

**GETTING BENEATH THE TOPSOIL OF *KNICK*: A DUE-PROCESS
INQUIRY OF THE RIGHTS OF PROPERTY OWNERS FACING
UNVERIFIED BURIAL SITE CLAIMS**

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INTRODUCTION

Rose Mary Knick owned a home on a sizeable piece of property in Scott Township, Pennsylvania, a few miles outside of Scranton.¹ One of her neighbors sought permission from the Township to search her land.² The neighbor did some research and concluded that a family member was buried on Knick’s land.³ The Township sought access and Knick denied it.⁴ Perhaps she did not like them, or perhaps she thought the claim was bogus, but no matter how she felt, as the owner of the land, it was her right to tell people what they could or could not do on it. As Knick says, “private property is private property.”⁵

Knick sought information from the Township on why they thought a cemetery existed on her property.⁶ The Township responded by enacting an ordinance which: required all property owners in the Township to 1) keep any “cemeteries” open to the “general public,” and 2) accept Township officials entering their land to maintain these cemeteries.⁷ The punishment for failure to comply with these terms is a civil fine of between \$300 and \$600, and there is no form of appeal or procedure for establishing the existence of

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¹ *Knick v. Scott Twp.* (*Scott Twp. I*), No. 3:14-CV-2223, 2015 U.S. Dist. LEXIS 146861, at *2 (M.D. Pa. Oct. 29, 2015).

² *Id.* at *3.

³ Terrie Morgan-Besecker, *Pa. Property Owner Sues After Family Seeks Access to Cemetery on Her Land*, MORNING CALL (Dec. 26, 2014, 5:47 PM), <https://www.mcall.com/news/nationworld/pennsylvania/mc-pa-cemetery-dispute-revolutionary-war-20141226-story.html>.

⁴ *Id.*

⁵ Jason Nark, *SCOTUS Will Dig Into Debate Over Alleged Cemetery on Pa. Farm*, PHILA. INQUIRER (May 24, 2018), <http://www.philly.com/philly/news/scotus-cemetery-pa-farm-private-property-scott-township-lackawanna-rose-mary-knick-20180524.html>.

⁶ *Knick*, 2015 U.S. Dist. LEXIS 146861, at *3–4.

⁷ SCOTT TWP., PA., ORDINANCE 12-12-20-001 art. 5–6 (2012).

a cemetery.⁸ A Township officer entered Knick's land under this ordinance without a warrant and determined that certain stones sitting on the land were grave markers.⁹ Knick was not fined for refusing access to the inspectors or the neighbors. Acting preemptively, Knick sued in state and federal court for a declaratory judgment on the ordinance's unconstitutionality and to enjoin its enforcement, claiming that her rights under the First, Fourth, Fifth, and Fourteenth Amendments were violated.¹⁰

Property owners have the right to control access to their property by excluding those who have no right to it. Academics, activists, legislators, and judges are in the process of establishing in many places the right to access the burial grounds of ancestors to respect the dead and maintain grave sites. These rights inevitably conflict. This issue is not new: both private and public parties consistently neglected and abused the graves of minorities and natives throughout American history.¹¹ More recently, the wide availability of historic information and increase in preservation efforts made possible by the Internet Age, combined with increasing development in historical areas, has led to a renaissance in the grave-preservation movement.¹² When these rights interfere with each other, which wins? Assuming that the right to respect the dead is an enforceable right that trumps property rights in certain situations, what burden should there be to prove or disprove the existence of a grave where no clear markers exist?

The Supreme Court had to decide this case not on these issues, but on the issue of standing. American courts will need to address the conflict between property rights and spiritual dignity which caused the underlying dispute.¹³ The matters of death, burial, and land rights are at the core of

⁸ *Id.* art. 7. An appeal exists for the limited purpose of challenging the levying of a fine, not for the Township's determination that a cemetery exists.

⁹ *Knick v. Twp. of Scott*, 862 F.3d 310, 315 (3d Cir. 2017).

¹⁰ *Knick v. Scott Twp. (Scott Twp. II)*, No. 3:14-CV-02223, 2016 U.S. Dist. LEXIS 121220, at *4-6 (M.D. Pa. Sept. 7, 2016).

¹¹ *See, e.g.*, 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, 2-4 (2002) (discussing inadvertent and intentional destruction of indigenous burial sites in New York); Constance M. Callahan, Comment, *Warp and Weft: Weaving a Blanket of Protection for Cultural Resources on Private Property*, 23 ENVTL. L. 1323, 1324 (1993) (noting the failure of federal law in protecting cultural resources).

¹² *See* Alfred L. Brophy, *Grave Matters: The Ancient Rights of the Graveyard*, 2006 BYU L. REV. 1469 (2006); *see also* Kate Galbraith, *New Homes Confront Old Burial Grounds*, N.Y. TIMES (June 17, 2007), <https://www.nytimes.com/2007/06/17/business/yourmoney/17natreal.html> (highlighting the issues raised by the discovery of old graves on lands purchased by developers).

¹³ The primary issue decided by the Court was whether to overturn *Williamson County's* state litigation requirement for ripeness of a takings claim. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2168 (2019). The test in *Williamson County* required: 1) a final decision from the state regarding the taking, and 2)

American values and rarely conflict in other circumstances. The case is further complicated by the Township's haphazard venture to decide the matter without any processes in place to protect landowners from unwarranted claimants. The district court denied all of Knick's claims, telling her to seek compensation from the state through inverse condemnation.¹⁴ The Third Circuit affirmed.¹⁵ But what would have happened if her claims had not been denied? Scott Township refused Knick any means of challenging their decision that a grave exists in the short and ill-defined statute.

This Comment has two goals: to review the right to grave access in the context of property rights, and to argue that Knick and other property owners should have the right to challenge designations of their property. It finds that comprehensive local statutes, tailored to local constituency value judgments on property and burial rights, are the best way to protect these important rights while ensuring the procedural due process owed to each.

I. IS THE RIGHT TO EXCLUDE LIMITED BY THE RIGHTS OF THE DEAD AND GRAVE TENDERS?

Fourteenth Amendment Due Process protects liberty and property from arbitrary government control. Before reaching the inquiry of what procedure is necessary under the Due Process Clause, it is necessary to examine whether the grave-visitor's liberty interest is significant enough to allow the Township to protect it by regulating Knick's property. Municipalities are limited by the Due Process Clause to reasonable regulations of property justified by the police power to serve the public safety, health, and welfare of their communities.¹⁶ The following review shows that municipalities have several strong justifications for creating grave-preservation laws notwithstanding their impact on private property rights.

the plaintiff to seek compensation from the state exhausting the state procedures available. *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, 194 (1985). *Williamson County* was reaffirmed in *San Remo*, which held that a state court's decision that no taking exists in most cases precludes a federal court under federal law from reviewing the claim. *San Remo Hotel, L.P. v. City & Cty. of San Francisco*, 545 U.S. 323, 338 (2005) ("Federal courts, moreover, are not free to disregard 28 U.S.C. § 1738 simply to guarantee that all takings plaintiffs can have their day in federal court."). Together these decisions prevented landowners who suffered a constitutional injury from seeking redress in federal court.

¹⁴ See generally *Scott Twp. I*, 2015 U.S. Dist. LEXIS 146861, *aff'd sub nom.* *Knick v. Twp. of Scott*, 862 F.3d 310 (3d Cir. 2017), *vacated* 139 S. Ct. 2162 (2019).

¹⁵ *Twp. of Scott*, 862 F.3d at 314.

¹⁶ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

The right to exclude is one of the most powerful and frequently used property rights. It allows fee simple property owners to deny access to their property. The right has been described by the Supreme Court as “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”¹⁷ This right, however, is not limitless. Several common law and statutory provisions limit the right to exclude.¹⁸ For instance, states can get warrants and make municipal inspections. Relevant to *Knick*, a common-law right has emerged in recent scholarship which recognizes the rights of the family of deceased to tend to the graves or grave sites of their ancestors. The Ninth Circuit has recognized a due-process right for parents to make “decisions dealing with death [of a child], such as . . . how to dispose of the remains.”¹⁹ Such a right is being codified in statutes across the country with serious implications for landowners and developers who may unknowingly be treading on abandoned grave sites.²⁰

An amicus brief was filed in *Knick* by several experts in the field of cemetery law arguing against Knick’s right to exclude persons from what they believe to be a cemetery on her property.²¹ They explain that, even without the statute put in place by Scott Township, any property with a burial ground on it is encumbered by rights in favor of the dead, the dead’s kin, and the public.²² They trace the different treatment of cemeteries as property back to Catholic Canon and Roman law.²³ They also identify centuries of common law and more recently concocted statutes in the United States setting forth mechanisms for establishing cemeteries and cemetery rights different than other types of land.²⁴ The most significant rights for the dead identified are those preventing disturbance or disinterment.²⁵ They identify the supposed burial ground on Ms. Knick’s property as being a

17 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982) (citing Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

18 Katrina M. Wyman, *The New Essentialism in Property*, 9 J. LEGAL ANALYSIS 183, 201–03 (2017).

19 Marsh v. City. of San Diego, 680 F.3d 1148, 1154 (9th Cir. 2012).

20 See, e.g., TEX. HEALTH & SAFETY CODE § 711.041(a) (2017) (“Any person who wishes to visit a cemetery or private burial grounds for 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”); 9 PA. CONS. STAT. § 703(b) (2017) (“The owner of a cemetery not owned by a cemetery company shall grant an individual reasonable ingress and egress to a burial plot in the cemetery for the purpose of visiting the burial plot.”).

21 Brief for Cemetery Law Scholars as Amici Curiae Supporting Respondents, *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019) (No. 17-647) [hereinafter Cemetery Law Scholars Brief].

22 *Id.* at 4–5.

23 *Id.* at 6–7.

24 *Id.* at 7–8.

25 *Id.* at 11–12.

private, unregistered cemetery, the likes of which were used by families in America for centuries.²⁶

In support of the proposition favoring the rights of the dead and their kin, the cemetery law experts' brief cited several cases.²⁷ One was the 1893 California quiet-title case *Stockton v. Weber*, which concerned land that was established by deed as a cemetery and a family's attempt to prevent its formal dedication.²⁸ The *Stockton* court held for the family because condition precedents in the deed had not been met, and so the municipality could not acquire the cemetery.²⁹ Another case cited was an Illinois condemnation case where a cemetery sued a railroad for taking their land and damaging the burial sites still held by them.³⁰ The dispute was over the bounds of the cemetery, and the court noted that what establishes a cemetery is the act of separating the land, marking it, and distinguishing it as burial grounds.³¹ Another was a Tennessee case where the court explicitly held that the owner of land containing a family burial plot must allow the family of the deceased reasonable access to the plot.³² One final noteworthy case was an early Supreme Court case over a Georgetown plot facing development.³³ The Court noted grave sites at risk of disturbance must be protected by courts to respect the religious sensibilities of the dead where no other remedy at law exists.³⁴

There are two problems with the cases cited in the brief: none of them consider the problem *ab initio* of how grave sites are designated by government officials, and many of their propositions are not recognized by other courts. A Colorado court has held that burial rights are best left to the general assembly, not common law.³⁵ A Florida court noted that the rights conferred to kin are part of a bargain which requires upkeep of burial sites

²⁶ *Id.* at 8.

²⁷ *Id.* at 4–5.

²⁸ *Id.* at 4. It should be noted that the brief includes a parenthetical from *Stockton v. Weber* which cannot be found in that case but instead comes from a 1950 textbook. See PERCIVAL JACKSON, THE LAW OF CADAVERS AND OF BURIAL AND BURIAL PLACES 187 (2nd ed. 1950) (“A single burial will entitle the interred cadaver to protection, and land containing a human being will be maintained inviolate.”).

²⁹ *Stockton v. Weber*, 33 P. 332 (Cal. 1893).

³⁰ Cemetery Law Scholars Brief at 5, *Knick*, 139 S. Ct. 2162 (No.17-647).

³¹ *Concordia Cemetery Ass'n v. Minn. & N.W.R. Co.*, 12 N.E. 536, 541 (Ill. 1887).

³² *Hines v. State*, 149 S.W. 1058, 1059 (Tenn. 1911).

³³ *Beatty v. Kurtz*, 27 U.S. 566 (1829).

³⁴ *Id.* at 584–85.

³⁵ *Bd. of City. Comm'rs of Morgan v. Kobobel*, 176 P.3d 860, 864 (Colo. App. 2007).

to avoid risking abandonment and the relinquishment of those rights.³⁶ For the cases cited, all refer to either established cemeteries or at the least cemeteries known to exist by the property owner.³⁷ The scholars do not identify the type of easement sought or the rights that come with it.³⁸ Easements vary based on type and the rights of the parties involved can vary significantly.³⁹ Some encumbrances can be abandoned, such as adverse possession.⁴⁰

A better parallel to property owners' rights would be what happens when developers inevitably discover the buried dead when breaking ground. Finding bones under existing property is not uncommon and requires action of the property owner, not just to determine if a cemetery exists, but also to determine if it is possibly the site of a murder or a health risk. Special issues arise in development because developers are not incentivized to respect the rights of the dead or their families: finding a grave creates regulatory and construction headaches which take time and money to overcome at the risk of (often justified) public outcry. A West Virginia case where a developer plowed over headstones is an example of this ill treatment.⁴¹ A case in North Carolina was dismissed where the plaintiffs could not establish that the developers knew of a grave site and thus could not argue that they desecrated it.⁴²

If courts recognize the right of access to burial sites, states may be required to compensate the landowner if it enforces the right of way. A taking of private property for public use must be compensated.⁴³ In *Knick*, the amount of property at issue was of relatively little value, so the remedy sought was not monetary but an injunction against enforcement of the statute.⁴⁴ Additionally, the state may resist compensation where the title is encumbered by the rights of those buried, descendants, and perhaps the

³⁶ *Mingledorff v. Crum*, 388 So. 2d 632, 636 (Fla. App. 1980).

³⁷ See generally Cemetery Law Scholars Brief, *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019) (No. 17-647).

³⁸ *Id.*

³⁹ RICHARD R. POWELL & PATRICK J. ROHAN, 4 POWELL ON REAL PROPERTY § 34.02(2)(a), at 34-13 (Matthew Bender & Co. 1997).

⁴⁰ RICHARD R. POWELL & PATRICK J. ROHAN, 4 POWELL ON REAL PROPERTY § 34.10, at 34-106, -108 (Matthew Bender & Co. 1997).

⁴¹ *Gen. Pipeline Constr., Inc. v. Hairston*, 765 S.E.2d 163, 167 (W. Va. 2014).

⁴² *Robinson v. Forest Creek Ltd. P'ship*, 712 S.E.2d 895, 898 (N.C. Ct. App. 2011).

⁴³ U.S. CONST. amend. V.; *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) ("[A] State, by *ipse dixit*, may not transform private property into public property without compensation . . .").

⁴⁴ *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2168 (2019).

public generally.⁴⁵ Some states have recognized an implied limitation on title of land which contains a graveyard.⁴⁶ This is precisely the issue which prompted the dispute in *Knick*.

Where a grave is known to exist, the law of many states provides a means of respecting the rights of parties involved. Inventory surveys can identify graves in developments and most states have laws on the book for the procedure to relocate graves discovered in the process of archaeological surveys.⁴⁷ In fact, under Pennsylvania law, *Knick* could possibly have accepted that the graves exist and sought to disinter the remains by seeking a disinterment permit.⁴⁸ Such a situation, assuming the persons seeking access would dispute *Knick's* right to disinter the remains, would be governed by common law and require the Orphan's Court to determine whether *Knick* has any pressing reason for the remains to be disinterred.⁴⁹ However, the situation in *Knick* is not covered by these laws at this early stage in the litigation.

The issue with a case like *Knick* is that it presents a chicken-or-the-egg problem. Does *Knick* have the right to challenge the existence of a grave, or is the mere possibility that one exists sufficient to require more thorough investigation such as an archaeological survey? The answer to this question has major implications for any property owner who may be the subject of a similar claim, whether it relates to graves or other items of cultural or historical significance. The answer will depend on: whether a title is encumbered by the mere existence of a burial site; a state's common law and statutory protections for grave sites; and the constitutional requirements relating to takings, searches and seizure, and the requirements of due process.

⁴⁵ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992).

⁴⁶ See Cemetery Law Scholars Brief at 23, *Knick*, 139 S. Ct. 2162 (No.17-647) (noting that a common law right to access property to visit relatives in cemeteries, characterized "as an implied easement in gross, is [] codified in about 20% of the states.").

⁴⁷ TANYA MARSH, *THE LAW OF HUMAN REMAINS* 21 (2016).

⁴⁸ 28 PA. CODE § 1.25 (2019).

⁴⁹ See *Novelli v. Carroll*, 420 A.2d 469, 472-74 (Pa. Super. Ct. 1980) (creating a seven-factor test weighing: (1) the degree of relationship that the party seeking reinterment bears to the decedent and the strength of that relationship; (2) the degree of relationship that the party seeking to prevent reinterment bears to the decedent; (3) the desire of the decedent, including the "general presumption that the decedent would not wish his remains to be disturbed," or a specific statement of desire by the decedent; (4) "the conduct of the person seeking reinterment, especially as it may relate to the circumstances of the original interment;" (5) "the length of time that has elapsed since the original interment;" (6) the strength of the reasons offered in favor of and in opposition to reinterment; and (7) the appraisal of such balance of factors).

II. WHAT PROCESS IS DUE WHEN LEGALLY ESTABLISHING GRAVES?

States treat burial and property rights very differently as the area has only begun to be codified in the 20th century and no model code exists.⁵⁰ Some states have no process in place to establish a burial ground, while some delegate the responsibility to courts or agencies.⁵¹ Most of the time there is little dispute that a grave is discovered when it becomes public knowledge. The concern here arises when there is a claim that a grave exists which is disputed by the property owner. This problem has become exacerbated as grave information becomes more widely available through crowd-sourced websites like findagrave.com and increased public access to genealogical and historical resources.⁵²

Understanding that rights exist in burial sites, some might think that the best approach would be to entirely limit property rights where graves are found. However, the basic notions of how our society works should not be ceded immediately when they are found to conflict with other rights. Millions of dollars and thousands of hours can go into a development, and at a certain point the public benefits to preserve and protect a long abandoned grave site become de minimis. On the other hand, plenty of examples of desecrating and ignoring grave sites exist.⁵³ For most cases, there is no hard rule that would protect both property and sacred rights. Instead, processes need to be established that would allow neutral parties to determine appropriate outcomes for the unique situations that arise in this field of law.

The Due Process Clause requires that, when the government takes property, the affected person have an opportunity to present their argument to protect their right at a hearing before a neutral body that has the ability to decide which right should prevail.⁵⁴ The Court uses a balancing test to determine the requirements of due process in a given situation: the private

⁵⁰ Tanya D. Marsh, *When Dirt and Death Collide: Legal and Property Interests in Burial Places*, 30 PROB. & PROP. 59, 59 (2016).

⁵¹ See generally MARSH, *supra* note 47.

⁵² See, e.g., FIND A GRAVE, <https://www.findagrave.com> (last visited Mar. 19, 2020) (allowing users to search memorials, grave records, and cemeteries); see also Cemetery Law Scholars Brief at 9, Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019) (No.17-647) (citing to *Find A Grave* when listing the number of cemeteries listed in Lackawanna County, Pennsylvania).

⁵³ See, e.g., Gen. Pipeline Constr. v. Hairston, 765 S.E.2d 163, 169–70, 174 (W. Va. 2014) (acknowledging that the jury found the defendants had desecrated a grave site but remanding on grounds of liability); Stephanie Farr & Jason Laughlin, “An Abominable Crime:” *Investigation Underway into Toppled Headstones at Jewish Cemetery*, PHILA. INQUIRER (Feb. 26, 2017), <https://www.inquirer.com/philly/news/Cops-Report-of-vandalism-at-Jewish-cemetery.html>.

⁵⁴ Mathews v. Eldridge, 424 U.S. 319, 332–35 (1976).

interest affected by the government interest and the value of additional procedures in guarding against erroneous deprivations of that interest versus the fiscal and administrative burdens that the additional procedures would impose upon the government.⁵⁵ Due process generally requires at a minimum: notice, the opportunity to be heard, and a fair and balanced trier of fact.⁵⁶ Due process functions to ensure government decisions are made correctly and efficiently. It allows the person affected to argue about how the rules are being applied in a particular instance, and it protects the dignity of the person affected by the rules.⁵⁷ In the property context, a court has the power to strike down laws targeting a particular property or transferring private property from one private party to another without reasonable police-power motivations.⁵⁸

In *Knick*, a private party claimed that they had a right to access a property and that right was vested in the nature of the property, which could only be verified by intrusion onto the property. The landowner denied that claim, and a dispute arose which involved the rights of the person to visit and tend the supposed grave and the landowner to their property. Scott Township's ordinance and some others presume the existence of a cemetery, but the property owner must have the opportunity to deny that claim, otherwise the state may arbitrarily intrude on property rights without any measure of protection.

There are several methods that states use to allow families to access their ancestors' graves on private property. The primary means are private enforcement by the family petitioning the court under state statute, or state action to preserve historic grounds. Having established three interests in the property at stake: that of the owner, the dead, and the descendants, each must be at least minimally protected under the Due Process Clause. There are several existing procedures in place which protect these rights, but the existence of a grave is often assumed to be known for a fact before hearings take place, which makes those procedures wholly inadequate for the circumstances at issue in *Knick*.

⁵⁵ Developments in the Law, *Zoning*, 91 HARV. L. REV. 1427, 1505–08 (1978) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)); *Mathews*, 424 U.S. at 335.

⁵⁶ *Mathews*, 424 U.S. at 349–50.

⁵⁷ See Developments in the Law, *supra* note 55, at 1505 (1978).

⁵⁸ *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (“[W]hen, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable.”).

A. *Private Enforcement*

1. *Statute*

Every state has laws and regulations pertaining to the establishment and maintenance of cemeteries.⁵⁹ These laws ensure that graves are created with respect for the dead and maintained while the cemetery is still in operation. Usually restrictions are placed on disinterment such as requiring family approval or abandonment of the grave.⁶⁰ Recently, several states have passed statutes protecting the right to visit existing graves, putting into statute what may have been enforceable only under common law or contractual rights previously.⁶¹

A remarkably similar case to *Knick* arose in West Virginia where a family claimed to have ancestors buried on another's private property in unmarked, then-unknown graves.⁶² West Virginia law covers the rights of visitation to grave sites.⁶³ However, the family had no evidence besides "inadmissible hearsay" to establish the site of the graves.⁶⁴ The court therefore did not allow their petition to visit the sites or establish a monument to move forward, and was willing to consider the defendant landowner's counterclaim for trespass.⁶⁵ The law provides the right to "authorized" persons to request access from the landowner, and if refused, gives them a right to petition the court to enjoin the landowner from refusing access to the site.⁶⁶ As occurred in *Blankenship*, the court then has to determine whether the petitioner is an "authorized" person which requires determining whether a grave exists in the first place.⁶⁷ This provides the landowner with the opportunity to present arguments: against the existence of a cemetery, against the petitioner for not following the statute's notice provisions, and potentially for violating trespass

⁵⁹ See generally MARSH, *supra* note 47.

⁶⁰ Aaron H. Midler, Note, *The Spirit of NAGPRA: The Native American Graves Protection and Repatriation Act and the Regulation of Culturally Unidentifiable Remains*, 86 CHI.-KENT L. REV. 1331, 1335 (2011).

⁶¹ See, e.g., 9 PA. CONS. STAT. § 703 (2017) ("The owner of a cemetery not owned by a cemetery company shall grant an individual reasonable ingress and egress to a burial plot in the cemetery for the purpose of visiting the burial plot."); TEX. HEALTH & SAFETY CODE § 711.041 (2017) ("Any person who wishes to visit a cemetery or private burial grounds for 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.").

⁶² *Blankenship v. Mendelson*, No. 11-1136, 2012 W. Va. LEXIS 474, at *1-2 (W. Va. June 22, 2012).

⁶³ *Id.* at *3; W. VA. CODE § 37-13A-1 (2019).

⁶⁴ *Blankenship*, 2012 W. Va. LEXIS 474, at *3.

⁶⁵ *Id.*

⁶⁶ W. VA. CODE §§ 37-13A-1 to -7 (2019).

⁶⁷ *Id.*

or other criminal laws in attempting to gain access to the property without their or the court's approval.

Pennsylvania, the state where *Knick* occurred, passed a similar bill protecting the right to access graves in 2017.⁶⁸ The statute had provisions requiring landowners to allow grave visitation, but gave landowners the opportunity to limit access. If a person was denied access, the statute granted them the right to petition a court for an injunction.⁶⁹ No opinions have been published yet referencing this statute, but if judges similarly require the petitioner to prove the grave exists and give the landowner the opportunity to deny its existence, the requirements of due process will be met. However, yet to be resolved under such a statute would be Knick's takings and unlawful search claims. The grave scholars argue that title to a property with a grave on it is subject to an encumbrance in favor of the rights of the dead, the kin of the dead, and the public.⁷⁰ These rights include the prevention of the landowner from removing or disturbing the grave, relatives and friends having access to visit and care for the graves, limiting the use of the property to cemetery purposes, and limiting the owner from changing or removing land set aside to be a cemetery.⁷¹

2. *Common Law*

There are also common-law rights of kin to the protection of their ancestors in some jurisdictions. These include actions in tort for desecration.⁷² Louisiana, for example, finds that once graves are marked as such, rights are established and property owners cannot exclude those who wish to visit graves.⁷³ These rights are becoming memorialized more frequently in statute, preempting the use of common law to enforce them. Because dead bodies are not regarded as property, many courts do not allow civil suits for damages done to them.⁷⁴ Although most courts recognize the

⁶⁸ 9 PA. CONS. STAT. § 703 (2017).

⁶⁹ *Id.* § 703(b), 703(g).

⁷⁰ Cemetery Law Scholars Brief at 4–5, *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019) (No.17-647).

⁷¹ *Vidrine v. Vidrine*, 225 So. 2d 691, 697 (La. Ct. App. 1969).

⁷² *Larson v. Chase*, 50 N.W. 238, 240 (Minn. 1891) (“[I]t would be a reproach to the law if a plaintiff’s right to recover for mental anguish resulting from the mutilation or other disturbance of the remains of his dead should be made to depend upon whether in committing the act the defendant also committed a technical trespass upon plaintiff’s premises, while everybody’s common sense would tell him that the real and substantial wrong was not the trespass on the land, but the indignity to the dead.”).

⁷³ *Thomas v. Mobley*, 118 So. 2d 476, 478 (La. Ct. App. 1960).

⁷⁴ *See Marsh*, *supra* note 50, at 15.

right of kin to control the burial (absent the dead's wishes otherwise), only some recognize the right of preservation of the deceased.⁷⁵ Once buried, American law protects the site of the grave in perpetuity.⁷⁶

The brief of the Cemetery Law Scholars in *Knick* identifies a common-law right to access graves.⁷⁷ It cites cases in which parties sue in tort for damages from restriction of access, including a 1940 Louisiana case which awards damages for mental anguish due to intentional disturbance of a grave by the owner of the land in which the grave sat.⁷⁸ Contract law can also provide remedies where plots are purchased in cemeteries, but that is of course irrelevant here.⁷⁹ A system could be devised to enforce access to graves in this manner. As in an action in tort, property owners would be given full ability to argue their defense including whether or not a grave exists in the first instance. This would ensure that the due-process rights of the landowner are protected. The court could be given the power to examine the site of the alleged burial to determine whether or not a grave exists upon some showing of evidence of its existence. The difficulty would be that the landowner would have to prove that something does not exist, so some burden would have to be placed on the petitioner to show strong evidence of the grave's existence, and perhaps a court allowance of discovery on the defendant's land. Since it is not clear whether most states would support an action of this kind, and the results of common law actions can be incongruous, legislative action is more appropriate to create a cause of action.⁸⁰

If a state recognizes such rights, there must be some limiting principle, otherwise the whole world will become a cemetery. As discussed above, the common-law rights to visit graves are not uniform among the states.⁸¹ In order to claim privileges regarding a cemetery, burdens should be placed upon a family to maintain it in order to limit the damage to the property owner. Eventually, unless social customs regarding distant ancestors

⁷⁵ *Id.* at 9, 15.

⁷⁶ *Id.* at 11.

⁷⁷ Cemetery Law Scholars Brief at 14, *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019) (No.17-647).

⁷⁸ *Id.* at 19–20 (citing *Humphreys v. Bennett Oil Corp.*, 197 So. 222, 229–30 (La. 1940)).

⁷⁹ Midler, *supra* note 60, at 1333.

⁸⁰ Additionally, many of the cases that do support grave-desecration tort suits require close relation to the deceased for standing. See *id.* at 1333–34 (“Today, the availability of civil remedies for the desecration of a corpse or grave largely depends upon whether a potential plaintiff can satisfy the legal definition of ‘next of kin.’”).

⁸¹ Marsh notes that European practice is to disinter bones after decomposition and reuse the empty graves, a practical solution to this problem. Marsh, *supra* note 50, at 11.

dramatically change, the dead will be forgotten by their descendants and so will the graves. Abandonment is used in some jurisdictions to deal with this problem. In those jurisdictions, abandoned graves and the kin of the deceased within them receive less protection than graves that have been maintained.⁸²

A Texas case provides an illustration of why the law should limit the rights of descendants as such. A gas-processing facility was bought in 1955 subject to a reservation in the deed that the cemetery existing on the land remain for that purpose for as long as it was used as such.⁸³ The cemetery had in the six decades since been abandoned by families tending their dead.⁸⁴ The buyers tended the cemetery and did not disturb it so long as it did not interfere with their gas processing.⁸⁵ When the day came that the buyers needed the cemetery to be moved and the bodies disinterred, a descendant of the seller intervened to demand the cemetery remain.⁸⁶ The seller's descendant was successful because, by tending the cemetery, the buyers had made it so the site was not "abandoned" and the bodies therein could not be disinterred under Texas law.⁸⁷ Abandoned graves will be left to the property owner to deal with, and their actions will still be limited by laws protecting the rights of the dead, but the distant relatives will no longer have the ability to come back decades or centuries later to require landowners to enforce rights that were long ago abandoned. *Knick* would be an obvious case of abandonment because there is no evidence that the graves had been tended, much less even known about, for the duration of Knick's ownership of the property. That raises additional questions, the answers to which may change the effect of abandonment, such as to what extent graves lose protection by abandonment, and whether the right of access vests in the kin or the public generally.

B. *Historic Preservation*

Historical designation is another method municipalities use to respect the rights of the dead and their ancestors. Designation is the process whereby land is restricted from certain types of development and use in order to respect its historical significance. Such designations are used by local governments to maintain a historical character of a neighborhood or protect

⁸² A. F. Hutchinson Land Co. v. Whitehead Bros., 218 A.D. 682, 684–85 (N.Y. App. Div. 1926).

⁸³ Levandovsky v. Targa Res. Inc., 375 S.W.3d 593, 595 (Tex. App. 2012).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 598.

a historical landmark. A heavy-handed approach can have negative economic consequences, and a too lax approach will lead to desirable sites being destroyed. In the context of cemeteries, local governments may decide to preserve a cemetery because a famous person is buried there, or because the cemetery itself is significant to the beauty or history of the community.

There are several federal laws which protect American cultural resources. The Native American Graves Protection and Repatriation Act of 2010 (“NAGPRA”) was established to protect native remains from desecration and return the remains from public to tribal control.⁸⁸ The National Historic Preservation Act of 1966 (“NHPA”) allows the National Park Service (“NPS”) to designate sites worthy of preservation.⁸⁹ NHPA allows claims to be heard by the NPS where a petitioner believes that an activity may damage a site of cultural significance, while NAGPRA allows native tribes to claim the remains of ancestors if they can prove they originate from the same tribe.⁹⁰

These preservation statutes can and often are applied to cemeteries. Hawaii has a unique system which finds the balance in favor of the rights of the descendants, giving standing to challenge development on burial sites under the Hawaiian Constitution to all descendants of the islands’ natives.⁹¹ Hawaii requires an Archaeological Inventory Survey to be completed for each project that may disturb historic property or a burial site.⁹² Challenges may also be filed by private parties against developments claiming disturbance to cultural resources.⁹³ Upon receiving such a challenge, the Department of Land and Natural Resources, Historic Preservation Division and the Burial Council determine if the land should be designated as a burial site.⁹⁴ If land is designated, the remains cannot be disinterred and moved to another site without approval of the Historic Preservation Division and Burial Council.⁹⁵ These decisions can be appealed.⁹⁶ The system also

⁸⁸ Native American Graves Protection and Repatriation Act of 2010 (NAGPRA), Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001–13); *see also* Midler, *supra* note 60, at 1332 (describing the Act’s protection of native burials).

⁸⁹ National Historic Preservation Act (NHPA), Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified at 54 U.S.C. § 100101).

⁹⁰ Midler, *supra* note 60, at 1332.

⁹¹ *Kaleikini v. Thielen*, 237 P.3d 1067, 1092 (Haw. 2010).

⁹² *Hall v. Dep’t of Land & Nat. Res.*, 290 P.3d 525, 527 (Haw. Ct. App. 2012).

⁹³ HAW. STATE HISTORIC PRES. DIV., SUMMARY OF HAWAII BURIAL LAWS 3 (2015), *available at* <https://dlnr.hawaii.gov/shpd/files/2015/06/SUMMARY-OF-HAWAII-BURIAL-LAWS.pdf>.

⁹⁴ *Id.* at 7.

⁹⁵ *Id.* at 10–13.

⁹⁶ *Id.* at 3.

requires an Archaeological Inventory Survey to be completed before construction begins, much like environmental impact statements.⁹⁷ The strong burial beliefs of the native Hawaiian people and the resulting frequency of archaeological sites, especially due to the islands' long history and small land area, led the state to weigh burial rights more heavily than those of landowners.⁹⁸

Philadelphia lies at the other end of the spectrum, having archaeological and burial protection laws on the books but not always enforcing them. A developer uncovered coffins in the city in 2017 and city officials refused to seek designation of the spot as one of archaeological interest.⁹⁹ Instead, the developer worked with private archaeologists to excavate the site and sought permission from the Orphan's Court to move the remains to another burial site.¹⁰⁰ The Orphan's Court then assumed supervision of the exhumation which took several months and uncovered over four hundred bodies.¹⁰¹ This was a successful resolution where the developer was willing to work with the city and public.¹⁰² However, the months of delay likely cost a significant amount of money, and there are few incentives for developers to act this way except out of human decency and archaeological curiosity.

In 2018, construction of a public school unearthed ninety-five graves dating from the late nineteenth century in Sugar Land, Texas.¹⁰³ Local officials decided to continue building a school and to remove the bodies to a separate cemetery.¹⁰⁴ Texas law requires reporting any "unverified cemetery" to the Texas Historical Commission, which must determine whether a cemetery exists and the appropriate steps to take to preserve the

⁹⁷ *A Brief Historical Overview of Burial Issues*, KAMAKAKO'I, <https://www.kamakakoi.com/a-brief-historical-overview-of-burial-issues/> (last visited Mar. 19, 2020).

⁹⁸ *Id.*

⁹⁹ Stephan Salisbury, *Bones From 407 Human Skeletons Talled in Court Report on Arch Street Building Site*, PHILA. INQUIRER (Oct. 30, 2017), <http://www.philly.com/philly/news/pennsylvania/philadelphia/bones-arch-street-construction-site-pmc-orphans-court-20171030.html>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Coincidentally, the bones existed at the site because a nineteenth-century order from the Orphan's Court to relocate the bones was not completed. Stephan Salisbury, *Judge Wants to Know What Developer Intends To Do With Arch Street Bones*, PHILA. INQUIRER (July 24, 2017), <http://www.philly.com/philly/news/pennsylvania/philadelphia/developer-seeking-court-approval-to-remove-burials-from-arch-street-site-20170724.html>.

¹⁰³ Charly Edsitty, *'We Must be Careful' Bodies of Nearly 100 Slaves to Stay at FBISD Construction Site for Now*, ABC13 NEWS (Nov. 19, 2018), <https://abc13.com/society/bodies-of-nearly-100-slaves-to-stay-at-fbisd-construction-site-/4718036/>.

¹⁰⁴ *Id.*

site or exhume the bodies.¹⁰⁵ The statute requires the landowner give consent before any historical commission search of the property.¹⁰⁶ A Texas court must remove the dedication of an existing but abandoned cemetery or allow exhumation of bodies in an abandoned or unknown cemetery if the landowner petitions the court and the court finds it is in the public interest to do so.¹⁰⁷ Texas additionally does not allow persons an egress over private land to unverified cemeteries as it does to dedicated cemeteries.¹⁰⁸

The Federal Government will sometimes get involved in the discovery of a burial ground if it has significant ties to the history and culture of our nation as a whole. In 1991, a large cemetery of over 15,000 Africans dating to the seventeenth century was discovered in Manhattan during the construction of a federal office building.¹⁰⁹ Due to a requirement that federally funded development comply with certain preservation and archaeological requirements, the site was discovered and preserved.¹¹⁰ The site is now a National Historic Landmark and open to the public to learn about the history of slavery in New York City.¹¹¹ This is a rare case where the government is directly involved in construction and the site itself is of significance to the community as a whole and not a single family. The outcome is justified by both of the foregoing but also by the reliance of federally funded construction on federal dollars and the responsibilities that come with using that money.

The methods of determining if a cemetery exists at the outset could be reviewed by administrative bodies such as preservation commissions. Due to their quasi-judicial nature, courts would hold that due-process rights should be more tailored to the situation than would be due in court.¹¹² At a bare minimum, the landowner would certainly have a right to present their argument before a neutral body. However, courts may take less seriously a

¹⁰⁵ TEX. HEALTH & SAFETY CODE § 711.001–.084 (2013).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *History & Culture*, NAT'L PARK SERV., <https://www.nps.gov/afbg/learn/historyculture/index.htm> (last visited Mar. 19, 2020).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319 (1976) (finding that procedural due-process requirements were met in an administrative hearing for Social Security disability benefits tailored to accommodate the extent of benefits awarded, in comparison to welfare benefit recipients); *Korean Buddhist Dae Won Sa Temple v. Sullivan*, 953 P.2d 1315, 1342–43 (Haw. 1998) (holding that a zoning board's refusal to allow cross-examination of witnesses does not violate due process because it is harmless).

challenge to a biased board or a refusal to allow a property owner to use certain litigation devices such as calling witnesses or cross-examination.¹¹³

As shown above, many states are beginning to effect by statute means of dealing with latent burial sites on private property. Statutes provide the most effective means of handling these situations because they provide clear guidelines at the outset for how parties should understand their rights. The issue in *Knick* could be resolved if the Township had a procedure in place for determining the existence of a grave without arbitrary designation. Addressing this issue through statutes is preferable to allowing courts to conjure incomprehensible multi-factor tests that attempt to balance the rights of the parties because positive laws lower the risk of incongruous results and needless litigation. State and local legislatures need to implement laws that respect the access right appropriately for their constituencies. If they do not, *Knick*-type litigation is inevitable and will leave one side feeling their rights unvindicated in every case.

These statutes vary in important ways to reflect different constituencies' valuing of property rights and visitation rights. Texas requires a state commission to get involved when the existence of an unmarked grave is claimed, but officials cannot search without an owner's consent.¹¹⁴ West Virginia on the other hand has a court resolve the matter of whether a grave exists, and has no statutory restrictions on the court's ability to possibly allow a party to complete a historical survey.¹¹⁵ Pennsylvania makes no mention of unmarked or undiscovered graves in its statute at all.¹¹⁶ A statute should clearly establish what the rights are of the landowner and the petitioner, what standard shall be used in determining whether a grave exists, to what extent parties may investigate the land, and what body is responsible for hearing the case. The statutory rights may include provisions strongly favoring the landowner such as in Texas, or the rights of the community and petitioners such as in Hawaii. The standard will likely be a burden on the petitioner to prove by a preponderance of the evidence that a grave exists. However, the burden could shift, and the standard could change depending on what values a state holds more closely. The practical effect of this standard will also be strongly influenced by the leeway of discovery given to the petitioning party. For instance, in Texas, although a party may petition to establish a cemetery,

¹¹³ See, e.g., *Mathews*, 424 U.S. at 334 (tolerating less strict procedural due-process requirements in certain circumstances); *Korean Buddhist Temple*, 953 P.2d at 1342-43.

¹¹⁴ TEX. HEALTH & SAFETY CODE § 711.001-.084 (2013).

¹¹⁵ W. VA. CODE § 37-13A-1 to -7 (2019).

¹¹⁶ 2017 Pa. Laws 64.

that right is fully contingent on the landowner's consent to the historical commission to access the property.

CONCLUSION

States and municipalities fashion solutions to the issue of abandoned and unmarked graves that fit their unique needs. Hawaii's extensive review process would be cumbersome in most places, but their limited land and unique culture require a different approach than in most other places. Texas has landed squarely on the side of landowners, requiring their permission for any investigation of their land. For Scott Township and Knick, the resolution probably lies somewhere in between. Colonial-era farmlands are bound to be laden with family plots, and the respect they are due demands concessions from landowners. Scott Township's error was ignoring the process altogether. The Township decided whether the graves existed without giving Knick any say in the matter, denying her the due process necessary in creating a system where all parties and the public feel that they have a say.

States are likely the best forum for enforcing these laws because of their ability to tailor laws to their unique cultural and religious needs. As noted above, Hawaii is going to have very different needs than Pennsylvania. Federal law will have to protect Native burial grounds and cemeteries on federal land, but laws that cover the whole country run the risk of being underinclusive of plots that matter to individual families. Additionally, courts are going to be more protective of due-process rights than administrative bodies. This should guide advocates who wish to protect property rights to counterintuitively accept statutes protecting rights of way with limits and for the benefit of the property owners because an administrative agency may not be as generous as the legislature and their right to present their case should they disagree with a decision would be much more limited.