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**Easement Come, Easment Go - The Cemetery Access Easement:  
The Exemption to the Right to Exclude Whose Time Has Come to  
Facilitate the Preservation of Nineteenth-Century Texas Family  
Cemeteries**

J. Dwight Tom

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# Easement Come, Easement Go—The Cemetery Access Easement: The Exception to the Right to Exclude Whose Time Has Come to Facilitate the Preservation of Nineteenth-Century Texas Family Cemeteries.

*J. Dwight Tom†*

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## I. INTRODUCTION

For half a century, the Stewart family ranch home was nestled on a cedar break near the mouth of Maverick Creek at the Nueces River. The young grandchildren<sup>1</sup> would take turns riding a pony named *Lil' Bit* down and back from the creek imagining what life must have been like for the “Cowboys and Indians” or the “Vaqueros and Banditos” that once called the Nueces Strip<sup>2</sup> home. The pony gave way to a dirt bike and eventually the all-terrain vehicle replaced the dirt bike as the “pony” of choice for the great grandchildren. No matter if they were “ranch hand for the day” or on one of many “endless adventures,” everyone paused and reflected upon one constant presence on the ranch— Cowboy Cemetery. There on the high ground overlooking Maverick Creek stands a double Oak tree.<sup>3</sup> No tombstones, just word of mouth and the centuries-old iron fence that indicate the existence of the cemetery.<sup>4</sup> The “tumbled down fenced area contain[s] the grave of Wade Hampton Threadgill . . . who was [shot] by Con Gibson on June 12, 1889 in an argument

<sup>1</sup> The Author is one of seven grandchildren.

<sup>2</sup> South of the one-time border of Texas and Mexico: between the Nueces and Rio Grande Rivers.

<sup>3</sup> ALLAN A. STOVALL, BREAKS OF THE BALCONES: A REGIONAL HISTORY 136–38 (1967); Freida Rogers, *Known Graves in Nueces Canyon*, 4 SW. TEX. GENEALOGICAL SOC'Y Q.: BRANCHES AND ACORNS, no. 1, Sep. 1988, at 34–35; Cemetery—Atlas Number 7463002205 (UV-C022), TEXAS HISTORIC SITES ATLAS, <http://atlas.thc.state.tx.us> (Navigation Tabs) (last visited Apr. 4, 2016) (aka Sutherland Grave) [hereinafter ATLAS].

<sup>4</sup> Rogers, *supra* note 3.

over livestock.”<sup>5</sup> Cowboy Cemetery was established during the forty-fourth year of Texas statehood.

As post-Native American settlers moved west they no longer used the churchyard as a place for burial.<sup>6</sup> For many nineteenth-century Texas settlers, necessity determined the site of final repose.<sup>7</sup> Families buried their dead on the land where they worked and lived.<sup>8</sup> Today, nineteenth-century family cemeteries<sup>9</sup> no longer accessible from public land are in danger of disappearing.<sup>10</sup> To ensure preservation, Texas property owners have a moral and legal obligation to allow access to these cemeteries.<sup>11</sup>

The Honorable Hubert Humphrey stated that three factors comprise the moral test of government: “[H]ow that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; and those who are in the shadows of life—the sick, the needy, and [persons with disabilities].”<sup>12</sup> This Article proposes that there is a fourth factor: how that government treats those who are in the quietus of life, the chosen final resting places. It is against this backdrop of preserving Cowboy Cemetery and other final resting places of those who helped secure the personal freedoms and property rights enjoyed today,<sup>13</sup> that this Article describes how Texas law must protect these cemeteries. This Article argues that the best preservation tool is the cemetery access

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<sup>5</sup> *Id.*; STOVALL, *supra* note 3.

<sup>6</sup> U.S. DEP’T. OF THE INTERIOR, NAT’L PARK SERV., GUIDELINES FOR EVALUATING AND REGISTERING CEMETERIES AND BURIAL PLACES, II. *Burial Customs and Cemeteries in American History*,

[https://www.nps.gov/nr/publications/bulletins/nrb41/nrb41\\_5.htm](https://www.nps.gov/nr/publications/bulletins/nrb41/nrb41_5.htm) (last visited Apr. 4, 2016) [hereinafter *Burial Customs*] (“eventually burial in churchyards became impractical for all but those living close to churches.”); see C. Allen Shaffer, *The Standing of the Dead: Solving the Problem of Abandoned Graveyards*, 32 CAP. U. L. REV. 479, 483-84 (2003).

<sup>7</sup> *Burial Customs*, *supra* note 6 (discussing southern plantations, “distance...from churches necessitated alternative locations for cemeteries.”); see *Cemetery Preservation*, TEX. HIST. COMM’N, <http://www.thc.state.tx.us/preserve/projects-and-programs/cemetery-preservation/> (last visited Apr. 11, 2016) (also discussing Native-American burials that fall under tribal and federal law in “State Antiquities Code Protection” section).

<sup>8</sup> See *Cemetery Preservation*, *supra* note 7.

<sup>9</sup> Tex. Admin. Code § 22.1(8) (2016) (defining family cemetery as “a cemetery containing members of a single family or kinship group, usually located on land belonging to the family or occupied by the family when established.”).

<sup>10</sup> *2006 Texas’ Most Endangered Places*, PRES. TEX., <http://www.preservationtexas.org/endorsed/historic-texas-cemeteries/> (last visited Apr. 11, 2016) (showing deterioration from weather, erosion, vegetation, and neglect).

<sup>11</sup> Shaffer, *supra* note 6, at 487-88 (allowing access to record, repair, and maintain the cemetery).

<sup>12</sup> 123 CONG. REC. 37,287 (1977).

<sup>13</sup> “There would be no United States as we know it today had it not been for San Jacinto.” Jesse H. Jones, Chairman, Reconstruction Fin. Corp., Address at the Laying of the Cornerstone of the San Jacinto Memorial Monument at San Jacinto Battleground Park: 101st Anniversary of Texas Independence (Apr. 21, 1937) in SAN JACINTO DAY DINNER HOUSTON COUNTRY CLUB, Apr. 21, 1998, at 1, 11 (on file at Albert and Ethel Herzstein Library—San Jacinto Museum of History).

easement, and that it should be strengthened under Texas law.

The right to exclude is “universally held to be a fundamental element of the property right. . . .”<sup>14</sup> However, the right to exclude is not unlimited—an easement is an exception to this property right because, by definition, it bars the exclusion of an easement holder.<sup>15</sup> The cemetery access easement is such an exception that gives the holder the right of access to the cemetery.<sup>16</sup> It is unlikely that over the last two centuries property owners consciously exercised this right to exclude when removing, plowing, or cultivating an area that was once a cemetery.<sup>17</sup> Most likely, they were trying to provide for themselves, and may have actually been related to those interred. But many post-Great Depression cemetery removals were likely performed in a conscious attempt to “remove” the easement as well as “free up” the land for development, because the land was no longer owned by the family or descendants of the interred.<sup>18</sup> Although the concepts to be discussed apply equally to urban cemeteries, the primary focus of this Article is the cemetery access easement and its role in the preservation of nineteenth-century Texas family cemeteries that now survive on rural private land.<sup>19</sup> As further discussed in Part III(B), Texas has attempted to codify the common law concepts of the cemetery access easement by giving shared enforcement authority to the Texas Historical Commission (“THC”) and the Texas Funeral Service Commission (“TFSC”) — agencies that have chosen to shift the majority of that burden to private citizens.

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<sup>14</sup> *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979).

<sup>15</sup> See BLACK’S LAW DICTIONARY 585-86 (9th ed. 2009).

<sup>16</sup> DUKEMINIER, ET AL., PROPERTY 785 (7th ed. 2010) (defining this “graveyard right” as an “easement implied from prior use”).

<sup>17</sup> Alfred L. Brophy, *Grave Matters: The Ancient Rights of the Graveyard*, 2006 BYU L. REV. 1469, 1470 (2006) (“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”).

<sup>18</sup> *Id.* at 1499-1505; see Stephanie Stern, *Encouraging Conservation on Private Lands: A Behavioral Analysis of Financial Incentives*, 48 ARIZ. L. REV. 541, 547 (2006) (discussing an unintended consequence of the Endangered Species Act that discourages reporting and “creates an incentive to destroy the endangered species or its habitat to remove the threat of future restrictions,” a concern that equally applies to family cemeteries).

<sup>19</sup> An in-depth analysis of the historic treatment and future preservation of all nineteenth-century cemeteries is beyond the scope of this Article. For more information, see Brophy, *supra* note 17, at 1512–15 (discussing preservation of nineteenth-century slave cemeteries); 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 (2006) (applying a Race Theory approach to preservation of cemeteries); Mary L. Clark, *Keep Your Hands Off My (Dead) Body: A Critique of the Ways in Which the State Disrupts the Personhood Interests of the Deceased and His or Her Kin in Disposing of the Dead and Assigning Identity in Death*, 58 RUTGERS L. REV. 45 (2005); Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 73 B.U. L. REV. 559, 622-642 (1995) (discussing American-Indian burial grounds).

Eight decades have passed since the State of Texas embarked on placing granite historical markers in celebration of the Texas State Centennial.<sup>20</sup> These memorials were placed on public and private land. Many were placed in family cemeteries that are now inaccessible from public land.<sup>21</sup> Of the approximately 50,000 cemeteries in Texas today,<sup>22</sup> The THC has designated 1,706 of these cemeteries as a Historic Texas Cemetery (“HTC”).<sup>23</sup> Through the THC, Texas leaves the primary responsibility to identify and preserve historic cemeteries to volunteer efforts.<sup>24</sup> Are these administrative designations effective notice to property owners that a cemetery access easement exists? As technology continues to facilitate the instantaneous sharing and discovery of historical and genealogical information, is the current Texas cemetery access easement regulatory scheme adequate to maintain the right of access balanced with the rights of private property owners? What about the rights of the dead? To address these concerns, this Article proposes that Texas must strengthen the cemetery access easement.

This Article discusses the cemetery access easement and access agreements under the lens of an emerging modern theoretical approach—the Social Morality Theory of Property Law.<sup>25</sup> Part II reviews the history of public and private memorials in Texas, preservation efforts of nineteenth-century cemeteries, and other significant Texas historical sites. Part III discusses the cemetery access easement under current Texas law and regulatory schemes. Part IV discusses the obstacles of awareness and access as the greatest threats to the current and future status of nineteenth-century Texas family cemeteries on rural private land. Finally, Part V proposes incentives, approaches, and recommendations to strengthen Texas cemetery access easement law in order to facilitate the preservation of nineteenth-century Texas family cemeteries on rural private

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<sup>20</sup> COMMISSION OF CONTROL FOR TEXAS CENTENNIAL CELEBRATIONS, MONUMENTS COMMEMORATING THE CENTENARY OF TEXAS INDEPENDENCE: MONUMENTS ERECTED BY THE STATE OF TEXAS TO COMMEMORATE THE CENTENARY OF TEXAS INDEPENDENCE 9 (1938) [hereinafter MONUMENTS].

<sup>21</sup> *Id.* at 164–80 (placing of state sponsored grave markers in nineteenth-century Texas cemeteries).

<sup>22</sup> *Cemetery Preservation*, *supra* note 7; Anne Shelton & Bob Brinkman, *Places of Honor and Repose: Restoring Texas’ Historic Cemeteries*, THE MEDALLION 7 (Nov./Dec., 2010), <http://www.co.san-augustine.tx.us/info/NovDec2010Medallion.pdf>.

<sup>23</sup> *Fast Facts*, TEX. HIST. COMM’N, <http://www.thc.state.tx.us/about/fast-facts> (last visited Apr. 11, 2016).

<sup>24</sup> See Ellen Pearlman, *Rest in Place*, GOVERNING (Nov. 2000), <http://www.governing.com/topics/transportation-infrastructure/rest-place.html> (discussing Texas Legislature’s failure to pass an Adopt-a-Cemetery program similar to State-sponsored Adopt-a-Highway and Adopt-a-Beach programs); TEX. HIST. COMM’N, PRESERVING HISTORIC CEMETERIES: TEXAS PRESERVATION GUIDELINES 3 (2011), <http://www.thc.state.tx.us/public/upload/forms/preserving-historic-cemeteries-2011.pdf> [hereinafter PRESERVATION].

<sup>25</sup> See generally PETER GERHART, PROPERTY LAW AND SOCIAL MORALITY (2014) (attempting to bring a morality based approach to the traditional silos of Law—Torts, Property, and Contracts).

land.

## II. TEXAS RECOGNITION OF CEMETERIES AND OTHER TEXAS HISTORICAL SITES

The Texas Constitution empowers the legislature to “make appropriations for preserving and perpetuating memorials of the history of Texas,”<sup>26</sup> meaning that citizens of Texas have a state constitutional right to preserve the history of Texas.<sup>27</sup> This Part provides an overview of memorial and preservation efforts of cemeteries and other historic sites. Section A examines public efforts to preserve nineteenth-century cemeteries and other historical sites. Section B discusses the memorial and preservation efforts of private organizations in identifying the significance of nineteenth-century cemeteries.

### A. Public Memorial and Preservation Efforts

#### 1. Texas State Historical Markers

With the first marker installed in 1962, the Texas Historical Commission (THC), places “Official Texas Historical Markers” across the State to commemorate events and individuals.<sup>28</sup> Markers have been dedicated to Native-American, Spanish, French, Mexican, Republic of Texas, and American historical sites.<sup>29</sup> Many, if not the majority, are next to or accessible from public roads and state highways open to the general public.<sup>30</sup> The modern medallion and scroll shaped signs of today evolved from the grand recognition of Texas battles, veterans, and historical sites to celebrate her first 100 years.<sup>31</sup> Historical markers serve as important reminders of the land’s historical significance to subsequent property owners and, when associated with a cemetery, as a reminder that a cemetery access easement exists.

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<sup>26</sup> TEX. CONST. art. XVI, § 39.

<sup>27</sup> See *id.*; Bacon v. Tex. Hist. Comm’n, 411 S.W.3d 161, 163–64 (Tex. App. 2013).

<sup>28</sup> Bacon, 411 S.W.3d at 164–65 (from 1953 to 1973 the agency was entitled the Texas State Historical Survey Committee); *Agency Timeline*, TEX. HIST. COMM’N, <http://www.thc.state.tx.us/about-us/agency-timeline> (last visited Apr. 11, 2016); Truett Latimer & Laurie E. Jasinski, *Texas Historical Commission*, HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/mdt17> (last visited Apr. 11, 2016).

<sup>29</sup> TEX. HIST. COMM’N, PRESERVATION CONNECTION: TEXAS’ STATEWIDE HISTORIC PRESERVATION PLAN 2011-2020 13–15 (2010), [http://www.thc.state.tx.us/public/upload/forms/Texas%20Statewide%20Preservation%20Plan%202011\\_2020.pdf](http://www.thc.state.tx.us/public/upload/forms/Texas%20Statewide%20Preservation%20Plan%202011_2020.pdf) [hereinafter THC PLAN] (estimating 12,000 years of human occupation in Texas).

<sup>30</sup> TEX. HIST. COMM’N, OFFICIAL TEXAS HISTORICAL MARKER POLICIES (2012), <http://www.thc.state.tx.us/public/upload/publications/Marker%20Policies.pdf>.

<sup>31</sup> See Shelton et al., *supra* note 22, at 6–7.

## 2. Historic Texas Cemetery Program

As Texas prepared to celebrate her Sesquicentennial in 1986, the THC became aware of the need to protect endangered cemeteries.<sup>32</sup> Over the next decade, the THC developed the Historic Texas Cemetery (HTC) program.<sup>33</sup> The application for an HTC designation provides the THC with detailed information on the cemetery that is recorded in county deed records.<sup>34</sup> An HTC designation is a prerequisite for the Historical Marker Program.<sup>35</sup> And, as its main goal is to preserve a preexisting cemetery, an HTC designation poses little threat to private property rights.<sup>36</sup>

## 3. The Texas Atlas

Twenty-first-century technology has provided researchers with important tools for the preservation of nineteenth-century cemeteries.<sup>37</sup> By 2005, as part of its Record, Investigate, and Protect (“RIP”) program, the THC added nineteenth-century cemeteries (as recorded on United States Geological Survey quad maps) to the THC Database of historical sites, the Texas Historic Sites Atlas (“Texas Atlas”).<sup>38</sup> The Texas Atlas contains entries for recorded historical sites in each Texas county,<sup>39</sup> including: Historic County Courthouses, National Register Properties, State Antiquities Landmarks (Architectural Only), Historical Markers, Cemeteries, Museums and Neighborhood Surveys.<sup>40</sup>

### *B. Private Memorial and Preservation Efforts*

#### 1. Genealogical Organizations

Texas genealogical organizations have evolved into repositories of Texas and American history.<sup>41</sup> These organizations provide grave markers that distinguish

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<sup>32</sup> *History of the Cemetery Preservation Program* TEX. HIST. COMM’N, <http://www.thc.state.tx.us/preserve/projects-and-programs/cemetery-preservation/history-cemetery-preservation-program> (last visited Feb. 28, 2016) [hereinafter *History*].

<sup>33</sup> *Id.*

<sup>34</sup> TEX. HIST. COMM’N, *HTC Guidelines/Instructions* (2014), <http://www.thc.state.tx.us/preserve/projects-and-programs/cemetery-preservation/historic-texas-cemetery-designation> [hereinafter *HTC Guidelines*]; PRESERVATION, *supra* note 24, at 3-5.

<sup>35</sup> *HTC Guidelines*, *supra* note 34, at 2; PRESERVATION, *supra* note 24, at 3.

<sup>36</sup> *See* PRESERVATION, *supra* note 24, at 3.

<sup>37</sup> *See History*, *supra* note 32.

<sup>38</sup> *Id.*; ATLAS, *supra* note 3.

<sup>39</sup> ATLAS, *supra* note 3.

<sup>40</sup> *See id.*

<sup>41</sup> *See, e.g., Membership*, SONS OF THE REPUBLIC OF TEX., <http://srttexas.org/index.php/membership/> (last visited Apr. 11, 2016) (representing an example of the required genealogical information, which is similar to eligibility requirements of most organizations).



and commemorate the service of members' ancestors.<sup>42</sup> Founded in 1891, the Daughters of the Republic of Texas ("DRT") is the original Texas patriotic women's genealogical organization.<sup>43</sup> Essential tenets of the DRT mission statement are to: "Encourage research into early Texas records, preserve historic documents and encourage the publication of historic records" and "[s]ecure and memorialize historic sites."<sup>44</sup> Members of DRT may memorialize their Texas ancestor with a DRT Memorial Medallion grave marker.<sup>45</sup> Similarly, members of another organization, the Former Texas Rangers Association ("FTRA"),<sup>46</sup> memorialize their Texas Ranger ancestor with a Texas Ranger Memorial Cross grave marker.<sup>47</sup> Over the last two decades, more than 600 Texas Ranger Memorial Crosses were dedicated across the State.<sup>48</sup> In addition to these unique Texas organizations, many Texas ancestors qualify for recognition by national and international genealogical organizations such as the Sons and Daughters of the American Revolution. These organizations commemorate and encourage preservation of nineteenth-century cemeteries by offering memorial grave markers.<sup>49</sup> Genealogical organizations' memorial grave markers serve as an important reminder to subsequent property owners of the existence of a cemetery access easement.

## 2. The Texas State Historical Association

The Texas State Historical Association ("TSHA") is the "Guidon of Texas History"<sup>50</sup> and its publication, *The Handbook of Texas*, is a voluminous encyclopedia of Texas history.<sup>51</sup> Organized in Austin on March 2, 1897, the

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<sup>42</sup> *Memorial Medallion*, THE DAUGHTERS OF THE REPUBLIC OF TEX., <http://www.drinfo.org/preservation/memorial-medallion> (last visited Apr. 11, 2016).

<sup>43</sup> *About Us*, THE DAUGHTERS OF THE REPUBLIC OF TEX., <http://www.drinfo.org/about-drt/about> (last visited Apr. 11, 2016).

<sup>44</sup> *Id.*

<sup>45</sup> *Memorial Medallion*, *supra* note 42.

<sup>46</sup> *Established in 1897*, THE FORMER TEXAS RANGERS ASSOC., <http://www.formertexasrangers.org/assocHistory.htm> (last visited Apr. 11, 2016).

<sup>47</sup> *Texas Ranger Memorial Cross Program*, THE FORMER TEXAS RANGERS ASSOC., <http://www.formertexasrangers.org/assocCrosses.htm> (last visited Apr. 11, 2016).

<sup>48</sup> Milton Wright, *President's Message*, STRAIGHT TALK, Vol. 33 December 2014, at 2.

<sup>49</sup> See NATIONAL SOCIETY, SONS OF THE AMERICAN REVOLUTION (NSSAR), *Why Join the NSSAR?* [https://www.sar.org/Membership/Why\\_Join](https://www.sar.org/Membership/Why_Join) (encouraging members to "Get information on patriot graves, mark a grave site."); NATIONAL SOCIETY, DAUGHTERS OF THE AMERICAN REVOLUTION (NSDAR), *DAR Historic Preservation Efforts* <http://www.dar.org/national-society/dar-historic-preservation-efforts> ("DAR members locate, restore, and mark thousands of patriot gravesites and headstones throughout the United States.").

<sup>50</sup> E-mail from J.P. Bryan, Honorary Life Board Member, Tex. State Hist. Ass'n, to author (Dec. 20, 2014, 06:33 CST) (on file with author) (fundraising campaign and noting that TSHA also publishes books, the SW. HIST. Q., & THE TEXAS ALMANAC).

<sup>51</sup> *Handbook of Texas Online*, TEX. STATE HIST. ASS'N, <http://www.tshaonline.org/handbook/online> (last visited Apr. 11, 2016).

TSHA is: “the oldest learned society in the state. Its mission is to ‘foster the appreciation, understanding, and teaching of the rich and unique history of Texas and, by example and through programs and activities, encourage and promote research, preservation, and publication of historical material affecting the state of Texas.’”<sup>52</sup> Members of TSHA record Texas history with an endowment and a reach that includes educators, historians, and preservationists.<sup>53</sup> *The Handbook of Texas* includes the location and burials of many nineteenth-century cemeteries.<sup>54</sup> *The Handbook of Texas* serves as a memorial to those interred and as a reminder of the need for preservation.

### III. CURRENT TEXAS LAW

Part III discusses the cemetery access easement under current Texas law. Section A examines the common law origins of the cemetery access easement. Section A also attempts to explain, under the lens of the Social Morality Theory of Property Law, the cemetery access easement as an exception to the right to exclude.<sup>55</sup> Section B discusses how Texas has codified the common law cemetery access easement with statutes and regulations.

#### A. *The Cemetery Access Easement*

“[W]hen you pass by a cemetery, you notice that just about every headstone has a birth date and a death date, and those two dates are separated by a dash” — a dash that represents a lifetime.<sup>56</sup> A dash, regardless of the chosen resting place, that should be honored and not subject to upheaval at the whim of a subsequent property owner.<sup>57</sup> A cemetery, accessible from public property, implies an invitation to enter and pay your respects.<sup>58</sup> It is when the cemetery is on private property that the cemetery access easement comes into play.<sup>59</sup>

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<sup>52</sup> *About TSHA*, TEX. STATE HIST. ASS’N, <http://www.tshaonline.org/about-tsha> (last visited Apr. 11, 2016).

<sup>53</sup> E-mail from John L. Nau III, Board President, Tex. State Hist. Ass’n, to author (Dec. 16, 2014, 06:50 CST) (on file with author).

<sup>54</sup> *Handbook of Texas Online*, TEX. STATE HIST. ASS’N, <http://www.tshaonline.org/handbook/online/search> (search “cemeteries”) (last visited Apr. 4, 2016).

<sup>55</sup> See PROPERTY LAW AND SOCIAL MORALITY, *supra* note 25, at 161.

<sup>56</sup> LT. GEN. (RET.) RICK LYNCH, ADAPT OR DIE 99 (2013).

<sup>57</sup> See *Damon v. State*, 52 S.W.2d 368, 370 (Tex. Comm’n App. 1932); *Cemeteries*, 12 Tex. Jur. 3d § 1 [hereinafter *Cemeteries*].

<sup>58</sup> See *Peterson v. Stolz*, 269 S.W. 113, 117 (Tex. Civ. App. 1925), *writ refused*, (Apr. 8, 1925); *Cemeteries*, *supra* note 57, at § 1.

<sup>59</sup> *Peterson*, 269 S.W. at 117 (defining a private cemetery as “used only by a family or small portion of a community.”); *Cemeteries*, *supra* note 57, at § 1 (“A public cemetery is a public place.” But, for a private cemetery there may be a need to facilitate access.). For the purposes of this Article, “cemetery visitors” refers to anyone, whether descendants or concerned citizens, who wants access to the cemetery. Unless otherwise noted, “nineteenth-century cemetery” refers to surviving marked nineteenth-century Texas family cemeteries on rural private land. Texas Admin. Code § 22.1(8)

An easement is an interest in private property owned by another, defined in part as a right “to use or control the land, or an area above or below. . . that would otherwise amount to a nuisance.”<sup>60</sup> The cemetery access easement is not an express easement,<sup>61</sup> an easement by implication,<sup>62</sup> nor an implied easement by necessity.<sup>63</sup> The cemetery access easement is more than an easement in gross because it passes with ownership of the land.<sup>64</sup> The cemetery access easement is a post hoc easement because the easement existed after (if not simultaneously with) the burial on the land.<sup>65</sup> One might conclude that the most descriptive definition of the cemetery access easement is a pseudo-perpetual,<sup>66</sup> private,<sup>67</sup> intermittent,<sup>68</sup> access<sup>69</sup> easement. It is private and intermittent in that cemetery visitors only hold and enjoy it at the time they visit the cemetery.<sup>70</sup> It is perpetual<sup>71</sup> in so far as it is subject to a few uncontrollable limitations:<sup>72</sup> nature;<sup>73</sup> man;<sup>74</sup> the police power of the state;<sup>75</sup> and the *Blackholian Gravitational Pull* of the Event Horizon that is the archaeological record.<sup>76</sup>

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(2016) (defining family cemetery as “a cemetery containing members of a single family or kinship group, usually located on land belonging to the family or occupied by the family when established.”).

<sup>60</sup> *Easement*, BLACK’S LAW DICTIONARY 585 (9th ed. 2009).

<sup>61</sup> *See* *Pewitt v. Terry*, 03-12-00013-CV, 2012 WL 4052135, at \*3 (Tex. App. Sept. 13, 2012).

<sup>62</sup> *See id.*

<sup>63</sup> *See id.* at \*4.

<sup>64</sup> THOMPSON ON REAL PROPERTY § 53.09 [hereinafter THOMPSON] (annotating: “if narrowly viewed as an easement in gross, many jurisdictions in former periods would have limited its duration by restrictive views of divisibility or descendability”).

<sup>65</sup> *Post hoc, ergo propter hoc*, BLACK’S LAW DICTIONARY 1285 (9th ed. 2009) (“after this, therefore because of this.”).

<sup>66</sup> *See* Tex. Health & Safety Code Ann. § 711.035(c) (2016); *Smallwood v. Midfield Oil Co.*, 89 S.W.2d 1086, 1090 (Tex. Civ. App. 1935), *writ dismissed*; *Cemeteries*, *supra* note 57, at § 12; Jess R. Phelps, *Preserving Perpetuity?: Exploring the Challenges of Perpetual Preservation in an Ever-Changing World*, 43 ENVTL. L. 941, 956-57 (2013); Shaffer, *supra* note 6, at 486.

<sup>67</sup> *Easement*, BLACK’S LAW DICTIONARY 587 (9th ed. 2009) (“An easement whose enjoyment is restricted to one specific person or a few specific people”).

<sup>68</sup> *Id.* at 587 (“An easement that is usable or used only from time to time, not regularly or continuously”).

<sup>69</sup> *Id.* at 586 (“An easement allowing one or more persons to travel across another’s land to get to a nearby location, such as a road”).

<sup>70</sup> *Id.* at 587.

<sup>71</sup> Shaffer, *supra* note 6, at 486; THOMPSON, *supra* note 64 (annotating, “[B]urial is for eternity and that nothing could be more permanent.”).

<sup>72</sup> THOMPSON, *supra* note 64 (annotating, “[T]hat circumstances may require, or at least justify, temporary disturbance of what is often euphemistically called final repose.”).

<sup>73</sup> PRESERVATION, *supra* note 24, at 2.

<sup>74</sup> *Id.*

<sup>75</sup> *Cemeteries*, *supra* note 57, at § 2.

<sup>76</sup> The author’s attempt to assign a phonetic connotation to Justice Williams concern; THOMPSON, *supra* note 64 (quoting *Ritter v. Couch*, 76 S.E. 428, 437 (W. Va. 1912) (Williams, J., dissenting) (“If land, once devoted to burial purposes, could not thereafter be used for any other purpose, it would not be many centuries until the face of the earth would be wholly occupied by the

## 1. Exception to the Right to Exclude

The cemetery access easement emanates from within the penumbra of the property that contains the interred remains.<sup>77</sup> The descendants of the deceased hold this right of access.<sup>78</sup> Everyone who has an interest in historic knowledge and preservation holds this right of access.<sup>79</sup> By virtue of the grave, the cemetery access easement arises when anyone wants to visit a cemetery on private land for a cemetery purpose—to mourn, to honor, to record, or to preserve.<sup>80</sup> Viewed under a lens of the Social Morality Theory of Property Law the cemetery access easement creates an obligation of subsequent property owners to allow access.<sup>81</sup> It is this obligation that excepts cemetery visitors from exclusion.<sup>82</sup> However, is the right to exclude truly the essential stick?<sup>83</sup> The property owner controls the bundle of sticks<sup>84</sup>—yet these property rights are subject to limitations.<sup>85</sup> These limitations include easements and other land use restrictions that the owner must consider when making property decisions.<sup>86</sup> The cemetery access easement is an exception to the right to exclude for at least two reasons: duty and prior historical use.

The exception is a duty because property law has struggled with defining the boundary between access and exclusion.<sup>87</sup> Duty is a foundational tenet of

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dead, and there would be no place for the living.”)

<sup>77</sup> Analogous to the relationship between the land and its burials, is the intersection of the Natural Law and the public trust doctrine, “this doctrine is an emanation within a penumbra, but one that is validated because of this very relationship;” *see generally* George P. Smith II & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations Within A Penumbra*, 33 B.C. ENVTL. AFF. L. REV. 307, 309 (2006) (discussing public resource preservation and how the influence of Natural Law intersects with the public trust doctrine).

<sup>78</sup> *See* *Gibson v Berry Cemetery Assn.*, 250 S.W.2d 600, 601–02 (Tex. Civ. App. 1952) (owning only a right of access); Michael T. Olexa, et. al., *No Grave Like Home: Protecting the Deceased and Their Final Resting Places from Destruction Without Going Six Feet Under*, 11 DRAKE J. AGRIC. L. 51, 72 (2006) (quoting *Gibson*: “[T]he right of ‘visitation, ornamentation, and the protection of the graves . . . .’”).

<sup>79</sup> THOMPSON, *supra* note 64 (quoting *Tracy v. Bittle*, 112 S.W. 45, 49 (Mo. 1908) (“[S]acred memories are awakened in viewing the spot . . . They have a right to return to the spot, . . . and do homage . . . .”); *See, e.g.*, Ryan M. Seidemann & Rachel L. Moss, *Places Worth Saving: A Legal Guide to The Protection of Historic Cemeteries in Louisiana and Recommendations for Additional Protection*, 55 LOY. L. REV. 449, 482 (2009).

<sup>80</sup> Tex. Health and Safety Code § 711.041 (2016); *Gibson*, 250 S.W.2d at 602 (crossing private property to get to public cemetery); *see Cemeteries, supra* note 57, at § 36; *Shaffer, supra* note 6, at 487–88.

<sup>81</sup> PROPERTY LAW AND SOCIAL MORALITY, *supra* note 25, at 161–174.

<sup>82</sup> *See id.*

<sup>83</sup> Brophy, *supra* note 17, at 1477–78 (inspiring this Article).

<sup>84</sup> PROPERTY LAW AND SOCIAL MORALITY, *supra* note 25, at 46–7 (citing among others: A.M. HONORE, OWNERSHIP, IN MAKING LAW BIND: ESSAYS LEGAL AND PHILOSOPHICAL 161 (1987)).

<sup>85</sup> *Id.*

<sup>86</sup> *See id.*

<sup>87</sup> *Id.* at 162–63 (suggesting the boundary is like a trespass, but narrower).

property law subject to morality and social values that usually determine when the law favors access.<sup>88</sup> The well-being of others is the duty that restricts the right to exclude.<sup>89</sup> When an owner decides to purchase land with an existing use such as a nineteenth-century cemetery, he receives notice of a duty to the well-being of others with an interest in access to the cemetery.<sup>90</sup> The owner must now make decisions that coincide with the well-being of non-owners and their access to the property.<sup>91</sup> The exception arises from historical use because a purchaser who knows of prior or customary use and who still decides to purchase the property must accept this limit on the right to exclude.<sup>92</sup> “Prior and customary uses serve as a kind of non-legislated zoning, forming a set of unstated expectations that owners take on when they purchase the property.”<sup>93</sup> The ultimate preexisting historical use is a dedication of the land for cemetery purposes.<sup>94</sup> The access rights of non-owners and the duties and responsibilities of owners are both subject to statutes and court orders.<sup>95</sup> The court “in light of the nonowner’s interest” evaluates an owner’s reason for exclusion.<sup>96</sup>

### B. Texas Regulatory Scheme

A sense of *noblesse oblige* may no longer protect non-owners, or the rights of the interred; therefore, the common law cemetery access easement has been codified in Texas law.<sup>97</sup> In 2001, the Texas attorney general determined that Texas statutes apply broadly to nineteenth-century cemeteries.<sup>98</sup> This application of Texas statutes facilitates the preservation of nineteenth-century cemeteries.<sup>99</sup>

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<sup>88</sup> See *id.* at 162 n. 6 (“Privileged access is thought to be the creation of the law, as in the doctrine of necessity”).

<sup>89</sup> *Moral Duty*, BLACK’S LAW DICTIONARY 580–81 (9th ed. 2009) (defining “moral duty: ...the breach of which would be a moral wrong; perfect duty: ...not merely recognized by the law but is actually enforceable; preexisting duty: A duty that one is already legally bound to perform.”).

<sup>90</sup> See PROPERTY LAW AND SOCIAL MORALITY, *supra* note 25, at 168–74 (arising from any transfer by deed) (citing JOSEPH WILLIAM SINGER, THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP 43 (2000); Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996)).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 173 (citing case law).

<sup>93</sup> *Id.*

<sup>94</sup> See *State v. Forest Lawn Lot Owners Ass’n*, 254 S.W.2d 87, 91 (Tex. 1953); *Cemeteries*, *supra* note 57, at §§ 12, 14.

<sup>95</sup> Judge Joe Spurlock II, Professor of Law, A Right, Power or a Duty is always subject to the Statutes and Court Orders, Family Law Lecture at TAMU Law (December 6, 2014) (notes on file with author).

<sup>96</sup> GERHART, *supra* note 25, at 162.

<sup>97</sup> Tex. Health & Safety Code Ann. § 711.001(1-a)(C) (2016); *Cemeteries*, *supra* note 57.

<sup>98</sup> Op. Tex. Att’y Gen. No. JC-0355 (2001).

<sup>99</sup> TEX. HIST. COMM’N, CEMETERY LAWS, <http://www.thc.state.tx.us/preserve/projects-and-programs/cemetery-preservation/cemetery-laws> (last visited Apr. 11, 2016).

### 1. Dedication of the Land for Cemetery Purpose

Texas does not require a formal ceremony and recognizes the dedication of nineteenth-century cemeteries under the common law.<sup>100</sup> The interment on the land dedicates the land to cemetery purposes.<sup>101</sup> The presence of a fence and headstones constitutes a dedication per se.<sup>102</sup> Even a single headstone on the property is sufficient to put a subsequent owner on notice that the land is dedicated as a cemetery.<sup>103</sup> The dedication runs with the land—title to the land is infinitely alienable—but title will always be encumbered by the cemetery land use.<sup>104</sup> The dedication of the land implies a property interest in the family of the interred, descendants, and the entire community.<sup>105</sup> This property interest is the cemetery access easement.<sup>106</sup>

### 2. The Cemetery Access Statute

The Access to Cemetery Statute (“Access Statute”) is applicable to property “that surrounds, is adjacent to, or is contiguous with the actual cemetery grounds.”<sup>107</sup> The Access Statute provides in part: “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. . . [and] the time of the visit is reasonable.”<sup>108</sup> The current Access Statute applies to the land between the cemetery and the nearest public road, where many nineteenth-century cemeteries are located.<sup>109</sup>

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<sup>100</sup> PRESERVATION, *supra* note 24, at 9; *see* Op. Tex. Att’y Gen. Nos. JC-0355 (2001), JC-0235 (2000) (“[I]and dedicated as a cemetery under common law, as opposed to chapter 711, may be conveyed, but the conveyance may not interfere with the land’s dedicated use.”).

<sup>101</sup> *See* Davis v. May, 135 S.W.3d 747, 749–50 (Tex. App. 2003); Damon v. State, 52 S.W.2d 368, 369 (Tex. Comm’n App. 1932).

<sup>102</sup> Discussion of the effect of discovering unmarked graves is beyond the scope of this Article. *Smallwood v. Midfield Oil Co.*, 89 S.W.2d 1086, 1090 (Tex. Civ. App. 1935); *see generally Cemeteries*, *supra* note 57 (citing *Castro Romero v. Becken*, 256 F.3d 349 (5th Cir. 2001) (referring to Tex. Health & Safety Code Ann. §§ 711.001(2), 711.034. (2016)).

<sup>103</sup> *Michels v. Crouch*, 122 S.W.2d 211, 214 (Tex. Civ. App. 1938); *Cemeteries*, *supra* note 57.

<sup>104</sup> *Houston Oil Co. of Tex. v. Williams*, 57 S.W.2d 380, 384–85 (Tex. Civ. App. 1933); *See generally Cemeteries*, *supra* note 57, at §§ 12, 14 (conceding an actual public necessity).

<sup>105</sup> *See* Shaffer, *supra* note 6, at 486.

<sup>106</sup> *See* DUKEMINIER, *supra* note 16.

<sup>107</sup> *Thompson v. Winkelmann*, 01-06-00457-CV, 2008 WL 921041, at \*4 (Tex. App. Apr. 3, 2008).

<sup>108</sup> Tex. Health & Safety Code Ann. § 711.041 (2016).

<sup>109</sup> Tex. Admin. Code § 205.2 (2016) (effectuating the Access Statute).

### 3. The Cemetery Access Rule

The Texas Funeral Service Commission (“TFSC” or “Commission”) has the authority to enforce the Access Statute.<sup>110</sup> The Access Rule defines *reasonable* as: hours of access of “8:00 a.m. to 5:00 p.m. on any day of the week”<sup>111</sup> and states that a landowner “may not designate a route or routes . . . that discourages visits to a cemetery.”<sup>112</sup> According to the TFSC, the intent behind the Access Rule is “to encourage parties to reach agreement on the terms of ingress and egress either through informal negotiation or formal mediation and for the Funeral Service Commission to enter a final order only as a last resort.”<sup>113</sup> The Commission went on to say that the rights and concerns of each party would be considered if such an order was made.<sup>114</sup> The TFSC requests that an access agreement with private property owners be filed with the Commission.<sup>115</sup> The TFSC describes the Access Rule as “a system that encourages voluntary negotiations (resulting in a written agreement) between affected landowners and persons desiring access to cemeteries . . . for which no public ingress or egress exists.”<sup>116</sup> As of 2014 no agreements have been filed with TFSC.<sup>117</sup> However, this does not mean there are no formal or causal agreements between property owners and those who wish to visit a cemetery. Current Texas law incorporates common law principles of the cemetery access easement into the current Access Statute and Access Rule.<sup>118</sup> Principles that provide a framework for owners and nonowners to establish agreements (written or oral) that facilitate access and encourage preservation.

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<sup>110</sup> Tex. Health & Safety Code Ann. § 711.012(b) (2016); *see* 2009 Tex. Sess. Law Serv. Ch. 263 (H.B. 1468) (Vernon’s) (West, Westlaw through 81st Sess.) (amending § 711.012(b) to grant the Texas Funeral Services Commission authority over § 711.041, the Access Statute).

<sup>111</sup> Ingress and Egress to Cemeteries and Private Burial Grounds Which Have No Public Ingress or Egress, Tex. Admin. Code § 205.2 (2016).

<sup>112</sup> *Id.*

<sup>113</sup> 34 Tex. Reg. 1057 (2009) (codified at Tex. Admin. Code § 205.2); *see also* Alternative Dispute Resolution Policy and Procedure, Tex. Admin. Code § 207.1 (2016).

<sup>114</sup> 34 Tex. Reg. 1057 (2009) (codified at Tex. Admin. Code § 205.2).

<sup>115</sup> Ingress and Egress to Cemeteries and Private Burial Grounds Which Have No Public Ingress or Egress, Tex. Admin. Code § 205.2 (2016).

<sup>116</sup> 34 Tex. Reg. 1057 (2009) (codified at Tex. Admin. Code § 205.2).

<sup>117</sup> E-mail from Kyle Smith, Staff Attorney, Tex. Funeral Serv. Comm’n, to author (Oct. 10, 2014 08:28 CST) (on file with author); *see infra* IV(B).

<sup>118</sup> Tex. Admin. Code § 205.2 (2016).

## IV. OBSTACLES AND CONCERNS OF ACCESS AND PRESERVATION

*If relatives of blood may not defend  
the graves of their departed, who may?*<sup>119</sup>

*Unfortunately, not everyone may be as fond  
of your late relatives as you are.*<sup>120</sup>

The year 2012 ushered in a new era for the Stewart Family ranch as it changed ownership for the first time in five decades.<sup>121</sup> An online search of Uvalde County records indicates that Cowboy Cemetery was never reserved in a deed.<sup>122</sup> This is likely the disposition of many Texas family cemeteries on rural private land that have yet to gain the HTC designation. Texas, through the Texas Historical Commission (“THC”) leaves the primary responsibility to identify and preserve historic cemeteries to volunteer efforts.<sup>123</sup> Cowboy Cemetery deserves protection and to never be treated as “abandoned”—a label that effectively disregards the possibility of future preservation efforts.<sup>124</sup>

The 2006 list of Texas’ Most Endangered Places included Historic Texas Cemeteries.<sup>125</sup> Preservation efforts of Cowboy Cemetery and other nineteenth-century cemeteries will require cooperation among volunteers, descendants, communities, private property owners, as well as federal, state, and local governments. THC provides a “Notice of Existence of Cemetery” pursuant to the Health and Safety Code section 711.011: Filing Record of Unknown Cemetery.<sup>126</sup> There is no fee and the notice must be notarized and recorded with the county clerk.<sup>127</sup> The notice may serve as a placeholder before applying for an

<sup>119</sup> Michael T. Olexa, et al., *A Grave Situation: Protecting the Deceased and Their Final Resting Places from Destruction*, FLA. B.J., November 2012, at 35 (quoting Brannon, J., Hitter v. Crouch, 76 S.E. 428, 430 (W. Va. 1912)).

<sup>120</sup> Doug Jordan, *Oh Bury Me (Not) on the Lone Prairie Establishing Family Cemeteries on Texas Farms and Ranches*, 73 TEX. B.J. 374, 376 (2010).

<sup>121</sup> Uvalde County Deed Record 2012003011 (1970 conveyance to J.W. Stewart recorded in Volume 177, Page 453 Uvalde County Deed Record).

<sup>122</sup> *Id.* (excepting a 1929 power line easement, a 1980 pipeline easement, and a 1983 telephone line easement—Cowboy Cemetery existed long before rural Texas became a spider’s web of buried pipelines, cables and wires.).

<sup>123</sup> PRESERVATION, *supra* note 24.

<sup>124</sup> See Tex. Admin. Code § 22.1 (2016); Tex. Health & Safety Code Ann. § 711.036 (2016); Levandovsky v. Targa Res. Inc., 375 S.W.3d 593, 597 (Tex. App. 2012); *Cemeteries*, *supra* note 57, at § 24 (classifying as abandoned is the first step in the process of removing a cemetery).

<sup>125</sup> *2006 Texas’ Most Endangered Places*, PRESERVATION TEX., <http://www.preservationtexas.org/2006-texas-most-endangered-places/> (last visited Apr. 11, 2016).

<sup>126</sup> Tex. Health & Safety Code Ann § 711.011 (2016).

<sup>127</sup> *Notice of Existence of Cemetery*, TEX. HIST. COMM’N, <http://www.thc.state.tx.us/preserve/projects-and-programs/cemetery-preservation/notice-existence-cemetery> (last visited Apr. 11, 2016) [hereinafter *Notice*].



HTC designation or other preservation efforts.<sup>128</sup> A recurring theme of the Texas regulatory scheme has emerged as THC's website states, "The [THC] has no formal role in the enforcement or filing of the notice requirements mandated under Chapter 711 of the Health and Safety Code."<sup>129</sup>

The obstacles of awareness and access are the greatest threats to the current and future status of nineteenth-century Texas family cemeteries on rural private land. In this Part, Section A examines how under current Texas law there are relatively low burdens of persuasion and notice to remove a cemetery dedication. Section B examines whether the TFSC has sufficient authority under current Texas law to enforce the Access Rule. Section C discusses the status of nineteenth-century cemetery preservation under the current programs and goals of the THC. Finally, Section D poses the concern that awareness of the cemetery access easement has not kept pace with the technological advances of modern genealogy.

Most surviving nineteenth-century cemeteries likely have very few graves and cover a small part of the overall land including the cemetery and the access easement.<sup>130</sup> Preservation must be handled as a heritage issue not a dead hand<sup>131</sup> or living-versus-dead issue.<sup>132</sup> Besides time and the farmer's plow, the two greatest threats to the current and future status of nineteenth-century cemeteries are: (1) awareness of the cemetery access easement by property owners; and, (2) awareness of and access to the cemetery by cemetery visitors.

#### A. Removal of the Cemetery Dedication

The Texas regulatory scheme provides remedies for subsequent property owners to have a cemetery dedication removed.<sup>133</sup> This means that the interred remains can be moved from the property to a public cemetery.<sup>134</sup> While a cemetery existing on or between one's property and a public road is not a nuisance per se, Texas statutes and regulations may provide property owners a

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<sup>128</sup> See *Historic Texas Cemetery Designation*, TEX. HIST. COMM'N, <http://www.thc.state.tx.us/preserve/projects-and-programs/cemetery-preservation/historic-texas-cemetery-designation> (last visited Mar. 11, 2016) [hereinafter *Designation*].

<sup>129</sup> *Notice*, *supra* note 127 (providing instructions and sample form with the proper caption).

<sup>130</sup> Texas Admin. Code § 22.1(8) (2016) (defining family cemetery as "a cemetery containing members of a single family or kinship group, usually located on land belonging to the family or occupied by the family when established."); see *Burial Customs*, *supra* note 6 (comprising single family cemeteries before population growth gave rise to perpetual care public cemeteries).

<sup>131</sup> *Deadhand*, BLACK'S LAW DICTIONARY 456 (9th ed. 2009) (defining "deadhand" as restricting the transfer of land to a sole family or organization regardless of the affiliation of a prospective subsequent owner).

<sup>132</sup> Brophy, *supra* note 17, at 1500-01.

<sup>133</sup> Tex. Health & Safety Code Ann §§ 711.004, 711.007, 711.010, 711.036 (2016) (removing remains to a perpetual care cemetery).

<sup>134</sup> *Id.*

relatively low burden of evidence in abating a cemetery as a nuisance or as abandoned.<sup>135</sup> Thus, the concern is that Texas law may be balanced in favor of the property owner when removing the cemetery dedication.

The recent case of *Levandovsky v. Targa* reinforces the need for a stronger cemetery access easement and raised the concern of at least one out-of-state cemetery law commentator—that it may be too easy to remove the dedication under current Texas law.<sup>136</sup> The issue before the court was abandonment and notice,<sup>137</sup> but *Targa* may also stand for awareness—awareness of the cemetery access easement by property owners and cemetery visitors. The case revolved around Ben Fisher Cemetery, a nineteenth-century cemetery now surrounded by a natural gas processing facility.<sup>138</sup> Citing public safety concerns, after the current property owner and its predecessors had maintained the cemetery for at least fifty-five years, Targa petitioned to have the cemetery moved.<sup>139</sup>

In preparing their original petition, Targa discovered that Levandovsky was a granddaughter of one of the interred.<sup>140</sup> If the granddaughter (or any “required”<sup>141</sup> party) had been notified by the process now deemed acceptable when the interred’s next of kin is unknown (limited-area publication in a local newspaper<sup>142</sup>)—the remains would likely have been removed with little or no protest.<sup>143</sup> Although the Cemetery likely met the THC specifications of an HTC because the oldest grave in the cemetery was from 1898,<sup>144</sup> when served notice as required by statute, the THC did not intervene in the trial court proceeding.<sup>145</sup>

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<sup>135</sup> See Tex. Health & Safety Code Ann. §§ 711.007, 711.010 (2016) (abating a cemetery as a nuisance, and requiring proof of abandonment and removal of dedication is in the public best interest, respectively).

<sup>136</sup> See *Levandovsky v. Targa Res. Inc.*, 375 S.W.3d 593 (Tex. App. 2012); Seidemann, *supra* note 79, at 26-7.

<sup>137</sup> See *Levandovsky*, 375 S.W.3d at 597-98.

<sup>138</sup> *Id.* at 595.

<sup>139</sup> *Id.*

<sup>140</sup> *Levandovsky v. Targa Res. Inc.*, 375 S.W.3d 593, 595 (Tex. App. 2012); see Brief of Appellees at 2-3, *Levandovsky v. Targa Res. Inc.*, 375 S.W.3d 593 (Tex. App. 2012) (No. 14-11-01000-CV) [hereinafter Targa Brief] (on file with author).

<sup>141</sup> See Tex. Health & Safety Code Ann. § 711.004(a) (2016) (listing the priority order of what parties must be notified and also give written consent prior to removing interred remains from a cemetery plot).

<sup>142</sup> Tex. Health & Safety Code Ann. §§ 711.004, 711.036 (2016); See 3A Tex. Jur. Pl & Pr. Forms § 59:21 (2d ed.) (indicating the legal fiction of notice by publication as an acceptable form of service).

<sup>143</sup> See *Levandovsky*, 375 S.W.3d at 595 (indicating that if not for Targa genealogy research, granddaughter was unaware of the existence of the cemetery).

<sup>144</sup> Texas Admin. Code § 22.6 (2016) (interments more than fifty years old with headstones representing nineteenth and twentieth-century style and craftsmanship); *Levandovsky v. Targa Res. Inc.*, 375 S.W.3d at 597 (adding appendix with photos of headstones).

<sup>145</sup> *Levandovsky*, 375 S.W.3d at 595; Brief of Amicus Curiae for Tex. Hist. Comm’n, et al. Supporting Appellant, at 1-2, *Levandovsky v. Targa Res. Inc.*, 375 S.W.3d 593, 595 (Tex. App. 2012) (No. 14-11-01000-CV) [hereinafter THC Amicus Brief] (citing budget concerns) (on file with

Moreover, Targa more than complied with the statute's requirements because a Targa employee found and contacted Levandovsky.<sup>146</sup> Not until it appeared that positive law might be created on appeal did the THC intervene on the appellant's behalf.<sup>147</sup>

The THC defines abandonment in part as “non-perpetual care cemetery containing one or more graves and possessing cemetery elements for which no cemetery organization exists and which is not otherwise maintained by any caretakers.”<sup>148</sup> The statutory definition of abandonment saved the Ben Fisher Cemetery only because Targa maintained the property.<sup>149</sup> After the *Targa* case, it seems that removal is “left up to the discretion of the landowner, with little or no consideration given to the integrity of the historical record . . . it does appear . . . industry in this case was going to appropriately accomplish the [removal]. It is doubtful that this scenario will often repeat itself. . . .”<sup>150</sup> A concern that many surviving nineteenth-century cemeteries may not be maintained inspired this Article on the cemetery access easement.

### *B. The Role of the Texas Funeral Service Commission*

In 2015, the current Access Rule took effect.<sup>151</sup> There were at least two questions posed during the notice and comment period.<sup>152</sup> The author asked: “Does the filed access agreement serve as evidence that a cemetery is not abandoned?”<sup>153</sup> and “Are local law enforcement agencies notified of the agreement by the Commission?”<sup>154</sup> The answer to the second questions indicates that the TFSC does not have enforcement authority and leaves enforcement of access agreements to each party.<sup>155</sup>

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author).

<sup>146</sup> See *Levandovsky*, 375 S.W.3d at 595; Targa Brief, *supra* note 140, at 2–3 (conceding happenstance that employee was a genealogist).

<sup>147</sup> See *Levandovsky*, 375 S.W.3d at 595; THC Amicus Brief, *supra* note 145, at 1-2.

<sup>148</sup> Tex. Admin. Code § 22.1(1) (2016); THC Amicus Brief, *supra* note 145, at 4.

<sup>149</sup> See *Levandovsky*, 375 S.W.3d at 595; Tex. Admin. Code §22.1 (2016); see *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex. 1999) (holding that Administrative rules have the same force and effect as statutes).

<sup>150</sup> Seidemann, *supra* note 79, at 26-27 (citing *Levandovsky*, 375 S.W.3d 593 at 595–97 (finding that cemetery was only incidentally saved from disinterment by landowner)).

<sup>151</sup> Ingress and Egress to Cemeteries and Private Burial Grounds Which Have No Public Ingress or Egress, Tex. Admin. Code § 205.2 (2016).

<sup>152</sup> E-mail from Kyle Smith, Staff Attorney, Tex. Funeral Serv. Comm'n, to Author (Oct. 10, 2014 08:28 CST) (on file with author) (answering Author concerns of notice, potential complaints of trespass, and blocked access); 39 Tex. Reg. 7863 (2014) (Both questions posed by author during the comment period).

<sup>153</sup> *Id.* (answering, “I do not think the agreement would provide proof that the Cemetery has not been abandoned.”).

<sup>154</sup> *Id.* (answering, “No law enforcement agencies are notified.”).

<sup>155</sup> *Id.* (answering, “[T]he Commission has no authority to enforce the agreement. It would be up to the parties to file suit to enforce a right of access or to get a court order to prevent access.”).

As discussed in Part III(B)(3), the TFSC Access Rule requires that access agreements be reduced to writing.<sup>156</sup> Awareness of the cemetery access easement and a misplaced doctrinaire perception of property rights is a common obstacle faced by cemetery visitors who initiate contact with the current property owner.<sup>157</sup> This obstacle is most likely to be encountered for those seeking access to nineteenth-century cemeteries. When parties cannot agree to draft their own access agreement, the TFSC serves as mediator.<sup>158</sup> E-mail correspondence with the TFSC indicates that a filed access agreement offers little protection to the cemetery.<sup>159</sup>

While many cemetery visitors are aware that they have the right to access and an access agreement, they are not aware that these do not give them the right to unlimited access.<sup>160</sup> Many property owners may not be aware that an access agreement does not require them to open their land to the general public.<sup>161</sup> Both sides must be aware that cemetery visitors only have the right to reasonable access—enough access to maintain and preserve as well as memorialize the cemetery.<sup>162</sup> Unfortunately (at the time of this Article) an access agreement, regardless if filed with the TFSC, is not binding on either party.<sup>163</sup>

### *C. The Role of the Texas Historical Commission*

As discussed in Part II(A)(2), the application for a Historic Texas Cemetery (HTC) designation provides the THC with detailed cemetery information that is recorded in the county deed records.<sup>164</sup> The designation poses little threat to

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<sup>156</sup> Tex. Admin. Code § 205.2 (2016).

<sup>157</sup> Telephone Interview with Private Property Owner in Uvalde County (Oct. 16, 2014) (regarding access to Davenport family cemetery (ATLAS, *supra* note 3 Cemetery—Atlas Number 7463001005 (UV-C010)); see THC PLAN, *supra* note 29, at 20; see generally Erin Morrow, *The Environmental Front: Cultural Warfare in the West*, 25 J. LAND RESOURCES & ENVTL. L. 183, 195-96 (2005) (discussing environmental regulation in rural areas noting that “Private landowners are crucial to successful conservation efforts.” much like cemetery preservation efforts).

<sup>158</sup> Tex. Admin. Code §§ 205.2, 207.1 (2016).

<sup>159</sup> E-mail from Kyle Smith, Staff Attorney, Tex. Funeral Serv. Comm’n, to Author (Oct. 10, 2014 08:28 CST) (answering, “Unfortunately the agreement does not have any real binding authority.” In fact, no agreement has ever been filed with the TFSC).

<sup>160</sup> See *Pewitt v. Terry*, 03-12-00013-CV, 2012 WL 4052135, at \*1 (Tex. App. Sept. 13, 2012) (concerning an access agreement to an active cemetery on private land).

<sup>161</sup> Some locations and cemeteries by their very nature should never be open to the general public and access limited as to visitors and by appointment only. See PRESERVATION, *supra* note 24, at 4; THC PLAN *supra* note 29, at 20 (“There is a public perception that preservation policies take away property rights.”).

<sup>162</sup> See Tex. Admin. Code § 205.2 (2016); Tex. Health & Safety Code Ann. § 711.041 (2016); PRESERVATION, *supra* note 24 at 4; THC PLAN *supra* note 29, at 20.

<sup>163</sup> Smith, *supra* note 159.

<sup>164</sup> Tex. Admin. Code § 22.6 (2016); *History*, *supra* note 32; PRESERVATION, *supra* note 24, at 4.

private property rights, as its main goal is to preserve a preexisting cemetery.<sup>165</sup> Property owners need to be aware that the designation does not require them to open the cemetery to the general public.<sup>166</sup> The detail required by the application process makes a cemetery access agreement a practical prerequisite for nineteenth-century cemeteries to be designated as an HTC.<sup>167</sup> State funding for the HTC program is at best tenuous, as most efforts to identify and prepare HTC applications are left to volunteers and local sources.<sup>168</sup> Starting in 2006, the Record, Investigate, and Protect (“RIP”) Guardian Volunteer Network facilitated the upkeep and monitoring of HTC designated cemeteries.<sup>169</sup> Budget cuts have put the RIP program on hold since 2012.<sup>170</sup>

It is not clear whether an HTC designation precludes the effect of the THC’s statutory definition of abandoned cemetery.<sup>171</sup> The THC defines abandoned cemetery as “non-perpetual care cemetery containing one or more graves and possessing cemetery elements for which no cemetery organization exists and which is not otherwise maintained by any caretakers. It may or may not be recorded in deed records of the county in which it lies.”<sup>172</sup> The THC touts on its website that an HTC designation aids in preservation “by alerting present and future landowners of the presence of this important historical resource on their property.”<sup>173</sup> Unfortunately, the HTC designation is not enough to ensure the cemetery cannot be deemed “abandoned” under the current THC definition even when recorded in the deed.<sup>174</sup> As of 2014, there was a twelve to eighteen-month waiting period for incoming HTC applications.<sup>175</sup>

The THC is the State Historic Preservation Office under the National Historic Preservation Act of 1966.<sup>176</sup> Every ten years the THC is required to publish a preservation plan.<sup>177</sup> The current plan is entitled “Preservation Connection:

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<sup>165</sup> PRESERVATION, *supra* note 24, at 3.

<sup>166</sup> *See id.* at 4.

<sup>167</sup> *Designation*, *supra* note 128 (Guidelines/ Instructions Link to: *HTC Guidelines* requiring location & property maps and site plan including, “Road names or access routes to the cemetery.”).

<sup>168</sup> *History*, *supra* note 32; PRESERVATION, *supra* note 24, at 8.

<sup>169</sup> *History*, *supra* note 32 (“The Cemetery Program also managed the RIP Guardian volunteer network from 2006 to 2012.”); PRESERVATION, *supra* note 24, at 3.

<sup>170</sup> *History*, *supra* note 32 (staffing currently only provides for technical support and recommendations).

<sup>171</sup> Tex. Admin. Code § 22.1(1) (2016); Tex. Health & Safety Code Ann. § 711.010 (2016) (requiring THC be given notice of removal petition for unknown or abandoned cemeteries); *see* *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex. 1999) (holding that Administrative rules have the same force and effect as statutes); THC Amicus Brief, *supra* note 145, at 5-6; PRESERVATION, *supra* note 24, at 3.

<sup>172</sup> Tex. Admin. Code § 22.1(1) (2016).

<sup>173</sup> PRESERVATION, *supra* note 24, at 3; *Designation*, *supra* note 128.

<sup>174</sup> Tex. Admin. Code § 22.1(1) (2016).

<sup>175</sup> *Designation*, *supra* note 128.

<sup>176</sup> THC PLAN, *supra* note 29, at 4; 16 U.S.C.A. § 470 (2016).

<sup>177</sup> THC PLAN, *supra* note 29, at 4.

Texas' Statewide Historic Preservation Plan 2011-2020" ("Preservation Plan").<sup>178</sup> A description of the Preservation Plan's "Historic and Cultural Fabric of Texas" mentions slave cemeteries and touts both the Texas Atlas and the fact that at the time of the report there were 1400 Historic Texas Cemeteries.<sup>179</sup> The Texas Centennial was only mentioned in passing.<sup>180</sup> At a quick glance, cemetery preservation does not seem to be at the forefront for the THC.<sup>181</sup> According to the Preservation Plan, "more than 90 percent of archeological sites in Texas are privately owned and many are damaged or lost each year."<sup>182</sup> How many nineteenth-century Texas cemeteries are included in this assertion?

#### *D. Modern Genealogy*

The twenty-first century has brought unprecedented access to historical and genealogical information. What once took days, months, or even years of planning can now be accomplished in seconds. A virtual sea of digital access supplements visits to local, state, and federal libraries and archives.<sup>183</sup> Unfortunately, it is only when descendants begin to research that they become aware of the potential need to preserve the nineteenth-century cemeteries of their ancestors. This lack of awareness by cemetery visitors makes the awareness of property owners that much more important—awareness of the cemetery access easement is essential to preserve our "analog" ancestors who are buried where they chose to be buried.

#### V. THE FUTURE OF NINETEENTH-CENTURY TEXAS FAMILY CEMETERIES

The Texas Constitution gives the authority to enact legislation to preserve historic sites.<sup>184</sup> The State of Texas placed approximately 257 Centennial markers as grave markers.<sup>185</sup> "In a number of cases the graves to be marked were located in abandoned cemeteries or other desolate places. With the consent of descendants, the remains of [thirty two] were moved to the State Cemetery in

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<sup>178</sup> *Id.* at 3.

<sup>179</sup> *Id.* at 13–15.

<sup>180</sup> *Id.* at 14.

<sup>181</sup> *See id.* at 13-15 (focusing on structures and commercial buildings); THC Amicus Brief, *supra* note 145 at 1–2 (favoring a restrictive definition of abandoned cemeteries to conserve limited agency resources).

<sup>182</sup> THC PLAN, *supra* note 29, at 13.

<sup>183</sup> Ancestry.com (paid) and its subsidiary findagrave.com (free) are the major private subscriber-based digital repositories of genealogical information. There is digital access through Federal, State, and local entities as well. *See, e.g.*, census.gov; thc.com; glo.texas.gov; dshts.state.tx.us/VIS/; texasfile.com.

<sup>184</sup> TEX. CONST. art. XVI, § 39 (authority to "make appropriations for preserving and perpetuating memorials of the history of Texas").

<sup>185</sup> MONUMENTS, *supra* note 20, at 163–180 (celebrating the 1936 Centennial).

Austin.”<sup>186</sup> Reinterring at the State Cemetery is no longer a viable alternative to preservation in the twenty-first century,<sup>187</sup> and its discussion is beyond the scope of this Article.

This Part proposes incentives, approaches, and legislative recommendations to strengthen the Texas cemetery access easement regulatory scheme. Section A proposes changes and additions to Texas statutes and regulations governing the cemetery access easement that will potentially encourage and facilitate nineteenth-century cemetery preservation. Section B and C reflect upon the current role of the agencies that enforce the cemetery access easement to suggest changes and approaches that will potentially improve the future role of these agencies in nineteenth-century cemetery preservation.

### *A. Texas Regulatory Scheme*

A nineteenth-century cemetery serves notice to subsequent owners that the parcel of land (containing the burials) is dedicated to cemetery purpose and that a cemetery access easement exists. This notice extends to adjacent property owners and any owner when the land is between the cemetery and a public road.<sup>188</sup> This Article proposes that the State should require a higher burden of proof and notice to remove the dedication. This requirement is imperative when no public roadway provides access to the cemetery. The proposed higher burden of notice, discussed below, is governed by statute. Section B discusses the proposed higher burden of proof because proving “abandonment” is governed by THC administrative rules.

#### 1. Strengthen Notice Required to Remove Dedication

The currently accepted notice by publication in a local newspaper is insufficient to give adequate notice to *unknown* next of kin.<sup>189</sup> The THC substitutes and acts as an agent for the concerned citizens of each county. But no such substitute is provided for the next of kin. With unprecedented access to historical records, an effort to identify next of kin should be more than notice by publication. As discussed in Part IV(D), current advances make it easier for anyone to discover that they have relatives buried in a cemetery and that they are

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<sup>186</sup> MONUMENTS, *supra* note 20, at 163; Letter from L.W. Kemp, Chairman, Advisory Board of Texas History, to Next of Kin (Dec. 15, 1936) (on file in Folder 6, John Files Tom Papers, 1835-1952, Doc 5213, with The Daughters of the Republic of Texas Library at the Alamo, San Antonio, Texas—pending transfer to Tex. Gen. Land Office).

<sup>187</sup> 39 Tex. Reg. 10057 (affidavit Dec. 19, 2014) (selling of unused Texas State Cemetery land to fund future maintenance costs).

<sup>188</sup> Ingress and Egress to Cemeteries and Private Burial Grounds Which Have No Public Ingress or Egress, Tex. Admin. Code § 205.2 (2016).

<sup>189</sup> TEX. HEALTH & SAFETY CODE ANN. § 711.004(a)(5) (2016); TEX. EST. CODE ANN. §§ 201.001-.002, .103 (2016) (providing statutory definition of next of kin).

in fact a descendant; therefore, notice by publication should be reserved until all other reasonable options are exhausted. This Article proposes that Texas law require appointment of an ad litem type representative to facilitate a search for next of kin.

The Texas legislature could task the THC, in conjunction with county and local governments, to develop procedures to appoint and facilitate who would conduct this search (the “ad litem”). An ad litem type search is proper because a court proceeding removing the dedication is in essence removing two rights: the right of access and the right of sepulture. Regardless of whether the appointed ad litem researcher is an attorney, notice of next of kin may be approached similar to a Texas Heirship proceeding.<sup>190</sup> The THC and the legislature have an example set forth by Tarrant County Probate Court Number One’s Ad Litem Manual that includes an Investigator’s Checklist.<sup>191</sup>

As discussed in Parts II(A)(3) and II(B)(2), the Texas Atlas is a searchable online database and *The Handbook of Texas* is a voluminous atlas of Texas history. The Texas Atlas should be a preferred research tool of the ad litem because it contains the locations of Texas Historical Markers and other historical sites for every Texas County. The Handbook should serve as a source of ad litem research because most entries have an individual author (who may be a relative). Locating the author and researching the author’s sources may lead to locating the next of kin. When a cemetery (or an interred) has an entry in the *Handbook of Texas*, the Texas Atlas, or is associated with a Texas Historical Marker, this Article recommends treating this as evidence a cemetery is not abandoned and also as notice of the cemetery access easement, regardless of whether the cemetery is classified “active” or “inactive” (as defined *infra* V(B)(1)(a)).

As discussed in Part II(B)(1), Texas genealogical organizations have evolved into repositories of Texas and American history. Not only is a historical preservation mechanism provided for in the Texas Constitution, it is also federal policy to encourage historic preservation.<sup>192</sup> Title 36 of the United States Code includes a list of recognized patriotic genealogical organizations.<sup>193</sup> Many nineteenth-century cemeteries are the final resting place of ancestors that qualify descendants to join these genealogical organizations. The ad litem can utilize

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<sup>190</sup> See Steve M. King, J., *The Ad Litem Manual for 2014: For Guardianship & Heirship Proceedings in Texas Probate Courts* 45, 45–51 (January 2016) (citing Tex. Estates Code § 202.009; TEX. R. CIV. PROC. § 244), available at <http://access.tarrantcounty.com/en/probate-courts/probate-court-1.html> (“Ad Litem Manual Link”) (last visited Apr. 5, 2016) (detailing research process required for Heirship proceedings).

<sup>191</sup> *Id.* at 75.

<sup>192</sup> TEX. CONST. art. XVI, § 39; 16 U.S.C.A. § 470 (2016).

<sup>193</sup> 36 U.S.C.A. §§ 20101-240112 (2016) (listing Patriotic and National Organizations; see, e.g., American Historical Association; The American Legion; National Society, Daughters of American Colonists).



records of these organizations to determine the next of kin (and subsequent descendants) of those buried in nineteenth-century cemeteries. If the cemetery or burial is part of a record then that descendant should be contacted and the local or nearest genealogical organization chapter should be notified as a party to the suit. These organizations may be able to provide fundraising, donations, and volunteers to ensure preservation of the cemetery. As when a Texas Historical Marker is present, when a genealogical organization memorial grave marker exists or is eligible to be installed, this Article proposes that this be treated as evidence that a cemetery is not abandoned, and also as notice of the cemetery access easement, regardless of whether the cemetery is classified “active” or “inactive” (as defined *infra* V(B)(1)(a)). To facilitate awareness of the cemetery access easement and the preservation of nineteenth-century cemeteries, the Texas regulatory scheme must strengthen the notice required to remove the dedication.

## 2. Expand Tax Incentives to Encourage Access Agreements

The THC preservation plan survey identified that local, state, and federal tax incentives could be the most effective preservation tools.<sup>194</sup> Unfortunately, additional tax incentives may be a hard sell as rural counties experience “population loss and a dwindling tax base”<sup>195</sup> as urban sprawl continues. These incentives must be structured to encourage property owners to change their misconceptions of the cemetery access easement.<sup>196</sup> In Texas an absolute tax exemption exists for the actual acreage dedicated as a private or not for profit cemetery.<sup>197</sup> Once an access agreement is reduced to writing and filed with the TFSC, this Article recommends that the tax exemption be extended to the actual acreage of the cemetery access easement. The Texas Constitution provides for preserving our history, and those who are required in part to “pay” for such preservation should be reimbursed or duly compensated. This reimbursement can be in the form of grants, ad valorem tax exemptions, sales tax exemptions, or discounts on preservation supplies, and other financial incentives.

Tax incentives encourage participation in historic preservation programs that create preservation easements.<sup>198</sup> Under current Texas law, a cemetery may qualify for a perpetual preservation easement when it is an integral part of the

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<sup>194</sup> THC PLAN, *supra* note 29, at 8.

<sup>195</sup> *Id.* at 15.

<sup>196</sup> See Stern, *supra* note 18, at 558 (discussing how individuals respond to incentives).

<sup>197</sup> TEX. CONST. art. VIII, § 2; see TEX. TAX CODE ANN. § 11.17 (2016); TEX. HEALTH & SAFETY CODE ANN. § 711.035 (2016) (for profit cemeteries do not enjoy this exemption).

<sup>198</sup> TEX. HIST. COMM’N, *Preservation Covenants and Easements*, available at <http://www.thc.state.tx.us/project-review/preservation-covenants-and-easements> (last visited Apr. 11, 2016) (“Under some circumstances, property owners who enter into a qualified preservation easement in perpetuity can receive tax benefits while still retaining ownership of the property.”).

property subject to the easement.<sup>199</sup> An argument that preservation easements should be extended to all cemeteries would require more research to consider all ramifications. Nevertheless, this Article proposes that access issues for preservation easements that receive tax incentives equally apply to nineteenth-century cemetery access easements (regardless of any tax incentives).<sup>200</sup> In advance of the new Texas Preservation Tax Credit Program,<sup>201</sup> David J. Kohtz, defined three categories of access: physical, visual, and virtual.<sup>202</sup> A response to Kohtz posed a fourth category—policy.<sup>203</sup> Federal regulations of tax deductions for conservation easements that require access offer a model for Texas to approach nineteenth-century cemetery access for any purpose (e.g., tax incentives or access agreements).<sup>204</sup> The regulation sets forth factors to consider when required “visual public access” is limited.<sup>205</sup> Two factors considered that apply directly to cemeteries are remoteness of the property and privacy rights of owners.<sup>206</sup>

Physical access is actual *in person* access to the cemetery. Visual access becomes an issue when the cemetery is not near a public road but on private property—the location of many nineteenth-century cemeteries.<sup>207</sup> Virtual access to historic sites has evolved from postcards mailed by a tourist in the twentieth-century to current live webcam video feeds available twenty-four hours a day.<sup>208</sup> Policy access for nineteenth-century cemeteries is to encourage historic preservation and recognize the importance of maintaining these cemeteries for future generations.<sup>209</sup> While physical access may not be a key part of current

<sup>199</sup> *Id.*; TEX. ADMIN. CODE §§ 13.3(e)(2) (2016).

<sup>200</sup> See David J. Kohtz, *Improving Tax Incentives for Historic Preservation*, 90 TEX. L. REV. 1041 (2012) (justifying tax incentives and how to facilitate public access to properties. The author poses that these same approaches to access apply to cemetery access); David Listokin & Siona Listokin-Smith, *Improving the Incentives for Historic Preservation: A Reply to David Kohtz*, 90 TEX. L. REV. 285, 285 (2012) (arguing more analysis is needed and adding a policy discussion to access).

<sup>201</sup> See TEX. ADMIN. CODE §§ 13.1–13.8 (2016).

<sup>202</sup> Kohtz, *supra* note 200, at 1041-42.

<sup>203</sup> David Listokin, et al., *supra* note 200, at 285.

<sup>204</sup> See Kohtz, *supra* note 200, at 1051-52 (discussing 26 C.F.R. § 1.170A-14(d)(5)(iv)(B)).

<sup>205</sup> 26 C.F.R. § 1.170A-14(d)(5)(iv)(A)(B) (2016); see Kohtz, *supra* note 200, at 1052 (“(1) ...historical significance of the property, (2) ...nature of the features subject to the easement, (3) ...remoteness and accessibility of the property, (4) ...physical hazards to the public, (5) ...unreasonable intrusion on individual privacy interests, and (6) ...opportunity for the public to view the property without visiting the site.”) (citing 26 C.F.R. § 1.170A-14(d)(5)(iv)).

<sup>206</sup> 26 C.F.R. § 1.170A-14(d)(5)(iv)(A)(B); see Kohtz, *supra* note 200, at 1052.

<sup>207</sup> Rogers, *supra* note 3 (surveying known graves and noting access that requires crossing private property including approximately 400 yards to reach Cowboy Cemetery aka Sutherland Grave); ATLAS, *supra* note 3, (including map locations for most cemetery entries); see PRESERVATION, *supra* note 24, at 4 (advising to obtain permission from private property owner); see generally *Burial Customs*, *supra* note 6 (discussing family cemeteries on southern plantations).

<sup>208</sup> See Kohtz, *supra* note 200, at 1059-1063.

<sup>209</sup> See Listokin, *supra* note 200, at 292–294.

local and state tax incentives, this Article proposes that physical access is the key to cemetery preservation. If tax incentives are extended to the cemetery access easement, the access required could start as physical access to rehabilitate the cemetery.<sup>210</sup> Required access could evolve into virtual access with a periodic physical access component for maintenance and cemetery visits.<sup>211</sup> This approach may be the most amenable to cemetery visitors and property owners and would apply equally to access agreements with no incentives. Tax incentives and an expanded property tax exemption would encourage awareness of the cemetery access easement, access agreements, and facilitate the preservation of nineteenth-century cemeteries.

### *B. Texas Historical Commission*

A task of the THC is to effectuate the statutes that govern nineteenth-century cemeteries.<sup>212</sup> These statutes codify the common law and therefore should be broadly construed.<sup>213</sup> The THC is an agency and its power to effectuate rules is limited by statutory language; therefore, in response to criticism or comments on proposed changes to agency rules the THC must defer to the legislature.<sup>214</sup> If the THC determines it has little power to effect the propositions of this Article, then the propositions should also be considered by current and future legislatures.

#### 1. Strengthen the Definition of Abandonment

##### a. Classify Cemeteries as Inactive or Active

Nineteenth-century cemeteries that are no longer used for burial (“inactive”) are the most likely in need of preservation. To encourage cooperation between property owners and cemetery visitors, this Article proposes that these cemeteries should be classified as “inactive” or “active” instead of merely “abandoned” when considering the removal of a cemetery dedication.<sup>215</sup> An “active” classification would effectively end a removal proceeding unless there is an actual public necessity.<sup>216</sup> Regardless if a cemetery organization exists,

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<sup>210</sup> See Kohtz, *supra* note 200, at 1063–1064 (“the federal factors...can help balance the privacy interests of the owner against...a meaningful public benefit as a condition of tax incentives.”).

<sup>211</sup> *Id.*; ATLAS, *supra* note 3 (uploading photos and documents is already an option).

<sup>212</sup> TEX. HEALTH & SAFETY CODE ANN. § 711.012(c) (2016).

<sup>213</sup> See Op. Tex. Att’y Gen. No. JC-0355 (2001) (applying modern statutes “as a general matter to the cemeteries dedicated in late nineteenth century.”).

<sup>214</sup> See 35 Tex. Reg. 3809 (2010) (responding to commenter’s suggestion to define certain cemeteries as “maintained” or “unmarked”).

<sup>215</sup> The author proposes that a cemetery be classified “inactive” with a rebuttable presumption that no future burial rights exist and “active” when future burial rights are readily identified; TEX. ADMIN. CODE § 22.1(1) (2016).

<sup>216</sup> See TEX. HEALTH & SAFETY CODE ANN. §§ 711.004, 711.007, 711.036(c) (2016) (excepting bona fide public safety concerns).

those who plan to be buried there would likely maintain an “active” nineteenth-century cemetery and its access easement on rural private land. An “active” cemetery also likely has an access agreement in place.<sup>217</sup> The “inactive” classification would be the most amenable to cemetery visitors and property owners because it allows the dedication to be removed as to the acreage that will no longer be used for cemetery purposes.<sup>218</sup> The “active” or “inactive” classification may encourage negotiated access agreements because the role of nonowners would be readily identified as cemetery visitors or those with burial rights.

b. Recorded in the Deed

While the THC rule on abandonment might follow Texas common law as written, the fact that the cemetery dedication is recorded in a deed should be given more weight.<sup>219</sup> The existence of a cemetery on the land provides the property owner constructive notice of the dedication and the preexisting use.<sup>220</sup> This may be *de facto* notice because it may not have been acknowledged at the time of purchase. But, when recorded in the deed, it becomes *de jure* notice.<sup>221</sup> This notice may be accomplished by an express reservation in the deed, a formal HTC designation,<sup>222</sup> a formal TFSC filed access agreement,<sup>223</sup> or a Notice of Existence of Cemetery.<sup>224</sup> These forms of written recorded notice should be treated as evidence that the cemetery is not abandoned.<sup>225</sup> This would of course be rebuttable upon the existence of an actual public necessity.<sup>226</sup>

The THC’s Texas Atlas is an online searchable database of every recorded Texas historic site.<sup>227</sup> This Article proposes that the above-discussed notices of record must also be included in the Texas Atlas for the corresponding cemetery. This would include updating or adding new records. The Texas Atlas should be expanded to include whether an access agreement exists and provide access to a copy of the agreement for future cemetery visitors. These recommendations of classification and recording in the deed will strengthen the definition of

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<sup>217</sup> See TEX. ADMIN. CODE § 205.2 (2016).

<sup>218</sup> See TEX. HEALTH & SAFETY CODE ANN. § 711.036(a)(2) (2016) (removing the dedication as to the land not used at “inactive” cemetery is already an option available to cemetery organizations).

<sup>219</sup> TEX. ADMIN. CODE § 22.1 (2016).

<sup>220</sup> See *Smallwood v. Midfield Oil Co.*, 89 S.W.2d 1086, 1090 (Tex. Civ. App. 1935); see generally *Cemeteries*, *supra* note 57, at § 1.

<sup>221</sup> TEX. ADMIN. CODE § 22.6 (2016); TEX. HEALTH & SAFETY CODE ANN. § 711.011 (2016); Notice, *supra* note 127.

<sup>222</sup> TEX. ADMIN. CODE § 22.6 (2016).

<sup>223</sup> TEX. ADMIN. CODE § 205.2 (2016).

<sup>224</sup> TEX. HEALTH & SAFETY CODE ANN. § 711.011 (2016); Notice, *supra* note 127.

<sup>225</sup> TEX. PROP. CODE ANN. § 13.002 (2016).

<sup>226</sup> TEX. HEALTH & SAFETY CODE ANN. §§ 711.004, 711.007, 711.036(c) (2016).

<sup>227</sup> ATLAS, *supra* note 3.

abandonment and facilitate awareness of the cemetery access easement in Texas as well as raise the burden of proof needed to remove a cemetery dedication. It is the hope of this Article that historic cemetery preservation will make its way into the THC's future preservation plans as more than a bit player—the future of the THC is the future of nineteenth-century cemeteries.

### C. Texas Funeral Service Commission

*“[P]roperty systems evolve at the boundary between cooperation and conflict because a claim of ownership or dominion is an invitation to either conflict or cooperation.”*<sup>228</sup>

*“[P]rivate property is not honored because it is private property; it is private property because it is honored by the community.”*<sup>229</sup>

Cooperation among cemetery visitors and property owners is the goal of any cemetery access agreement. Both sides have a strong connection to the land and bring knowledge of the land to the cemetery access negotiation.<sup>230</sup> The cemetery visitor brings historical knowledge about the land. The landowner brings experience and knowledge of the current operations on the land.<sup>231</sup> The cemetery access agreement cannot discourage visits to the cemetery nor interfere with the productivity of the landowner.

#### 1. Social Morality and the Cemetery Access Agreement

This Article proposes that the Texas Funeral Service Commission (TFSC) should incorporate a social morality approach to its guidelines for cemetery access agreements and, in conjunction with the legislature, create a statutory access agreement. Discussing the Social Morality Theory of property law, Peter Gerhart explains: “The law operates to mediate . . . the interests of owners and non-owners by assessing how [they] conduct themselves and comparing that behavior with the behavior of an ideal decision maker—one who has appropriately accounted for the factors that are required for the kind of decisions being made.”<sup>232</sup> Gerhart calls this “other-regarding” decision making<sup>233</sup>—the ultimate *Golden Rule*—“Do unto others as would be done unto you. . .”<sup>234</sup>

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<sup>228</sup> PROPERTY LAW AND SOCIAL MORALITY, *supra* note 25, at 314.

<sup>229</sup> *Id.* at 99 (citing a John Locke concept).

<sup>230</sup> *See Brophy*, *supra* note 17, at 1507.

<sup>231</sup> *See Morrow*, *supra* note 157, at 198.

<sup>232</sup> PROPERTY LAW AND SOCIAL MORALITY, *supra* note 25, at 47.

<sup>233</sup> *See id.* at 54 (Gerhart's version of the *Golden Rule*).

<sup>234</sup> *See Matthew 7:12* (following an almost universal religious principle); *see also* JAMES R. HOLBROOK & BENJAMIN J. COOK, *ADVANCED NEGOTIATION AND MEDIATION: CONCEPTS, SKILLS, AND EXERCISES* 156 (2013) (quoting the following similar principles: “Latter-day Saints, ‘Therefore,

Exclusion and trespass still apply to the property that is not subject to the cemetery access easement.<sup>235</sup> The non-owner and the owner have a duty to each other to establish boundaries, reasonable use, and reasonable times of entry as well as duration.<sup>236</sup> This arises by common courtesy but also has statutory implications in Texas.

A statutory cemetery access agreement could be modeled after Chapter 752 of the Estates Code's Statutory Durable Power of Attorney.<sup>237</sup> A proposed statutory cemetery access agreement would provide a tool to facilitate voluntary access agreements that will be filed with the TFSC. The legislature may look to the language of the Family Code's Mediated Settlement Agreement to determine the necessary language for a binding access agreement.<sup>238</sup> The TFSC, working with the legislature, must find a solution that is recorded in the deed, binding on all parties, and passes with ownership of the land. The social morality approach will ensure that the solution maintains the right of access balanced with the rights of private property owners while preserving nineteenth-century cemeteries.

Budgetary constraints are a conceded obstacle of historic preservation that can only be overcome by public sector and private sector collaboration. The above proposed incentives, approaches, and legislative recommendations may serve to strengthen the Texas cemetery access easement regulatory scheme and facilitate preservation efforts.

## VI. CONCLUSION

Texas family cemeteries on rural private land should be preserved. So should Centennial Markers as well as many other historic sites both urban and rural. With the 2036 Texas Bicentennial on the horizon, it is unlikely that future generations will witness cooperation among state and federal government on as grand a scale as the 1936 Texas Centennial. Hopefully this article brings awareness to the cemetery access easement and the need for historic preservation.

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all things whatsoever ye would that men should do to you, do ye even so to them, for this is the law and the prophets;' Judaism, 'What is hateful to you, do not do to your neighbor;' Islam, 'Not one of you truly believes until you wish for others what you wish for yourself;' Buddhism, 'Treat not others in ways that you yourself would find hurtful;' Hinduism, 'This is the sum of duty: do not do to others what would cause pain if done to you.'").

<sup>235</sup> PROPERTY LAW AND SOCIAL MORALITY, *supra* note 25, at 46–7.

<sup>236</sup> See PROPERTY LAW AND SOCIAL MORALITY, *supra* note 25, at 46–48; see also TEX. ADMIN. CODE § 205.2 (2016); Tex. Health and Safety Code 711.041 (2016).

<sup>237</sup> See TEX. ESTATES CODE ANN. §§ 752.001-.004, 752.051, 752.101-.115 (2016).

<sup>238</sup> See TEX. FAM. CODE ANN. §§ 6.602(a)–(d) (defining a binding agreement as: "(1) ... prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation; (2) is signed by each party to the agreement; and (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed."); see also TEX. FAM. CODE ANN. § 153.0071(d)–(e) (2016).

Be it native or transplant, we all must appreciate what has been done before so that we may have our today. The dead have no standing to defend their right to remain in the burial plot of their choice. Property owners, descendants, concerned citizens, cooperating with each other and local, state, and federal governments are tasked with defending this right. The moral test of government may have at least three factors: how the children, elderly, and sick are treated.<sup>239</sup> Yet if there is indeed a fourth factor—how government treats the chosen final resting place—and Texas adopts strengthened cemetery access easement regulations to preserve Cowboy Cemetery and other final resting places of those who helped secure today's Texas, that government will pass the test. A strengthened cemetery access easement regulatory scheme that maintains the rights of access balanced with the rights of private property owners is the key to facilitate the preservation of nineteenth-century Texas family cemeteries.

*I think that we can perhaps meditate a little on those Americans ten thousand years from now, when the weathering on the faces of Washington and Jefferson and Lincoln shall have proceeded to perhaps the depth of a tenth of an inch, and wonder what our descendants—and I think they will still be here will think about us.*

*Let us hope that at least they will give us the benefit of the doubt, that they will believe we have honestly striven every day and generation to preserve for our descendants a decent land to live in and a decent form of government to operate under.<sup>240</sup>*

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<sup>239</sup> 123 CONG. REC. 37,287 (1977).

<sup>240</sup> Franklin D. Roosevelt, U.S. Pres., Remarks at Mount Rushmore National Memorial (Aug. 30, 1936) (transcript available at THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=15109>).