

# Perspectives on the Right to Exclude and the Dilemma of Climate Change

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Katrina M. Wyman, [Limiting the National Right to Exclude](#), 72 **U. Miami L. Rev.** 425 (2018).

As the United States Supreme Court said in 1979 and restated in 1982 and then restated again in 2002, “‘the right to exclude others’ is ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’”<sup>1</sup> Just as the bundle of sticks metaphor has become ubiquitous and virtually indispensable to the definition of real property, so too has the right to exclude become essential to the idea of the assemblage of rights and things that constitute real property. Katrina M. Wyman, in her article *Limiting the National Right to Exclude*, challenges her reader “to rethink the robustness of the right to exclude that states currently enjoy” against the challenges to human mobility that she believes climate change will generate for millions of people. (P. 459.)

Regardless of one’s position regarding climate change, Wyman draws her reader into a compelling “what if” conversation. What if the earth’s physical environment is changing such that, in a relatively short period of time, land that is currently inhabited will become uninhabitable, either because of sea level rise or because of increasingly high temperatures? How should we understand the prospects of individuals and cultures that become dispossessed under such scenarios?

Wyman is willing to imagine curtailing the rights of sovereign states to exclude foreigners under the circumstances mentioned above. She discusses three categories of recognized limitations on the rights of private landowners to exclude and considers how they inform a discussion of the degree to which states’ rights to exclude foreigners can or should be curtailed.

The first of the three categories involves necessity-based limits, pursuant to which a private landowner’s right to exclude must give way, in cases of imminent danger, to the right of others to enter the landowner’s property to save their own lives or property. (P. 440.) If private rights must yield to great public welfare concerns in the private landowner context, Wyman argues, these same public welfare concerns may “override the right of states to exclude foreigners in peril.” (P. 442.)

The second category of limitations on the rights of landowners to exclude is anti-discrimination limitations in the public accommodations area. (P. 445.) Title II of the Civil Rights Act of 1964 is the private analog of the state as the quintessential “‘public accommodation[.]’ because [states] open their borders for trade, including trade with other nations and foreigners who travel to buy and sell goods and services, and for tourists to simply visit.” (P. 447.) Thus states seem no different from their private counterparts in this category and should have similar limits on whom they must accept and serve.

The third and final category of restrictions on the private landowner’s right to exclude that Wyman offers is eminent domain, the power of the government to take private property for a public use upon the payment of just compensation, pursuant to the Fifth Amendment of the United States Constitution. (P. 452.) Wyman concedes that no comparable right empowers one state to forcibly transfer the land of another sovereign. She also acknowledges that the idea of such forcible transfers is a “highly objectionable throwback to the era of European colonization....” (P. 453.) But, Wyman engages the work of scholars who support a right of partial displacement of existing countries from some of their

territories by societies that are rendered refugees as a result of climate change.

Wyman's normative contribution is to invite her reader to consider the possibility of shifting towards a framework of greater human mobility across national borders, and perhaps even open borders. What is exciting about Wyman's contribution is that she has taken such a historic concept, the right to exclude, and has offered a new way of approaching it.

I began my 1L property class this semester with [Johnson v. M'Intosh](#). One of the lessons of this iconic case is that "[a]n absolute [title], must be an exclusive title, or at least a title which excludes all others not compatible with it."<sup>2</sup> I am excited to share Wyman's article with my students and to challenge them to experience the historic concept of the right to exclude in a fresh and new way, in a way that grapples with challenges and opportunities of the twenty-first century.

1. [United States v. Craft](#), 535 U.S. 274, 283 (2002) and [Loretto v. Teleprompter Manhattan CATV Corp.](#), 458 U.S. 419, 435 (1982) (both quoting [Kaiser Aetna v. United States](#), 444 U.S. 164, 176 (1979)
2. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

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