GIVING THE ABENAKI DEAD THEIR DUE: A PROPOSAL TO PROTECT NATIVE AMERICAN BURIAL SITES IN VERMONT

INTRODUCTION

Abenaki tradition holds that disturbing the bones of buried ancestors will visit discord upon the living.[1] That discord has perhaps arrived—if one considers the legal and social conflict created over the past thirty years by the periodic disturbance of human remains unearthed in development projects along Monument Road in Franklin County, Vermont. The discoveries have prompted protests from the local Abenaki tribe and, ultimately, intervention by the state.[2] The Abenaki believe the burial sites should be left undisturbed because they are sacred.[3] According to Abenaki Chief April Rushlow, "Anything that is around the burial site is sacred, whether it's a tree, a rock, the soil."[4] Like other Native American tribes, the Abenaki view of ancestral burial sites is part of a worldview that considers "Mother Earth" as sacred.[5]

But on Monument Road that worldview has collided head-on with the concept of private property, and the result is a classic conflict between private property rights and protection of historical—to some, sacred—resources. Such controversy is not confined to Vermont, as disturbances of burial sites elsewhere in the country have prompted similar conflict.[6] But in Vermont the dispute over protecting Native American remains has yet to find a lasting legal remedy. This Note suggests the answer may lie within the extension of common law principles of nuisance and property. It proposes a regulatory scheme to regulate development on private property containing Native American burial grounds in Vermont. More generally,

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1. Susan Trzepacz, *Conflict over Burial Remains Resurfaces on Monument Road*, COUNTY COURIER (Franklin County, Vt.), May 18, 2000, at 1 [hereinafter *Conflict*] (paraphrasing April Rushlow, Acting Chief of the Sovereign Republic of the Abenaki Nation of Missisquoi, St. Francis/Sokoki Band).

2. Susan Trzepacz, *Abenaki Protest Monument Road Development*, COUNTY COURIER (Franklin County, Vt.), Sept. 21, 2000, at 1 [hereinafter *Abenaki Protest*].

3. Interview with April Rushlow, Chief of the Sovereign Republic of the Abenaki Nation of Missisquoi, St. Francis/Sokoki Band, in Swanton, Vt. (Jan. 27, 2003).

4. *Id.*

5. *Id.*; *see* Christopher A. Amato, *Digging Sacred Ground: Burial Site Disturbances and the Loss of New York's Native American Heritage*, 27 COLUM. J. ENVTL. L. 1, 6–7 (2002) (stating that "[m]ost Native American religious beliefs dictate that burial sites once completed are not to be disturbed or displaced, except by natural occurrence").

6. *See* Amato, *supra* note 5, at 3 n.6 (noting that incidents of disturbance of remains in New York state has doubled in the past 15 years); William L. Evans, *Who Owns the Contents of Ohio's Ancient Graves?*, 22 CAP. U. L. REV. 711, 712 n.9 (1993) (detailing the notorious 1987 excavation by pothunters on the Slack Farm in Kentucky that destroyed 650 Native American graves); *see also* Wana the Bear v. Cmty. Constr., Inc., 180 Cal. Rptr. 423, 424 (1982) (recounting the 1979 disinterment of the remains of more than 200 Miwok Indians by the developer of a subdivision).

the Note suggests that such a scheme can provide stricter protection for Native American gravesites in other states by drawing on existing policies and common law protections for burial sites.

Part I of the Note explains the historical background of the Monument Road dispute. Part II examines Fifth Amendment takings jurisprudence requiring "background principles" of nuisance or property law to overcome regulatory categorical takings challenges, and analyzes the use of nuisance and property law and current state statutory law as background principles for prohibiting development on burial sites in Vermont. Part III offers a regulatory scheme for regulating development of such sites and a comparison to the state's current approach favoring land acquisition.

I. BACKGROUND

A. The Monument Road Dispute

The seeds of this dispute were planted hundreds, if not thousands, of years ago, when ancients inhabited the state and buried their dead. Archeologists estimate that people have been living in Vermont for about 11,000 years.[7] By 1600, there were an estimated 10,000 western Abenaki in Vermont and New Hampshire.[8] Significant Abenaki villages are believed to have been located near the mouths of the Lamoille, Missisquoi, and Winooski rivers and Otter Creek in western Vermont, and on the Connecticut River near current-day Newbury in eastern Vermont.[9]

It is near the mouth of the Missisquoi that the Monument Road dispute has simmered for several years. Monument Road straddles the river a short distance from where it empties into Missisquoi Bay on Lake Champlain.[10] The road, which marks the town line between Swanton and Highgate, cuts through an area that is believed to have been an area of Abenaki settlements.[11] Most of the land along the road is privately owned and, in recent years, the area has become "popular with home builders . . . . [A]nd large undeveloped parcels continue to be subdivided."[12]

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7. WILLIAM A. HAVILAND & MARJORY W. POWER, THE ORIGINAL VERMONTERS: NATIVE INHABITANTS, PAST AND PRESENT 15 (1981).

8. COLIN G. CALLOWAY, THE WESTERN ABENAKIS OF VERMONT, 1600–1800: WAR, MIGRATION, AND THE SURVIVAL OF AN INDIAN PEOPLE 10 (1990).

9. HAVILAND & POWER, *supra* note 7, at 151–52.

10. The area can be located in VERMONT ATLAS & GAZETTEER 51 (9th ed. 1996).

11. *Conflict*, *supra* note 1.

12. *Abenaki Protest*, *supra* note 2.

Since the early 1970s, the remains of more than 100 bodies have been found at residential construction sites on the road.[13] Archeologists estimate that up to 80,000 Abenaki may have been buried in the area over the past 10,000 years.[14] The state believes there were Abenaki "habitation sites" along the river and, next to those, burial sites.[15]

The conflict began to surface in 1973, when a landowner discovered human remains as he was digging a cellar hole.[16] Construction halted and the skeletal remains of more than eighty bodies were exhumed by archeologists from the University of Vermont.[17] Archeologists believe that this particular burial ground was in use for nearly 800 years, beginning about 2,900 years ago.[18] The ensuing dispute over the discovery took twenty-three years to resolve; the state ultimately purchased the parcel with $200,000 earmarked by the legislature and $125,000 from an anonymous donor.[19] The remains were re-interred in an Abenaki ceremony closed to the public.[20]

By 1992, the Division of Historic Preservation had reason to believe that at least two other burial sites had been disturbed on Monument Road in the previous two decades.[21] A more recent discovery occurred in May 2000, when excavation for a modular home unearthed skeletal remains.[22] Discovery of the remains prompted the Vermont Attorney General to seek a restraining order halting construction until the parties could reach an agreement to protect the site.[23] Washington County Superior Court granted the temporary restraining order.[24] The state ultimately purchased the third-of-an-acre lot for $60,000, well above the property's

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13. Susan Trzepacz, *Abenaki Threaten Federal Action to Protect Burial Sites*, COUNTY COURIER, Sept. 28, 2000, at 1 [hereinafter *Abenaki Threaten*].

14. Kevin O'Connor, *Daughter of the Dawn: Abenaki Chief April Rushlow Aims for State, National Recognition*, BARRE MONTPELIER TIMES ARGUS, Jan. 12, 2003, at A1.

15. Letter from Eric Gilbertson, Director of Vermont Division for Historic Preservation, to Raymond Tanguay, Town Manager of Highgate (Nov. 13, 1992) (on file with plaintiff's complaint, Sovereign Republic of the Abenaki Nation of Missisquoi v. Jedware (No. 603-10-00 Wncv)) [hereinafter Gilbertson Letter].

16. *Id.*

17. *Id.*

18. *Id.*

19. FREDERICK MATTHEW WISEMAN, THE VOICE OF THE DAWN: AN AUTOHISTORY OF THE ABENAKI NATION 183 (2002).

20. *Id.*

21. Gilbertson Letter, *supra* note 15, at 2.

22. *Conflict*, *supra* note 1.

23. State of Vermont's Memorandum of Law in Support of Application for Preliminary Injunction, State v. Bushey, at 6 (No. 284-5-00 Wncv) (2000) [hereinafter Memorandum of Law, State v. Bushey].

24. Temporary Restraining Order, State v. Bushey (No. 284-5-00 Wncv) (2000) [hereinafter Temporary Restraining Order, State v. Bushey].

assessed value of $34,000.[25] Neither the Abenaki nor the property owners were satisfied with the outcome.[26] The disturbed site contained the remains of twenty-five to thirty bodies, which the local Abenaki removed and later re-interred on the property.[27] Altogether, the state has purchased fifteen to twenty acres on Monument Road to protect Abenaki burial sites.[28]

The issue reignited in September 2000 when local Abenaki blockaded the road in protest of continued residential development.[29] In October 2000, the Abenaki tribe sued a developer and the state, seeking an injunction, declaratory relief, and damages in connection with residential construction on the road.[30] Subsequently, the judge refused to dismiss causes of action based on state statutory law protecting burial sites and on common law public nuisance.[31] The parties later stipulated to dismissal of the case.[32]

As the dispute entered the courts, local Abenaki, property owners, and officials set up a working committee to resolve their differences.[33] The state also responded by enacting the Unmarked Burial Sites Special Fund.[34] The law provides money for identifying burial sites, for protection or removal of remains, and for mediation or dispute resolution.[35] However, before the legislation passed the General Assembly, some members of the working committee criticized the legislation as a "gutted" version of the original bill, which was sponsored by a local legislator.[36]

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25. Susan Trzepacz, *Land Buy Not Likely to End Monument Road Dispute*, COUNTY COURIER, June 8, 2000, at 1 [hereinafter *Land Buy*].

26. *Id.* The owners said they would not be able to find "another property as nice" and that there was "no compensation for the hassle," while Acting Abenaki Chief April Rushlow said the amount paid for the property was too high—"a ridiculous amount of money." *Id.* Gregory Brown, the state Commissioner of Housing and Community Affairs, who negotiated the purchase, said the deal was "fair to the property owners and fair to the Abenaki." *Id.*

27. *Abenaki Protest*, *supra* note 2.

28. *Id.*

29. *Id.*

30. Plaintiff's complaint, Sovereign Republic of the Abenaki Nation of Missisquoi v. Jedware, (No. 603-10-00 Wncv) (Oct. 9, 2000).

31. Entry Order, Sovereign Republic of the Abenaki Nation of Missisquoi v. Jedware at 2, 5 (No. 603-10-00 Wncv) (Sept. 4, 2001) [hereinafter Entry Order, Abenaki v. Jedware].

32. Stipulated Motion to Dismiss, Sovereign Republic of the Abenaki Nation of Missisquoi v. Jedware, (No. 603-10-00 Wncv) (Aug. 25, 2003). The Abenaki agreed to the dismissal because construction had been completed on the two lots in question. Interview with Chief April Rushlow of the Sovereign Republic of the Abenaki Nation of Missisquoi, St. Francis/Sokoki Band (Nov. 18, 2003).

33. Susan Trzepacz, *Senate Unearths Burial Policy*, COUNTY COURIER, Apr. 25, 2002, at 1 [hereinafter *Senate Unearths Burial Policy*].

34. VT. STAT. ANN. tit. 18 § 5212b (Supp. 2002).

35. *Id.*

36. *Senate Unearths Burial Policy*, *supra* note 33. Some members of the local working group argued that the original version of the bill provided the parties involved in a burial discovery with a detailed procedure for determining the existence of remains and resolving disputes between Abenaki and landowners. *Id.* Further, they argued that the enacted bill gives too much discretionary authority to the Vermont Department of Housing and Community Affairs. *Id.*

Section 5212b(a) establishes a state fund "for the purpose of protecting, preserving, moving or reinterring human remains discovered in unmarked burial sites."[37] Where remains are discovered in unmarked sites, the Commissioner of Housing and Community Affairs is empowered under the statute to disburse funds "in accordance with a process approved by the commissioner."[38] Further, "[t]he commissioner shall approve any process developed through consensus or agreement of the interested parties" including the owner of the land where the remains are discovered, the municipality, and the governor's advisory commission on Native American affairs.[39] The process must include, *inter alia*, methods for determining the presence of human remains, "[m]ethods for handling development and excavation," options for the property owner, and "[p]rocedures for protecting, preserving or moving unmarked burial sites and human remains."[40] The statute further states that the fund can be used for archeological assessments, monitoring of excavations, mediation and dispute resolution, and acquisition of property or development rights "provided the commissioner . . . determines that disbursements for this purpose will not unduly burden the fund."[41]

While section 5212b gives more form to a process that previously occurred ad hoc, it leaves critical questions unanswered. It denies the Abenaki tribe direct access to a process in which it has a substantial interest. While the statute theoretically provides money for identification of sites, it does not provide a uniform approach for mapping or identifying potential burial grounds near Monument Road or elsewhere in the state. Finally, the law fails to offer guidance on what weight to give the competing claims of "protecting" a site versus "removing" the remains. The Abenaki consider the remains and the sites themselves as sacred, yet the new law offers no answer to this cultural concern or to general historic preservation concerns, because it provides no long-term protection for burial sites. Nor does it offer certainty for landowners. For these reasons,

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37. VT. STAT. ANN. tit. 18 § 5212b(a) (Supp. 2002).

38. *Id.* § 5212b(c).

39. *Id.* The list of interested parties notably does not include representatives from the local Abenaki tribe. An earlier version of unmarked burial legislation, as introduced in the Senate, would have allowed representatives of the "affected Native American community" to have access to discovered sites and to participate in removal of the remains. S. 258, Adj. Sess. (Vt. 2002), *available at* http://www.leg.state.vt.us/ (last visited Jan. 20, 2004). The state does not officially recognize the Abenaki tribe, and the removal of the Native American representatives from the legislation is typical of the history of ambivalence with which the state has viewed Abenaki recognition. *See* O'Connor, *supra* note 14 (recounting how former Vermont Governor Thomas Salmon granted state recognition to the tribe in late 1976, only to have that recognition revoked a few weeks later by Salmon's successor, Richard Snelling, shortly after his inauguration).

40. VT. STAT. ANN. tit. 18 § 5212b(c)(2)–(4) (Supp. 2002).

41. *Id.* § 5212b(e).

the state must take a bolder approach. As discussed below, the state must restrict development of Native American sites because of their cultural and historic value. These sites can be protected without offending the U.S. Supreme Court's rulings regarding categorical takings under the Fifth Amendment.

II. A PROHIBITION OF DEVELOPMENT ON NATIVE AMERICAN BURIAL SITES IN VERMONT COULD WITHSTAND A CATEGORICAL TAKINGS CHALLENGE

The state can prohibit development on Native American burial sites by adopting a statute that is, in essence, an extension of current nuisance and property law and of the state policy underlying current grave protection statutes. This Note proposes a statute that would require discovered burial sites to remain undisturbed, thus severely limiting economic use of the property. Therefore, as noted below, the proposal must be examined against challenges arising from the categorical takings rule articulated by the U.S. Supreme Court.[42] The Court's analysis of categorical takings is outlined in *Lucas v. South Carolina Coastal Council*[43] and *Palazzolo v. Rhode Island*.[44]

A. Lucas, Palazzolo *and Background Principles*

The prohibition on governmental taking of private property without payment comes in the final words of the Fifth Amendment: "[N]or shall private property be taken for public use, without just compensation."[45] The takings clause applies to the states through the Fourteenth Amendment.[46]

In *Lucas*, a South Carolina property owner challenged a state coastal protection law that prohibited him from developing two ocean front parcels as a taking of property without just compensation under the Fifth Amendment.[47] In the majority opinion, Justice Scalia identified "two

42. For regulations that place limitations on land but do not constitute a categorical taking, the Court has applied the balancing test from *Penn Central Transportation Co. v. New York City*. Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001). *Penn Central* outlined the factors the court must consider in making "essentially ad hoc, factual inquiries" into whether a taking has occurred. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). Among those factors is the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Id.* The Court will also consider "the character of the governmental action." *Id.*

43. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

44. Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

45. U.S. CONST. amend. V.

46. *Palazzolo*, 533 U.S. at 617. The relevant part of the Fourteenth Amendment reads: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

47. *Lucas*, 505 U.S. at 1008–10.

discrete categories of regulatory action" that require compensation for the property owner without inquiry into the public interest underlying the regulation.[48] The first form of such categorical taking occurs when the government takes private property through actual physical "invasion" of property.[49] "[N]o matter how minute the intrusion, and no matter how weighty the public purpose behind it," the court will require compensation for this type of taking.[50] The second type of categorical taking requiring compensation is one in which "regulation denies all economically beneficial or productive use of land."[51] This second categorical taking is the focus of this analysis.

In *Lucas*, the trial court found that the property owner had been denied all economically beneficial use of his land through the state coastal regulations.[52] The Supreme Court indicated that a "limitation so severe" could not be legislated if that limitation did not already "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[53] The Court said that the law could "do no more than duplicate the result that could have been achieved in the courts . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally."[54]

Justice Scalia offered two hypotheticals in which such a regulatory taking would not require compensation: in one, the owner of a lake-bed is prohibited from filling the bed, to prevent the flooding of neighboring property; in the other, the corporate owner of a nuclear plant is told to "remove all improvements from its land upon discovery that the plant sits astride an earthquake fault."[55] Even though both owners may be denied all economically beneficial use of their properties, they would not be compensated because the proscribed uses would have *always* been impermissible under state property and nuisance law.[56] "[I]t was open to the State at any point to make the implication of those background principles of nuisance and property law explicit."[57]

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48. *Id.* at 1015.

49. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435–40 (1982) (holding that a New York law requiring apartment owners to allow cable lines to be attached to their buildings was a taking).

50. *Lucas*, 505 U.S. at 1015.

51. *Id.*

52. *Id.* at 1009.

53. *Id.* at 1029.

54. *Id.*

55. *Id.*

56. *Id.* at 1029–30.

57. *Id.* at 1030.

In concurrence, Justice Kennedy suggested that regulatory restrictions on property can find support beyond common law nuisance.[58] Kennedy wrote that nuisance law is not "the sole source of state authority to impose severe restrictions."[59] In regard to regulating fragile coastal property, for instance, "the State can go further in regulating . . . development and use than the common law of nuisance might otherwise permit."[60]

In the wake of *Lucas*, lower courts have attempted to define the contours of the "background principles" of property and nuisance law. In doing so, lower courts have had to consider if and when state statutory law will constitute a background principle: state courts in New York and Iowa, for instance, have turned to state statutes and regulations as background principles restricting title, while state courts in Oregon and Florida have used only common law principles.[61] Although this "nuisance exception" was first interpreted narrowly by the courts, "many courts now view the exception more broadly to include many aspects of state property law, both common law and statutory law."[62]

Although the Supreme Court has not provided specific guidance on when a state law would constitute a "background principle," the Court obliquely suggested in *Palazzolo*, decided nine years after *Lucas*, that statutory law can fall within that definition. In *Palazzolo*, a property owner asserted that the state's wetland regulation prevented him from developing his waterfront property, resulting in a taking without just compensation in violation of the Fifth and Fourteenth Amendments.[63] The landowner further asserted that he was denied all economically viable use of the property, to which he had obtained title after the 1971 enactment of the wetlands rules.[64] Rhode Island argued in *Palazzolo* that a newly enacted regulation becomes a background principle "which cannot be challenged by those who acquire title after the enactment."[65] The Court rejected that

58. Notably, Justice Kennedy later wrote the majority opinion in *Palazzolo*. *Palazzolo*, 533 U.S. at 611.

59. *Lucas*, 505 U.S. at 1035.

60. *Id.*

61. Kerri M. Millikan, *The* Lucas *Exception: Inclusion, Exclusion, and a Statute of Limitation*, 68 GEO. WASH. L. REV. 134, 135 (1999).

62. Patty Gerstenblith, *Protection of Cultural Heritage Found on Private Land: The Paradigm of the Miami Circle and Regulatory Takings Doctrine After Lucas*, 13 ST. THOMAS L. REV. 65, 95 (2000).

63. *Palazzolo*, 533 U.S. at 615.

64. *Id.* at 614–16. The court rejected Palazzolo's claim that he had been denied all economic use of the property, because upland portions of the tract still had "substantial" value. *Id.* at 616. The Supreme Court remanded the case, instructing the lower court to apply a *Penn Central* analysis. *Id.* at 632.

65. *Id.* at 629.

interpretation, but seemed to suggest that state statutes in some form could be included as background principles:

> We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here. It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title. This relative standard would be incompatible with our description of the concept in *Lucas*, which is explained in terms of those common, shared understandings of permissible limitations derived from a State's legal tradition.[66]

Although the Court rejects the notion that a state law becomes a background principle simply by enactment and the subsequent transfer of property title, the first part of the passage suggests that there may be "circumstances" in which statutory law is a background principle. Additionally, the last sentence suggests that the background principles concept from *Lucas* is broader than simply nuisance law, but includes "those common, shared understandings of permissible limitations derived from a State's legal tradition." Arguably, it would be difficult to envision "a State's legal tradition" that did not include state statutory law.[67]

B. Protection of Native American Remains and Background Principles of Common Law and Statutory Law in Vermont

Under the above takings analysis, the disturbance of Native American remains is unlawful in Vermont based on: 1) the state's common law nuisance doctrine; 2) the state's real property law; and 3) state statutory law that falls within "those common, shared understandings of permissible limitations" derived from Vermont's "legal tradition."

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66. *Id.* at 629–30.

67. Nor is it easy to envision the alternative, a cramped or static legal tradition that is unmoved by advances in knowledge and changes in mores. Consider Justice Stevens' view on the matter:

> Arresting the development of the common law is not only a departure from [the Court's] prior decisions; it is also profoundly unwise. The human condition is one of constant learning and evolution—both moral and practical. Legislatures implement that new learning; in doing so they must often revise the definition of property and the rights of property owners.

Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1069 (1992) (Stevens, J., dissenting).

1. The Nuisance Exception

To meet the exception to the regulatory categorical taking rule, a regulatory scheme must be consistent with a state's common law nuisance principles.[68] The critical question, as posed by Justice Scalia, is whether the activity would have "always" been unlawful.[69] In other words, would the limitation on title have existed under common law?

The Vermont Supreme Court in *Napro Development Corp. v. Town of Berlin* stated that "to be considered a public nuisance, an activity must disrupt the comfort and convenience of the general public by affecting some general interest."[70] Further, the court stated that public nuisance "requires interference with some common public right and permits abatement of the condition which causes injury to the public."[71]

Napro dealt with a town's attempt to bring a cause of action against an adult bookstore as a public nuisance.[72] The Vermont Supreme Court, however, was reluctant to apply public nuisance in an instance where it might intrude on constitutional protections of free speech.[73] Additionally, the court said that the town had been unable to show "any link" between the state's nuisance statutes and obscenity to support the theory that obscenity could be regulated as a public nuisance.[74] The court recognized the substantial authority of the state to exercise the police power with respect to the public nuisances:

> [T]he State has the authority to prevent or abate nuisances, subject to constitutional limitations, and the General Assembly has the authority to declare what shall be deemed nuisances and to provide for their suppression. Whatever is declared a nuisance must be so in fact, *i.e.*, the merger of the concept in a concrete activity.[75]

Napro established that in order to be a public nuisance, the alleged activity must offend a general interest or a public right, and that the public right can be a statutorily defined right. The disturbance of Native American remains meets both tests.

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68. Lucas, 505 U.S. at 1029.
69. *Id.* at 1030.
70. Napro Dev. Corp. v. Town of Berlin, 135 Vt. 353, 357, 376, A.2d 342, 346 (1977).
71. *Id.* at 359; 376 A.2d at 347.
72. *Id.* at 354–55, 376 A.2d at 344–45.
73. *Id.* at 356, 376 A.2d at 345–46.
74. *Id.* at 359, 376 A.2d at 347.
75. *Id.* at 361, 376 A.2d at 348 (citing Vermont Salvage Corp. v. Vill. of St. Johnsbury, 113 Vt. 341, 354, 34 A.2d 188, 196 (1943)).

There is arguably a general interest or public right in not disturbing the remains of the dead. The state Court of Appeals in Maryland stated that interest eloquently:

> A place for the burial of the dead . . . has characteristics differing from those of an ordinary tract of land. To many it is sacred ground which should not suffer intrusion from mundane objects. . . . [T]hrough the ages, all civilized peoples have considered the final resting place of their dead as hallowed and sacred ground.[76]

Likewise, in *State v. Medicine Bird Black Bear White Eagle*, the state Court of Appeals of Tennessee noted that "[s]ince antiquity, most societies have held burial grounds in great reverence" and that common law has generally protected burial grounds.[77] However, the Tennessee court also noted that protection was not absolute and that "common law permitted the disinterment of human remains when the demands of the living outweighed the right of undisturbed repose."[78]

In Vermont, the Washington County Superior Court cited *Medicine Bird* in its refusal to dismiss a cause of action based on public nuisance in the case between the local Abenaki and a developer.[79] Judge Katz wrote that under *Napro*, a public nuisance is an interference with a public right.[80] Katz then stated that a plaintiff "must first demonstrate that there is a 'public right' to the non-disturbance of native [sic] American burial grounds."[81] Katz concluded that Vermont's "legislative scheme prohibiting the disturbance of burial grounds is a recognition of the public right or interest being affected in this case."[82] Citing *Medicine Bird*, Katz further stated that "[i]t is clear that the remains of Native Americans are of general public importance and importance to the descendants of those buried."[83] That position is reinforced by the various protective statutes in Vermont and elsewhere.[84]

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76. Hickman v. Carven, 784 A.2d 31, 36 (Md. 2001) (quoting Abell v. Green Mount Cemetery, 56 A.2d 24, 25 (Md. 1947), and Diffendall v. Diffendall, 209 A.2d 914, 915–16 (Md. 1965)).

77. State v. Medicine Bird Black Bear White Eagle, 63 S.W.3d 734, 745–46 (Tenn. Ct. App. 2001).

78. *Id.* at 746. The court noted that "common law did not place burial grounds beyond the power of eminent domain." *Id.*

79. Entry Order, Abenaki v. Jedware, *supra* note 31, at 3.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 4.

Judge Katz's reasoning implies that the heritage value of the Native American burial sites extends beyond the Abenaki, to the broader culture. Desecration of Native American burial sites affects not only the descendants, but also members of the larger society that recognize those sites as a unique part of their culture and history.[85] Therefore, the broader culture arguably has an interest in preserving the burial sites.

Nevertheless, Katz further stated that the plaintiff must also demonstrate that interference with that public right is "unreasonable."[86] Katz looked to the Restatement of Torts for elaboration of this general rule. The Restatement outlines three circumstances where interference with a public right may be considered unreasonable, but the court focused on subsection (b) of section 821B: "whether the conduct is proscribed by a statute, ordinance or administrative regulation."[87]

The superior court concluded that "[b]ecause the conduct is proscribed by statue [sic], subsection (b) is present with respect to burial grounds."[88] But the court went further: "Other factors that the Court may consider to determine reasonableness are whether the conduct is intentional, negligent or reckless and also the gravity of the harm in relation to the utility of the conduct."[89] Finally, Katz noted that the alleged harm suffered by the public exists "to the extent that they are deprived of the cultural and historical value of the properly preserved remains."[90]

Critical to Judge Katz's reasoning, and to that of the Vermont Supreme Court in *Napro*, is the existence of a statutory scheme to support the public nuisance claim.[91] In *Napro*, the Supreme Court concluded that

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> To further support the importance of the burial grounds to all members of society, one must only look to the statutes in states across the country, including Vermont, which regulate the maintenance and preservation of cemeteries as well as the various schemes in place to preserve historical sites, including Native American burial grounds.

Id. The court then lists the relevant statutes: VT. STAT. ANN. tit. 18 §§ 5301–5579; VT. STAT. ANN. tit. 13 §§ 3764–3769; VT. STAT. ANN. tit. 3 § 2473; VT. STAT. ANN. tit. 22 § 723; VT. STAT. ANN. tit. 22 §§ 701–791. *Id.*

85. *See* FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 199 (1995) (writing of a "solidarity" that is created when "the majoritarian society comes to respect the essential cultural and human reality that Native Americans inhabit"). "It is a view that does not flatten Native American human and cultural reality into some familiar assimilative ethos but rather makes an informed, essentially imaginative reach of understanding that preserves and honors a certain 'pride' of difference." *Id.* "As the Lakota Chief Sitting Bull observed, 'It is not necessary that eagles should be crows.'" *Id.*

86. Entry Order, Abenaki v. Jedware, *supra* note 31, at 4.

87. *Id.*; RESTATEMENT (SECOND) OF TORTS § 821B (1979).

88. Entry Order, Abenaki v. Jedware, *supra* note 31, at 4.

89. *Id.* at 4–5.

90. *Id.* at 5.

91. Entry Order, Abenaki v. Jedware, *supra* note 31, at 3; *Napro*, 135 Vt. at 359, 376 A.2d at 347.

such a "link" did not exist between obscenity and nuisance law.[92] However, Vermont does have numerous statutes protecting burial sites.[93] Indeed, the Vermont Attorney General argued for an injunction to stop excavation for a home in *State v. Bushey* based partly on this extensive statutory scheme.[94] The state noted, in particular, that the state statute for Unauthorized Removal of Human Remains, provides for prison sentences of up to fifteen years and fines of up to $10,000 for anyone who "intentionally excavates, disinters, removes or carries away a human body, or the remains thereof, interred or entombed in this state" and that such a violation constitutes a felony.[95] The state argued that "[t]he Legislature's decision to attach serious criminal penalties to this conduct is consistent with the strong public policy and common law tradition against the desecration of graves and cemeteries."[96]

In granting a temporary restraining order to halt construction on the property, the superior court cited in its findings that "[d]isturbance of human remains at a burial ground violates the public policy of this State."[97] The court cited the potential $10,000 fine and fifteen-year prison sentence for violations of the provision under section 3761.[98] The court further stated that "[t]he State will suffer immediate injury if excavation continues at the site [and that] [s]uch injury is irreparable because the State will be unable to restore the site."[99]

It is clear, based on *Napro*, that the common law tradition in Vermont cannot be divorced from the statutory law when it comes to defining public nuisance.[100] The courts turn to state statutes to help determine whether the alleged public right exists before making a determination of whether that right was violated.[101] In *Lucas*, Justice Scalia wrote that the regulation can "do no more than duplicate the result that could have been achieved in the courts . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally."[102] In Vermont, the "background principles" recognize a link between common law nuisance and the state's

92. *Napro*, 135 Vt. at 359, 376 A.2d at 347.
93. *See* Entry Order, Abenaki v. Jedware, *supra* note 31, at 4 (listing relevant statutes).
94. Memorandum of Law, State v. Bushey, *supra* note 23, at 4.
95. *Id.* (quoting VT. STAT. ANN. tit. 13 § 3761 (1998)).
96. *Id.*
97. Temporary Restraining Order, State v. Bushey, *supra* note 24.
98. *Id.*
99. *Id.*
100. *Napro*, 135 Vt. at 359, 362, 376 A.2d at 347, 349.
101. *Id.*; *see* Entry Order, Abenaki v. Jedware, *supra* note 31, at 3–4 (noting that the Vermont statutory scheme protecting burial sites helps to establish a public right).
102. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

complementary power to abate nuisances. Given the strong statutory guidance on protecting burial grounds and the "common law tradition" noted by the Attorney General, a regulation to curtail development on Native American burial sites would constitute a logical extension of Vermont's nuisance law.

2. The Real Property Law Exception

In *Lucas*, the U.S. Supreme Court indicated that a state regulation cannot exceed that which "inhere[s] in the title itself, in the restrictions that background principles of the State's law of *property* and nuisance already place upon land ownership."[103] As argued below, a property owner under Vermont common law possesses no sticks in the "bundle of rights" concerning the remains themselves and, therefore, cannot claim a right to disturb or remove them. Further, the property owner has no right to use property in violation of existing statutory law.

The common law in nineteenth century Vermont held that whoever possesses "the surface of the soil is in law deemed to be in possession of all that lies underneath the surface. Land includes not only the ground or soil, but everything attached to it, above or below. The legal maxim is *cujus est solum, ejus est usque ad coelum.*"[104] However, the Vermont Supreme Court has recognized that the bones of the dead may not fall within the common law maxim. The court in *Nichols v. Central Vermont Railway Co.* recognized only a limited right to possession of remains:

> It is undoubtedly the law that, while a dead body is not considered as property in the technical sense of the word, yet the law recognizes a right somewhat akin to property, arising out of the duty of the nearest relatives to bury their dead, which authorizes and requires them to take possession of the dead body for the purpose of burial.[105]

The court stated further that "[t]he right is a personal and exclusive right to the custody and possession of the remains . . . [and] belongs to the surviving husband or wife, if any, or, if there be none, then to the next of kin."[106] The right, as defined by the court, is of limited extent and is exclusively held. Vermont common law is consistent with the broader

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103. *Id.* (emphasis added).
104. Stratton v. Lyons, 53 Vt. 641, 643 (1881).
105. Nichols v. Central Vt. Ry. Co., 94 Vt. 14, 16, 109 A. 905, 906 (1919).
106. *Id.*

common law tradition concerning remains.[107] *Nichols* recognized a limited right of the living to shepherd a body into its grave in Vermont, but the opinion does not suggest an extension or an expansion of those rights to property owners who subsequently come across the remains.[108]

Among the sticks in the "bundle of rights" of property ownership are the rights to possess, use, and dispose of property,[109] and to transport property.[110] But because of the limited property right in human remains, the property owner who obtains title to land arguably does not obtain the right to possess, dispose of, or transport remains that may be discovered buried in that land.[111] In other words, title to land cannot extend to that which the owner cannot possess. Such limitation would "inhere in the title itself"[112] under Vermont property law governing human remains.

Additionally, the "bundle of rights" in the property itself does not extend to uses that are contrary to state law.[113] The Iowa Supreme Court in *Hunziker v. State* ruled that a prohibition on removal of Native American remains in three separate Iowa statutory provisions precluded a property owner from claiming a right to disturb Native American remains discovered on the property.[114] "[T]he 'bundle of rights' the plaintiffs acquired by their fee simple title did not include the right to use the land contrary to the provisions" of the Iowa code protecting such sites.[115] Similarly, the rights obtained through property title in Vermont do not include a right to violate the state statutory scheme protecting burial sites.[116]

But the question remains: even if the property owner cannot possess the remains and does not obtain title rights that would violate the law, what property interest is at stake in the remains and to whom does it belong? The above discussion on nuisance deals with the public interest, as defined by state common law and statutory law. The property interest in

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107. *See* Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L.J. 723, 761–62 (1997) ("Traditionally, human remains fall outside of the common law concept of personal property: they cannot be owned, bought, or sold. Certain individuals, usually a surviving spouse or the next of kin, maintain a quasi-property right in a dead body which entitles them to give it a proper burial and to ensure that no one disturbs its rest." (footnote omitted)).

108. *Nichols*, 94 Vt. at 16, 109 A. at 906.

109. Fresh Pond Shopping Ctr., Inc. v Callahan, 464 U.S. 875, 878 (1983) (appeal dismissed) (Rehnquist, J., dissenting).

110. Keystone Bituminous Coal Ass'n. v. DeBenedictis, 581 F. Supp. 511, 518 (W.D. Pa. 1984).

111. *See* Evans, *supra* note 6, at 744 (arguing that "if a property owner excavated an ancient grave, the landowner could acquire no ownership rights in the skeletal remains because a body is not legally capable of being owned in the same manner that other property can be owned").

112. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

113. Hunziker v. State, 519 N.W.2d 367, 371 (Iowa 1994).

114. *Id.*

115. *Id.*

116. *See supra* Part II.B.1; *infra* Part II.B.3.

the remains arguably is much narrower and would extend in this case to the local Abenaki descendants.

In *Nichols*, the Vermont Supreme Court recognized that the quasi-property right extends to the surviving spouse or next of kin.[117] The case involved a claim brought by a mother over the treatment of the body of her dead son and, therefore, did not have occasion to discuss any rights that may extend to the descendants of the deceased.[118] At least one commentator notes that this quasi-property right has been extended to descendents: "[T]he descendants of human remains retain certain rights in the dead body, regardless of who owns the land on which the body is buried."[119] Judge Katz, in his denial of the motion to dismiss the nuisance claim in the case of *Abenaki v. Jedware*, noted the "importance to the descendants" of the disposition of Native American remains.[120]

In the case of the Abenaki, the state in the past has given the tribe a role in the removal, preservation and re-interment of remains. After the state purchased the Bushey property on Monument Road, Abenaki volunteers helped archeologists excavate the remains of the twenty-five to thirty bodies, which were then placed at the Abenaki Tribal Office in Swanton until they could later be re-interred by the Abenaki.[121] Previously, the remains discovered in 1973 and removed by the University of Vermont were re-interred on state-owned land in a ceremony performed by the Abenaki in the mid-1990s.[122] These examples illustrate that the state has acknowledged at least informally that the local Abenaki have an interest in the remains.

Although neither Vermont, nor the U.S. Secretary of Interior have officially recognized the Abenaki as an Indian tribe, a federal court acknowledged that the Abenaki are eligible for rights granted to Native American tribes under the Native American Graves Protection and Repatriation Act (NAGPRA).[123] The act provides for the restitution to Indian tribes of remains and cultural artifacts found on federal lands.[124]

In *Abenaki Nation of Mississquoi v. Hughes*, the U.S. District Court of Vermont rejected Abenaki attempts to halt the U.S. Army Corps of Engineers from authorizing the Village of Swanton to raise the spillway on

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117. Nichols v. Central Vt. Ry. Co., 94 Vt. 14, 16, 109 A. 905, 906 (1919).

118. *Id.*

119. Margaret B. Bowman, *The Reburial of Native American Skeletal Remains: Approaches to the Resolution of a Conflict*, 13 HARV. ENVTL. L. REV. 147, 167 (1989).

120. Entry Order, Abenaki v. Jedware, *supra* note 31, at 3.

121. *Abenaki Protest*, *supra* note 2.

122. WISEMAN, *supra* note 19, at 183.

123. Abenaki Nation of Mississquoi v. Hughes, 805 F. Supp 234, 251 (D. Vt. 1992).

124. *See* Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001–3013 (2000).

a dam at Highgate Falls.[125] However, the court acknowledged that the "Abenaki Nation of Mississquoi [sic] falls squarely within" those groups covered by NAGPRA.[126] The court first turned to the definition of "Indian tribe" under NAGPRA,[127] which includes "any tribe, band, nation, or other organized group or community of Indians . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."[128] The court then examined the federal regulations that determine whether a group exists as an Indian tribe.[129] The court determined that the Abenaki met the regulatory definition and that the Abenaki also received federal funds and assistance.[130] Therefore, the court concluded that the Abenaki are "within the class protected by NAGPRA."[131] Tribes within the class have a stake in the disposition of Native American remains and cultural items that have been "excavated or discovered on Federal or tribal lands."[132]

Although NAGPRA applies only to activities on federal or tribal lands, the federal court ruling supports the notion that the Abenaki have a general interest in the remains of their ancestors. While that interest may not contain the full "bundle of rights," it can prevent the land owner from excavating, possessing, or removing the remains.

3. Burial Statutes as Background Principles

To qualify as a background principle, Vermont's regulatory scheme concerning burial sites must fall within "those common, shared understandings of permissible limitations derived from a State's legal tradition."[133] Vermont's statutes meet that standard.

The Vermont Attorney General has noted the strong public policy embodied in state decisions to prohibit the desecration of burial sites[134]—a policy acknowledged by the Washington County Superior Court.[135] The sheer body of statutory law supports an interpretation that the "state's legal tradition" includes limitations on disturbance and removal of human

125. *Abenaki Nation*, 805 F. Supp. at 236, 252.
126. *Id.* at 251.
127. *Id.*
128. 25 U.S.C. 3001(7).
129. *Abenaki Nation*, 805 F. Supp at 251; *see* 25 C.F.R. § 83.1 (2003) (defining an Indian group as "any Indian or Alaska Native aggregation within the continental United States that the Secretary of the Interior does not acknowledge to be an Indian tribe").
130. *Abenaki Nation*, 805 F. Supp at 251.
131. *Id.*
132. 25 U.S.C. § 3002(a) (2000).
133. Palazzolo v. Rhode Island, 533 U.S. 606, 630 (2001).
134. Memorandum of Law, State v. Bushey, *supra* note 23, at 4.
135. Temporary Restraining Order, State v. Bushey, *supra* note 24.

remains.[136] Section 3761, in particular, makes state policy clear by imposing stiff punishment, as noted above, for anyone who "intentionally excavates, disinters, removes or carries away a human body, or the remains thereof, interred or entombed in this state."[137] The Attorney General noted that the legislature amended the law in 1989, broadening it to include the intentional removal or carrying away of objects entombed with the remains.[138] The prohibition on the unauthorized removal of human remains or "dead bodies" has been on the books since 1804.[139]

Additionally, the state has interpreted the language of section 3761 to apply to Native American sites.[140] The words of the statute are broad, as it applies to "a human body, or the remains thereof, *interred or entombed in this state*."[141] Language that would restrict the protection to remains found only in marked cemeteries is notably absent.

Finally, the Vermont Supreme Court in *Napro* recognized the legislature's substantial authority to identify and abate nuisances.[142] The legislature criminalized the excavation and removal of human remains, within its legislative power, and the state's highest court recognized this prohibition as fitting squarely within Vermont's legal tradition.

Despite these statutory protections, the Abenaki contend that the disturbance of burial sites has likely occurred in the past and gone unreported, a point acknowledged by state officials.[143] Additionally, town officials in Swanton and Highgate understood the law to apply only to "cemeteries that are clearly marked and delineated," though state officials maintain it applies to all burial sites.[144] The towns' narrower reading of the statute fails to recognize the cultural significance of the burial grounds to the Abenaki, who consider the sites and the remains as sacred.[145] Nor did

136. *See generally*, VT. STAT. ANN. tit. 13 §§ 3761–3769 (1998 & Supp. 2002) (prohibiting disturbance of unmarked burial grounds and cemeteries); VT. STAT. ANN. tit 18 §§ 5301–5579 (1998) (regulating cemeteries); VT. STAT. ANN. tit. 22 § 701(8) (1998) (providing for protection of burial sites under state historic preservation laws).

137. VT. STAT. ANN. tit. 13 § 3761.

138. Memorandum of Law, State v. Bushey, *supra* note 23, at 4.

139. *See History*, VT. STAT. ANN. tit. 13 § 3761.

140. *Land Buy*, *supra* note 25.

141. VT. STAT. ANN. tit. 13 § 3761 (emphasis added).

142. Napro Dev. Corp. v. Town of Berlin, 135 Vt. 353, 361, 376, A.2d 342, 348 (1977).

143. *Abenaki Protest*, *supra* note 2.

144. *Land Buy*, *supra* note 25. The view held by town officials at the time is not surprising, as there has traditionally been less protection for unmarked burial sites. *See* Harding, *supra* note 107, at 764 ("Unless a burial ground is clearly marked as such, it is often denied protection under the various laws dealing with cemeteries. Furthermore, if a 'cemetery' is abandoned, it is no longer protected by the law. Many Native American burial sites are considered abandoned even though the 'abandonment' was involuntary." (footnote omitted)).

145. *See supra* Introduction.

that narrow view recognize the broader historical importance of Native American burial sites, an interest recognized by Judge Katz.[146]

Another criminal statute, governing "Cemeteries and Monuments–Grave Markers and Historical Tablets," prohibits the excavation or destruction of "a grave, tomb or burial site, or portion thereof."[147] Significantly, the legislature provided a civil action provision, whereby citizens can bring suit for grave desecration. Under the provision, section 3769, violators can be found "further liable in a civil action."[148] Suit can be brought in the name of the property owner, the town, the association or corporation which hold lawful possession of the burial ground, or, in the case of a grave disturbance, "in the name of the surviving heirs or descendants" of the deceased.[149]

This broad statutory scheme establishes that a prohibition on disturbances of burial sites is deeply rooted in the state's legal tradition. The passage of the Unmarked Burial Sites Fund in 2002 furthers that notion, though that law falls far short of providing explicit protection of Native American burial sites.[150] The state could do more to directly protect Native American sites, based on the current background principles supplied by Vermont's statutory law.

C. Extending the Background Principles

The final, and perhaps most critical, question to consider is whether these background principles of common and statutory law can be extended to justify a statute that would explicitly prohibit development of Native American burial sites on private property. One could persuasively argue, as noted above, that excavation and removal of human remains are prohibited by Vermont common law and statutory law. However, would an express regulation do more than make "those background principles of nuisance and property law explicit"—an impressible limit under *Lucas*?[151]

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146. *See supra* Part II.B.1.

147. VT. STAT. ANN. tit. 13 § 3764 (1998). The statute reads, in part:

> A person shall not intentionally and without right or authority excavate, steal, remove, injure or destroy, or procure or cause to be excavated, stolen, removed, injured or destroyed, a gravestone or monument erected to the memory of a deceased person, or erected and intended for such use, or a grave, tomb or burial site, or portion thereof, in which the body or remains of a deceased person is interred.

Id.

148. VT. STAT. ANN. tit. 13 § 3769 (1998).

149. *Id.*

150. *See supra* Part I.

151. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992).

The Iowa case of *Hunziker v. State* offers some possible answers to that question. In that case, the Iowa Supreme Court considered a takings challenge brought by land developers who had sold a subdivision lot for construction of a house on the lot.[152] Pursuant to Iowa law, a state archeologist prohibited construction on the property when the archeologist learned that the site was a burial mound "made between 1000 and 2500 years ago by Native Americans of the Woodland Period."[153] Human bones were discovered at the site.[154]

In analyzing the issue, the court cited Iowa statutes protecting Native American burial sites,[155] including a provision that gave the state archeologist "authority to deny permission to disinter human remains that the . . . archeologist determines have state and national significance."[156] The court also identified another statute providing that anyone who "[i]ntentionally disinters human remains that have state and national significance" is engaging in criminal mischief in the third degree.[157]

The property owners argued that the state would have to show under *Lucas* that even without the state statutes, the owners would have been prohibited from building on the site based on state property law.[158] The court rejected that interpretation of *Lucas*, and held that because the statutes were in existence ten to twelve years before the plaintiffs purchased the property, they had acquired title subject to the statutory provisions restricting use of property containing human remains of a state or national significance.[159] The court reasoned that the statutes were "part of Iowa's property law" when the plaintiffs purchased the property.[160] The Iowa Supreme Court distinguished *Lucas* from the circumstances in *Hunziker* by noting that the plaintiffs in *Hunziker* acquired title after the regulations were in place, while in *Lucas* the regulation "was passed *after* the plaintiffs acquired title."[161] Such a distinction, however, did not find favor with the U.S. Supreme Court in *Palazzolo*, when the Court held that a statute's constitutionality cannot hinge upon timing in the transfer of title.[162]

In an argument for regulating Native American burial sites in Vermont, the consideration of background principles is broader than the

152. Hunziker v. State, 519 N.W.2d 367, 368 (1994).
153. *Id.*
154. *Id.*
155. *Id.* at 370.
156. IOWA CODE ANN. § 263B.9 (West 2003).
157. IOWA CODE ANN. § 716.5 (West 2003).
158. *Hunziker*, 519 N.W.2d at 370.
159. *Id.* at 371.
160. *Id.*
161. *Id.*
162. Palazzolo v. Rhode Island, 533 U.S. 606, 629–630 (2001).

timing issue identified by the Iowa Court. Vermont's common law of nuisance and property, as well as its deep legal tradition of protecting burial sites, would support an explicit regulation restricting development on Native American burial sites.

III. PROPOSAL TO RESTRICT DEVELOPMENT ON NATIVE AMERICAN BURIAL SITES

To ensure long-term protection for Native American burial sites and certainty for property owners, this proposal includes three components: state mapping of burial sites, disclosure in property transactions, and restriction on development of sites where remains are discovered.

A. Mapping

The Unmarked Burial Sites Fund enacted in 2002 allows money to be spent by the Commissioner of Housing and Community Affairs for "archeological assessments and archeological site or field investigations."[163] The enactment does not provide the more comprehensive approach offered in earlier legislation.

The state should adopt the approach of the earlier version, Senate Bill 258, which would have required the state to "identify, define, and provide maps of all general areas of known archaeological sensitivity, based on Native American traditional knowledge, history, soil studies, and excavations."[164] Further, the proposed legislation would have allowed property owners in those designated zones to request state-funded archaeological surveys of their property.[165] This uniform approach to mapping and designating zones that have a higher probability of containing human remains would serve municipalities, property owners, and the Abenaki. For the towns, it would create an additional land-use and zoning tool. For property owners, while mapping does not create certainty, it creates more certainty about the likelihood of discovering remains. For the Abenaki, mapping would help to identify where they should focus their efforts to protect their ancestors' remains. The proposal would restore the role of the local Abenaki in the identification and appropriate preservation of potential sites, as envisioned in Senate Bill 258.[166]

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163. VT. STAT. ANN. tit. 18 § 5212b(e)(3) (2000 & Supp. 2002).

164. S. 258, Adj. Sess. (Vt. 2002)), *available at* http://www.leg.state.vt.us/ (last visited Jan. 20, 2004). While this legislation did adopt more progressive measures for mapping and Abenaki participation, it still relied on land acquisition as the means of protecting burial sites. *Id.*

165. *Id.*

166. *Id.*

B. Disclosure

This proposal would require property sellers, within designated zones, to disclose to buyers the location of any property within those zones. Vermont's Consumer Fraud Act currently "provides a remedy for any consumer who contracts for goods or services and, in reliance upon false or fraudulent representations or promises, sustains damages or injury at the hand of 'the seller, solicitor or other violator.'"[167] The Vermont Supreme Court noted in *Carter v. Gugliuzzi* that the act "applies the prohibition against deceptive acts and practices specifically to 'real estate transactions.'"[168] Three elements must be met to constitute a deceptive act or practice: "(1) there must be a representation, omission, or practice likely to mislead consumers; (2) the consumer must be interpreting the message reasonably under the circumstances; and (3) the misleading effects must be material, that is, likely to affect the consumer's conduct or decision regarding the product."[169]

Under the proposed statute, failure to disclose a known high probability of human remains on a property, depending on the factual circumstances, could mislead the consumer. An interpretation as such could be reasonable, and the misleading effect would be material to a buyer's decision to buy the property.

The proposed disclosure requirement offers a proactive approach to ensure that the burden of owning land that may ultimately contain Native American burial sites is apportioned fairly among knowing buyers and sellers. While the seller does have the burden of disclosing the property's location in a designated zone, the seller can be shielded from liability should bones later be discovered on the property. The proposal would restore state assistance to property owners for archeological surveys, but it would not place an affirmative burden on property owners or sellers to survey their properties for remains.[170]

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167. Carter v. Gugliuzzi, 168 Vt. 48, 52, 716 A.2d 17, 21 (1998) (quoting VT. STAT. ANN. tit. 9 § 2461(b) (1967)).

168. *Id.* (quoting VT. STAT. ANN. tit. 9 § 2453(e)).

169. *Id.* at 23.

170. The author acknowledges there may be a cloud over title on property in the zone, even if there is no known presence of remains on the property. Yet those owners, burdened in this instance, benefit generally from laws recognizing that burial sites should not be disturbed. In the words of Justice Brandeis, they have "the advantage of living and doing business in a civilized community." Penn. Coal Co. v. Mahon, 260 U.S. 393, 422 (1922) (Brandeis, J., dissenting).

C. Restrictions on Development

This component of the proposal would explicitly restrict development of property containing Native American remains. The state's preferred alternative thus far has been mediation between landowners and the state and, ultimately, land acquisition by the state. This process, which has been implemented on an ad-hoc basis over the past thirty years, was essentially codified with the enactment of the Unmarked Burial Sites Special Fund. This new law requires the Commissioner of Housing and Community Affairs to develop "[p]rocedures for protecting, preserving or moving unmarked burial sites and human remains,"[171] and allows the commissioner to disburse funds for land acquisition provided that "disbursements for this purpose will not unduly burden the fund." [172] The law's language does not reveal on its face a significant commitment to purchasing Native American burial sites. Nor is there any assurance that land acquisition funds will be adequate.[173]

The state must take a bolder approach to protect Native American burial sites. The state common law and legal tradition support adopting a more restrictive statute that would prohibit development of Native American burial sites. Such an approach would offer long-term protection for burial sites and more certainty for property owners.

CONCLUSION

While the legal tradition in Vermont may permit an extension of the law to restrict development of Native American burial sites, the political reality likely will not allow it. The Vermont political establishment likely would be reluctant to spur conflict between alleged property rights and other public values. One can already hear lawmakers echoing the dissent in *Hunziker* in response to that decision: "[A] dead bones doctrine has risen from the soil, like a phoenix, to consume the live marrow of land ownership."[174]

Yet, the state has bucked common notions before.[175] The state could distinguish itself again, by recognizing the broader cultural

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171. VT. STAT. ANN. tit. 18 § 5212b(c)(4) (Supp. 2002).

172. *Id.* §5212b(e)(5).

173. *See* Constance M. Callahan, *Warp and Weft: Weaving a Blanket of Protection for Cultural Resource on Private Property*, 23 ENVTL. L. 1323, 1348–49 (1993) (noting that "[i]n economically difficult times, when social services and education budgets are receiving decreased funding, few states or municipalities can justify spending money to save an archeological site from development").

174. *Hunziker*, 519 N.W.2d at 373 (Snell, J., dissenting).

175. *See, e.g.*, Baker v. State, 170 Vt. 194, 197, 744 A.2d 864, 867 (1999) (holding that same-sex couples are entitled under the Vermont Constitution to the same rights enjoyed by married

importance of its Abenaki heritage and the public interest in protecting that heritage. The state's legal tradition would permit it and, according to Abenaki tradition, the souls of the Abenaki dead demand it.

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heterosexual couples); *see also* VT. STAT. ANN. tit. 15 §§ 1201–07 (1999) (allowing same-sex couples to enter into Civil Unions and receive marriage benefits and protections).