BYU Law Review

Volume 2006 | Issue 6 Article 2

12-18-2006

Grave Matters: The Ancient Rights of the Graveyard

Alfred L. Brophy

Grave Matters: The Ancient Rights of the Graveyard

Alfred L. Brophy[*]

> The system of property and law goes back for its origin to barbarous and sacred times; it is the fruit of the same mysterious cause as the mineral or animal world. There is a natural sentiment and prepossession in favor of age, of ancestors, of barbarous and aboriginal usages, which is a homage to the element of necessity and divinity which is in them. The respect for the old names of places, of mountains, and streams, is universal. The Indian and barbarous name can never be supplanted without loss.
>
> Ralph Waldo Emerson[1]

Ralph Waldo Emerson's oration *The Conservative* recognized the power that ancient ideas and practices hold over the minds of individuals. The reverence that grows up around long-standing uses is a frequent justification for property rights.[2] When people have used property in a way for an extended period of time they come to believe that other uses cannot interfere with theirs—that they have a claim against the entire world.[3]

* Professor of Law, University of Alabama School of Law. J.D., Columbia University; Ph.D., Harvard University. Contact the author at abrophy@law.ua.edu or 205.348.0841.

I would like to thank Mary Sarah Bilder, Mark Brandon, David Callies, John Dzienkowski, Dedi Felman, Brent Little, Calvin Massey, Angela Onwuachi-Willig, Charles Ogletree, Kenneth Rosen, Pratik Shah, Stephen Siegel, Joseph Singer, David Stras, and especially Carl Christensen and Caryl Yzenbaard for their comments. And I would like to thank my former colleagues at Oklahoma Indian Legal Services, where I first dealt with cemetery access. Alexander Georgiannis provided excellent research assistance.

1. Ralph Waldo Emerson, The Conservative (Dec. 9, 1841), *in* RALPH WALDO EMERSON: ESSAYS AND LECTURES 171, 177 (Joel Porte ed., 1983).

2. *See, e.g.*, 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *8 (London, A. Strahan 1803) ("[O]ccupancy is the thing by which the title was in fact originally gained . . . .").

3. *See, e.g.*, Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897) ("A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man."). Particularly in the nineteenth century, judges recognized the centrality of long-standing uses in forming property rights. *See, e.g.*, Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 591 (1823) ("However extravagant the

Emerson's oration also recognized the reverence we pay to ancestors. That reverence is rarely deeper than in cemeteries. In cemeteries that are located on private property, then, meet two ancient, powerful ideas: the right of property owners to exclude and the veneration of age and of ancestors. That conflict between the right to worship at our ancestors' graves and the right to exclude appears with increasing frequency these days, as landowners seek to develop land where cemeteries are located and descendants of people buried in the cemeteries seek to reclaim something of their heritage.[4]

pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned."). Recent property writing has, moreover, explored this theme in some depth. *See, e.g.*, GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970, at 43–71 (1998); LAURA UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 11–30 (2003).

Recent property scholarship has explored case studies where possession (and the long-standing understandings that go with it) gives rise to property rights. *See, e.g.*, Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORG. 83 (1989); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315 (1993); Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979); Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985).

4. A sampling of the conflicts appear in Michael Amon, *Reclaiming Forgotten Family Graveyards; Counties Are Mapping Obscure Cemeteries in Bid To Shield Them*, WASH. POST, July 8, 2001, at C01 (discussing colonial Virginia practice of locating cemeteries on plantations); *Boone Society Concerned over Sale of Stemme Farm*, JOPLIN INDEP., May 17, 2005 (discussing concern over access to grave of Daniel Boone, located on private property in Missouri); Jessica Brown, *Cemeteries Succumb to Time, Crowding; Efforts Made To Preserve Lost, Neglected Pieces of History*, CINCINNATI ENQUIRER, July 25, 2005; Kevin Chappell, *Cemetery Development Protested; Howard County Groups Say Unmarked Graves Are Threatened*, WASH. POST, July 2, 1992, at D3; Ceri Larson Danes, *Slave Cemetery vs. Waterfront Access; Nearby Landowners Ask Judge Permission To Build Road over Old Wilsonia Neck Burial Site*, E. SHORE NEWS, Feb. 9, 2005 (reporting that neighboring landowners seek easement to cross slave cemetery to access water); Alex Davis, *Developer Might Change Plan, Not Move Clark Cemetery*, LOUISVILLE COURIER-J., May 20, 2005, at 1B (questioning moving of cemetery); Roxana Hegeman, *Forgotten Black Cemetery Rallies Kansas Community*, KAN. CITY CALL, Feb. 21, 2003 (discussing maintenance of African American cemetery); Eugene L. Meyer, *History Chiseled in Stone*, WASH. POST, Oct. 30, 1998, at N06 (African American graves from late nineteenth century in danger); *More Graves Found on U. Va. Campus Experts Believe It Was 1800s Cemetery for Free Black Community*, RICH. TIMES-DISPATCH, Aug. 5, 2005, at B-9; Kirsten Tagami, *Final Resting Places Meet Progress: Airport Project Protects Graves*, ATLANTA J.-CONST., June 19, 2005, at 1C. Evidence abounds of the continuing interest in cemeteries. *See, e.g.*, Connie Skipitares, *Ceremonies Set for Patients Buried in Mass Unmarked Grave Sites*, SAN JOSE MERCURY NEWS, Sept. 17, 2005, at B1; *Stairway to Heaven: A Guidebook to the Grave Sites and Memorials of Rock & Roll's Dearly Departed Legends*, ROLLING STONE, Sept. 22, 2005, at 26.

We also see in the long-standing right to visit a cemetery, a respect for the rights of members of the community who do not own the land where the cemetery is located.[5]

5. Scholars frequently discuss conflict between the private rights of exclusion and the community's larger interest (even if not always judicially recognized) in property. *See, e.g.*, Carol Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329 (1996) (discussing both the protected individual and collective rights encompassed by property); Laura S. Underkuffler, *The Perfidy of Property*, 70 TEX. L. REV. 293 (1991) (reviewing JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM (1990)); Laura S. Underkuffler-Fruend, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033 (1996). For perhaps the strongest argument for community rights made in recent years, see Joseph Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988). A few indications suggest that we may see a resurrection of concern for the community's rights in property. Among the many things that *Hawaii Housing Authority v. Midkiff* stood for was a concern for those who are subject to the control of their landlords because they are landless. 467 U.S. 229 (1984). The central justification for upholding the Hawaii Housing Authority's exercise of eminent domain was the opposition to land oligarchy:

> The people of Hawaii have attempted, much as the settlers of the original 13 Colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs. The land oligopoly has, according to the Hawaii Legislature, 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. Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers.

Id. at 241–42 (footnote omitted). The Court further noted efforts by Americans after the Revolution to "eradicate the feudal incidents with which large proprietors had encumbered land in the Colonies." *Id*. at 241 n.5. Justice O'Conner re-emphasized this anti-feudal construct in *Kelo v. New London*, as she distinguished the eminent domain in *Kelo* from that in *Midkiff*:

> In *Midkiff*, we upheld a land condemnation scheme in Hawaii whereby title in real property was taken from lessors and transferred to lessees. At that time, the State and Federal Governments owned nearly 49% of the State's land, and another 47% was in the hands of only 72 private landowners. Concentration of land ownership was so dramatic that on the State's most urbanized island, Oahu, 22 landowners owned 72.5% of the fee simple titles. The Hawaii Legislature had concluded that the oligopoly in land ownership was "skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare," and therefore enacted a condemnation scheme for redistributing title.

Kelo v. New London, 125 S. Ct. 2655, 2674 (2005) (O'Connor, J., dissenting) (citations omitted).

There may also be a resurgence of recognition of the rights of natives who do not own land, which further illustrates a rebalancing of community and individual rights. *See, e.g.*, Pueblo of San Ildefonso v. Ridlon, 103 F.3d 936, 940 (10th Cir. 1996). That resurgence of native rights is strong in Hawaii. *See, e.g.*, Pele Defense Fund v. Paty, 837 P.2d 1247, 1256, 1270 (Haw. 1992) (providing for rights to access private property for "traditionally exercised subsistence, cultural and religious practices," as long as the land has not already been developed); Palama v. Sheehan, 440 P.2d 95, 97–98 (Haw. 1968) (grounding right of access in native rights rather than implied easement). Those cases provide some hint of what one might call "aloha jurisprudence." See HAW. REV. STAT. § 5-7.5(b) (1993), which authorizes

For example, the conflict appeared recently in a now generations-old dispute between the Hatfields and the McCoys in Kentucky. Descendants of the McCoys wanted access to a graveyard containing five of the six McCoys killed in feuding during the late nineteenth century.[6] A Hatfield descendant refused them access.[7] It is appropriate, given how important property rights have become and how important property was to the origins of the feud in the nineteenth century, that the feud once again turns on property rights. The current feud also illuminates an ancient—and rarely discussed—right of families of people interred in cemeteries, and the ways those rights limit what we think of as central rights of property owners.

This Essay explores in depth one ancient right associated with graveyards: the right to access graves of ancestors, even if they are on private property. Relatives of people buried in cemeteries on private property have a common law right to access the property to visit the cemetery. That right, which is an implied easement in gross, is recognized by statue in about a fifth of states and by case law in many others. This Essay explores the origins, nature, and scope of the little-recognized right and its implications for property theory. It discusses in more cursory fashion two corollary rights: the prohibition against desecration of graves and the right to burial. These rights work in tandem to protect graves and the right to visit them. While we currently hear relatively little about these rights, they are of importance to those who choose to exercise them. Many others, if they knew their rights, might choose to exercise them as

Hawaiian courts to give consideration to the "aloha spirit"—"the working philosophy of native Hawaiians." *Id.* "'Aloha' is the essence of relationships in which each person is important to every other person for collective existence." *Id.* § 5-7.5(a)). For two perceptive explorations of native Hawaiian rights, see Kahikino Noa Dettweiler, *Racial Classification or Cultural Identification?: The Gathering Rights Jurisprudence of Two Twentieth Century Hawaiian Supreme Court Justices*, 6 ASIAN-PAC. L. & POL'Y J. 174 (2005), *available at* http://www.hawaii.edu/aplpj/pdfs/v6.01_Dettweiler.pdf; Jocelyn B. Garovoy, *"Ua Keo Ke Kuleana O Na Kanaka" (Reserving the Rights of Native Tenants): Integrating* Kuleana *Rights and Land Trust Priorities in Hawaii*, 29 HARV. ENVTL. L. REV. 523 (2005); *see also* Alfred L. Brophy, *Aloha Jurisprudence: Equity Rules in Property*, 87 OR. L. REV. (forthcoming 2007).

6. Roger Alford, *Hatfields, McCoys Take Feudin' to Court*, COM. APPEAL, Dec. 29, 2002, at A4; Alfred L. Brophy, *Hatfields and McCoys Feud Over Graveyard*, PROVIDENCE J., Jan. 13, 2003.

7. Brophy, *supra* note 6.

well.[8] And the right of access and the right to further burial, which are some of the only common law rights to access another's property,[9] offer important insight into the nature of property rights. We can see how the common law harmonized rights to exclude with other, overlapping community interests. It reminds us that while the rights of property (such as the right to exclude and to use property as one would like) are of critical importance, there are limitations on those rights. Finally, this Essay links this ancient right to the current discussion of memory of the era of slavery. It suggests that this right might be useful for descendants of enslaved people buried on private property.

I. DISPUTING AT THE GRAVEYARD'S GATE: THE RIGHT TO EXCLUDE

> I find this vast network, which you call property, extended over the whole planet. I cannot occupy the bleakest crag of the White Hills or the Allegheny Range, but some man or corporation steps up to show me that it is his.
>
> Ralph Waldo Emerson[10]

8. Georgia's Historic Preservation Division of its Department of Natural Resources, for instance, counsels on its website that "even descendants or heirs should ask the landowner for permission to come onto the property and discuss notification of intent to visit, the frequency of visitation, and passageway to be used." Georgia Department of Natural Resources, Historic Preservation Division, How Do I Gain Access to a Cemetery on Private Property? (Jan. 16, 2006), http://hpd.dnr.state.ga.us/content/displaycontent.asp?txtDocument=96. While the advice is sound from the perspective of harmony, it may leave readers with the impression that they can only visit cemeteries at the sufferance of the landowner. *See* CHRISTINE VAN VOORHIES, GRAVE INTENTIONS: A COMPREHENSIVE GUIDE TO PRESERVING HISTORIC CEMETERIES IN GEORGIA (2003).

The website of the Virginia Department of Historic Resources ("Helping You Put Virginia's Historic Resources to Work") provides advice on the scope of the landowner's rights. *See* Cemetery Preservation, http://www.dhr.virginia.gov/homepage_general/ faq_cem _presv.htm, (last visited Dec. 31, 2006). In response to the question, "What are my legal rights and obligations" if there is "an old abandoned cemetery on my property[?]" Virginia Code § 57-27.1 provides for access by family members of the people buried, plot owners, and researchers. *Id.*

The Alabama Historical Commission's pamphlet on cemetery preservation makes no mention at all of the right to access cemeteries on private property. *See* AHC CEMETERY PAMPHLET GUIDE, http://www.preserveala.org/documents/pdf/overallprogram.pdf (last visited Dec. 31, 2006).

9. As described below, the easement for access to cemeteries is a form of easement by implication. *See infra* Part II.A.

10. Emerson, *supra* note 1, at 180.

Emerson captures well Americans' love of property. At the center of that love are the rights to alienate,[11] to use the property as the owner chooses,[12] and to exclude others.[13] There are, of course, notable limitations on those rights. Courts enforce limited restrictions on the right of an owner to alienate,[14] and they will enjoin as nuisances—or at least require compensation for—uses of property that impose unreasonable interferences on neighbors.[15]

Express and implied easements are also limitations on the right to exclude others. Express easements are explicit grants from one landowner to another, often a neighboring landowner, to cross the owner's property. They are the most common type of easements.[16]

11. Courts routinely protect the right to alienate whomever the owner wishes, by sale, Shelley v. Kraemer, 334 U.S. 1 (1948), as well as by gift, Hodel v. Irving, 481 U.S. 704 (1987).

12. Courts routinely uphold the right to use property as the owner wishes, unless the use is a common law nuisance or violates zoning ordinances adopted before the use began. *See, e.g.*, Pa. Nw. Distribs., Inc. v. Zoning Hearing Bd., 584 A.2d 1372, 1375 (Pa. 1991) (applying zoning to property uses that pre-dated zoning, but permitting a limited period for conversion to conforming uses); Morison v. Rawlinson, 7 S.E.2d 635, 637 (S.C. 1940) (enjoining African American church as a nuisance).

Nuisance serves as a mediating doctrine, which balances competing and reasonable uses of property. *See* Amphitheaters, Inc. v. Portland Meadows, 198 P.2d 847, 858 (1948) (holding interference with neighborhood drive-in movie theater not a nuisance because theater was particularly sensitive). The vast literature on nuisance, much of which deals with these issues, includes MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 74–78 (1977); James W. Ely, Jr., *Property Rights and Environmental Regulation: The Case for Compensation*, 28 HARV. J.L. & PUB. POL'Y 51 (2005); Daniel Farber, *Reassessing* Boomer*: Justice, Efficiency, and Nuisance Law*, *in* PROPERTY LAW AND LEGAL EDUCATION: ESSAYS IN HONOR OF JOHN E. CRIBBET 7 (Peter Hay & Michael Hoeflich eds., 1988); Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. ENVTL. AFF. L. REV. 89 (1998); William W. Fisher, The Law of the Land: An Intellectual History of American Property Doctrine, 1776–1880, at 186–238 (1991) (Ph.D. dissertation, Harvard University).

13. *See, e.g.*, Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 159 (Wis. 1997); *see also infra* notes 21–26.

14. *See, e.g.*, Pritchett v. Turner, 437 So. 2d 104, 111 (Ala. 1983) (upholding forfeiture restraint on alienation to one family member).

15. Boomer v. Atl. Cement Co., 257 N.E.2d 870, 874–75 (N.Y. 1970); RESTATEMENT (SECOND) OF TORTS § 822 (1979) (focusing on unreasonableness for determination of private nuisance); *id.* § 826(a) (balancing utility against harm for judging unreasonableness); *id.* § 826(b) (establishing unreasonableness when "conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible"); *id.* § 829A ("An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm resulting from the invasion is severe and greater than the other should be required to bear without compensation.").

16. *See* PAUL GOLDSTEIN & BARTON H. THOMPSON, JR., PROPERTY LAW: OWNERSHIP, USE, AND CONSERVATION 823 (2006).

However, courts also recognize implied easements. Courts imply easements in cases of estoppel, such as when the owner of the property has granted access in the past and those seeking access have made expenditures in reliance on that access;[17] in cases of necessity, when a parcel of property is divided and sold, leaving one part landlocked;[18] or in cases of implication by prior use, when a parcel is divided and, prior to division, one part of the parcel made use of the other part.[19] Courts also create easements for access after long-term, prescriptive use.[20]

Even with respect to the right to exclude, there are occasional times when private individuals have the right of access on private property. Perhaps the best known is the right of union organizers to visit employers' property to organize.[21] There are more limited rights to distribute literature on private property.[22] Sometimes the basis is the belief that private property has taken on all the attributes of public property, as in *Marsh v. Alabama*, a case that construed a company town to be a state actor for the purposes of a challenge to the town's restriction on protests.[23] However, the line of reasoning that likens private property to public property seems to have diminished over time. There are only occasional echoes of that jurisprudence in cases that permit pamphleting on private property,

17. *See, e.g.*, Rase v. Castle Mountain Ranch, Inc., 631 P.2d 680 (Mont. 1981).

18. *See, e.g.*, Roy v. Euro-Holland Vastgoed, 404 So. 2d 410 (Fla. Dist. Ct. App. 1981); Morrell v. Rice, 622 A.2d 1156 (Me. 1993) (finding easement by necessity for land divided in 1810); Othen v. Rosier, 226 S.W.2d 622, 625–26 (Tex. 1950) (denying easement by necessity because claimant failed to show necessity existed at time of division of parcel). On differences between easements implied by prior use and by necessity, see J. GORDON HYLTON ET AL., PROPERTY LAW AND THE PUBLIC INTEREST: CASES AND MATERIALS 485–86 (2d ed. 2003); SHELDON F. KURTZ & HERBERT HOVENKAMP, AMERICAN PROPERTY LAW 662–64 (3d ed. 1999); EDWARD RABIN ET AL., FUNDAMENTALS OF PROPERTY LAW 426–32 (5th ed. 2006).

19. *See, e.g.*, Van Sandt v. Royster, 83 P.2d 698 (Kan. 1938); Romanchuk v. Plotkin, 9 N.W.2d 421 (Minn. 1943).

20. *See, e.g.*, Cmty. Feed Store, Inc. v. Ne. Culverty Corp., 559 A.2d 1068, 1070 (Vt. 1989).

21. Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507, 521 (1976) (interpreting § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (2000), which makes it an unfair labor practice for employers to interfere with employees' exercise of § 7 rights); CDK Contracting Co., 308 N.L.R.B. 1117, 1118 (1992) (setting limits on employer's right to exclude organizing activity on employer's property in construction industry).

22. *See, e.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); State v. Schmid, 423 A.2d 615 (N.J. 1980) (dismissing prosecution for trespass on Princeton University's campus on state constitutional right to free speech).

23. 326 U.S. 501 (1946).

such as malls and universities.[24] Several state supreme courts have found a public right to cross private property for beach access, at least when private owners have joined together and limited access.[25] There are also rights of tenants to receive visitors on private property, even if the owner of the property does not want the visitors.[26]

At the bottom of all of these restrictions are principles of reasonableness—reasonableness of regulations and reasonableness of use. The reasonableness standard for regulations is based on the principle in the United States Supreme Court's decision of *Lucas v. South Carolina Coastal Commission*, which is that regulations will be subject to special scrutiny if they are imposed after the acquisition of an interest in the regulated property.[27] *Lucas* addressed South Carolina legislation that prohibited development along a coastal front. South Carolina defended the regulations with the claim that building would be hazardous to the property owners as well as

24. *See, e.g.*, N.J. Coal. Against the War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757 (N.J. 1994); *Schmid*, 423 A.2d at 615; Commonwealth v. Tate, 432 A.2d 1382 (Pa. 1981); *see also* JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 205–09 (2d ed. 1997) (interpreting Civil Rights Act of 1964 as part of concern for public access to commercial property).

25. *See, e.g.*, City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73 (Fla. 1974); Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984); *cf.* Stevens v. City of Cannon Beach, 854 P.2d 449 (Or. 1993) (finding right of access). *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission* opens the possibility of conditioning building permits on the maintenance of beach access, grounded in native Hawaiian practices. 903 P.2d 1246 (Haw. 1995). The vast scholarly commentary on those rights includes Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform*, 44 VAND. L. REV. 1209 (1991); Joseph J. Kalo, *The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina*, 78 N.C. L. REV. 1869 (2000).

26. *See* State v. Shack, 277 A.2d 369 (N.J. 1971). One might argue that the right of tenant farmers to their lawyers and physicians is best phrased as part of the common law on the right of tenants to reasonable visitors. Nevertheless, the New Jersey Supreme Court phrased the right as part of a human rights limitation on the right to exclude. *Id.* at 372 ("Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises."). Perhaps such a formulation is necessary to avoid a farmer making the right to exclude visitors an explicit part of the tenancy. One might be tempted to speak of New Jersey's anti-feudal jurisprudence. *Cf.* Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277 (1998) (exploring the various modes of speaking about property, including images of republicanism and dignity, as well as exclusion).

27. 505 U.S. 1003 (1992).

damaging to the public beaches.[28] South Carolina analogized the regulations to common law prohibition of nuisance; however, the common law of nuisance did not extend so far.[29] And the Court was unwilling to elide the gap between common law nuisance and regulation of noxious uses, as it did in 1911 in *Hadacheck v. Sebastian*.[30] The Supreme Court found that such a restriction could constitute a taking that required compensation.[31] *Lucas* thus represented the resurgence of the Court's respect for property rights, even from regulation.

Lucas, nevertheless, permits regulations of property, even if they deprive an owner of all economically viable uses, if they "do no more than duplicate the result . . . under the State's law of private nuisance, or by the States under its complementary power to abate nuisances."[32] The Court looked to background principles of state law to determine whether there was a property interest that the state was regulating or whether (at the time the regulation was imposed) the owner's property was already subject to regulation.[33]

Still, and unsurprisingly, a dominant theme in American property law is that the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[34] For instance, Native Americans are often restricted from accessing

28. *Id*. at 1040 (Blackmun, J., dissenting).

29. *See id*. at 1029 ("Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.").

30. 239 U.S. 394 (1915) (analogizing regulation of a brick yard to common law nuisance, without finding such nuisance).

31. *Lucas*, 505 U.S. at 1019.

32. *Id*. at 1029.

33. *Id*. at 1029–31. The Supreme Court recently allowed a takings claim to proceed even where a developer bought the property knowing that there were restrictions on building there. *See* Palazzolo v. Rhode Island, 533 U.S. 606 (2001). The right to cross (to the cemetery's land) is based on an implied reservation. Therefore, there is no taking, even though there is physical occupation of property. *See* Yee v. City of Escondido, 503 U.S. 519, 527 (1992) ("[T]he Takings Clause requires compensation if the government authorizes a compelled physical invasion of property.").

34. Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979). Many commentators emphasize the right to exclude as well. *See, e.g.*, Richard A. Epstein, *Rights and "Rights Talk,"* 105 HARV. L. REV. 1106, 1109–14 (1992) (reviewing MARY ANN GLENDON, RIGHTS TALK (1991)); Thomas W. Merrill, *Property and the Right To Exclude*, 77 NEB. L. REV. 730, 730 (1998) ("[T]he right to exclude others is more than just 'one of the most essential' constituents of property—it is the *sine qua non* . . . . Deny someone the exclusion right and they do not have property.").

land owned by their ancestors.[35] What is surprising about graveyard access is how little we hear about this ancient right, which has for generations limited the right of property owners to exclude or, phrased more positively, given some members of the public a right of access. In fact, other than a few minor mentions in legal encyclopedias, the right to access cemeteries has received virtually no commentary.[36]

II. THE GRAVEYARD RIGHTS

> Pennsylvania, with a refined and elevated sense of what is due to both the dead and the living, has forbidden, by statute, the opening of streets, lanes, alleys, or public roads through any burial ground or cemetery, and has provided a penalty for wilful injuries done to graveyards—not only to the tombstones and fence-railings, but even to the "shrubs and plants" which bereaved love cultivates in such places. The sentiment is sound, and has the sanction of mankind in all ages, which regards the resting-place of the dead as hallowed ground—not subject to the laws of ordinary property, nor liable to be devoted to common uses. We do but express the concurrence in this sentiment which we feel, when we hold that a church and burial ground situated as these now under

35. *See, e.g.*, Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559 (1995). We also hear much about Native American graves. *See* Sarah Harding, *Culture, Commodification, and Native American Cultural Patrimony*, *in* RETHINKING COMMODIFICATION 137 (Martha M. Ertman & Joan C. Williams eds., 2005). For a discussion about Native Americans' interests in land they do not own, see Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061 (2005). We also hear about the ways that historians are revisiting Native American land loss. *See, e.g.*, STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER (2005); LINDSAY ROBERTSON, CONQUEST BY LAW (2005).

36. *See* 14 AM. JUR. 2D *Cemeteries* §§ 1, 42–44 (2000) (discussing rights of access and observing that "[p]ersons entitled to visit, protect, and beautify graves must be accorded ingress and egress from the public highway next or nearest to the cemetery, at reasonable times and in a reasonable manner."); PERCIVAL E. JACKSON, THE LAW OF CADAVERS AND BURIALS AND BURIAL PLACES (2d ed. 1950); *see also* RICHARD B. CUNNINGHAM, ARCHAEOLOGY, RELICS, AND THE LAW 441–686 (1999) (surveying issues related to protection and custody of human remains); *cf.* 14 C.J.S. 2D *Cemeteries* §§ 1, 24 (1991) (noting in passing the right to access lots that have been purchased); JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND ¶ 1.06[2][c] (rev. ed. 1995) ("[A]ccess issues have been resolved by reference to equitable principles and statutory provisions." (citing Mallock v. S. Mem'l Park, Inc., 561 So. 2d 330 (Fla. Dist. Ct. App. 1990) (interpreting Florida statute granting ingress and egress to cemetery); Sanford v. Vinal, 552 N.E.2d 579 (Mass. App. Ct. 1990) (finding abandonment of easement to a burial plot))).

> consideration, and owned by distinct religious societies as tenants in common, are not within the spirit and meaning of our statutes of partition, and that the Court were right in denying judgment *quod partitio fiat* to the plaintiffs.
>
> *Brown v. Lutheran Church*[37]

Given the significance of graveyards to Americans' hearts, they receive special protection in law in several ways. First, there is an implied easement across surrounding land to access the graveyard. Closely allied to the first right is a second: the restriction on desecration of graves. Third, there is also a right to bury relatives on the property. Fourth, there are restrictions on the right of the owner of the graveyard to sell or mortgage the property or use it in ways inconsistent with cemetery purposes.

A. The Right of Access

The most important of the graveyard rights is the right of access. Some states define the right by statute, others by case law. At base, the right is an easement in gross to cross private property to access a cemetery. The easement is held by the relatives of the person buried in the cemetery, and it descends by operation of law but is neither devisable nor alienable. In a few states, other interested parties, like genealogical researchers, also have the same right of access across private property.[38]

The right of access arises when a person is buried on property with the permission of the owners. Most commonly the deceased is a member of the family of the owners at the time of burial, but the deceased may not be related to the owners of the property. In either case, giving permission to bury the deceased carries with it an implied grant of permission for the relatives to visit the property. Sometimes the implied grant of permission for access is shown through a dedication of the cemetery, but formal dedication is not necessary.[39] The grant of permission for access is enforced as an

37. 23 Pa. 495 (1854) (denying partition of cemetery by sale).

38. *See, e.g.*, VA. CODE ANN. § 57-27.1 (2003).

39. *See, e.g.*, Eggerson v. Ancar, 6 Teiss. 417, 418–19 (La. Ct. App. 1909) ("No particular form of deed was necessary for such a dedication. We do not think that any deed at all was necessary. The mere fact of setting aside the land as a graveyard and permitting its use for burial purposes was in our opinion sufficient to constitute a valid dedication. Nor was it necessary that the dedication be registered. Dedications to public use, and servitudes in favor of the public, are not regulated by the strict rules which govern private property and

implied promise through estoppel or acquiescence, although courts rarely discuss the basis.[40] The assumption is that by allowing the deceased to be buried, the owner of the property is making at least an implied promise for continued access. Moreover, courts assume that burial is made in reliance on such a promise—which is often an implied promise. In the unlikely case that the owners who granted permission for the burial still own the property, the implication of an easement to access the cemetery is relatively straightforward. The fact of burial is close to complete proof that the landowners granted permission for access.

More commonly, the claim for access is made against subsequent owners who have purchased or inherited the property, rather than against those who allowed for burial in the first place. Those wishing to visit the burial can assert an easement by estoppel against successors to the owner of the servient estate. In the case of bona fide purchases, there has to be some kind of notice of the existence of the easement[41]—which in this case will be some kind of evidence of the cemetery. That evidence will also be necessary to show that the holders of the right of access have not abandoned the easement.[42]

Sometimes the property containing the cemetery has also been broken into pieces, so that the people seeking to exercise the easement must cross property of several different owners to reach the cemetery. In these rare cases, courts use a second implied easement: an easement implied by necessity. In these cases, courts maintain that

transactions between individuals. The visible signs of such dedication and open use of the property by the public afford ample notice and protection to all, and supply the place of both title and registry.").

40. *See* Mingledorff v. Crum, 388 So. 2d 632, 635–36 (Fla. Dist. Ct. App. 1980) (acquiescence); Roundtree v. Hutchinson, 107 P. 345, 346–47 (Wash. 1910) (finding cemetery access through the doctrine of common-law dedication to a public use, which operates by estoppel).

41. The classic case on notice of an implied easement to subsequent purchasers comes in *Van Sandt v. Royster*, 83 P.2d 698 (Kan. 1938). *See also* RESTATEMENT (THIRD) OF PROPERTY § 2.12 (mentioning easements implied from prior use); *id.* § 2.14 (mentioning easements implied for underground utilities as an "implied servitude imposed to carry out the general plan"); *id.* § 2.15 (providing that easements by necessity are created where "rights necessary to reasonable enjoyment of the land implies the creation of a servitude").

42. There could, of course, be an express reservation of an easement for access. But frequently the sellers fail to provide for an express reservation. And if there were an express easement, then there is no need to talk about implied rights at the center of this paper. *See* R. WILSON FREYERMUTH ET AL., PROPERTY AND LAWYERING 556 (2d ed. 2006) (discussing creation of easements by express reservation).

there was an implied reservation of the easement by the cemetery's first owner in favor of the family members of the person buried in the cemetery at the time the property was divided.[43]

The right of access also arises when a deceased is buried in a cemetery not owned by the deceased's family. In that case, there is a two-step process. First, the easement for access is implicitly granted by the landowner to the family members of the deceased.[44] Second, if the landowner sells, there is again an implied reservation by the seller in favor of the family members.[45]

Sometimes there could even be a right of access over property that was never owned by the same person who owned the cemetery. That is more complex conceptually and would arise when the cemetery is landlocked. For example, Missouri provides by statute for a right of access across any privately owned land to access a cemetery.[46] There are no cases testing the limits of the right of access

43. This is what the Restatement (Third) of Property calls a servitude implied from prior use. §§ 2.11–.12 (2000). Easements are typically impliedly reserved when there is a previous, apparent use of the easement and there is a reasonable necessity for the easement. *See generally* RESTATEMENT OF PROPERTY § 476 (1944) (listing eight factors used in determining intention to impliedly reserve an easement).

There is a second way of thinking about the easement by implication when the property is sold. When a cemetery is sold, there is an easement implied by necessity because there is no way of accessing the cemetery other than over the land that has been sold. Because the standard for easements by necessity is more stringent (there is *no other* means of access at the time of sale) than the standard for easements impliedly reserved, the latter is most likely the best way of analyzing the right of graveyard access. Easements by implied reservation are well-known in property. *See, e.g.*, Granite Props. Ltd. P'ship v. Manns, 512 N.E.2d 1230 (Ill. 1987); *Van Sandt*, 83 P.2d at 698.

44. *See, e.g.*, Bessemer Land & Improvement Co. v. Jenkins, 18 So. 565, 569 (Ala. 1895) ("[T]he proofs . . . tend to show a dedication, that the dead of the community, including plaintiff's child, were buried in the cemetery with the knowledge, consent, and license of defendant, and that the plaintiff, and the public generally, were encouraged to bury their dead there. If this was true, the defendant would be estopped to deny plaintiff's rights to and possession of the spot of land for the purpose used, and it could not, therefore, any more than a stranger, unlawfully interfere with or desecrate it.").

45. *See, e.g.*, Phinizy v. Gardner, 125 S.E. 195, 196 (Ga. 1924) (upholding an explicit reservation access to a burial ground by way of a carriage road of which purchasers had notice, and which provided "that the piece of ground now appropriated as a family burying ground, together with an acre of land adjoining, to be laid off by my executors, shall be reserved for the purposes of a graveyard only, and that a right of way from the Savannah road be always reserved over the intervening land for the passage of funerals").

46. MO. ANN. STAT. § 214.132 (West 2004). The statute provides:

> Any person who wished to visit an abandoned family cemetery or private burying ground which is completely surrounded by privately owned land, for which no public ingress or egress is available, shall have the right to reasonable ingress or

in Missouri, so it is difficult to know whether a court would imply an easement across property never owned by the owner of the land where the cemetery is located.

1. Identifying the scope of the right from state statutes

Approximately eleven states, primarily in the South and in areas settled by Southerners, provide by statute for a right of access by relatives of people buried on private property.[47] The statutes typically imply an easement for access. The most detailed statutory scheme is provided by Virginia, which gives family members and descendants, cemetery plot owners, and genealogical researchers a right of access across property where graves are located in order to visit and maintain the graves.[48] The right is limited to reasonable visitation

> egress for the purpose of visiting such cemetery. This right of access to such cemeteries extends only to visitation during reasonable hours and only for purposes usually associated with cemetery visits.

Id.

47. *See* ARIZ. REV. STAT. ANN. § 32-2194.12 (2002); ARK. CODE ANN. § 18-15-1408 (2003); FLA. STAT. § 704.08 (2000); IND. CODE § 6-1.1-6.8-15 (2003); MO. ANN. STAT. § 214.132 (West 2004); N.C. GEN. STAT. § 65-75 (2005); OKLA. STAT. tit. 8, §§ 186–187 (1998); TEX. HEALTH & SAFETY CODE ANN. § 711.041 (Vernon 2003); VT. STAT. ANN. tit. 18, § 5322 (2000); VA. CODE ANN. § 57-27.1 (Supp. 2006); W. VA. CODE § 37-13A-1 (2000).

48. VA. CODE ANN. § 57-27.1 (Supp. 2006). The statute provides:

> A. Owners of private property on which a cemetery or graves are located shall have a duty to allow ingress and egress to the cemetery or graves by (i) family members and descendants of deceased persons buried there; (ii) any cemetery plot owner; and (iii) any person engaging in genealogy research, who has given reasonable notice to the owner of record or to the occupant of the property or both. The landowner may designate the frequency of access, hours and duration of the access and the access route if no traditional access route is obviously visible by view of the property. The landowner, in the absence of gross negligence or willful misconduct, shall be immune from liability in any civil suit, claim, action, or cause of action arising out of the access granted pursuant to this section.
>
> B. The right of ingress and egress granted to persons specified in subsection A shall be reasonable and limited to the purposes of visiting graves, maintaining the gravesite or cemetery, or conducting genealogy research. The right of ingress and egress shall not be construed to provide a right to operate motor vehicles on the property for accessing a cemetery or gravesite unless there is a road or adequate right-of-way that permits access by motor vehicle and the owner has given written permission to use the road or right-of-way of necessity.
>
> C. Any person entering onto private property to access a gravesite or cemetery shall be responsible for conducting himself in a manner that does not damage the private lands, the cemetery or gravesites and shall be liable to the owner of the property for any damage caused as a result of his access.

and maintenance, and motorized vehicles are not permitted unless roads are already on the property.[49] West Virginia's statute, which is almost identical to Virginia's, also recognizes a right of access by friends.[50]

Several other states offer a specific court procedure to obtain a permit for access to a cemetery. For instance, North Carolina provides that descendants of a deceased buried in a cemetery, as well as other people with a "special interest," may petition the superior court for an order to allow visitation and maintenance of the cemetery.[51] As with a Missouri statute that declares a right of access across any privately owned land to reach a cemetery, the North Carolina statute contemplates the right to cross property to access a cemetery, even if the cemetery is not located on that owner's property. Thus, one might use the statute to cross the land of several different owners. The statute is not entirely a codification of common law implied reservation, because the doctrine of implied

> D. Any person denied reasonable access under the provisions of this section may bring an action in the circuit court where the property is located to enjoin the owner of the property from denying the person reasonable ingress and egress to the cemetery or gravesite. In granting such relief, the court may set the frequency of access, hours and duration of the access.
>
> E. The provisions of this section shall not apply to any deed or other written instrument that creates or reserves a cemetery or gravesite on private property.

Id.

49. *Id.* § 57-27.1(B).

50. W. VA. CODE § 37-13A-1 (recognizing right of access by "close friends").

51. North Carolina has two provisions that work in tandem. One provision allows descendants, their designees, and other people with a special interest to enter property to "discover, restore, maintain, or visit a private grave or abandoned public cemetery" if they obtain permission of the landowner. N.C. GEN. STAT. § 65-74. If, however, the landowner does not give permission, then those people may petition the court "for an order allowing the petitioner to enter the property to discover, restore, maintain, or visit the grave or abandoned public cemetery." *Id.* § 65-75. The court shall grant access if:

> (1) There are reasonable grounds to believe that the grave or abandoned public cemetery is located on the property or that it is reasonably necessary to enter or cross the landowner's property to reach the grave or abandoned public cemetery.
>
> (2) The petitioner, or his designee, is a descendant of the deceased, or that the petitioner has a special interest in the grave or abandoned public cemetery.
>
> (3) The entry on the property would not unreasonably interfere with the enjoyment of the property by the landowner.

Id. § 65-75(a)(1)–(3). The court's order may dictate a particular route to take to access the cemetery and also specify the times for visitation. *Id.* § 65-75(b)*; see also* North Carolina Office of State Archeology, North Carolina Archeology (2006), http://www.arch.dcr.state.nc.us/ncarch/reporting/cemetery.htm (describing North Carolina statutes regarding protection of cemeteries).

reservation would allow an easement only across property that was owned by the owner of the cemetery at the time of interment. Then, as parcels were sold off, there would be an implied reservation of the right to cross them to access the cemetery. But in the North Carolina statute, the right is broader because it allows access across other parcels. Vermont has a similar statute.[52]

A Texas statute provides a similar right of access across parcels other than those where the cemetery is located:

> Any person who wishes to visit a cemetery or private burial grounds from which no public ingress or egress is available shall have the right to reasonable ingress and egress for the purpose of visiting the cemetery or private burial grounds. This right of access extends to visitation during reasonable hours and only for purposes usually associated with cemetery visits.[53]

But in the 1999 case of *Meek v. Smith*, the Texas Court of Civil Appeals held that the right of access across property that does not abut the cemetery is an unconstitutional taking.[54] The facts in *Meek*

52. VT. STAT. ANN. tit. 18 § 5322. Vermont requires the people seeking access to a cemetery to petition to the selectmen or cemetery commissioners instead of the county court:

> Any person wishing to have a temporary right of entry over private land in order to enter a graveyard enclosure to which there is no public right-of-way may apply in writing to the selectmen or cemetery commissioners, as the case may be, state the reason for such request and the period of time for which such right is to be exercised. The applicant shall also notify in writing an owner or occupier of the land over which the right-of-way is desired. If the selectmen or cemetery commissioners find that the request is reasonable, they shall issue a permit for a temporary right of entry designating the particular place where, and the manner in which, the land may be crossed. The owner or occupier of the land may recommend a place of crossing which, if reasonable, shall be the place designated by the selectmen or cemetery commissioners.

Id.

53. TEX. HEALTH & SAFETY CODE ANN. § 711.041 (Vernon 2003), *declared unconstitutional in part by* Meek v. Smith, 7 S.W.3d 297 (Tex. App. 1999).

54. *Meek*, 7 S.W.3d 297. Similarly, in *Hunziker v. State*, the court denied compensation to a couple for restrictions that prohibited them from building on the land in a way that would interfere with a Native American burial mound, because the right to dig up the remains did not exist at the time the couple acquired the property. 519 N.W.2d 367, 369 (Iowa 1994). The court emphasized, in regard to *Lucas*, that

> [I]mplicit in the Supreme Court's "bundle of rights" analysis is that the *right* to use the land in the way contemplated is what controls. Here, when the plaintiffs acquired title, there was no right to disinter the human remains and build in the area where the remains were located . . . . This limitation or restriction on the use of the land inhered in the plaintiffs' title.

Id.

are somewhat ambiguous, but it appears that the plaintiffs sought access to the Coley Creek Cemetery over adjacent property owned by Everitt and Donna Meek.[55] The trial court rejected the plaintiffs' claim of easement by implication or by implied dedication, which would have been appropriate only if the Meeks' land and the cemetery had been owned jointly at the time of the interment.[56] Thus the court in *Meek* faced only a narrow question: whether it is constitutionally permissible to provide an easement over neighboring land to visit a cemetery.[57] Surprisingly, the court did not discuss such critical cases as *Loretto v. Teleprompter Manhattan CATV Corp.*, which held that physical occupation is a categorical taking;[58] nor did it discuss the common law right to visit cemeteries. The court interpreted the statute as though it created additional rights and found those rights to cross others' property to arrive at the cemetery to be an unconstitutional taking.[59] A more recent case has limited *Meek* and reaffirmed the common law right of access across the cemetery's land and land once owned by the cemetery.[60]

Perhaps the most straightforward enumeration of rights comes from Florida's statute, which provides for an easement for reasonable access to visit and maintain the cemetery.[61] Thus, Florida deals

55. *Meek*, 7 S.W.3d at 299.

56. *Id.*

57. *Id.* at 300.

58. 458 U.S. 419 (1987). Because *Loretto* provides that even a small physical invasion constitutes a taking, *id.* at 436–37, it has implications for those seeking to cross land to get to a cemetery.

59. *Meek*, 7 S.W.3d at 301–02.

60. *See* Davis v. May, 135 S.W.3d 747, 751 (Tex. App. 2003) (finding easement to cross land that adjoins cemetery and denying unconstitutional taking argument). The *Davis* court emphasizes that the property to be crossed is adjacent to the cemetery, which was not the case in *Meek*. *Id.* at 749. What is somewhat confusing, however, is how the statute could be constitutionally permissible if it provides the right to cross property that was not, at the time of the creation of the cemetery, owned by the same entity that owned the cemetery. The court finds a common law right in ingress and egress, though that right is based on an implied reservation at the time of creation of the cemetery. *Id.* at 751. Thus, one wonders about the effect of the statute, because, as the *Davis* court acknowledges, *id.* at 750–51, the Tennessee Supreme Court's 1911 decision in *Hines v. State* established the basic principle of implied dedication. 149 S.W. 1058, 1059 (Tenn. 1911). And Texas adopted that decision long ago. *See* Houston Oil Co. v. Williams, 57 S.W.2d 380, 385 (Tex. Civ. App. 1933).

For further analysis of the takings implications of prohibitions on the desecration of native graves, see Patty Gerstenblith, *Protection of Cultural Heritage Found on Private Land: The Paradigm of the Miami Circle and Regulatory Takings Doctrine After* Lucas, 13 ST. THOMAS L. REV. 65 (2000).

61. FLA. STAT. § 704.08 (2000). The statute provides:

directly with the key issue in cemetery access: the conflict between absolute exclusion and reasonable accommodation. Given the limited success of reasonableness of accommodations over the absolute of the right of exclusion, there may be a temptation to apply it in other areas of property law. In fact, the reasonableness of property rights is frequently a part of property law.[62]

In contrast to Florida's statute, which provides access for visitation and for maintenance purposes, Indiana's statute creates the most limited rights of access. It grants a right to access cemetery land

> The relatives and descendants of any person buried in a cemetery shall have an easement for ingress and egress for the purpose of visiting the cemetery at reasonable times and in a reasonable manner. The owner of the land may designate the easement. If the cemetery is abandoned or otherwise not being maintained, such relatives and descendants may request the owner to provide for reasonable maintenance of the cemetery, and, if the owner refuses or fails to maintain the cemetery, the relatives and descendants shall have the right to maintain the cemetery.

Id. The statute is interpreted in *Mallock v. South Memorial Park, Inc*., 561 So. 2d 330, 332 (Fla. 1990).

62. *See supra* notes 12–15 (discussing nuisance). Various cases discuss reasonableness as an explanatory factor in other areas of law as well. *See* Pa. Coal v. Mahon, 260 U.S. 393 (1922) (regulatory takings); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1922) (zoning); Somer v. Kridel, 378 A.2d 767 (N.J. 1977) (mitigation of damages in leases); Prospect Dev. Co. v. Bershader, 515 S.E.2d 291 (Va. 1999) (easement by estoppel); Somerville v. Jacobs, 170 S.E.2d 805 (W. Va. 1969) (mistaken improvers); El Di, Inc. v. Town of Bethany Beach, 477 A.2d 1066 (Del. 1984) (termination of servitudes); State *ex rel*. Haman v. Fox, 594 P.2d 1093 (Idaho 1979) (custom); *In re* Certain Scholarship Funds, 575 A.2d 1325 (N.H. 1990) (*cy pres*). Moreover, equity frequently mitigates property's absolutes. In fact, those absolutes in property law were uncommon even in the writings of William Blackstone, the author most often associated with absoluteness. *See* 2 BLACKSTONE, *supra* note 2, at *2; Alfred L. Brophy, *Integrating Spaces: New Perspectives on Race in the Property Curriculum*, 55 J. LEGAL EDUC. 319, 319–20 (2005) (discussing Blackstone's statement about property). As Forrest McDonald reminds us, Blackstone began book two by defining the right of property in absolute terms, then spent much of the remainder of the book qualifying that right. *See* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 13 (1988); *cf*. John C.P. Goldberg, *The Constitutional Status of Tort Law*, 115 YALE L.J. 524, 545–48 (2005) (exploring Blackstone's concern with origins of rights).

one day each year.[63] The statute provides a legislative answer to the perplexing question of what is "reasonable use."[64]

Arkansas has a complex and unique statutory scheme that provides for the conversion of cemeteries from private to public ownership.[65] The legal basis for this conversion is the idea of adverse possession. The statute requires fifty years of use as a cemetery as a standard for adverse possession.[66] The conversion to a public cemetery allows the county court to appoint public or nonprofit bodies to care for public cemeteries. However, the statutory scheme makes no provision for access; it is instead concerned with care of the cemetery.[67]

Arizona prohibits the sale of a cemetery unless there is provision for access.[68] The result of that statute is to provide by law for an implied easement across the cemetery's property, although the statute does not provide for access across neighboring property.

Oklahoma has two relevant statutes. One provides for establishment of streets and other ways of access to cemeteries.[69] The statute is ambiguous, but it presumably authorizes the use of eminent domain to acquire the right of access. Another statute, of more modest scope but perhaps more use, provides relatives a right of access to abandoned cemeteries on private land.[70] In a puzzling

63. IND. CODE § 6-1.1-6.8-15 (2001) ("The owner of land that is classified under this chapter as cemetery land must allow family members and descendants of persons buried in the cemetery to have at least one (1) day each year to gain access to and visit the cemetery. The date of the visit to the cemetery must be agreed upon between the owner and the family members and descendants of persons buried in the cemetery.").

64. Reasonableness frequently appeared in implied easement cases. *See, e.g.*, Palama v. Sheehan, 440 P.2d 96, 98 (Haw. 1968) (finding implied easement as based on long-standing use).

65. ARK. CODE ANN. § 18-15-1408 (2003).

66. *Id.*

67. *Id.*

68. ARIZ. REV. STAT. ANN. § 32-2194.12 (2002) ("No cemetery may be sold without provision for permanent access.").

69. OKLA. STAT. tit. 8, §§ 186–187 (1998).

70. *Id.* § 187. The statute provides for visits only during reasonable hours. It also imposes the duty of making efforts to notify owners and occupiers of the property prior to visit:

> Any relative of the deceased who wishes to visit an abandoned cemetery which is completely surrounded by privately owned land, for which no public ingress or egress is available, shall have the right to reasonable ingress or egress for the purpose of visiting such cemetery. This right of access to such cemeteries extends only to visitation during reasonable hours and only for purposes usually associated with

concluding sentence, however, the statute maintains that "[t]his section shall not be interpreted to allow the creation of an easement or claim of easement nor a right of ownership or claim of right of ownership to an abandoned cemetery."[71] The purpose of that sentence is elusive because the statute seems to provide for an easement. However, perhaps the sentence is meant only to make clear that there is no right other than the right of reasonable access "for purposes usually associated with cemetery visits" and that it creates no rights *beyond* that.[72]

2. Identifying the scope of the right from case law

Many of the states that do not have statutes providing for access do have case law that permits access. That permission is similar to the rights of access created by statute in states such as Florida and Texas. It provides, in essence, that the relatives of those buried in "dedicated" cemeteries on private property have the right to access that property for reasonable visits to the grave. Several states have particularly well-developed case law, including Alabama, Kentucky, and Pennsylvania. Other states have a more limited body of case law from the late nineteenth and early twentieth centuries.[73] The following three cases illustrate how case law has defined the right of

> cemetery visits. For the purposes of this section, "abandoned cemetery" means any place where human skeletal remains are buried and which no body has been interred for at least twenty-five (25) years and where such site is readily identifiable as a cemetery by an inspection of the property. Any relative of the deceased who wishes to visit an abandoned cemetery shall make a good faith effort to notify the owners and tenants, if any, of said property prior to visiting the cemetery.

Id.

71. *Id.* Perhaps the puzzle is explained, as Carl Christensen has suggested in conversation to me, because the legislature thought that it was only recognizing a pre-existing right and not creating any new rights.

72. *Id.*

73. *See, e.g.*, Morgan v. Collins Sch. House, 133 So. 675 (Miss. 1931) (providing for right of access and burial for family members once a landowner permits one member of the family to be buried on the property); Roundtree v. Hutchinson, 107 P. 345, 346–47 (Wash. 1910) (explaining that implied dedication works as enforced through equitable estoppel). In several cases, the right of access is discussed in the context of moving cemeteries. *See, e.g.*, N. E. Coal Co. v. Pickelsimer, 68 S.W.2d 760, 761–62 (Ky. 1934) (regarding action against mining company for damages caused to graves of relatives); Humphreys v. Bennett Oil Co., 197 So. 222, 227–28 (La. 1940) (discussing encroachment on cemetery by oil drilling and the mental anguish that ensued); Lakin v. Ames, 64 Mass. (10 Cush.) 198 (1852) (prohibiting removal of graves by arguing that descendants have the right to visit graves).

access, applied well-established property principles to the right of access, and articulated the scope of the right.

The most recent comprehensive discussion of the right of access comes from the Texas Court of Appeals case of *Davis v. May*, decided in 2003.[74] The court interpreted the rights of Marsha May to visit the graves of her great-grandfather, James Riley Alexander, and a few other relatives. The Alexanders were buried on family-owned land, which was subsequently sold without any provision for access to the graves. Over time and after some intermediate conveyances, the property came into the hands of Emmit and Debra Davis. The Davises, as the owners of the property on which the cemetery was located, refused May access to the graves of her ancestors.[75]

At trial, a jury concluded that May should have reasonable access, which the jury thought would be one four-hour visit per month. In affirming the judgment, the Texas Court of Appeals held that the property owner, by permitting the burials, took on the obligation of holding the property in trust for the family members of the people buried there, which included the obligation to allow access to the property, perform reasonable upkeep, and also permit further limited burials.[76] *Davis* adopted the broad language of the 1911 Tennessee Supreme Court opinion in *Hines v. State*, which established that subsequent purchasers of a cemetery take it subject to the implied easement for access and further burial, stating, "The graves are there to be seen, and the purchaser is charged with notice of the fact that the particular lot has been dedicated to burial purposes, and of the rights of descendants and relatives of those there buried."[77]

Courts have also harnessed well-established property principles, including easement by prescription and implied reservation, to permit access to a cemetery. For example, in the 1945 case *Scruggs v. Beason*, the Alabama Supreme Court held that family members had the right to cross private property to visit the Choat Graveyard, which was first established in 1868 and had approximately 120

74. 135 S.W.3d 747 (Tex. App. 2003).

75. *Id.* at 748.

76. *Id.* at 750.

77. *Id.* at 751 (quoting Hines v. State, 149 S.W. 1058, 1059 (Tenn. 1911)). Other courts have used *Hines* to imply an easement (often invoking acquiescence). *See, e.g.*, Mingledorff v. Crum, 388 So. 2d 632, 635–36 (Fla. Dist. Ct. App. 1980); Heiligman v. Chambers, 338 P.2d 144, 147–48 (Okla. 1959).

graves.[78] There were two bases for the court's decision. First, there was an easement by prescription, as the family members had crossed the property continuously since the cemetery was first established. Second, there was an implied reservation when the private property in question was sold and divided from the land where the cemetery was located.[79]

A 1995 case from Kentucky, *Department of Fish & Wildlife Resources v. Garner*, is the most recent statement of the scope of the right to access a cemetery.[80] *Garner* balanced the interests of relatives and the state in providing access to a cemetery in a limited-access wildlife preservation area.[81] Jacob Garner's great-grandmother and his cousin were buried in a small cemetery of approximately three-quarters of an acre that contained approximately a dozen graves. The cemetery was located in a wildlife management area owned by the federal government and managed by the state of Kentucky.[82] The state put up three gates, which were locked during the winter, to prevent vandalism and maintain control over the area.[83] The court balanced Garner's right of access, which at times he exercised through self-help by breaking the gates, against the state's interest in maintaining security.[84] It observed that "the owners of the easement and the servient estate have correlative rights and duties which neither may unreasonably exercise to the injury of the other."[85] The court struck a balance between access and control by allowing the state to exclude the public but requiring that it provide keys to Garner and his family members so that they would have access to the cemetery whenever they would like.[86]

There are several key steps required to create a right of access. First, there must have been a determination that the landowner initially consented to the burial on her land, which some courts refer to as dedication.[87] The standard for dedication appears to be quite

78. 20 So. 2d 774, 775 (Ala. 1945).

79. *Id*. at 776–77.

80. 896 S.W.2d 10 (Ky. 1995).

81. *Id*. at 12.

82. *Id*. at 11.

83. *Id*.

84. *See id*. at 12.

85. *Id*. at 14.

86. *Id*. at 14–15.

87. *See, e.g.*, Vidrine v. Vidrine, 225 So. 2d 691, 695 (La. Ct. App. 1969); Thomas v. Moberley, 118 So. 2d 476, 478 (La. Ct. App. 1960).

low, perhaps as little as a showing that there was some acknowledgment that people were openly buried in the cemetery.[88] The presence of a headstone seems to be sufficient to establish dedication, but less may be sufficient.[89] Second, there must be a determination that the cemetery has not been abandoned. The standard for abandonment is somewhat higher than dedication; courts require continuing use of the cemetery or at least some continuing recognition that bodies are buried there.[90] Nevertheless, in some cases there are rights of access even to an abandoned cemetery. A Florida statute articulates the minority view that if the cemetery is abandoned and not being maintained, the courts will likely allow access by family members so that people who are most

88. One case has a somewhat higher standard for dedication: consecration by a priest. *See* McEnery v. Pargoud, 10 La. Ann. 497, 499 (1855) ("In countries where the Catholic religion prevails as the religion of the State, grounds, like cemeteries, become sacred and inalienable after being blessed by the priestly power. . . . The evidence shows that a part of the ground in question was first used as a place of burial under the Spanish provincial government, about the year 1794. No concession of the land was ever made. The inhabitants intended to build a church there, but never consummated their intention. A small portion of it, by a sort of common consent, was enclosed with pickets by the inhabitants, and used as a cemetery for a short period, say from 1794 to 1800. It does not appear whether it was ever consecrated. Its use was then abandoned, another spot having been selected for a grave yard which was thought to be more convenient.").

89. *Hines v. State*, for instance, noted the headstone as part of its discussion of dedication. Thus, dedication does not seem to impose a separate burden beyond showing that there was acquiescence in the burial by the property owner. 149 S.W. 1058, 1059 (Tenn. 1911). Presumably, if there were another way of demonstrating that there was at least acquiescence—such as multiple burials over time—that would satisfy the requirement of consent or dedication.

90. When there has been no interment for decades, there may be abandonment. *See* Harris v. Borough of Fair Haven, 721 A.2d 758, 762 (N.J. Super. Ct. Ch. Div. 1998) (refusing to intervene to stop a zoning variance that would allow new construction over an African American cemetery where there had been no interments in more than one hundred years).

In addition, at least one court overturned an injunction protecting a cemetery from sale, because the cemetery had been abandoned. *See* Van Buskirk v. Standard Oil Co., 134 A. 676, 678–79 (N.J. 1926). In *Van Buskirk*, the New Jersey Court of Errors and Appeals reversed the New Jersey Chancery Court's original injunction, which supported an extreme version of the rights of heirs based on the rule that equity recognizes the right to access. *See id.*; *see also* Van Buskirk v. Standard Oil Co., 121 A. 450, 452 (N.J. Ch. 1923) ("Equity will grant relief in a proper case, at the suit of relatives, or even friends, whether owners of the soil of the cemetery or not, of those buried therein, because a dead body is in the custody of the law and the disturbance of its resting place and its removal is subject to the control and direction of this court." (citations omitted)). But that injunction was overturned because the cemetery had been abandoned, as shown by the removal of bodies. *See Van Buskirk*, 134 A. 676.

interested in its preservation can maintain it.[91] Finally, although rarely discussed in case law, there likely must be a connection between those buried and those seeking access. No case articulates a requirement that those seeking access actually knew the people they are visiting. But it is possible that people who are no longer able to trace a specific connection may have no greater right of access than members of the public.[92]

3. Defining the right of access

The right of access, aged as it may be, remains an amorphous right. Because the right has been litigated infrequently, there are some ambiguities. First, how close must the connection be between the person interred on the property and those claiming access? Second, how much evidence must remain of the cemetery—or how much evidence must there be about the place of burial? Finally, how broad is the right of visitation—or how frequently and how long may the visits last? In each case, courts will likely draw upon a reasonableness calculus by analogy to recent easement by implication cases[93] and to the Restatement (Third) of Servitudes.[94] Cemetery cases usually involve a subsequent purchaser who took with notice—constructive notice, at a minimum—of the existence of the cemetery.[95] The question, of course, is how does one determine reasonableness for purposes of access?

91. FLA. STAT. § 704.08 (2000).

92. One might draw an inference from a case upholding a judgment for negligent grave desecration. *See* Rhodes Mut. Life Ins. Co. v. Moore, 586 So. 2d 866, 867 (Ala. 1991) (allowing a great-grandchild to sue because he knew the decedent whose grave was desecrated).

93. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.12 (2000) (reasonable necessity needed for easements implied by prior use). The classic case of easement implied by prior use, *Van Sandt v. Royster*, 83 P.2d 698 (Kan. 1938), is commonly thought to incorporate a reasonableness calculation in determining the need for an easement for sewage disposal.

94. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 (focusing on reasonableness of determining the validity of servitudes). Here the cases establishing easements by estoppel—which often require notoriously little in the way of evidence of promises—may be helpful in setting the amount of evidence necessary to establish an easement for access based on (implied) promises of continued access. *See, e.g.*, Holbrook v. Taylor, 532 S.W.2d 763, 766 (Ky. 1976) (finding easement by estoppel on evidence that there was "tacit approval" for use of a road for access to a claimant's property).

95. The implication is thus easier than cases of hidden easements. Even in the later cases, courts are willing to imply easements. *See* RESTATEMENT (THIRD) OF PROP.:

In terms of the closeness of the connection between the deceased and those seeking to visit the decedent's gravesite, courts will likely allow anyone who knew the decedent to access the property. But there is also no reason to stop at the point where there is a living connection and to permit only those who knew the decedent to visit the cemetery. None of the statutes require such a direct connection, which may be a good indication of the sentiment of the common law. The statutes of Virginia, West Virginia, and North Carolina contemplate visits by people other than relatives.[96] In fact, given the difficulty of proving family connections and the likelihood that few who are unrelated to the deceased are likely to seek out the deceased's place of burial, courts may be relatively relaxed in demanding proof of an immediate connection between the deceased and the person seeking access. If the number of people wishing to visit the cemetery becomes too burdensome, the number, time, and length of visits may be limited. Those who would impose a requirement of direct connection run the risk of limiting the right too dramatically. The legislatures that have visited this issue have not seen the need for such a strict limitation. At a minimum, those who are direct descendants of the decedent ought to have a right to visit, as long as there remains knowledge of the general area where the decedent is buried.

The final question—the number, time, and length of visits—is probably something best left to the particular equities of each case. Courts will likely take into consideration the relationship of the decedent to those wishing to visit, the hardship to the property owners caused by visitations, and the ability of the relatives to schedule visitations at other times. As our citizens' knowledge and interest in history continues to expand, courts will likely be increasingly called upon to interpret these important rights, which have up until now often been resolved through private meetings.

SERVITUDES § 2.12(4); Joel Eichengrun, *The Problem of Hidden Easements and the Subsequent Purchaser Without Notice*, 40 OKLA. L. REV. 3, 13 (1987).

96. N.C. GEN. STAT. § 65-75 (2005); VA. CODE ANN. § 57-27.1(A)(iii) (Supp. 2006); W. VA. CODE § 37-13A-1 (2000).

B. Corollary Rights: Rights Regarding Desecration, Burial, and Sale

1. Rights against desecration

> If relatives of blood may not defend the graves of their departed, who may? Always the human heart has rebelled against the invasion of the cemetery precincts; always has the human mind contemplated the grave as the last and enduring resting place after the struggles and sorrows of this world. When the patriarch Jacob was dying in Egypt, he spake unto the Israelites, and said: "I am to be gathered unto my people; bury me with my fathers in the cave that is in the field of Ephron, the Hittite, in the cave that is in the field of Machpelah, which is before Mamre, in the land of Canaan, which Abraham bought with the field of Ephron, the Hittite, for a possession of a burying place. There they buried Abraham and Sarah, his wife; there they buried Isaac and Rebekah, his wife; and there I buried Leah." Gen. xlix, 29. Jacob regarded the grave as the never-ending resting place of his kindred. Ever since those distant days so has felt the human heart. Everything else has changed; but that sentiment remains steadfast to-day.
>
> *Ritter v. Couch*[97]

A critical right, closely allied to the right of access to an ancestor's grave, is the right against desecration. Desecration may include removal of human remains[98] as well as disruption of the grave itself[99] or the monuments around it.[100] If the owner of land

97. 76 S.E. 428, 430 (W. Va. 1912).

98. A typical statute is "Unauthorized Removal of Human Remains":

> A person who, not being authorized by law, intentionally excavates, disinters, removes or carries away a human body, or the remains thereof, interred or entombed in this state, or intentionally excavates, disinters, removes or carries away an object interred or entombed with a human body in this state, or knowingly aids in such excavation, disinterment, removal or carrying away, or is accessory thereto, shall be imprisoned not more than fifteen years or fined not more than $10,000.00, or both.

VT. STAT. ANN. tit. 13, § 3761 (2005); *see also* Steve Cusick, *Giving the Abenaki Dead Their Due: A Proposal To Protect Native American Burial Sites in Vermont*, 28 VT. L. REV. 467, 479 (2004) (proposing further limitations on developing property where native graves are located, largely based on nuisance rationale and because the disturbance of graves is already prohibited under Vermont law).

99. *See* Christopher A. Amato, *Digging Sacred Ground: Burial Site Disturbances and the Loss of New York's Native American Heritage*, 27 COLUM. J. ENVTL. L. 1, 2–3 (2002) (lamenting inadequate protections for native graves in New York).

where a cemetery is located were allowed to destroy the cemetery, then there would be little left of the right to visit a grave, because the grave could be destroyed and the right to visit does not extend to a grave that no longer exists. The right of access of family members works in conjunction with the limitation on landowners' right to use cemetery property.[101] This is another part of the affirmative easement that exists on cemeteries.

Most states have statutes criminalizing the desecration of cemeteries[102] and well-developed case law providing for causes of action by family members against those who destroy graves, even if the graves are on the property of those destroying the graves.[103] There is, then, a public and a private right to protect against desecration. The private right puts the power of protection into the hands of the people most interested in it. The right also works to protect the right of access, for it gives those people who have the right of access the power to protect the grave. However, the people who have the right to sue for desecration may be a more limited group than those who have the right to access a cemetery. That is, people with the right to sue may need a closer family connection to maintain a desecration action than to obtain access. This is because access is a general right held by people who want to pay respects to their relatives and ancestors, whereas the tort action for desecration may require a closer connection between those whose graves are disturbed and those who are claiming injury from desecration, so that the people suing have direct evidence of injury.

100. *See, e.g.*, Desecration of Venerated Objects, COLO. REV. STAT. § 18-9-113 (2004) (defining desecration of a burial place as "defacing, damaging, polluting, or otherwise physically mistreating in a way that the defendant knows will outrage the sensibilities of persons likely to observe or discover his action or its result"); MASS. GEN. LAWS ch. 266, § 127A (2000) (providing for up to five years of imprisonment for "[w]hoever willfully, intentionally and without right, or wantonly and without cause, destroys, defaces, mars, or injures a . . . place used for the purpose of burial or memorializing the dead").

101. The rule against desecration is more in the nature of a bright line rule in contrast to the reasonableness rule of access.

102. *See, e.g.*, ALA. CODE § 13A-7-23.1 (2006).

103. *See, e.g.*, Mary L. Clark, *Treading on Hallowed Ground: Implications for Property Law and Critical Theory of Land Associated with Human Death and Burial*, 94 KY. L.J. 487, 505 n.66 (2005–2006) (explaining some of the tort and criminal law prohibiting the desecration of cemeteries). *But see* Lior Jacob Strahilevitz, *The Right To Destroy*, 114 YALE L.J. 781, 815–22 (2005) (reviewing, among other topics, society's feelings towards destruction of historic buildings and valuable chattels and arguing that destruction of what some might consider valuable benefits society as a whole).

Courts typically allow suit by these interested parties when cemeteries are disturbed through leveling or disruption of graves, removal or destruction of monuments such as headstones, and removal of gates or other markers.[104] The key element is the intentional disruption of a grave.[105] Relatives and descendants are permitted a full range of relief, from money damages to injunctions. One of the most recent cases to interpret the action of desecration is *Rhodes Mutual Life Insurance Co. v. Moore*, which permitted recovery by the great-great-grandson of the deceased, who is a remote descendant.[106] *Rhodes* illustrates the generally expansive view of the right to prevent desecration and to recover for it when it occurs.

Other cases have found liability for desecration of cemeteries more than a century old. In the 1987 case of *Whitt v. Hulsey*, the Alabama Supreme Court upheld a jury award of punitive damages for grave desecration for a cemetery that dated to at least 1853.[107] Allegedly, when a new owner purchased the property containing the cemetery in 1983, he removed headstones.[108] *Whitt* provides for a private cause of action against those who destroy a cemetery as long as the cemetery is still identifiable. There are statutory provisions for relocating cemeteries, which frequently require a court's approval for relocation.[109] Landowners who violate these provisions and unilaterally remove headstones or bodies may have punitive damage awards levied against them.[110] This is a necessary right to preserve the cemetery so that there is a cemetery to visit.

104. *See, e.g.*, N. E. Coal Co. v. Pickelsimer, 68 S.W.2d 760, 761 (Ky. 1934) (mining in vicinity of cemetery, which disrupted access to cemetery and soil near cemetery); Michels v. Crouch, 150 S.W.2d 111, 111 (Tex. Civ. App. 1941) (plowing in cemetery and damaging headstone).

105. *See, e.g.*, Johnson v. Ky.-Va. Stone Co., 149 S.W.2d 496, 497–98 (Ky. 1941) (holding construction contractor not liable because the disruption was done without knowledge that there was a grave).

106. 586 So. 2d 866, 866–67 (Ala. 1991).

107. 519 So. 2d 901, 906 (Ala. 1987).

108. *Id.* at 901.

109. *See, e.g.*, Proceedings by Landowner for Removal of Remains from Abandoned Family Graveyard, VA. CODE ANN. § 57-38.1 (2006).

110. *See, e.g.*, Whitt v. Hulsey, 519 So. 2d 901 (Ala. 1987) (finding exemplary damages may be appropriate for reckless desecration of cemetery by neighboring landowners); Growth Properties I v. Cannon, 669 S.W.2d 447 (Ark. 1984) (awarding punitive damages for grossly negligent desecration); Gostkowski v. Roman Catholic Church of Sacred Hearts of Jesus and

Desecration happens frequently when new owners are building on the property, as well as when they are farming. In *Polhemus v. Daly*, for example, the owner of the property used the cemetery as a sod farm.[111] The owner used a horse-drawn sled to remove sod, which obliterated the identity of the graves.[112] Such an act constituted a desecration to all the graves, and the owner was therefore enjoined.[113] However, the court declined to enforce a previous injunction on burning vegetation in and around the grave area, as burning vegetation was a common method of clearing the ground and, therefore, not desecration.[114] Similarly, in *Cochran v. Hill*, the Texas Court of Appeals enjoined a property owner from pasturing live stock or drilling oil wells in the cemetery located on his property.[115]

2. Right of further burial

> A vault, in reference to interment, is but a place to entomb; and when so used, becomes a tomb; a receptacle for the dead—a last resting place. A grant of such a place gives an exclusive right; and why may it not be perpetual? Abraham's purchase of the cave in the field of Machpelah, "for a possession of a burying-place," was of that character. There, according to sacred history, the patriarch buried his wife Sarah, and was himself buried; there, were Isaac and Rebecca also laid; in that cave Jacob buried Leah, and while sojourning in Egypt and about to die, he made his son Joseph swear to him to remove his body and bury it with his fathers. Here we have an instance of a purchase, which enured to the purchaser and his heirs even to the fourth generation.
>
> It is certainly competent for a man, at this day, to buy the fee simple of an estate in land for the purposes of sepulture; and when converted to that use, the title may descend or be again the subject of sale.
>
> *In re Corp. of Brick Presbyterian Church of N.Y.*[116]

Mary, 186 N.E. 798 (N.Y. 1933) (awarding punitive damages following removal of body from grave and further abusive treatment of the decedent's family).

111. 296 S.W. 442, 443 (Mo. Ct. App. 1927).

112. *Id.* at 442–43.

113. *Id.* at 445.

114. *See id.*

115. 255 S.W. 768, 769 (Tex. Civ. App. 1923).

116. 6 N.Y. Ch. Ann. 607, 613 (1837).

Another right, closely allied to the right of access, is the right of further burial. Often the right of burial is acquired by purchase, as happens when a family purchases a series of plots in a cemetery.[117] Some courts also imply a right of further burial in a private cemetery once the cemetery owner has consented to some burials.[118]

A further right related to burial is the right to mark a grave, such as through placement of a monument, like a head stone. The right to mark a grave is appurtenant to the right of burial; those who are entitled to bury a family member are allowed to place grave markers, though the boundaries of those rights are best left to another article.[119]

3. Restrictions on sale of cemeteries

There are also restrictions on the sale of public cemeteries (as opposed to cemeteries on private property, which are the focus of the rest of this article). Those restrictions on sale are related to the right of reburial, as they relate to what owners can do with cemeteries. Thus, while a cemetery may be relocated when there is extraordinary need, there can be no sale of the public cemetery

117. The right even in those cases is most likely an easement. *See* Richards v. Nw. Protestant Dutch Church, 20 How. Pr. 317, 317 (N.Y. Sup. Ct. 1859) ("The right of *burial* in a lot, when confined to a *church yard*, as distinguished from a separate independent *cemetery*, although *conveyed* with the common formula of "heirs and assigns forever," must stand upon the same footing as the right of public worship in a particular *pew* of the consecrated edifice. It is an *easement* in, and not a title to, the freehold, and must be understood as granted and taken subject (with compensation of course,) to such changes as the altered circumstances of the congregation or the neighborhood may render necessary.").

118. The Tennessee Supreme Court's 1911 decision in *Hines v. State* articulated, in dicta, a right of further burial, 149 S.W. 1058, 1059 (1911), which has been quoted in subsequent cases, like *Davis v. May*, 135 S.W.3d 747 (Tex. App. 2003): "The right of burial extends to all the descendants of the owner who devoted the property to burial purposes, and they may exercise it when the necessity arises." *Id.* at 750. Because the right has received little articulation in the courts, it is difficult to know its scope. However, the right of burial could easily be justified along the same lines as the right of access.

119. *See* Durell v. Hayward, 75 Mass. (9 Gray) 248, 249 (1857) ("The indisputable and paramount right, as well as duty, of a husband, to dispose of the body of his deceased wife by a decent sepulture in a suitable place, carries with it the right of placing over the spot of burial a proper monument or memorial in accordance with the well known and long established usage of the community."). But at times courts seem to think (perhaps improperly) that the property owner controls what monuments may be placed on graves. *See* Smiley v. Bartlett, 6 Ohio C.C. 234 (1892) (discussing the equity court's right to intervene in disposition of a body and commenting that "the cemetery lot in which the body is now buried is the private property of the defendant, Matthew Bartlett, who may, at will, prevent the plaintiffs from approaching or decorating the grave of their mother").

unless there are adequate provisions for the preservation of the cemetery. The Pennsylvania Supreme Court spoke to the restrictions on the sale of cemeteries in 1859. It explained that courts should enjoin the sale of a church's graveyard, for a sale would likely violate the intent of the cemetery's founders:

> We hold that the ground once given for the interment of a body is appropriated for ever to that body. It is not only the *domus ultima*, but the *domus aeterna*, so far as eternal can be applied to man, or terrestrial things. Nothing but the most pressing public necessity should ever cause the rest of the dead to be disturbed. We believe it our duty to restrain, by injunction, this congregation from selling, or encumbering by mortgage or judgment, so much of the hundred acres of land described in the bill as has been set apart for a grave-yard; and as the same might be insufficient in size for the purpose, or not specifically designated, we shall appoint a suitable artist to lay off the ground intended to be embraced by the decree. We also deem it improper to sell or encumber the church built on those premises. If encumbered, it may be sold to the great inconvenience of the worshippers, and contrary, as we believe, to the intention of the founders.[120]

III. BALANCING PUBLIC RIGHTS IN CEMETERIES

Hidden in cemeteries, then, are conflicts between how we remember our ancestors—and therefore how we think about ourselves—and the need for economically productive use of property. This has arisen numerous times in American history as the living population has competed with the dead one for space.

Once, the Louisiana courts tried to solve this problem by treating the dedication of a cemetery as the conversion of it from private property into public property, which the community has the right to govern. One case spoke of the early rights of the churches and the public in cemeteries:

> By the Spanish law, things established for the service of God were held sacred, and the dominion thereof was not in any person, and could not be counted as property. The laws on that subject were borrowed from paganism; but nevertheless, since the solemn

120. Brendle v. German Reformed Congregation, 33 Pa. 415, 422 (1859); *see also* Arkenburgh v. Wood, 23 Barb. 360 (N.Y. Gen. Term 1856) (permitting sale so long as the cemetery continues as a church yard).

> consecration of churches and cemeteries was established, immediately on things being consecrated, religion was considered as occupying them, and being irrevocably inseparable from them. The consequences of this principle were regulated by the common law institutes of the law of Spain . . . .[121]

But that hint of radically different treatment of property rights in cemeteries was rejected in Louisiana long ago,[122] and there have been frequent conflicts between those whose relatives are buried in cemeteries and those who would like to use the cemetery property for another purpose. Thus, cemeteries have joined other conflicts that appear periodically where established uses of property conflict with more economically productive uses of property. The most prominent recent example of this clash appears in the reaction to *Kelo v. City of New London*.[123]

The clash between the living and the dead—between the living who want to use the property for some purpose other than memory of the dead and the living who prefer the established cemetery—has appeared since the early nineteenth century. Given the conflict between a traditional use of property and a potentially more economically efficient use of the same property, courts must balance the right of burial and access with the right to remove bodies and thus move cemeteries. Removal is sometimes necessary, especially in areas that have grown substantially since the cemetery was first established. The battle over the Trinity Church Cemetery on Wall Street in Manhattan illustrates this conflict between the long-established and not economically productive use of land and the need for making land economically productive.[124] This is part of a vigorous debate over public versus private rights in land, which has

121. Xiques v. Bujac, 7 La. Ann. 498, 503 (1852).

122. McEnery v. Pargoud, 10 La. Ann. 497, 499 (1855) ("In 1803, the country embracing it was ceded to the United States, and in 1823, this land was confirmed to the parish of Ouachita by Congress, moved, it would seem, by a respect for the feelings and associations of the old inhabitants of the neighborhood. But the United States annexed no condition to its grant. The fee simple of the land passed absolutely to the parish, and it must thenceforward be considered as under the dominion of the laws of Louisiana.").

123. 125 S. Ct. 2655 (2005).

124. *See* HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870, at 73–75 (1983); *see also* Brick Presbyterian Church v. Mayor of N.Y., 5 Cow. 538 (N.Y. Sup. Ct. 1826) (interpreting city's power to stop interments).

stretched from the nineteenth century to the present.[125] The Pennsylvania Supreme Court phrased the conflict well in 1850 when it asked whether rights of the dead would outweigh the rights of the living to use property for railroad tracks.[126] It was a strand of the classic debate over control of property by the dead (and their relatives) or by the living.[127]

The problem in cemeteries, however, is not just that people who are now dead are occupying the property. For preservation of cemeteries is largely about the preservation of a place for people who are alive to visit, remember, and worship their ancestors and relatives. Thus, cemeteries pose a conflict between the rights of the living to have a place of memorial for the dead and the rights of other living people to use the land in (what to them is) a more productive fashion. Yet, frequently it is spoken about as a conflict between dead and living. The Pennsylvania Supreme Court phrased the controversy as one between the abodes of the dead and the needs of the living. It said a cemetery had to be relocated so that a railroad could go through the land occupied by the cemetery. In a utilitarian fashion that is representative of antebellum judicial reasoning, the Court concluded that it could not make the railroad run through a different and more dangerous route, for that would subject the living to even more damage than relocation of the cemetery:

> The abodes of the living are not more inviolable than the abodes of the dead; yet thousands of human bones lie beneath the walks and

125. *See, e.g.*, ALEXANDER, *supra* note 3, 72–88 (discussing republicanism and property rights in antebellum United States); WILLIAM NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996) (discussing conflicts over right to use property for the public benefit as opposed to private uses). For a similar debate in the South, see Alfred L. Brophy, The Intersection of Slavery and Property in Southern Legal Thought: From Missouri Compromise Through Civil War 1–203 (2001) (unpublished Ph.D. dissertation, Harvard University) (on file with author).

As Carl Christensen has reminded me, the right against removal has some implications for notice rights of relatives. Whether relatives have a constitutional right of pre-removal notification under *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), is an issue beyond this essay, but one that deserves scrutiny.

126. Brocket v. Ohio & Pa. R.R. Co., 14 Pa. 241, 244–45 (1850).

127. *See, e.g.*, ALEXANDER, *supra* note 3, 158–84 (discussing concern over dead hand control and development of rule against perpetuities in the late nineteenth century); *see also* PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA (1997); Alfred L. Brophy, *Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists*, 79 B.U. L. REV. 1161 (1999) (reviewing KARSTEN, *supra*) (discussing conflicts over control of property by vested interests or newer users).

> alleys of Washington Square in Philadelphia, once its Potter's Field, now its most frequented pleasure-ground. If a cemetery cannot impede the march of improvement for purposes of recreation, how can the owner of a cottage expect that it will impede a work of necessity? The legislation of a country necessarily takes its tone from the temper and the necessities of the age. A house, a church, a grave-yard, or any thing else, may be conveniently privileged in an act to incorporate a turnpike or a canal company, because it may be avoided without lessening the usefulness of the work; but every deflexion from a right line in the bed of a railroad, is proportionately productive of danger to property and life. It is indispensable to safety and speed that the route of it be as direct as the surface of the country will permit; but they could not be attained in a settled country if every hovel or house were privileged; and thus a *quasi* national work, intended for posterity, might be botched through a respect for the sacredness of temporary erections. The course of a railroad might be insuperably obstructed by the obstinacy of a proprietor in the gorge of a mountain, or the pass be made, at least, difficult and dangerous. A mangled passenger, inquiring the reason of a deflexion, when the cause of it had disappeared, might be told of our infinite respect for property at the expense of safety; but the information would neither ease his pain nor set his leg.[128]

The New York Supreme Court, similarly, rejected a claim that the state could not take a cemetery in order to convert it into a street. The court held that the right of relocation exists as part of the city's power of eminent domain.[129]

Similarly, the New York Supreme Court of Judicature dealt with the conflict between the rights of the dead and those of the living in 1837 when it rejected an effort to prevent the sale of the Brick Presbyterian Church in Manhattan for use as a street.[130] The city had

128. *Brocket*, 14 Pa. at 244–45.

129. *See In re* Opening of Albany St., 6 Abb. Pr. 273, 276–77 (N.Y. Sup. Ct. 1858) ("The remaining objections made to the granting of this motion rest entirely upon the merits of the opening, and should have been presented to the Common Council, and not to the court. Even if, as suggested by the counsel for Trinity Church, the opening of this street is against the law of nature and the divine law, because it is an interference with a public cemetery,—if it be demoralizing to permit a burying ground to be disturbed, if compensation cannot be made for the dead, whose bodies are to be removed; still none of those reasons are properly addressed to this court at this time.").

130. *See* Brick Presbyterian Church v. Mayor of N.Y., 5 Cow. 538, 542 (N.Y. Sup. Ct. 1826).

already encroached on the church and made the cemetery an improper place for burial. The court quoted Sir Walter Scott's opinion in *Gilbert v. Buzzard*, which had rejected the right to bury people in iron caskets. Such caskets would have prolonged the period of time necessary for bodies to decompose and thus dramatically extended the amount of space needed for cemeteries:

> This is the known progress of things in their ordinary course; and if to this is to be added the general introduction of a new mode of interment, which is to insure to the bodies a much longer possession, the evil will be intolerable. A comparatively small portion of the dead will shoulder out the living and their posterity. The whole environs of this metropolis must be surrounded by a circumvallation of church-yards, perpetually enlarging, by becoming themselves surcharged with bodies; if indeed landowners can be found willing to divert their ground from the beneficial uses of the living to the barren preservation of the dead . . . .[131]

Perhaps in relation to the Christian belief in the bodily resurrection of the dead, Scott implied that the right may be subject to a limitation for the period during which the bodies are intact.

Both public and private entities may seek to relocate the cemeteries. A public entity, like a city, may relocate cemeteries under its eminent domain power. Thus, in recent years, the relocation of cemeteries by government bodies has occasioned little litigation. However, there are more conflicts when landowners try to relocate cemeteries so that they can build on the property.[132] Private relocation of cemeteries is governed by statute. Such statutes typically require the landowner to petition the local court for permission to relocate the cemetery.[133] The property owner must

131. *In re* Corp. of Brick Presbyterian Church of N.Y., 6 N.Y. Ch. Ann. 607, 612 (1837) (quoting Gilbert v. Buzzard, 3 Phil. Ecc. 335, 355 (1820)).

132. Sometimes, the burial ground has the right to re-bury. *See, e.g.*, Windt v. German Reformed Church, 4 Sand. Ch. 471, 474 (N.Y. Ch. 1847) ("The complainants have relatives interred there, but no one of them has any deed of a vault or a portion of the ground, or any title thereto. No such deed or conveyance has been executed to any person. The whole title has remained in the corporation. The sepulture of friends and relatives, in such a burying ground, confers no title or right upon the survivors. If the latter have any interest in the cemetery, or control over its use and disposal, it can only be as corporators in the society owning the ground.").

133. *See, e.g.*, Proceedings by Landowner for Removal of Remains from Abandoned Family Graveyard, VA. CODE ANN. § 57-38.1 (2006).

show that there are reasonable plans for relocation and that the cemetery is not currently in use.[134]

Underscoring the debate of private entities and their attempts to relocate cemeteries, the New York Supreme Court in *Schoonmaker v. Reformed Protestant Dutch Church of Kingston* strictly limited rights of burial and visitation and even allowed the removal of headstones:

> The legal doctrine is, that "the common cemetery is not . . . the exclusive property of one generation now departed, but it is the common property of the living, and of generations yet unborn, and subject only to the temporary appropriation."
>
> In the most enlarged construction that can be given to the plaintiff's legal rights, those rights must be considered as satisfied. The feelings, which still prompt her to guard the soil with which the remains of her kindred have long since mingled, are natural and commendable. It is very manifest, from the facts before me, that the defendants have sedulously sought to guard against any unnecessary violation of those feelings. They seek to appropriate the land to the beneficial uses of the living. This it is their right, if not their duty to do. However painful it may be to the plaintiff to see the memorials which affection has erected in memory of her kindred removed, she has no legal right longer to divert the land to the barren preservation of those memorials.[135]

One other question that sometimes arose in considering the public and private rights surrounding use of cemetery property was whether it constituted a nuisance. In general, cemeteries were not by themselves nuisances.[136] However, in certain instances

134. *See, e.g.*, Declaration for Abandonment of Cemetery and Removal of Human Remains Interred Therein—Publication, Posting, and Mailing of Notice, ALA. CODE § 11-47-62 (1975).

135. Schoonmaker v. Reformed Protestant Dutch Church of Kingston, 5 How. Pr. 265, 271 (N.Y. Sup. Ct. 1850) (citation omitted).

136. *See* Ellison v. Comm'rs of Wash., 58 N.C. (1 Jones Eq.) 57, 60–61 (1859) ("Our conclusion is, that *burying the dead* in public cemeteries, is not necessarily a nuisance, but might become so by careless and improvident modes of interment. It is, at most, a doubtful or contingent nuisance, and in such cases, the courts of equity will not interfere to prevent, but will leave complainants to establish the nuisance by an action at law, when it shall arise."). The Louisiana Supreme Court acknowledged that cemeteries might injure property interests at any place and so refused to enjoin them. City of New Orleans v. Wardens of Church, 11 La. Ann. 244, 245 (1856) ("It is very evident that, wherever located, the cemetery must be in the vicinity of private property, belonging to persons, who might be able to prove that the marketable value of their property is injuriously affected by such vicinity.").

there were injunctions on burials where it endangered public health.[137]

It is critical that a cemetery retain its hallowed character; otherwise, the cemetery is liable to be moved.[138] And when the location of a cemetery is lost, the relatives of people buried there lose their special rights to protect the cemetery. They are left with no more rights than the general public, which means they have no rights.[139]

IV. THE MEANING OF THE RIGHT OF ACCESS

> Pa said softly, "Grampa buried his pa with his own hand, done it in dignity, an' shaped the grave nice with his own shovel. That was a time when a man had the right to be buried by his own son an' a son had the right to bury his own father."
>
> "The law says different now," said Uncle John.
>
> "Sometimes the law can't be foller'd no way," said Pa. "Not in decency, anyways. They's lots a times you can't. When Floyd was loose an' goin' wild, law said we got to give him up—an' nobody give him up. Sometimes a fella got to sift the law. I'm sayin' now I got the right to bury my own pa. Anybody got somepin to say?"
>
> Pa Joad in *The Grapes of Wrath*[140]

137. Clark v. Lawrence, 59 N.C. (1 Jones Eq.) 83, 84–86 (1860) (permitting injunction where interment would endanger public health).

138. *See* Clarke v. Keating, 170 N.Y.S. 187, 190 (App. Div. 1918) (finding that burial rights granted by will in 1794 had been extinguished because the cemetery had been run-down, and around 1907 the bodies in the cemetery had been moved to another cemetery).

> Even without precise precedent, land that has lost its sacred character should not be withheld from serving the needs of the community, through a mere sentiment regarding a site in which the higher uses have ceased. The Roman law hallowed, not only a cemetery, *solum religiosum*, but regarded a single lawful burial as a dedication of such a site to religious use. However, the strong practical sense of that civilization, favoring extinguishment of rights by nonuser, held cemeteries and single burial places as reserved from trade only while such burials remained. After disinterment and removal of the body or remains, the religious character of the ground ceased (*desinit locus religiosus esse*).

Id. at 215.

139. *See* Sanford v. Vinal, 552 N.E.2d 579, 581 (Mass. App. Ct. 1990).

140. JOHN STEINBECK, THE GRAPES OF WRATH (1939), *in* THE GRAPES OF WRATH AND OTHER WRITINGS 1936–1941, at 357 (Library of America 1996). There is a 1932 Oklahoma case, which one seriously doubts that Steinbeck knew about, that relieves a husband of

> "I offer we put a note of writin' in a bottle an' lay it with Grampa, tellin' who he is an' how he died, an' why he's buried here."
>
> . . . .
>
> . . . Tom sat down in the firelight. He squinted his eyes in concentration, and at last wrote slowly and carefully on the end paper in big clear letters: "This here is William James Joad, dyed of a stroke, old old man. His fokes bured him becaws they got no money to pay for funerls. Nobody kilt him. Jus a stroke an he dyed."
>
> Tom Joad, *The Grapes of Wrath*[141]

The Joads' quiet civil disobedience—and Steinbeck's invocation of Pretty Boy Floyd—reminds one of the multiple ways in which the poor and dispossessed have dealt with legal institutions. Ralph Ellison, another of the great writers inspired by Oklahoma, also

expenses for burying his wife. *See In re* Wilson's Estate, 15 P.2d 825 (Okla. 1932). A dissenting justice quoted Genesis's story of Abraham purchasing a burial place for Sarah:

> And Abraham said unto the sons of Heth, I am a stranger and a sojourner with you; give me a possession of a burying place. And the children of Heth answered, thou art a mighty prince among us; in the choice of our sepulchres bury thy dead. And Abraham replied that he wanted the cave of Machpelah which is in the end of his field for as much money as it is worth. And the Hittite answered, the field I give thee and the cave that is therein I give thee. And Abraham answered, I will give thee money for the field, take it of me, and I will bury my dead there. And Ephron answered, the land is worth four hundred shekels of silver; what is that betwixt me and thee? Therefore bury thy dead. And Abraham weighed to Ephron the silver, four hundred shekels of silver, current money with the merchant. And the field of Ephron and the cave which was therein and all the trees that were in the field, that were in all the borders round about, were made sure to Abraham for a possession. And after this, Abraham buried Sarah his wife in the cave in the field in the land of Canaan. Here, from the earliest dawn of time, civilized men, to the present day, have felt it a moral and a legal duty to bury their wives as befits their station in life.
>
> . . . Abraham refused a free burial place for Sarah and insisted that he bear the expense of preparing the last resting place for his beloved companion.

Id. at 827–28. Perhaps Steinbeck did have the story of burial in Genesis in mind when the family left grandpa Joad in the desert.

The same story was used to conclude a lawyer's argument that a grant in 1712 for a town cemetery had extinguished all the grantor's rights in *Town of Chatham v. Brainerd*, 11 Conn. 60, 80 (1835). After recounting the story of Abraham, the advocate observed:

> The same feeling has been cherished among all civilized nations. And when we erect our memorials to perpetuate the recollection of the virtues of departed friends and relatives, we are solaced by the belief, that their bodies will rest undisturbed in their places of sepulture, until they are raised in glory.

Id.

141. STEINBECK, *supra* note 140, at 358, 360.

spoke of Pretty Boy Floyd and civil disobedience. He wondered, though, at the ways that white people protected Floyd, even while they harshly criticized black law breakers. Ellison saw a disparity in law between white and black, but he also advanced a faith in law.[142] The ancient right of access to a graveyard and faith in law join two powerful concepts for remaking the power of landowners and those seeking access. The ancient right of access links the living with the past, evokes feelings of national and personal sentiment and pride, and educates the living regarding our past. Through these powers and the legal rights arising from the common law, the right of access has the potential to redefine the lines between landowners and those seeking access.

The ancient right of the cemetery has some magical power hidden within it to rebalance the power of landowners and those whose ancestors are buried on that land. In the recent explosion of talk of the past—particularly of life under slavery and Jim Crow[143]—and the understanding that comes along with that past, there is now the opportunity to harness one ancient right of the graveyard, to visit private property, and to remember the past.

Cemeteries have a strong hold on the American, indeed the human, mind. From the description of sepulchers in the Bible through the great nineteenth century cemeteries at Gettysburg[144] and countless other places like Mount Auburn in Cambridge, Massachusetts,[145] there has been a reverence for the cities of the

142. *See* RALPH ELLISON, *The Perspective of Literature*, *in* GOING TO THE TERRITORY 321, 324 (1986).

143. *See, e.g.*, BROWN UNIV. STEERING COMM. ON SLAVERY AND JUSTICE, SLAVERY AND JUSTICE 67–78 (2006), http://www.brown.edu/Research/Slavery_Justice/documents/SlaveryAndJustice.pdf; Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256 (2005).

144. GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA (1991); *see also* CHRISTOPHER WALDREP, VICKSBURG'S LONG SHADOW: THE CIVIL WAR MEMORY OF RACE AND REMEMBRANCE (2006) (exploring the memory of the Battle of Vicksburg).

145. *An Address on the Dedication of the Cemetery at Mount Auburn, September 24, 1831*, 1 NEW ENG. MAG. 539, 539–42 (1831) (discussing Joseph Story's dedication oration); *see also* ROBERT POGUE HARRISON, DOMINION OF THE DEAD (2003); KENNETH JACKSON & CAMILO VERGARA, SILENT CITIES: THE EVOLUTION OF THE AMERICAN CEMETERY (1990); ALLAN I. LUDWIG, GRAVEN IMAGES: NEW ENGLAND STONECARVING AND ITS SYMBOLS, 1650–1815 (1966); DAVID CHARLES SLOANE, LAST GREAT NECESSITY: CEMETERIES IN AMERICAN HISTORY (1991); S.W.G. Benjamin, *Cemeteries*, 27 HARPER'S 331 (1863); *Burial*, 93 N. AM. REV. 108, 124–27, 135–36 (1861); *Earth Burial and Cremation*, 135 N. AM. REV.

dead. Some sense of the judiciary's reverence comes from cases involving improper disposal of bodies:

> From our childhood we all have been accustomed to pay a reverential respect to the sepulchres of our fathers, and to attach a character of sacredness to the grounds dedicated and inclosed as the cemeteries of the dead. Hence, before the late statute of *Massachusetts* was enacted, it was an offence at common law to dig up the bodies of those who had been buried, for the purpose of dissection. It is an outrage upon the public feelings, and torturing to the afflicted relatives of the deceased. If it be a crime thus to disturb the ashes of the dead, it must also be a crime to deprive them of a decent burial, by a disgraceful exposure, or disposal of the body contrary to usages so long sanctioned, and which are so grateful to the wounded hearts of friends and mourners. If a dead body may be thrown into a river, it may be cast into a street:—if the body of a child—so, the body of an adult, male or female. Good morals—decency—our best feelings—the law of the land—all forbid such proceedings. It is imprudent to weaken the influence of that sentiment which gives solemnity and interest to every thing connected with the tomb.
>
> Our funeral rites and services are adapted to make deep impressions and to produce the best effects. The disposition to perform with all possible solemnity the funeral obsequies of the departed is universal in our country;— and even on the ocean, where the usual method of sepulture is out of the question, the occasion is marked with all the respect which circumstances will admit.[146]

The right of access has meaning for several reasons. First, and perhaps most important, is sentimental attachment to cemeteries. The cemetery has great meaning to individuals, and sometimes, as in the case of Gettysburg and Arlington National Cemetery, they have great meaning for us as a nation. The important New York lawyer and politician Daniel D. Barnard spoke at the consecration of the Albany Cemetery in 1844 in the midst of the anti-rent movement, of which he was a strong opponent.[147] Even Barnard, a staunch

266, 279–80 (1882); *The Grave in the Forest*, 4 S. LITERARY MESSENGER 690, 690–93 (1838).

146. *In re* Kanavan, 1 Me. 226, 227 (1821).

147. *See* Daniel Barnard, *The "Anti-Rent" Movement and Outbreak in New York*, 2 WHIG REV. 577 (1845). Barnard's concern for the repose correlates with his general concern for

supporter of private property rights against the community, recognized the importance of cemeteries to the human spirit:

> The living cannot occupy the earth exclusively—space must be yielded for the dead. As fast as we can count men die, and their bodies must rest somewhere in the ground—such, at least, as are not consumed by fire, or swallowed up in the sea. . . . [L]and must be appropriated for their use and occupation. Where it is not thus appropriated, and appropriated liberally, the dead are defrauded. They are entitled to their share of the earth, by what seems an original and authoritative designation of the uses to which it should be subject. . . . The living must possess and subdue the earth; but a fair portion of it is the true inheritance of the dead.[148]

Those, like Ralph Waldo Emerson, who cared less than Barnard for property rights, saw much value in cemeteries as well. But Emerson saw more precisely the value of cemeteries for what they give to us as living people. And he saw in cemeteries an opportunity to educate and improve the living. Emerson celebrated them in a speech at the dedication of Sleepy Hollow Cemetery in Concord, where he is now buried:

> I suppose all of us will readily admit the value of parks and cultivated grounds to the pleasure and education of the people, but I have heard it said here that we would gladly spend for a park for the living, but not for a cemetery; a garden for the living, a home of thought and friendship. Certainly the living need it more than the dead; indeed, to speak precisely, it is given to the dead for the reaction of benefit on the living. But if the direct regard to the living be thought expedient, that is also in your power. This ground is happily so divided by Nature as to admit of this relation between the Past and the Present. In the valley where we stand will be the Monuments. On the other side of the ridge, towards the town, a portion of the land is in full view of the cheer of the village and is out of sight of the Monuments; it admits of being reserved for secular purposes; for games,—not such as the Greeks honored the dead with, but for games of education; . . . patriotic eloquence,

vested rights. *See, e.g.*, DANIEL BARNARD, MAN AND THE STATE: SOCIAL AND POLITICAL: AN ADDRESS DELIVERED BEFORE THE CONNECTICUT ALPHA OF PHI BETA KAPPA AT YALE COLLEGE (B.L. Hamlen ed., 1846); DANIEL D. BARNARD, A PLEA FOR SOCIAL AND POPULAR REPOSE: . . . AN ADDRESS DELIVERED BEFORE THE PHILOMATHEAN AND EUCLEIAN SOCIETIES OF THE UNIVERSITY OF THE CITY OF NEW-YORK, JULY 1, 1845 (New York, 1845).

148. D.D. Barnard, Address (Oct. 7, 1844), *in* ALBANY RURAL CEMETERY ASSOCIATION: ITS RULES, REGULATIONS, &C 14, 15–16 (1846).

> the utterance of the principles of national liberty to private, social, literary or religious fraternities. Here we may establish that most agreeable of all museums, agreeable to the temper of our times,—an *Arboretum* . . . .[149]

Cemeteries are, indeed, powerful places, which have received recognition by poets, by orators, by the people themselves. Visits to cemeteries remind us of the connections between the past and the present and the ways that we are dependent on the contributions made by people in the past. Cemeteries have great power to remind us of the contributions others have made; they are often the sites of celebrations, even if somber, of the past and of our debts to the people buried in them.

In a cemetery we are reminded of the connections of people to one another.[150] Daniel Barnard spoke about these connections at the dedication of the Albany Cemetery:

> This will be a common burial-place where all shall meet on terms of common fellowship and brotherhood. Every dear relation in life, severed by death, shall be found restored again in these grounds—husband and wife, parent and child, brother and sister, shall be re-united here. Friend shall meet friend here; and enemies, too, shall meet, there enmities all forgotten. Yonder city, where, as every where in life, the harmonies of society are apt to be broken by petty feuds, by ungentle rivalries, by disturbing jealousies, by party animosities, by religious dissensions, shall, one after another, as death singles them out, send up her multitudinous population to these grounds, and here they shall take their respective places, in amiable proximity to each other, peaceful, harmonious, undisturbed and undisturbing, the same shadows deepening on them, the same sun-light over them, resting in the same hope . . . .[151]

In addition to the mystical powers of cemeteries to change the attitudes of property owners and visitors, talk of the long-standing

149. Ralph Waldo Emerson, Address to the Inhabitants of Concord at the Consecration of Sleepy Hollow Cemetery (Sept. 29, 1855), *in* THE COMPLETE WORKS OF RALPH WALDO EMERSON 427, 432–33 (1884).

150. Hannoch Dagan, *Just Compensation, Incentives, and Social Meanings*, 99 MICH. L. REV. 134 (2000); Kitty Rogers, *Integrating the City of the Dead: The Integration of Cemeteries and the Evolution of Property Law, 1900–1969*, 56 ALA. L. REV. 1153 (2004) (exploring the legal basis for the end of racial segregation of cemeteries and its cultural meaning).

151. Barnard, *supra* note 148, at 29–30.

legal rights associated with the right of access has important implications for property rights. Because the right of graveyard access existed at common law, the owners of property are not entitled to exclude or even to claim compensation for a taking. This may be part of a little-remarked trend towards humanitarian analysis of property law, which turns in part on anti-feudal sentiments existing throughout American history.[152] Such anti-feudal sentiments provide a basis, even if dimly and incompletely recognized, for judges to protect freedom from expansive private control, as it now holds. Of course, property rights advocates may see an expansion of community rights as a form of feudalism as well.[153] Perhaps the anti-feudal construct—that individuals should not be as dependent as they are on private property—is an analog to the new property jurisprudence, which protects from loss by excessive and arbitrary governmental changes in benefits. The parallel is that in the case of the anti-feudal construct, there are limitations on the power of

152. One looking for an anti-feudal stance should see John Adams, A Dissertation on the Canon and the Feudal Law, *in* 1 PAPERS OF JOHN ADAMS 103–28 (Robert J. Taylor et al. eds., 1977); Thomas Jefferson, Summary of View of Rights of British America, *in* 1 PAPERS OF THOMAS JEFFERSON 121–35 (Julian P. Boyd ed., Princeton Univ. Press 1969) (1950); *see also* CHARLES MCCURDY, THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS, 1839–1865 (2001) (discussing Anti-Rent Movement of the late antebellum period). More recently, one could cite the growth of respect for tenants, *see supra* note 26, concern over concentration of land in Hawaii, *see supra* note 5, and the limitations of restraints on alienation in servitudes. *See* Kenley v. Nu-West, Inc., 762 P.2d 631 (Ariz. Ct. App. 1988). This is also, I suspect, a piece of "aloha jurisprudence." *See supra* note 5.

A number of scholars, including Gregory Alexander and Joan Williams, have referred to similar ideas, often under the term of republicanism. *See* ALEXANDER, *supra* note 3, at 43–71; CURTIS BERGER & JOAN WILLIAMS, PROPERTY LAND OWNERSHIP AND USE 28–63 (4th ed. 1997) (employing various modifying terms, such as egalitarian, elitist, and entrepreneurial republicanism). Peter Karsten has referred to a similar phenomenon as the jurisprudence of the heart. *See* KARSTEN, s*upra* note 127. I have expressed skepticism about Karsten's interpretation of judges in the antebellum period. *See* Brophy, *supra* note 127. There is certainly evidence that some people, mostly outsiders, employed a "jurisprudence of sentiment" in the antebellum period. *See, e.g.*, Harriet Beecher Stowe, *Love Versus Law*, *in* THE MAYFLOWER; OR, SKETCHES OF SCENES AND CHARACTERS AMONG THE DESCENDANTS OF THE PILGRIMS 19, 19–79 (1844) (contrasting property law with sentiments of love in a rural New England town).

153. *See* RICHARD POMBO & JOSEPH FARDA, THIS LAND IS OUR LAND: HOW TO END THE WAR ON PRIVATE PROPERTY 7 (1996) ("Here's the opening salvo, then, in a revolution championing ownership over servitude and freedom over slavery."). "America is both a land and a people. Neither should be sacrificed for the benefit of the other." *Id.* at 193.

property owners, just as the new property jurisprudence limits the power of the entity that bestows the property.[154]

While we are hearing much these days about the debate about reparations for slavery and Jim Crow, there are efforts to find ways of reminding us about the past.[155] Perhaps one of the most successful efforts to recall the past is the disclosure ordinances that require businesses to recount their connections to slavery.[156] A few have already spoken about slave cemeteries as a place for remembering the connections to the past.[157] Because cemeteries and monuments to the dead are important signifiers of our national identity, they remind us of the sacrifices made by people in the past and remind us, too, of both the burdens and promises of our history.[158]

154. *See generally* Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965) (working out some of the implications of his theory of the "new property"); Elizabeth Bussiere, *The "New Property" Theory of Welfare Rights: Promises and Pitfalls*, 13 GOOD SOC'Y 1, 1–9 (2004) (locating the acceptance of Reich's theory in jurisprudence and culture of the 1960s). Richard Chused synthesizes "property and the post-World War II administrative state"—the subject of Reich's concern—in his casebook with cases including *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1 (1973); and discussion of critical legal studies writing in Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982). RICHARD CHUSED, CASES AND MATERIAL IN PROPERTY 527–90 (2d ed. 1999). There has, moreover, been a resurgence of talk about the lack of property generally. *See, e.g.*, Jane B. Baron, *Property and "No Property,"* 42 HOUS. L. REV. 1425 (2006); Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV 1237 (2005).

155. *See, e.g.*, Eric J. Miller, *Reconceiving Reparations: Multiple Strategies in the Reparations Debate*, 24 B.C. THIRD WORLD L.J. 45 (2004); Charles Ogletree, *Reparations for the Children of Slavery: Litigating the Issues*, 33 U. MEM. L. REV. 245 (2003).

156. *See, e.g.*, Business, Corporate and Slavery Era Insurance Ordinance, CHI., ILL., MUNICIPAL CODE § 2-92-585 (2005). The statute provides that companies doing business with the city must search the company's (and its predecessors') records for evidence of "investments or profits from slavery or slaveholder insurance policies during the slavery era" and then disclose the names of the slaves and slaveholders involved. *See also* ALFRED L. BROPHY, REPARATIONS: PRO & CON 201 (2006) (reprinting an older and more limited version of the ordinance, which related only to insurance disclosure).

157. There has been some discussion of slave cemeteries. *See, e.g.*, *Burial Ground of Unkept Promises*, N.Y. TIMES, Oct. 6, 2002; Brent Staples, *Editorial Observer; History Lessons From the Slaves of New York*, N.Y. TIMES, Jan. 9, 2000.

158. The role of monuments in national culture is an important and as yet inadequately explored area of scholarship. Sanford Levinson has made a very promising beginning. *See* SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 31–63 (1998) (discussing the contest over public monuments to era of Civil War and Reconstruction in the South); *see also* Norman W. Spaulding, *Constitution as Counter Monument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003). A body of work is also emerging on truth commissions and official

Nor has there been much talk of cemetery access, such as the descendants of slaves visiting the plantations where their ancestors labored, died, and are buried. Yet, that simple right has fewer of the problems that plague reparations lawsuits such as the statute of limitations.[159] The Tennessee Supreme Court wrote in 1911, regarding access by descendants to a cemetery established around 1851, that the statute of limitations was not a bar to suit even though filed many years later:

apologies as creators of public memory. *See, e.g.*, Roy L. Brooks, *Getting Reparations for Slavery Right—A Response to Posner and Vermeule*, 80 NOTRE DAME L. REV. 251 (2004); Edward T. Linenthal, *The Contested Landscape of American Memorialization: Levinson's Written in Stone*, 25 LAW & SOC. INQUIRY 249 (2000). There has been little exploration yet about the role of judicial opinions as monuments to national memory, although in the nineteenth century judges sometimes spoke about precedent as monuments to guide them and later jurists. *See, e.g.*, *In re* Opinion of the Justices, 81 Mass. (1 Gray) 599, 600 (1860) ("The enduring monuments of [Chief Justice Lemuel Shaw's] judicial learning, his intellectual grasp, his sound judgment, and his unceasing labor, will be found in the published reports of the judicial decisions of this court."). At other times, judges worried that the precedents were not yet certain. *See, e.g.*, Hempstead v. Reed, 6 Conn. 480, 493 (1827) (Peters, J., concurring) ("I cannot grope through a labyrinth of legal lore, not indeed endless, but 'lengthening as I go,' to find reasons for reversing our decision in *Smith v. Mead*, 3 Conn. Rep. 253., merely to dispose of a question hypothetically raised."). And even history has failed in many cases to serve as an adequate monument. As Attorney General Randolph argued in *Chisholm v. Georgia*: "A parade of deep research into the Amphyctionic Council, or the Achaean league, would be fruitless, from the dearth of historical monuments. With the best lights they would probably be found, not to be positively identical with our union." 2 U.S. 419, 424 (1793), *superseded by* U.S. CONST. amend. XI.

Monument law continues to capture attention and provide a basis for assertion of long-vested rights. *See* Tenn. Div. of the United Daughters of the Confederacy v. Vanderbilt Univ., 174 S.W.3d 98 (Tenn. Ct. App. 2005); Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811, 836 n.105 (2006); John K. Eason, *Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad*, 38 U.C. DAVIS L. REV. 375 (2005). The problems involve not only vested rights, but which group has a claim to public space. Over time the meaning of monuments may, of course, change. What at one point was a celebration of the Old South may, for another generation, be a reminder of the bad old days. I was reminded of this because following the Tulsa race riot, photographs of the riot's aftermath circulated in both black and white Oklahoma. *See* ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921: RACE, REPARATIONS, & RECONCILIATION 63–68 (2003) (discussing and reprinting pictures of the riot and its aftermath). The meaning of the photographs differed, though, for each group. What I find also troubling is that after a certain passage of time, people have often forgotten all the connections of the monument to the past. Often a building's name has become separated from any sense of the person for whom it was named, whether that person's life, on balance, contributed or restricted our progress.

159. *See, e.g.*, *In re* African-American Slave Descendants Litig., 304 F. Supp. 2d 1027 (N.D. Ill. 2004); Richard Epstein, *The Case Against Black Reparations*, 84 B.U. L. REV. 1177, 1183–87 (2004) (discussing problems with statute of limitations); Suzette Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68 (2005).

> Nor is the right barred by the statute of limitations, so long as the lot is kept inclosed, or, if uninclosed, so long as the monuments and gravestones marking the graves are to be found there, or other attention is given to the graves, so as to show and perpetuate the sacred object and purpose to which the land has been devoted. No possession of the living is required in such cases, and there can be no actual ouster or adverse possession, to put in operation the statute of limitations, so long as the dead are there buried, their graves are marked, and any acts are done tending to preserve their memory and mark their last resting place.[160]

Perhaps even less should be necessary to preserve the right of access: as long as the graves are kept alive in the memories of the community and so long as they can be located, the easement may continue.[161]

And so one may soon see the descendants of people enslaved on southern plantations returning to those plantations to visit the graves of their ancestors and to talk about the meaning of the graves for remembering the role of slavery in our past. Cemetery visits offer something more, though. They are a metaphor for the reuniting of black and white in our common past. The master and the slave were bound together, and while there was an obscene disparity of power between them, the relationship bound both of them tightly together. In a sense, one could not exist without the other. The right to visit burial grounds is a tangible manifestation of the fact that the white and black communities are inseparable. We are tied together by our common past, our common humanity, our common nationality, and our common future.[162] The exercise of the ancient right of the

160. Hines v. State, 149 S.W. 1058, 1060 (Tenn. 1911).

161. *Cf. In re* African-American Slave Descendants Litig., 375 F. Supp. 2d 721, 752–54 (N.D. Ill. 2005) (dismissing reparations suit, inter alia, because plaintiffs are not linked to the people enslaved by defendant corporations). For those claiming access to cemeteries, there is, of course, the requirement that the slaves' descendants be related to the people asserting the right of access.

162. I am indebted to Calvin Massey for suggesting this aspect of the symbolic importance of cemetery visits. It reminds me, also, of Ralph Ellison's eloquent statement about how much of what we think of as American culture derives from African American culture, and vice versa, and the contradictions borne of those disparate origins. *See, e.g.*, Ralph Ellison, *Going to the Territory*, *in* THE COLLECTED WORKS OF RALPH ELLISON 591, 594–95 (John Callahan ed., 1995). Ellison also explored this with particular wit through a vignette of a young African American man wearing a Confederate cap in his class day talk, May 15, 1990, at Columbia. *See* Ralph Ellison, *Notes for Class Day Talk at Columbia University*, *in* THE COLLECTED WORKS OF RALPH ELLISON 837, 839–41 (John Callahan ed., 1995).

graveyard also offers the hope of recalling that common mission and of rebalancing the rights of slaves' descendants and plantation owners' descendants. And it also offers the descendants of slaves a piece of property—an easement for access—however small, that their ancestors left for them.