

# ARTICLE

## WHY PROPERTY LAW DOES NOT SUPPORT THE ANTITRUST ABANDONMENT OF STANDARDS

*Michael A. Carrier\**

### ABSTRACT

Property is being hijacked. In property law itself, it is well-recognized that owners' rights are accompanied by robust limits. No one familiar with property law could reasonably claim that property owners have absolute rights to exclude.

But when the concept of property is exported elsewhere, those limits are sometimes forgotten. Such a version of property is viewed as absolute, not restricted by any limits. In the copyright realm, for example, we have seen it with owners claiming that infringement is "theft" or "piracy."

And now we are seeing it in the antitrust arena. The head of the U.S. Department of Justice's Antitrust Division, Makan Delrahim, has advocated an absolutist conception of property for patents, asserting that they provide an unqualified right to exclude followed by an injunction. That position is accompanied by the claim that antitrust has no role to play in addressing *patent holdup*, which occurs when a patent owner seeks an injunction or excessive royalties after an industry has adopted a patented technology that cannot be avoided.

---

\* Distinguished Professor, Rutgers Law School; Intellectual Property Fellow, Innovators Network Foundation. Copyright © 2019 Michael A. Carrier. Parts of this Article are adapted from previous work. I would like to thank Dave Fagundes, Deepa Varadarajan, and participants in the University of Houston Law Center IPIL National Conference for valuable comments.

This Article demonstrates how absolutist conceptions of limitless rights are not consistent with property law and do not justify abandoning antitrust scrutiny of patent holdup.

#### TABLE OF CONTENTS

I. INTRODUCTION .....	266
II. STANDARDS.....	267
III. ABSOLUTIST PROPERTY.....	269
A. <i>The Edifice</i> .....	270
B. <i>The Flaws</i> .....	272
IV. PROPERTY .....	277
A. <i>Limits on Right to Exclude</i> .....	278
B. <i>Limits on Right to Transfer</i> .....	280
C. <i>Limits on Right to Use</i> .....	282
D. <i>Synthesis on Limits</i> .....	284
V. CONCLUSION.....	284

#### I. INTRODUCTION

Property is being hijacked. In property law itself, it is well-recognized that owners' rights are accompanied by robust limits. No one familiar with property law could reasonably claim that property owners have absolute rights to exclude.

But when the concept of property is exported elsewhere, those limits are sometimes forgotten. Such a version of property is viewed as absolute, not restricted by any limits. In the copyright realm, for example, we have seen it with owners claiming that infringement is "theft" or "piracy."

And now we are seeing it in the antitrust arena. The head of the U.S. Department of Justice's Antitrust Division, Makan Delrahim, has advocated an absolutist conception of property for patents, asserting that they provide an unqualified right to exclude followed by an injunction. That position is accompanied by the claim that antitrust has no role to play in addressing *patent holdup*, which occurs when a patent owner seeks an injunction or excessive royalties after an industry has adopted a patented technology that cannot be avoided.

This Article demonstrates how absolutist conceptions of limitless rights are not consistent with property law and do not justify abandoning antitrust scrutiny of patent holdup.

## II. STANDARDS

The setting this Article explores involves standards. A standard is a common platform that allows products to work together. Standards are ubiquitous in our economy. They allow us to speak to and understand one another. They let consumers access ATMs and credit-card machines. They underlie phone and wireless networks. They permit computer users to share videos. And they appear in countless other settings.

In contrast, the absence of standards, from biblical times to the present, has had damaging effects. The multiplicity of languages at the Tower of Babel led to misunderstanding and conflict.<sup>1</sup> Before the standardization of time zones in the late 19th century, cities and towns used different forms of time, relying on clocks placed in town squares or jewelers' windows.<sup>2</sup> During the Great Baltimore Fire of 1904, which burned longer than thirty hours and destroyed more than 1,500 buildings, the city's hydrants did not fit the hoses of firefighters from nearby cities.<sup>3</sup> In the late 20th century, purchasers of Sony's Betamax VCRs were stranded as the market tipped to JVC's VHS format. And for nearly two years, consumers delayed buying high-definition DVD players and recorders until Toshiba abandoned its HD-DVD format, ceding the market to Sony's Blu-Ray technology.<sup>4</sup>

Standards, in short, are crucial to our economy. As is apparent from the above examples, they are especially needed in *network effects markets*, in which users benefit from an increase in the number of other users in the system. A telephone or e-mail system, for example, becomes more valuable as more users connect to it. Networks also feature positive feedback. The more popular a

1. See Carl Shapiro, *Setting Compatibility Standards: Cooperation or Collusion?*, in EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 81 (Rochelle Cooper Dreyfuss et al. eds., 2001).

2. *U.S. Time Zones*, U.S. NAVAL OBSERVATORY (2007), [https://aa.usno.navy.mil/faq/docs/us\\_tzones](https://aa.usno.navy.mil/faq/docs/us_tzones) [[https://web.archive.org/web/20190508121805/https://aa.usno.navy.mil/faq/docs/us\\_tzones](https://web.archive.org/web/20190508121805/https://aa.usno.navy.mil/faq/docs/us_tzones)] (last visited Aug. 26, 2019).

3. Shapiro, *supra* note 1, at 81–82; *The Great Baltimore Fire Begins*, HISTORY (Feb. 9, 2010), <https://www.history.com/this-day-in-history/the-great-baltimore-fire-begins> [<https://perma.cc/ZZ63-UN5E>].

4. Maria Panaritis, *HD DVD Ready to Bow Out of War with Blu-ray*, PHILA. INQUIRER (Feb. 18, 2008), [http://www.philly.com/philly/business/breaking/20080218\\_HD\\_DVD\\_ready\\_to\\_bow\\_out\\_of\\_war\\_with\\_Blu-ray.html](http://www.philly.com/philly/business/breaking/20080218_HD_DVD_ready_to_bow_out_of_war_with_Blu-ray.html) [<https://perma.cc/D7C8-C599>] (analogizing the victory of Blu-ray disks over HD DVDs to the victory of VHS tapes over Betamax cassettes).

computer operating system becomes, the more applications will be written for it.

Even though standards are vital, antitrust law traditionally viewed the process of setting standards with suspicion. Standard-setting organizations (SSOs) tend to be composed of industry rivals discussing sensitive information such as price.<sup>5</sup> As Adam Smith worried: “People of the same trade seldom meet together, even for merriment or diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”<sup>6</sup>

Despite antitrust’s concern, competitors have good reason to engage in such discussions. Before the selection of a standard, an SSO typically can choose from an array of alternative technologies.<sup>7</sup> After the SSO chooses a standard, however, the owner of the selected technology tends to gain significant power. If the technology is patented, the owner could impose excessive licensing terms that reflect not just the value of the patent but also the significant costs of switching to a new technology. In many cases, the royalties are passed on to consumers who are forced to pay higher prices.<sup>8</sup>

Nor can SSO members, faced with demands for excessively high royalties, migrate easily to a different technology. As former FTC Chairman Deborah Platt Majoras explained: “After the standard is chosen, industry participants likely will start designing, testing, and producing goods that conform to the standard—that is, after all, the whole idea of engaging in standard setting.”<sup>9</sup> But these efforts, in learning about a particular technology and investing in equipment and complementary products, typically do not have value if the user switches to an alternative technology.<sup>10</sup> As a result of these costs (as well as the

---

5. *E.g.*, Kevin D. McDonald, *Afterword: Looking for Antitrust Law at the IP Intersection*, 77 ANTITRUST L.J. 1017, 1026 (2011).

6. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 131 (5th ed. 1826).

7. In certain settings, there may be only one superior technical option.

8. Joseph Farrell et al., *Standard Setting, Patents, and Hold-Up*, 74 ANTITRUST L.J. 603, 645 (2007); Deborah Platt Majoras, Former Chairman, Fed. Trade Comm’n, *Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting 4* (Sept. 23, 2005), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/recognizing-procompetitive-potential-royalty-discussions-standard-setting/050923stanford.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/recognizing-procompetitive-potential-royalty-discussions-standard-setting/050923stanford.pdf) [<https://perma.cc/9YG8-UHZE>].

9. Majoras, *supra* note 8, at 3.

10. Farrell et al., *supra* note 8, at 612 n.35; Daniel G. Swanson & William J. Baumol, *Reasonable and Nondiscriminatory (RAND) Royalties, Standards Selection, and Control of Market Power*, 73 ANTITRUST L.J. 1, 9–10 (2005).

costs of selecting a new standard), the industry will be locked into the chosen standard.

This threat of holdup explains why SSOs have required members to provide certain information or make certain promises before the standard's selection. Some SSOs have mandated that participants disclose patents that could be implicated by the standard.<sup>11</sup> Many have required members to agree to license their IP on fair, reasonable, and nondiscriminatory (FRAND) terms.<sup>12</sup> Antitrust law has traditionally been suspicious of such price-related activities, which deters SSO members from sharing information that could prevent holdup. But any information a patent holder provides before the SSO adopts a technology involving its patents promises to be useful. And that is why in the past several decades, antitrust agencies have challenged various types of patent-related behavior in the standard-setting context.<sup>13</sup>

### III. ABSOLUTIST PROPERTY

In the setting of standards and patent holdup, the head of the Department of Justice's Antitrust Division, Makan Delrahim, has staked out a uniquely aggressive position that relies on absolutist conceptions of property. This Part first discusses Delrahim's views on patents, injunctions, holdup, and antitrust. It then rebuts each of these points.

---

11. Michael A. Carrier, *Why Antitrust Should Defer to the Intellectual Property Rules of Standard-Setting Organizations: A Commentary on Teece and Sherry*, 87 MINN. L. REV. 2019, 2034 (2003).

12. Jorge Contreras & Meredith Jacob, *Standards-Essential Patents and FRAND Licensing*, PIJIP, <http://www.pijip.org/standards-essential-patents-and-frand-licensing/> [<https://perma.cc/73NW-Y4RE>] (last visited Nov. 14, 2019).

13. See, e.g., *FTC v. Qualcomm Inc.*, No. 5:17-CV-00220-LHK, 2019 WL 2206013, at \*1, \*10 (N.D. Cal. May 21, 2019); *Motorola Mobility LLC and Google Inc.; Analysis of Proposed Consent Order to Aid Public Comment*, 78 Fed. Reg. 2398, 2400 (Jan. 11, 2013); Press Release, Fed. Trade Comm'n, *FTC Order Restores Competition in U.S. Market for Equipment Used to Recharge Vehicle Air Conditioning Systems* (Nov. 26, 2012), <https://www.ftc.gov/news-events/press-releases/2012/11/ftc-order-restores-competition-us-market-equipment-used-recharge> [<https://perma.cc/L4XX-GTZ3>]; Press Release, Fed. Trade Comm'n, *FTC Challenges Patent Holders' Refusal to Meet Commitment to License Patents Covering 'Ethernet' Standard Used in Virtually All Personal Computers in U.S.* (Jan. 23, 2008), <https://www.ftc.gov/news-events/press-releases/2008/01/ftc-challenges-patent-holders-refusal-meet-commitment-license> [<https://perma.cc/DV62-US7W>]; *In re Rambus*, 2006-2 Trade Cas. (CCH) ¶ 75,364, 2006 WL 2330117 (Fed. Trade Comm'n Aug. 2, 2006), available at <https://www.ftc.gov/sites/default/files/documents/cases/2006/08/060802commissionopinion.pdf> [<https://perma.cc/DL3A-B3RL>]; *In re Union Oil Co. of Cal.*, 138 F.T.C. 1, 45 (2003); *In re Dell*, 121 F.T.C. 616, 624 (1996).

### A. *The Edifice*

Assistant Attorney General (AAG) Delrahim’s absolutist edifice is constructed on four pillars.

First, Delrahim emphasizes the “core of what it means to hold an IP right—namely, the right to exclude.”<sup>14</sup> Patents are “a form of property, and the right to exclude is one of the most fundamental bargaining rights a property owner possesses.”<sup>15</sup> Patent rights “function best if an owner retains a right to exclude,” and “[d]epriving a patent holder of this right would skew the bargain away from the free-market incentive scheme that the Constitution and Congress have established.”<sup>16</sup>

Delrahim turns for support to the Constitution’s text, which provides that “Congress shall have the Power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the *exclusive right* to their respective writings and discoveries.”<sup>17</sup> Delrahim asserts that “the authors of the Constitution not only used the word ‘right,’ but . . . also preceded it with the equally important word ‘exclusive.’”<sup>18</sup> And he states that patent law “offer[s] incentives for holders of valid patents to seek the greatest rewards possible for their inventions.”<sup>19</sup> In underscoring the importance of absolute exclusionary rights and ignoring the *utilitarian* justification that

14. Makan Delrahim, Assistant Att’y Gen., Antitrust Div., The “New Madison” Approach to Antitrust and Intellectual Property Law 12 (Mar. 16, 2018) (transcript available at <https://www.justice.gov/opa/speech/file/1044316/download> [<https://perma.cc/TW2B-LMC4>]) [hereinafter Delrahim, Penn Speech].

15. Makan Delrahim, Assistant Att’y Gen., Antitrust Div., Take It to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law 12 (Nov. 10, 2017) (transcript available at <https://www.justice.gov/opa/speech/file/1010746/download> [<https://perma.cc/743B-HNYN>]) [hereinafter Delrahim, USC Speech].

16. Makan Delrahim, Assistant Att’y Gen., Antitrust Div., Protecting Free-Market Patent Bargaining, Competition, and the Right to Exclude 6 (Oct. 10, 2018) (transcript available at <https://www.justice.gov/opa/speech/file/1100016/download> [<https://perma.cc/2QV5-H6MR>]) [hereinafter Delrahim, Ottawa Speech].

17. Makan Delrahim, Assistant Att’y Gen., Antitrust Div., “Telegraph Road”: Incentivizing Innovation at the Intersection of Patent and Antitrust Law 2 (Dec. 7, 2018) (transcript available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-19th-annual-berkeley-stanford> [<https://perma.cc/D6ZH-KVW5>]) [hereinafter Delrahim, Palo Alto Speech] (quoting U.S. CONST. art. I, § 8, cl. 8) (emphasis added).

18. *Id.*

19. Makan Delrahim, Assistant Att’y Gen., Antitrust Div., Antitrust Law and Patent Licensing in the New Wild West 10 (Sep. 18, 2018) (transcript available at <https://www.justice.gov/opa/speech/file/1095011/download> [<https://perma.cc/6Q82-SCGW>]) [hereinafter Delrahim, San Francisco Speech].

links these rights with societal welfare, Delrahim's position implicates a *natural rights* justification for property.<sup>20</sup>

AAG Delrahim's second pillar centers on injunctions. A patentee's ability to obtain an injunction against infringement "gives it necessary leverage in a free market negotiation."<sup>21</sup> The "right to seek an injunction" is "enshrined in the Constitution as a foundation of free market negotiations for patented inventions."<sup>22</sup> Understanding "patent rights, once conferred, as a form of property right helps frame the current debate over injunctions, and demonstrates how far we've strayed off course."<sup>23</sup> In other words, "a violation by a patent holder of an SSO rule that restricts a patent-holder's right to seek injunctive relief should be appropriately the subject of a contract or fraud action, and rarely if ever should be an antitrust violation."<sup>24</sup>

Third, Delrahim claims that the notion of patent holdup is overblown. He states that "in recent years, competition policy has focused too heavily on the so-called unilateral hold-up problem, often ignoring what fuels dynamic innovation and efficiency."<sup>25</sup> In fact, he laments that "[e]very incremental shift in bargaining leverage toward implementers of new technologies acting in concert can undermine incentives to innovate."<sup>26</sup>

Delrahim worries that "[t]oo often lost in the debate over the hold-up problem is recognition of a more serious risk: the hold-out problem."<sup>27</sup> He warns that "implementers threaten to under-invest in the implementation of a standard . . . until their royalty demands are met."<sup>28</sup> This problem is "a more serious impediment to innovation" because (in contrast to implementers, some of whose investments "occur after royalty rates for new technology could have been determined"), innovators "make an investment before they know whether that investment will ever pay off."<sup>29</sup>

---

20. Delrahim's articulations of property are troubling from both a descriptive and a normative perspective. His attempts to provide a descriptive account of what property *is* are not accurate. See discussion *infra* Section III.B. But even if he were suggesting a normative perspective of what property law *should be*, this would ignore the robust and long-standing reasons for property's limits, which serve important public policy goals that courts have long held to limit property's exclusionary rights. See, e.g., *Graham v. John Deere Co.*, 383 U.S. 1, 5–6 (1966).

21. Delrahim, Ottawa Speech, *supra* note 16, at 8.

22. *Id.* at 9 (emphasis omitted).

23. Delrahim, Penn Speech, *supra* note 14, at 13.

24. Delrahim, USC Speech, *supra* note 15, at 11–12.

25. *Id.* at 6.

26. *Id.*

27. *Id.* at 5.

28. *Id.*

29. *Id.*

Fourth, Delrahim disclaims a role for antitrust. He states that “patent hold-up is not an antitrust problem”<sup>30</sup> and that “a unilateral refusal to license a valid patent should be per se legal.”<sup>31</sup> A patent holder “cannot violate the antitrust laws by properly exercising the rights patents confer, such as seeking an injunction or refusing to license such a patent.”<sup>32</sup> Nor should a “unilateral violation of a FRAND commitment . . . give rise to a cause of action under Section 2 of the Sherman Act, even if a patent holder is alleged to have misled or deceived a[n] [SSO] with respect to its licensing intentions.”<sup>33</sup> The reason is that “[a]pplying Section 2 to this sort of unilateral conduct would contravene the underlying policies of the antitrust laws.”<sup>34</sup>

The fact that “a patent holder can derive higher licensing fees through hold-up simply reflects basic commercial reality,” and “[c]ondemning this practice . . . as an antitrust violation, while ignoring equal incentives of implementers to ‘hold out,’ risks creating ‘false positive’ errors of over-enforcement that would discourage valuable innovation.”<sup>35</sup> A monopolization cause of action “would skew the patent licensing bargain away from the bargaining outcome that a free market dictates.”<sup>36</sup> It “would be a mistake to infer that a contractual FRAND commitment somehow establishes a duty under the antitrust laws to license on terms demanded by a licensee or that violations of an ambiguous FRAND term become an antitrust violation.”<sup>37</sup> And even deception to an SSO “is not the sort of market-power-enhancing conduct that Section 2 should reach because a cause of action for treble damages would impede the policies underlying the Sherman Act.”<sup>38</sup>

### B. *The Flaws*

Each of AAG Delrahim’s pillars is hobbled by flaws.

First, the right to exclude is not sacrosanct. As I discuss in detail in Part IV, property owners do not have absolute rights to

30. Delrahim, Penn Speech, *supra* note 14, at 6.

31. Delrahim, USC Speech, *supra* note 15, at 8 (emphasis omitted); *see also* Delrahim, Penn Speech, *supra* note 14, at 5.

32. Delrahim, USC Speech, *supra* note 15, at 8.

33. Delrahim, San Francisco Speech, *supra* note 19, at 5.

34. *Id.* at 5–6.

35. Delrahim, Penn Speech, *supra* note 14, at 8.

36. Delrahim, San Francisco Speech, *supra* note 19, at 2, 12.

37. *Id.* at 8.

38. *Id.* at 11; *see also* Delrahim, Penn Speech, *supra* note 14, at 9–10 (“I worry that courts and enforcers have overly indulged theories of patent holdup as a supposed competition problem, while losing sight of the basic policies of antitrust law.” (footnote omitted)).

exclude. There are at least fifty doctrines that limit property owners' rights. Just to mention one, landowners cannot prevent others from entering their land to save lives or property or to avoid some other serious harm.<sup>39</sup>

Delrahim's treatment of patents as natural property rights ignores the uncontroversial utilitarian framework for the patent grant. The U.S. Supreme Court has long made clear the primacy of the utilitarian justification. Half a century ago, for example, the Court in *Graham v. John Deere* explained that "[t]he patent monopoly was not designed to secure to the inventor his natural right in his discoveries," but instead was "a reward, an inducement, to bring forth new knowledge" and was to be granted only to "inventions and discoveries which furthered human knowledge."<sup>40</sup>

Exclusive rights exist not to bestow upon patentees a moral right to a reward but to promote the best interests of society. That is why patents, like other forms of intellectual property, are subject to doctrines (like novelty, nonobviousness, the written-description and enablement disclosure requirements, and a limited 20-year term) that ensure that protections for market competition balance patents' incentive effects.

A focus on exclusionary natural rights is also inconsistent with several Supreme Court rulings. In upholding the Patent Office's *inter partes* review process for administratively reconsidering patents, the Court made clear that "[p]atents convey only a specific form of property right—a public franchise."<sup>41</sup> In *FTC v. Actavis*, the Court explained that antitrust has a role to play within the scope of the patent, as "it would be incongruous to determine antitrust legality by measuring [a] settlement's anticompetitive effects solely against patent law policy, rather than by measuring them against procompetitive antitrust policies as well."<sup>42</sup> And in *Lear v. Adkins*, the Court eliminated licensee estoppel, finding that a licensee could challenge patent validity even after licensing the patent.<sup>43</sup>

Second, the position that patent infringement automatically leads to an injunction is, for good reason, no longer the law. More than a decade ago, the Supreme Court ruled unequivocally that

39. See *infra* notes 76–78 and accompanying text.

40. *Graham v. John Deere Co.*, 383 U.S. 1, 9 (1966).

41. *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1375 (2018); see also *id.* at 1373 ("[T]he decision to *grant* a patent . . . involv[es] public rights . . .").

42. *FTC v. Actavis, Inc.*, 570 U.S. 136, 148 (2013).

43. *Lear, Inc. v. Adkins*, 395 U.S. 653, 670–71 (1969).

courts must decide whether to grant injunctions “consistent with traditional principles of equity, in patent disputes no less than in other cases . . . .”<sup>44</sup> To similar effect, the patent statute provides that courts “may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.”<sup>45</sup> In fact, the Federal Circuit, not historically associated with insufficient protection of patent rights, has made clear that the framework the Supreme Court set forth in *eBay v. MercExchange* “provides ample strength and flexibility for addressing the unique aspect of FRAND committed patents and industry standards in general.”<sup>46</sup> Because there could be thousands of patents in a product today, it is not appropriate to uniformly apply standards from the 18th century when tangible inventions were the focus and there were so few patents in a product that “if you put technology in a bag and shook it, it would make . . . noise.”<sup>47</sup>

Third, the holdup problem has been recognized by courts and SSOs themselves as a real problem. As one court stated, patent holdup is not a theoretical concern, but instead “is a substantial problem that [F]RAND is designed to prevent.”<sup>48</sup> And a second court rejected the argument that “hold up does not exist in the real world,” finding that such an argument “does not trump the evidence . . . that hold up took place in this case.”<sup>49</sup>

Similarly, former FTC Commissioner Terrell McSweeney pointed to “ample evidence” of patent holdup, including FTC enforcement actions, acknowledgement of the problem by panelists at FTC/DOJ hearings, “strong anecdotal support,” and courts concluding that patentees “demand[ed] far more than that to which they were entitled,” with courts in two cases awarding only 1/150 and 1/500 of the royalties sought.<sup>50</sup> The fact that SSOs—those with the most knowledge of the issues—adopt

44. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 394 (2006).

45. 35 U.S.C. § 283 (2012).

46. *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1332 (Fed. Cir. 2014), *overruled on other grounds by Williamson v. Citrix Online, LLC*, 792 F.3d 1339 (Fed. Cir. 2015).

47. Robert P. Merges, *As Many as Six Impossible Patents Before Breakfast: Property Rights for Business Concepts and Patent System Reform*, 14 BERKELEY TECH. L.J. 577, 585 (1999).

48. *In re Innovatio IP Ventures*, No. 11 C 9308, 2013 WL 5593609, at \*8–9 (N.D. Ill. Oct. 3, 2013).

49. *Microsoft Corp. v. Motorola, Inc.*, No. C10-1823JL R, 2013 WL 5373179, at \*7 (W.D. Wash. Sept. 24, 2013).

50. Terrell McSweeney, Former Comm’r, Fed. Trade Comm’n, *Holding the Line on Patent Holdup: Why Antitrust Enforcement Matters 4* (Mar. 21, 2018), [https://www.ftc.gov/system/files/documents/public\\_statements/1350033/mcsweeney\\_-\\_the\\_reality\\_of\\_patent\\_hold-up\\_3-21-18.pdf](https://www.ftc.gov/system/files/documents/public_statements/1350033/mcsweeney_-_the_reality_of_patent_hold-up_3-21-18.pdf) [<https://perma.cc/CYG7-D2GW>].

FRAND policies is itself telling proof that holdup is a problem. Otherwise, it is not clear why they would adopt policies to prevent holdup.<sup>51</sup>

Officials in both Republican and Democratic administrations have also consistently acknowledged the anticompetitive harms of patent holdup. The unanimously adopted 2007 joint report of the Department of Justice and Federal Trade Commission explained the difference between a patentee's power *ex ante* (when "multiple technologies may compete to be incorporated into the standard") and *ex post* (when "the chosen technology may lack effective substitutes precisely because the SSO chose it as the standard").<sup>52</sup> This disparity allows a patentee to "extract higher royalties or other licensing terms that reflect the absence of competitive alternatives."<sup>53</sup> The FTC also unanimously endorsed a 2011 Report that highlighted how "an entire industry" could be "susceptible" to the "particularly acute" concern of holdup, which can result in "higher prices" and "discourage standard setting activities and collaboration, which can delay innovation."<sup>54</sup>

Finally, *holdup* presents a more serious antitrust concern than *holdout*. Implementers that suffer holdup because of sunk investments in a technology are vulnerable to paying supra-competitive royalties based on the entire value of the product as

51. TIMOTHY J. MURIS, AM. ENTER. INST., BIPARTISAN PATENT REFORM AND COMPETITION POLICY 9 (2017), <http://www.aei.org/wp-content/uploads/2017/05/Bipartisan-Patent-Reform-and-Competition-Policy.pdf> [<https://perma.cc/Z3DR-N6TQ>].

52. U.S. DEPT. OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 35–36 (2007), <https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf> [<https://perma.cc/9UFQ-RYXT>]; *see also* McSweeney, *supra* note 50, at 1 (noting "patent holdup [has] long been an area of bipartisan agreement").

53. U.S. DEPT. OF JUSTICE & FED. TRADE COMM'N, *supra* note 52; *see also id.* at 37–38 (quoting a witness who stated that holdup results in "either [not] mak[ing] the standard or . . . acced[ing] to the . . . blackmail").

54. FED. TRADE COMM'N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION 234 (2011), <https://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf> [<https://perma.cc/WXK8-CXYZ>]. Similarly, former FTC Commissioner McSweeney lamented the DOJ's "unlearn[ing] the lessons of over 15 years of scholarship and bipartisan study and question[ed] their longstanding support for combatting holdup based on vague concerns about over-deterrence." McSweeney, *supra* note 50, at 1. And FTC Chairman Joe Simons has stated that "hold-up raises potential antitrust issues" and that "there is no special privilege or exemption under the antitrust laws for fraud, deception, or breaches of contract merely because those acts occurred in a standard-setting process." Joseph Simons, Chairman, Fed. Trade Comm'n, Prepared Remarks at the Georgetown Law Global Antitrust Enforcement Symposium 6 (Sept. 25, 2018), [https://www.ftc.gov/system/files/documents/public\\_statements/1413340/simons\\_georgetown\\_lunch\\_address\\_9-25-18.pdf](https://www.ftc.gov/system/files/documents/public_statements/1413340/simons_georgetown_lunch_address_9-25-18.pdf) [<https://perma.cc/9BQK-YTTU>].

opposed to the value of the patented technology.<sup>55</sup> In contrast, the risks faced by innovators who complain about licensees “holding out” are consistent with the situation facing “anyone . . . that makes a speculative investment, whether in technology, real estate, corporate securities, or any other industry.”<sup>56</sup>

To be sure, coordinated action between licensees could implicate antitrust, but these concerns are not presented in licensing disputes at the core of holdout. Both licensors and licensees can engage in holdout merely by “refus[ing] to perform in good faith or negotiate reasonably.”<sup>57</sup> In contrast, the holdup problem, and accompanying lock-in binding implementers, exist on only one side of the exchange.<sup>58</sup>

Fourth, patentees that obtain or maintain monopoly power *as a result of* breaching a FRAND commitment present a straightforward monopolization case.<sup>59</sup> FRAND breaches could satisfy the elements of monopolization, in particular, the requirement that a plaintiff demonstrate exclusionary conduct by showing (1) an exclusion of competitors (the exclusion of rival competitive technologies not chosen by the SSO) (2) that results in competitive injury (price increases and innovation harms from the breach) and (3) acquisition or maintenance of monopoly power (obtained through the breach).<sup>60</sup> In addition, antitrust liability does not take aim only at a patentee’s right to exclude but instead is on the table because of the *voluntary commitment* to license on FRAND terms.

Moreover, the conduct here is not immune from the application of antitrust law. Parties often claim, pursuant to the *Noerr-Pennington* doctrine, that “[t]hose who petition [the] government for redress are generally immune from antitrust liability.”<sup>61</sup> But the “absolutist position” that the *Noerr* doctrine “immunizes every concerted effort that is genuinely intended to

55. A. Douglas Melamed & Carl Shapiro, *How Antitrust Law Can Make FRAND Commitments More Effective*, 127 YALE L.J. 2110, 2119 (2018).

56. *Id.*; see also *id.* (“Requiring that buyers guarantee an adequate return to those who make speculative investments would be antithetical to the operation of the market system and would badly distort investment incentives.”).

57. MURIS, *supra* note 51, at 9.

58. See *id.*

59. *E.g.*, *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007); *Microsoft Mobile Inc. v. Interdigital, Inc.*, No. 15-723-RGA, 2016 WL 1464545, at \*2 (D. Del. Apr. 13, 2016). Relatedly, seeking an injunction against a licensee willing to pay a FRAND rate—such as where LSI sought an exclusion order in the U.S. International Trade Commission before proposing a FRAND license to Realtek—can constitute monopolization. *Realtek Semiconductor Corp. v. LSI Corp.*, 946 F. Supp. 2d 998, 1007–08 (N.D. Cal. 2013).

60. *E.g.*, *Microsoft*, 2016 WL 1464545, at \*2 (citing *Broadcom*, 501 F.3d at 314–15).

61. *Prof'l Real Estate Inv'rs v. Columbia Pictures Indus.*, 508 U.S. 49, 56 (1993).

influence governmental action” would give parties free rein to violate the antitrust laws, for example by being “free to enter into horizontal price agreements.”<sup>62</sup> A breach of a FRAND promise is “distinguish[able] . . . from *Noerr* and its progeny” because it is “the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves.”<sup>63</sup>

In short, each of the pillars on which AAG Delrahim relies has significant weaknesses. Perhaps the most fundamental flaw stems from his invocation of absolutist property, a concept that, as the next Part shows, is divorced from reality.

#### IV. PROPERTY

Discussions of property today sometimes focus on absolute rights. But, in fact, numerous limits restrict property, which is often viewed as consisting of a “bundle of rights.”<sup>64</sup> The foundational rights of property law are widely recognized to consist of the right to exclude, the right to transfer, and the right to use.<sup>65</sup> Among these, the right to exclude is typically considered the most important.<sup>66</sup> The right to transfer allows the conveyance of property to those who can use it most productively.<sup>67</sup> And the

62. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 503 (1988).

63. *Id.* at 505; *see also* *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 424–25 (1990) (reaffirming the limits to the *Noerr* doctrine set in *Allied*, 486 U.S. at 503).

64. *See, e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (landowners receive a “bundle of rights” . . . when they obtain title to property”); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 n.6 (1980) (“The term ‘property’ as used in the Taking Clause includes the ‘entire group of rights inhering in the citizen’s [ownership].” (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945))); *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (“[T]he destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.”).

65. *See, e.g.*, JEREMY WALDRON, *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 14 (Dennis Patterson ed., 2d ed. 2010) (calling these rights “the most striking incidents of ownership”); Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 *STAN. L. REV.* 1343, 1354 (1989) (arguing that the three rights are at the heart of courts’ and laypersons’ understandings of property). To be precise, “use” is a privilege rather than a right. *See* Gordon, *supra*, at 1359 (“A privilege is an entitlement to be free of governmental interference or compulsion.”). I refer to it as a right for ease of reference.

66. *See* *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (“[O]ne of the most essential sticks in the bundle of rights that are commonly characterized as property [is] the right to exclude others.”); *see also* Thomas W. Merrill, *Property and the Right to Exclude*, 77 *NEB. L. REV.* 730, 741–52 (1998) (advocating primacy of the right to exclude based on logic, history, and ubiquity). *But see* Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 *ARIZ. L. REV.* 371, 375–76 (2003) (arguing that exclusion theory “fails in producing a concept of property that can serve as a viable, substantive foundation for our property doctrines”); Carol M. Rose, *Canons of Property Talk, or, Blackstone’s Anxiety*, 108 *YALE L.J.* 601, 631–32 (1998) (critiquing notion of property as right to exclude).

67. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 33 (6th ed. 2003) (arguing that

right to use envelopes not only use but also other rights that sometimes are considered separately, such as rights of access, extraction, and management.<sup>68</sup>

In other work, I have described fifty limits to these rights.<sup>69</sup> In this Article I focus on fifteen, describing particularly important limits on the right to exclude, the right to transfer, and the right to use. The central thesis of Part IV is that each of the three central property rights are cabined by an array of limits.<sup>70</sup> This Part focuses on real property, but the same principles apply to personal property. Just to give one example, in rejecting the claim that the exercise of lawfully acquired IP rights cannot give rise to antitrust liability, the D.C. Circuit explained in *United States v. Microsoft* that such an assertion is “no more correct” than the claim that “use of one’s personal property, such as a baseball bat, cannot give rise to tort liability,” as IP rights “do not confer a privilege to violate the antitrust laws.”<sup>71</sup>

#### A. *Limits on Right to Exclude*

The right to exclude is subject to numerous limits. I discuss five such limits in this Section: easements, imminent necessity, the public trust doctrine, encroachment law, and restrictions on the rule of capture.

An easement is an interest in land that allows a person to use land owned by another.<sup>72</sup> Easements can be express or implied. *Express easements* appear explicitly in written instruments such as deeds and wills.<sup>73</sup> *Easements implied from an apparent and continuous use* occur when one part of a formerly united tract of

---

the right to transfer furthers efficiency); WALDRON, *supra* note 65, at 13 (explaining that right to transfer allows self-perpetuation of system of private property).

68. See Charlotte Hess & Elinor Ostrom, *Ideas, Artifacts, and Facilities: Information as a Common-Pool Resource*, 66 LAW & CONTEMP. PROBS. 111, 124 (2003) (defining access as “[t]he right to enter a defined physical area and enjoy nonsubtractive benefits,” extraction as “[t]he right to obtain resource units or products of a resource system,” and management as “[t]he right to regulate internal use patterns and transform the resource by making improvements”). The limits on various subsets of use-related rights are similar enough—and the resultant complexity of separate categorization confusing enough—that a general right of use suffices for the purposes of this Article.

69. See generally Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1 (2004).

70. To be sure, the limits themselves sometimes have limits. For example, an easement by necessity applies only where the two relevant tracts were once held by a common owner and the necessity arose at the time the tracts were severed. *E.g.*, *United States v. Town of Lincoln Zoning Bd. of Appeals*, No. 12-10179-LTS, 2014 WL 3696026, at \*9 (D. Mass. July 22, 2014).

71. *United States v. Microsoft Corp.*, 253 F.3d 34, 63 (D.C. Cir. 2001).

72. 7 THOMPSON ON REAL PROPERTY § 60.02(a) (David A. Thomas ed., 2d ed. 2006).

73. 4 POWELL ON REAL PROPERTY § 34.04[1] (Michael Allen Wolf ed., 2019).

land is used for the benefit of another part; an underground sewer pipe is a typical example.<sup>74</sup> *Easements by necessity* make landlocked land available to the market and allow owners to leave their property.<sup>75</sup> Each of these express and implied easements limits the ability of landowners to exclude others from their land.

*Imminent necessity* privileges entry onto another's land to save lives or property or to avoid other serious harm.<sup>76</sup> Accepted justifications include avoiding an imminent public disaster, fleeing from an attacking animal, reclaiming or removing chattel that has entered the property, abating a private nuisance, and executing a court order.<sup>77</sup> The privilege also extends to "a firefighter putting out a fire and a police officer in hot pursuit of a fleeing suspect or making an arrest for a criminal offense."<sup>78</sup> Each of these important purposes counsels limits on the owner's right to exclude.

States also exercise control over land pursuant to the *public trust* doctrine. This doctrine makes states trustees of navigable waters to preserve the public's right to use the waters for commerce, fishing, navigation, and recreational activities.<sup>79</sup> The doctrine provides rights of access over private property to reach beaches or public waters. Courts traditionally reserved for the public the area between the ocean and wet-sand areas of the beach, and they later extended this area to the dry sand.<sup>80</sup> In addition, courts have applied the doctrine to wildlife, marshlands, historical areas, cemeteries, and archeological sites.<sup>81</sup>

The law of *encroachments* limits the right to exclude by preventing courts from issuing an injunction when parts of buildings or other structures intrude onto others' lands. In particular, modern courts will not enjoin encroachments that are minimal, that would be costly to remove, and that result from innocent mistakes.<sup>82</sup> For example, one court refused to issue an

74. See, e.g., *Van Sandt v. Royster*, 83 P.2d 698, 703 (Kan. 1938).

75. 4 POWELL, *supra* note 73, § 34.07[1].

76. RESTATEMENT (SECOND) OF TORTS § 197(1) (AM. LAW INST. 1965).

77. *Carrier*, *supra* note 69, at 66 nn.295–300.

78. *Id.* at 66–67.

79. 9 POWELL, *supra* note 73, § 64A.04[3][g].

80. E.g., *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 368–69 (N.J. 1984).

81. See Maureen Ryan, *Cyberspace as Public Space: A Public Trust Paradigm for Copyright in a Digital World*, 79 OR. L. REV. 647, 698 (2000) (collecting cases).

82. E.g., Olivia Leigh Weeks, Comment, *Much Ado About Mighty Little – North Carolina and the Application of the Relative Hardship Doctrine to Encroachments of Permanent Structures on the Property of Another*, 12 CAMPBELL L. REV. 71, 74–77 (1989). A court may issue an injunction if there is willful encroachment. See, e.g., 1 AM. JUR. 2D *Adjoining Landowners* § 125 (2019).

injunction when a high-rise parking garage encroached a total of 1.3 square feet onto the plaintiff's property and reduced the property's market value by \$200, but would have cost the defendant \$500,000 to remove.<sup>83</sup>

A final limit involves restrictions on the rule of capture. All states today have adopted hunting laws that impose limits on capturing wild animals, such as licenses and hunting seasons.<sup>84</sup> The capture of oil and natural gas has been restricted by conservation laws such as those dictating the spacing of wells and providing for the coordinated development of reservoirs.<sup>85</sup> Judicial limitations on owners of riverbanks (riparian owners), allowing them to take surface waters<sup>86</sup> only for "reasonable uses" that do not unreasonably interfere with the uses and needs of others, promote the long-term development of the resource.<sup>87</sup> And doctrines of reasonable use embraced in Eastern and Midwestern states<sup>88</sup> prevent uses of groundwater that unreasonably injure other lawful users.<sup>89</sup>

### B. *Limits on Right to Transfer*

In addition to limits on rights to exclude, courts and legislatures have also recognized numerous limits on the right to transfer. Some of those limits are adverse possession, the unenforceability of restraints on alienation, eminent domain, the refusal to enforce racial covenants, and antidiscrimination statutes.

An absolute right to transfer would guarantee an owner's right *not* to transfer. The doctrine of *adverse possession* intrudes upon this right, forcing a transfer when the possessor can

83. *Urban Site Venture II Ltd. v. Levering Assocs. Ltd.*, 665 A.2d 1062, 1063, 1065 (Md. 1995).

84. Rance L. Craft, *Of Reservoir Hogs and Pelt Fiction: Defending the Ferae Naturae Analogy Between Petroleum and Wildlife*, 44 EMORY L.J. 697, 726 (1995).

85. *Id.* at 730–32; see Dean Lueck, *The Rule of First Possession and the Design of the Law*, 38 J.L. & ECON. 393, 426 (1995) (noting that most oil- and gas-producing states use well-spacing laws to prevent the depletion of neighboring lands and require the development of reservoirs if most surface owners agree).

86. "Surface waters" are found "in defined bodies or diffused surface waters." Joseph W. Dellapenna, *The Law of Water Allocation in the Southeastern States at the Opening of the Twenty-First Century*, 25 U. ARK. LITTLE ROCK L. REV. 9, 41 (2002).

87. 6 THOMPSON, *supra* note 72, § 50.08(k).

88. See Dylan O. Drummond, *Texas Groundwater Law in the Twenty-First Century: A Compendium of Historical Approaches, Current Problems, and Future Solutions Focusing on the High Plains Aquifer and the Panhandle*, 4 TEX. TECH J. TEX. ADMIN. L. 173, 198 (2003) (listing Arizona, Illinois, Iowa, Kentucky, Maryland, Michigan, New Hampshire, New York, Ohio, Pennsylvania, Washington, and West Virginia as states following the reasonable use rule).

89. Dellapenna, *supra* note 86, at 44.

demonstrate certain requirements. The typical elements a plaintiff must prove are (1) possession that is (2) open and notorious, (3) hostile, (4) continuous, and (5) exclusive (6) for the statute of limitations period.<sup>90</sup> Adverse possession serves purposes such as clearing stale claims, quieting title, recognizing the possessor's ties to the land, and encouraging the development of land.<sup>91</sup> For any of these purposes, the doctrine forces the transfer of land from its owner.

Limits also cabin the conditions of transfer. For example, courts typically strike down *total restraints on alienation*, which prevent the transfer of property interests.<sup>92</sup> Such restraints make property unmarketable, prevent it from being used by others who would have a greater ability to develop the land, and discourage improvements to land.<sup>93</sup> *Partial restraints on alienation* prevent the transfer of an interest for a certain period of time or limit the range of potential transferees.<sup>94</sup> And most courts invalidate *temporal restraints*, which present some of the same dangers as total alienation restraints.<sup>95</sup>

A much-discussed limit on the right to transfer is the power of *eminent domain*. Pursuant to this power, landowners must transfer their interests to the government. An essential element of sovereignty, eminent domain allows states to appropriate private property to promote the general welfare of society.<sup>96</sup> Historically, the government employed this power only for purposes such as military bases, post offices, highways, parks, and schools. Subsequently, however, the government invoked eminent domain for urban renewal, land redistribution, and commercial, industrial, and housing development.<sup>97</sup> In 2005, the Supreme Court, in *Kelo v. City of New London*, held that economic development can demonstrate the “public use” necessary for the government's exercise of eminent domain.<sup>98</sup> In the wake of *Kelo*,

90. 2 THOMPSON, *supra* note 72, § 87.05, at 111–14.

91. See, e.g., 14 POWELL, *supra* note 73, § 91.01[4], at 91-10 (clearing stale claims); Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 135 (1918) (quieting title); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476–77 (1897) (personhood theory); John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 816 (1994) (promoting development).

92. 10 POWELL, *supra* note 73, § 77.02, at 77-7 to -8.

93. See 3 THOMPSON, *supra* note 72, § 29.03(b), at 706–08.

94. See 10 POWELL, *supra* note 73, § 77.03, at 77-9.

95. *Id.* at n.1 (collecting cases).

96. 9 THOMPSON, *supra* note 72, § 80.01(b)(1)–(2), at 283–84.

97. JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW § 39.01, at 664 (3d. ed. 2012).

98. *Kelo v. City of New London*, 545 U.S. 469, 489 (2005). The *Kelo* case relied in part

many state legislatures limited such power, but eminent domain nonetheless remains a limit on the right to transfer.<sup>99</sup>

Another example of a limit on transfer involves the courts' refusal to enforce *racial covenants*. Such a rule inhibits segregation and advances social justice. In the seminal case of *Shelley v. Kraemer*, the Supreme Court prohibited judicial enforcement of racial covenants, holding that such enforcement violated the Equal Protection Clause of the Fourteenth Amendment.<sup>100</sup> The doctrine thus denies owners the right to refuse to transfer property for reasons relating to a person's race.

*Antidiscrimination statutes* provide the final, related example. The Fair Housing Act (Title VIII of the Civil Rights Act of 1968) prohibits the refusal to sell or rent a dwelling on the grounds of "race, color, religion, sex, familial status, or national origin."<sup>101</sup> The Civil Rights Act of 1866 provides that all United States citizens "shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property."<sup>102</sup> Additionally, several states have barred discrimination on the basis of marital status or sexual orientation.<sup>103</sup>

### C. *Limits on Right to Use*

The final set of limits restricts landowners' rights to use. Such limits include zoning, nuisance, takings, government regulations, and lateral support.

One ubiquitous limit on use, affecting nearly all land in the United States, is *zoning*. Zoning ordinances typically divide land into residential, commercial, and industrial districts and allow only certain uses in each district.<sup>104</sup> Zoning has expanded far beyond its initial compass as an early-20th-century response to the

---

on *Hawaii Housing Authority v. Midkiff*, in which the Court upheld the state's attempt to "reduce the perceived social and economic evils of a land oligopoly" that "created artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes." Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241–42 (1984).

99. NCC Staff, *Eminent Domain Still Under Fire*, CONST. DAILY BLOG (June 23, 2017), <https://constitutioncenter.org/blog/ten-years-later-eminant-domain-still-under-fire> [https://perma.cc/PXB3-7FHN].

100. *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

101. 42 U.S.C. § 3604(a) (2012).

102. 42 U.S.C. § 1982 (2012).

103. See, e.g., *Smith v. Fair Emp't & Hous. Comm'n*, 913 P.2d 909, 917–18 (Cal. 1996) (marital status); *Poff v. Caro*, 549 A.2d 900, 904 (N.J. Super. Ct. Law Div. 1987) (sexual orientation); *Braschi v. Stahl Assocs.*, 543 N.E.2d 49, 55 (N.Y. 1989) (familial status of same-sex partner).

104. See 12 POWELL, *supra* note 73, § 79C.01, at 79C-7 to -8.

“[s]moke, odors, noise, disease, filth, [and] overcrowding” of urban areas.<sup>105</sup> Today it serves to increase safety, promote health and welfare, conserve natural resources, maintain community purposes, and encourage the most appropriate use of land.<sup>106</sup>

The law of *nuisance* provides another limit on the use of land. A nuisance is a substantial and unreasonable interference with another’s use or enjoyment of land, and often takes the form of noise, odors, or pollution.<sup>107</sup> Interference with another’s use of land is unreasonable, according to the Restatement (Second) of Torts, if “the gravity of the harm outweighs the utility of the actor’s conduct.”<sup>108</sup> Protecting land against unreasonable interference—which often manifests itself in unpleasantness, discomfort, and danger—ensures that landowners’ investment in property will not be dissipated.<sup>109</sup>

Landowners’ rights to use their property also yield to governmental actions and regulations. This issue often arises in the area of *takings* jurisprudence. Takings law determines the point at which government restrictions interfere so much with private owners’ use of land that the land is effectively “taken” from owners and the government must pay “just compensation.”<sup>110</sup> Although takings doctrine presents one of the thorniest areas of property law, it also illustrates limits on the right to use property.

Even *government regulations* that do not reach the level of takings restrict owners’ use of property. The range of conceivable regulations is all-encompassing, including safety, fire, health, and building codes; zoning ordinances; wetlands, shorelands, and greenbelt ordinances; clean air and water acts; growth control ordinances; and historic protection zones.<sup>111</sup>

A final limitation on the right to use is the obligation of *lateral support* that neighbors owe to each other. The doctrine of lateral support grants landowners the right to be free from the collapse of their land caused by the excavations of their neighbors’ land.<sup>112</sup> Heightening this obligation is the need to provide artificial support and the application of the obligation to successive owners of

105. SPRANKLING, *supra* note 97, § 36.03(B)(1), at 611.

106. 12 POWELL, *supra* note 73, § 79C.03[2], at 79C-41 to -54.

107. *Id.* § 64.02[2]–[3], at 64-9 to -11.

108. RESTATEMENT (SECOND) OF TORTS § 826(a) (AM. LAW INST. 1979).

109. JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY § 3.1, at 102 (2d ed. 2005).

110. The Fifth Amendment provides: “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

111. WILLIAM B. STOEBOCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 9.1, at 518 (3d ed. 2000).

112. 9 POWELL, *supra* note 73, § 63.01.

excavated land.<sup>113</sup> In preventing the collapse of dwellings, the doctrine of lateral support demonstrates an obvious limit on the right to use land.

*D. Synthesis on Limits*

The rights granted by property law are far from absolute. Instead, landowners' rights to exclude, transfer, and use are subject to significant limits.

These limits reveal several reasons why property rights are not absolute. Some policies, like allowing access to landlocked land and permitting trespass when needed to avoid serious harm, are so important that they outweigh the loss of value the landowner suffers from being compelled to grant access. Enhancing societal welfare and thoughtful development explain limits like zoning, nuisance, government regulations, takings, and eminent domain. Fairness-related goals explain the lack of enforcement of racial covenants and antidiscrimination laws, as well as adverse possession, encroachments, and lateral support.

In short, the policies underlying property's limits make clear that the right to exclude is not the only objective that property law promotes. In numerous cases, countervailing public policies based on development, necessity, and equity outweigh the right to exclude.

V. CONCLUSION

When exported outside its domain, property often loses its identity. Gone are the nuances. Gone are the limits. And in their place is a barren caricature of absolutist property that does not reflect actual property law.

Outside property's home, some may not appreciate its true identity. That is exactly what happened when AAG Delrahim adopted just such an amped-up version of absolutist property. But if Delrahim is going to launch an assault on antitrust's vital role in policing standard-setting abuses, he will need support from somewhere other than property law.

---

113. *E.g.*, *Keck v. Longoria*, 771 S.W.2d 808, 810 (Ark. Ct. App. 1989) (artificial support); *Gorton v. Schofield*, 41 N.E.2d 12, 15 (Mass. 1942) (successive owners).