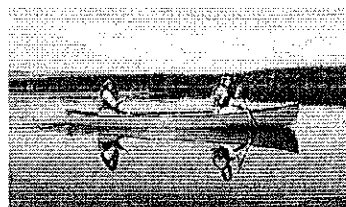
- ▶ All access taking must be exercised responsibly. LRSA Sec. 2(1).
 - ▶ Key assurance worked out in the long consensus building process
 - ▶ Fleshed out through Scottish Outdoor Access Code
 - ▶ Paired with duty on part of land managers to manage land responsibly for access takers' interest. LRSA Sec. 3(1—2)



know the code
before you go



Are the Scots Happy with Part I of the LRSA?



What can we learn from England and Wales and Scotland?



Sources

- ▶ John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 *Neb. L. Rev.* 739 (2011).
- ▶ John A. Lovett, *The Right to Exclude Meets the Right of Responsible Access: Scotland's Bold Experiment in Public Access Legislation*, 26, No. 2 *Probate and Property* 52 (March/April 2012).